

Evolution of General Jurisdiction Rules in the Years Since *Daimler Ag v. Bauman*

Federal Procedure Committee

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the U.S. Supreme Court held that, as a matter of due process, states may exercise general jurisdiction over an out-of-state corporation “only when the corporation’s affiliations with the State in which [the] suit is brought are so constant and pervasive ‘as to render [it] essentially at home in the forum State.’” *Daimler*, 134 S. Ct. at 751 (quoting *Goodyear*, 564 U.S. at 919, 131 S. Ct. at 2851) (second alteration in original). The Court held that “[w]ith respect to a corporation, the place of incorporation and principal place of business are ‘paradigm[m] . . . bases for general jurisdiction.’” *Id.* at 760 (quoting *Goodyear*, 564 U.S. at 924, 131 S. Ct. at 2854) (alteration in original).¹

Courts and commentators immediately recognized that the “essentially at home” standard—first articulated in *Goodyear*, and expanded upon in *Daimler*—represented a radical departure from and narrowing of the law of general jurisdiction as it had evolved, mostly in the lower federal and state courts, since the Supreme Court decided *International Shoe v. Washington* in 1945. Left unanswered in *Goodyear* and *Daimler*, however, were important questions about how the new standard would be applied, including, among others:

- (i) whether a corporation could be “essentially at home,” and thus subject to general jurisdiction, in a forum other than its principal place of business or state of incorporation;
- (ii) whether the 100-year-old “doing business” doctrine in New York and other states remained a viable basis for general jurisdiction;
- (iii) whether “tag” or “transient” jurisdiction remained a viable basis for general jurisdiction over a natural person; and
- (iv) whether general jurisdiction could be exercised based on a corporation’s registration to do business and mandated appointment of an agent for service of process within a state outside its home jurisdiction.

In the almost four years since *Daimler* was decided, courts in New York and elsewhere have issued approximately 1,500 reported decisions citing *Daimler*. While the above questions have not been entirely answered, the post-*Daimler* case law has significantly clarified the land-

scape. Below, after a brief historical overview of general jurisdiction and the *Goodyear* and *Daimler* decisions, as well as a recent decision by the Supreme Court—*BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017)—which reaffirmed the “essentially at home” standard articulated in *Goodyear* and *Daimler*, this report examines how the post-*Daimler* cases in New York and other jurisdictions have answered these questions and what uncertainties around them remain.

I. *Goodyear, Daimler, and the Evolving Jurisprudence of General Jurisdiction*

General personal jurisdiction is defined as a forum’s (typically, a state’s) exercise of personal jurisdiction over an entity or individual on a claim that does not arise out of the defendant’s contacts with the forum.² The concept of general jurisdiction, as distinct from specific jurisdiction, was introduced by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the watershed case that shifted the American paradigm of personal jurisdiction from a territory-based notion to a contacts-based one. *International Shoe* laid the groundwork for the jurisprudence of general jurisdiction by holding that a corporation’s operations within a state could be “so substantial as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.” 326 U.S. at 318. But because *International Shoe*’s facts raised issues only as to specific jurisdiction, the Court did not have occasion to examine the constitutional scope of general jurisdiction in that case. And in the 64 years following *International Shoe*, the Court decided only two general jurisdiction cases—*Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984)—neither of which much elucidated how constitutional limitations on general jurisdiction might broadly apply outside their unique facts.³ As a result, many consequential issues of general jurisdiction were left to state and lower federal courts to be answered, sometimes inconsistently.

The Supreme Court’s relative silence on general jurisdiction ended with *Goodyear* and *Daimler*.

A. *Goodyear Dunlop Tires Operations, S.A. v. Brown*

Goodyear involved a wrongful death claim in North Carolina state court arising from a bus accident outside Paris, France. On April 18, 2004, two 13-year-old boys

from North Carolina were killed when the bus in which they were passengers overturned on the way to Charles de Gaulle Airport. The boys' parents sued in North Carolina, naming as defendants various indirect foreign subsidiaries of Goodyear USA, an Ohio corporation also named as a defendant.⁴ The foreign subsidiaries operated and were organized in Turkey, France, and Luxembourg. They manufactured tires primarily for sale in Europe and Asia. The plaintiffs alleged that the accident was caused by a defective tire manufactured in Turkey by the Turkish subsidiary. None of the foreign subsidiaries sold or shipped tires to North Carolina customers, though a small percentage of their tires were distributed within North Carolina by other Goodyear USA affiliates.

The trial court denied the foreign subsidiaries' motion to dismiss. The North Carolina Court of Appeals affirmed, holding that the subsidiaries had "sufficiently continuous and systematic contacts" with North Carolina by placing their tires "in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina" and with knowledge "that a Goodyear affiliate obtained tires manufactured by Defendants and sold them in the United States in the regular course of business." *Brown v. Meter*, 199 N.C. App. 50, 58, 67 (2009), *rev'd sub nom. Goodyear*, 564 U.S. 915 (2011).

The Supreme Court reversed. It held that the stream-of-commerce theory used by the North Carolina courts properly applied only to a specific jurisdiction analysis and that general jurisdiction was held to a stricter standard. Noting that its post-*International Shoe* jurisdiction decisions had focused mainly on specific rather than general jurisdiction, the Court held that "[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." 564 U.S. at 924. The Court further held that a "court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them *essentially at home* in the forum State." *Id.* 564 U.S. at 924 (citing *International Shoe*, 326 U.S. at 317) (emphasis added).

B. *Daimler AG v. Bauman*

Daimler, which involved claims of human rights violations under federal, California, and Argentine law, expanded on *Goodyear's* "essentially at home" standard. The plaintiffs, twenty-two Argentine residents, filed a complaint in the Northern District of California against DaimlerChrysler Aktiengesellschaft ("Daimler"), a German company with its principal operations in Germany.

Plaintiffs alleged that Daimler's Argentine subsidiary, Mercedes-Benz Argentina ("MB Argentina"), had collaborated with the Argentine government in the 1970s and 1980s to torture and kill plaintiffs' relatives in Argentina, and that Daimler was vicariously liable for MB Argentina's alleged wrongdoing. 134 S. Ct. at 750-52. Plaintiffs alleged that Daimler was subject to general jurisdiction in California as a result of California contacts by Mercedes-Benz USA, LLC ("MBUSA"), a subsidiary of Daimler incorporated in Delaware with a principal place of business in New Jersey, which served as Daimler's exclusive importer and distributor in the U.S. *Id.* at 751-52. MBUSA was the largest supplier of luxury vehicles to the California market, and MBUSA's California sales accounted for 2.4% of Daimler's worldwide sales. *Id.* at 752.

Daimler moved to dismiss for lack of personal jurisdiction. After jurisdictional discovery, the district court granted the motion, holding that Daimler's contacts with California were insufficient to support general jurisdiction and that MBUSA's California contacts could not be attributed to Daimler on an agency theory. After initially affirming the district court's ruling, the Ninth Circuit on rehearing reversed itself and the district court, holding that MBUSA's California contacts could be attributed to Daimler through an agency theory and that "reasonableness" considerations did not bar general jurisdiction. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011).

The Supreme Court reversed. The Court noted that "[s]ince *International Shoe*, 'specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.'" *Daimler*, 134 S. Ct. at 755 (quoting *Goodyear*, 564 U.S. at 925). The Court went on to examine the three post-*International Shoe* decisions dealing with general jurisdiction—*Perkins*, *Helicopteros*, and *Goodyear*—concluding that "general jurisdiction has come to occupy a less dominant place in the contemporary scheme" than specific jurisdiction, which underwent a "rapid expansion" after *International Shoe*. *Id.* at 755, 757-58.

In analyzing the facts before it, the Supreme Court assumed for purposes of deciding the case that the MBUSA subsidiary would qualify as "at home," and thus be subject to general jurisdiction, in California. *Id.* at 758.⁵ The Court further assumed that MBUSA's contacts with California were imputable to Daimler for purposes of the jurisdiction analysis. *Id.* at 760.

Notwithstanding these assumptions, the Court held that Daimler was not subject to general jurisdiction in California. Under *Goodyear's* "essentially at home" standard, the Court held, "general jurisdiction requires affiliations 'so 'continuous and systematic' as to render [the

foreign corporation] . . . 'comparable to a domestic enterprise' in the forum state. *Id.* at 758 n.11 (quoting *Goodyear*, 564 U.S. at 919); *id.* at 761. The Court expanded on its statement in *Goodyear* that the "paradigm forum" for exercising general jurisdiction over a corporation is "one in which the corporation is fairly regarded as at home," *Goodyear*, 564 U.S. at 924, holding that "[w]ith respect to a corporation, the place of incorporation and principal place of business" satisfy this standard, *Daimler*, 134 S. Ct. at 760. Permitting jurisdiction over a defendant in *Daimler*'s position, the Court held, would be "exorbitant" and "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Id.* at 761-62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). Importantly, the Court introduced a notion of proportionality to the general jurisdiction analysis: Even though it assumed the MBUSA subsidiary's contacts with the forum to be sufficient for general jurisdiction over MBUSA, this was not enough to assert general jurisdiction over the parent where the subsidiary accounted for a relatively insubstantial portion of the parent's worldwide business.

C. *BNSF Railway v. Tyrrell*

On May 30, 2017, the Supreme Court decided *BNSF Railway*, a case that reaffirmed the "essentially at home" standard articulated in *Goodyear* and *Daimler*. Defendant railroad BNSF was sued in Montana by residents of North Dakota and South Dakota for injuries sustained by employees working outside of Montana. 137 S. Ct. at 1554. BNSF, incorporated in Delaware with a principal place of business in Texas, has 2,061 miles of track in Montana (roughly 6% of its total track mileage), employs 2,100 workers there, and generates under 10% of its revenue in the state. *Id.* The Montana courts exercised general jurisdiction over BNSF under both the Federal Employers' Liability Act ("FELA") and Minnesota state law, which purports to give Montana courts general jurisdiction over persons "found within" the state. *Id.*

The Supreme Court reversed. After holding that the FELA did not confer general jurisdiction, the Court held that BNSF was "found within" Montana and thus within the jurisdiction-conferring provision of Montana state law. *Id.* at 1558. But, the Court held, Montana's provision was inconsistent with due process under *Daimler*. *Id.* at 1558-59. Since BNSF was neither incorporated in Montana nor so heavily engaged in business there as to be "essentially at home" under *Daimler*, the Montana courts could not exercise general jurisdiction over the company with respect to claims arising elsewhere. *Id.* at 1559. Acknowledging the company's significant track mileage and business activities in the state, the Court cited *Daim-*

ler's proportionality analysis in holding that BNSF was nevertheless immune from general jurisdiction because it conducted more substantial activity outside of the state than in it. *Id.*

II. Open Questions After *Goodyear* and *Daimler*

After *Daimler*, the "essentially at home" standard was immediately recognized as a turning point that would significantly limit the scope of general jurisdiction as it had developed in the lower federal and state courts. But *Goodyear* and *Daimler* left unanswered significant questions about how the new standard should be applied to various jurisdictional rules that had been applied in the lower courts for years. Among the most significant were the issues outlined at the beginning of this report. Below, we examine how courts in New York and other jurisdictions have answered these questions.

A. Can a corporation be "essentially at home"—and thus subject to general jurisdiction—in a forum other than its jurisdiction of incorporation or principal place of business?

Perhaps the most obvious question raised by *Daimler* was whether a corporate defendant may be subject to general jurisdiction in a forum other than its states of incorporation and principal place of business—the "paradigm" examples given in *Daimler*. In a footnote, *Daimler* left open the "possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." *Id.* at 761 n.19 (citing *Perkins*); see *BNSF Ry.*, 137 S. Ct. at 1558 (citing *Daimler*'s footnote 19 and stating that "[t]he exercise of general jurisdiction is not limited to these forums").⁶ But the Court offered no guidance as to what facts might constitute such an "exceptional case." In holding that *Daimler*'s activities in California "plainly d[id] not approach that level," the Court signaled that it would be difficult to establish an "exceptional case." The question remained: how difficult? *Id.*

1. The national trend—few "exceptional" cases

Since *Daimler*, federal and state courts across the country have consistently interpreted the "possibility" left open in *Daimler* as exceedingly narrow. One of the first federal appellate opinions on the issue was *Monkton Ins. Servs., Ltd. v. Ritter*, a Fifth Circuit decision holding that "[i]t is . . . incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business." 768 F.3d 429, 432 (5th Cir. 2014)⁷; see also *First Metro. Church of Hous. v. Genesis Grp.*, 616 F. App'x 148 (5th Cir. 2015) (same). Soon after

Monkton, the Eleventh Circuit held that a corporation “cannot be subject to general jurisdiction in a forum unless the corporation’s activities in the forum closely approximate the activities that ordinarily characterize a corporation’s place of incorporation or principal place of business.” *Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1205 (11th Cir. 2015).

Consistent with *Monkton* and *Carmouche*, lower federal courts and state courts with overwhelming uniformity have found foreign corporations not to fall within *Daimler*’s “exceptional case” language.⁸ Of the approximately 1,500 reported decisions citing *Daimler*, our research has revealed only four—three federal and one state—in which an “exceptional case” was found to warrant subjecting a corporation to general jurisdiction in a forum other than its state of incorporation or principal place of business. Each is difficult to square with *Daimler*.

The three federal outliers are *In re Hellas Telecomm. (Lux.) II SCA*, 524 B.R. 488 (Bankr. S.D.N.Y. 2015), *Hendricks v. New Video Channel Am., LLC*, No. 2:14-cv-02989-RSWL-SSx, 2015 WL 3616983, at *1 (C.D. Cal. June 8, 2015), and *Barriere v. Juluca*, No. 12-23510-CIV, 2014 WL 652831, at *8 (S.D. Fla. Feb. 19, 2014). In *Hellas*, the bankruptcy court for the Southern District of New York exercised general jurisdiction over Deutsche Bank AG, a German bank headquartered in Germany, in the context of adversary proceedings initiated by foreign liquidators. The court found that Deutsche Bank’s New York office, which functioned as the bank’s regional head office for North America and housed \$5 billion of the bank’s assets and 1,600 of its employees (including 1,000 executives), constituted a “substantial, long-term presence” that was “more than merely transitory” and was sufficient to render Deutsche Bank “essentially at home” in New York. *Hellas*, 524 B.R. at 508.

In *Hendricks*, the Central District of California held that Temple Street Productions Incorporated (“TSPI”), a Canadian company with its a principal place of business in Canada, was subject to general jurisdiction in California where: (i) TSPI incorporated a wholly owned subsidiary, Temple Street Productions (US) (“TSP(US)”), under California law and placed TSP(US)’s principal place of business in California; (ii) TSPI referred to TSP(US) as its “LA office” and “US office” and listed an address for “Temple Street Productions” in California; (iii) TSP(US) was controlled by the same individuals who controlled TSPI; and (iv) TSP(US) and TSPI were in the same business of TV and film production. *Hendricks*, 2015 WL 3616983, at *3. The court held that these facts were sufficient to make out a *prima facie* case that TSPI constituted an “exceptional case” envisioned by *Daimler*. *Id.*⁹

In *Barriere*, decided one month after *Daimler*, plaintiff, a resident of Texas, was injured when she slipped on wet tiles at an Anguillan resort property that was managed by defendant, an Anguillan corporation with its principal place of business in Anguila. *Barriere*, 2014 WL 652831, at *1. The court held that the Anguillan corporation was subject to general jurisdiction in Florida on the grounds that: (i) it maintained a sales office in Florida; (ii) its assets were managed by a Florida-based agent; (iii) two of its co-defendants, who did not object to personal jurisdiction in Florida, promoted, managed, and operated the Anguillan company and provided reservation, sales, and promotional services for the company; and (iv) one of the co-defendants, who did not contest jurisdiction, was an actual or apparent agent of the company. *Id.* at 8.

The state outlier finding an “exceptional case” under *Daimler* is *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, 57 N.E.3d 656, *reh’g denied* (Ill. App. Ct. 2016).¹⁰ In that case, the defendant was a warehouse company incorporated and with its principal place of business in Indiana. The Appellate Court of Illinois nevertheless held that the company’s registration to do business in Illinois, employment of a manager of a warehouse in Illinois, and advertisements claiming ownership of warehouses in Illinois were “sufficient to make a *prima facie* showing that defendant has affiliations with Illinois that are ‘so continuous and systematic’ as to render it essentially ‘at home’ in Illinois.” *Aspen*, 57 N.E.3d at 667.¹¹

Each of these cases—*Hellas*, *Hendricks*, *Barriere*, and *Aspen Insurance*—seems inconsistent with *Daimler*. None presented truly “exceptional” circumstances. Indeed, none involved materially more significant in-forum contacts than those at issue in *Daimler*. Contrary to *Daimler*, moreover, none of these opinions engaged in the type of proportionality analysis that seems to be required by *Daimler*—weighing the defendant’s in-forum activities against its worldwide activities. *See Daimler*, 134 S. Ct. at 762 n.20 (holding that “[g]eneral jurisdiction . . . calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide”).

2. New York

Courts in New York have followed the national trend, declining to find “exceptional cases” in which to exercise general jurisdiction over foreign corporations. Most significantly, in *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016), the Second Circuit, citing the Fifth Circuit’s “incredibly difficult” language in *Monkton*, adopted the same narrow view as *Monkton*, all but foreclosing the prospect of finding general jurisdiction in New York over corporations that are neither incorporated nor have their principal place of business here.¹² In *Brown*, defendant Lockheed Martin Corporation (“Lockheed”),

incorporated in Maryland with its principal place of business there, was sued in Connecticut by a former employee who had been exposed to asbestos and contracted mesothelioma. The former employee had never worked for Lockheed in Connecticut and therefore could not assert specific jurisdiction there. Instead, he (and, after he passed away, his daughter) contended that the company was subject to general jurisdiction in Connecticut as a result of Lockheed's significant business activities within the state. Among other things, plaintiff submitted evidence showing that Lockheed: (i) had a physical presence within the state since 1982; (ii) had obtained a formal certificate to do business in the state in 1995; (iii) had leased the same building in the state since 1997; (iv) had run operations at three other leased locations in the state for at least four years; (v) employed approximately 30 to 70 workers in the state; and (vi) derived approximately \$160 million in revenue from its Connecticut-based work, on which it paid Connecticut taxes. *Id.* at 628. Based on these contacts, the plaintiff argued that the case presented the "exceptional" circumstances alluded to in *Daimler*, justifying general jurisdiction over a foreign corporation. *Id.*

The Second Circuit rejected the plaintiff's argument, holding that *Daimler* "considerably altered the analytic landscape for general jurisdiction and left little room" for arguments that "contacts of substance, deliberately undertaken and of some duration, could place a corporation 'at home' in many locations." *Id.* at 629. Citing *Daimler*, the court held that "when a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how 'systematic and continuous,' are *extraordinarily unlikely* to add up to an 'exceptional case.'" *Id.* (emphasis added). Noting that *Daimler* had cited only one historical example—*Perkins*—as "exceptional," the Second Circuit held that, in order to qualify as such, the circumstances presented must indicate that the forum is a "surrogate principal place of business" for the corporation at issue. *Id.*

In reaching its conclusion that Lockheed's contacts with the forum did not render Connecticut a "surrogate principal place of business" for Lockheed, the Second Circuit relied on an assessment of the company's in-state activities—including workforce and revenue—as a proportion of its worldwide business. *Id.* at 629-30. *Brown* thus highlighted at least one structural change in the general jurisdiction analysis required by *Daimler*: Courts will focus not only on an entity's contacts with a particular forum, but also on those contacts as a proportion of the entity's worldwide business activities and contacts with other forums. The Second Circuit noted that "Lockheed's business in Connecticut, while not insubstantial, constitutes only a very small part of its [worldwide] portfolio." *Id.* at 629.¹³ On that basis, the court denied jurisdiction.¹⁴

Virtually all lower federal and state courts in New York to have reached this question have taken the same approach, declining to find an "exceptional case" under *Daimler* in myriad circumstances.¹⁵ We have located only one reported decision in New York that found an "exceptional case" to exist—the bankruptcy court decision in *Hellas*, discussed above. As described above, however, *Hellas* is an outlier and hard to square with *Daimler*'s reasoning. Most surprising, in light of *Daimler*'s focus on proportionality between a defendant's in-forum and worldwide business activities, is *Hellas*'s failure to compare Deutsche Bank's business activities in New York to its activities worldwide. Instead, *Hellas* focused exclusively on the bank's New York contacts.

At least two other reported decisions in the Southern District of New York have explicitly disagreed with *Hellas* and found that Deutsche Bank is not subject to general jurisdiction in New York.¹⁶ And it is hard to understand how *Hellas* could be consistent with the Second Circuit's decision in *Brown*, decided one year after *Hellas*.

B. Is the "doing business" theory of general jurisdiction viable after *Daimler*?

One corollary to the courts' narrow interpretation of *Daimler*'s "exceptional case" language is that the "doing business" basis for general jurisdiction—good law in New York and other jurisdictions for nearly 100 years prior to *Daimler*¹⁷—is essentially dead.

1. New York's pre-*Daimler* "doing business" doctrine

Before *Daimler*, "doing business" had been recognized in New York as a valid basis for general jurisdiction since at least 1917, when the Court of Appeals decided *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267 (1917). *Tauza* held that where an out-of-state corporation conducts business in New York "not occasionally or casually, but with a fair measure of permanence and continuity," New York courts may assert personal jurisdiction even where "the cause of action sued upon has no relation in its origin to the business here transacted." *Id.* at 267-68. When CPLR 301 was enacted in 1963, it carried forward prior bases of general jurisdiction, including doing business jurisdiction.¹⁸

In order to satisfy the "doing business" test before *Daimler*, a plaintiff was required to show that a defendant "engaged in 'continuous, permanent, and substantial activity in New York.'" *Wawa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (quoting *Landoil Res. Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1043 (2d Cir. 1990)). *Accord Laufer v. Ostrow*, 55 N.Y.2d 305, 309-10 (1982). The "doing business" test focused on the quality and nature of the New York contacts, which

were analyzed to determine if they were sufficient while not offending due process. *Lauffer*, 55 N.Y.2d at 310. The standard was used to uphold general jurisdiction in New York based on, among other things, an international corporation's maintenance of an affiliate investor relations office in New York City,¹⁹ a foreign bank's maintenance of a branch office in New York,²⁰ a foreign corporation's provision of technology services (through a foreign subsidiary) making New York one of its "top ten retail markets,"²¹ and a foreign corporation's foreign subsidiary's maintenance of an employee and mailing address in New York.²²

Prior to *Daimler*, the "doing business test" was also the basis for general personal jurisdiction over a non-domiciliary individual. *Pichardo v. Zayas*, 122 A.D.3d 699, 702-03 (2d Dep't 2014); see also *Reich v. Lopez*, 38 F. Supp. 3d 436, 454 (S.D.N.Y., 2015) ("Although the 'doing business' test is most often used to find jurisdiction over a corporate defendant, this test can be applied to a non-resident individual."); *Lauffer*, 55 N.Y.2d at 313 (citing authorities for assumption that an individual doing business in New York so as to be present in New York is subject to general personal jurisdiction); 2 Commercial Litigation in New York State Court, § 2:21, at 59.

2. *Daimler's* discussion of doing business jurisdiction

Daimler's facts did not require the Supreme Court to rule directly on the continued viability of doing business jurisdiction. Nevertheless, the Court in two footnotes made statements strongly suggesting that the "essentially at home" standard could not be reconciled with the broad application of doing business jurisdiction that had been prevalent up to that time. In footnote 18, the Court specifically referenced the New York Court of Appeals' decision in *Tauza* as representing an outdated, "territorial" view of jurisdiction originating in the *Pennoyer* era. In responding to the *Daimler* plaintiffs' emphasis on *Tauza and Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898), which the Court had cited favorably in *Perkins*, the Court noted that "Barrow and *Tauza* indeed upheld the exercise of general jurisdiction based on the presence of a local office, which signaled that the corporation was 'doing business' in the forum," but the Court held that "*Perkins'* unadorned citation to these cases, both decided in the era dominated by *Pennoyer's* territorial thinking, . . . should not attract heavy reliance today." *Daimler*, 134 S. Ct. at 761 n.18. Similarly, in footnote 20, the Court contrasted the "essentially at home" standard with the "doing business" standard, stating: "A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, 'at home' would be synonymous with

'doing business' tests framed before specific jurisdiction evolved in the United States." *Id.* at 762 n.20.

3. Post-*Daimler* case law

Based on these footnotes in *Daimler*, commentators predicted that *Daimler* would render doing business jurisdiction "a dead letter"²³—a prediction that has since proved largely correct.

In New York, shortly after *Daimler* was decided, the Second Circuit expressed skepticism as to whether doing business jurisdiction could survive under the new "essentially at home" standard. See *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 224 n.2 (2d Cir. 2014) (noting "some tension between *Daimler's* 'at home' requirement and New York's 'doing business' test for corporate 'presence'" and that "*Daimler's* gloss on due process may lead New York courts to revisit Judge Cardozo's well-known and oft-repeated jurisdictional incantation" that "subjects a corporation to general jurisdiction if it does business [in New York] 'not occasionally or casually, but with a fair measure of permanence and continuity.'" *Id.* at 224 n.2 (quoting *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267 (1917)).²⁴ *Sonera's* facts did not require the court to decide the issue.

Later that year, in *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014), the Second Circuit addressed the issue more directly in a case questioning whether the District Court had personal jurisdiction over non-party Bank of China sufficient to enforce an order compelling the bank to freeze the defendants' assets. The bank, incorporated and with its principal place of business in China, had a global presence with four branches in the United States, including two in New York. *Id.* at 127. The court noted that, in *Daimler*, the Supreme Court had "expressly cast doubt on previous Supreme Court and New York Court of Appeals cases that permitted general jurisdiction on the basis that a foreign corporation was doing business through a local branch office in the forum." *Id.* at 135. Though the bank's maintenance of two branches in New York plainly would have satisfied the pre-*Daimler* "doing business" test under CPLR 301, *id.* at 136, the Second Circuit held that exercising general jurisdiction over the bank based solely on its operation of local branches in New York could not be squared with *Daimler* because the bank was neither incorporated nor headquartered in New York and it was "clearly not 'an exceptional case' where the Bank's contacts are 'so continuous and systematic as to render [it] essentially at home in the forum.'" *Id.* at 135 (quoting *Daimler*, 134 S. Ct. at 761 n.19).²⁵

One logical consequence of *Gucci* and *Daimler* is that, to serve as a valid jurisdictional basis, the extent of a corporation's business in New York must render the

situation “exceptional” within the meaning of *Daimler*.²⁶ But, as noted above, federal and state courts in New York have followed other circuits in holding that the “exceptional case” standard is “incredibly difficult” to meet.²⁷ Lower federal courts in New York thus have consistently declined to exercise general jurisdiction on the basis of “doing business” under CPLR 301 where jurisdiction likely could have been found before *Daimler*.²⁸ New York’s state courts have done the same.²⁹ To date, fifteen reported opinions issued by New York courts have cited both CPLR 301 and *Daimler*.³⁰ None has exercised general jurisdiction on a doing business theory.

The question remains whether a corporation that was formed and has its principal place of business outside New York could do substantial enough business in New York to bring it within the “exceptional case” contemplated by *Daimler*. Presumably, a fact pattern similar to *Perkins*, where the out-of-state corporation essentially relocated its principal place of business to New York for a period of time, would suffice.³¹ In that narrow sense, doing business may not be entirely dead. But it is clear that the doctrine has been gutted such that it can no longer serve as a basis for general jurisdiction in a run-of-the-mill case.

While we have not exhaustively surveyed nationwide case law on this issue, other circuits and states seem to be in accord with New York courts’ treatment of this issue.³²

C. Does “tag” jurisdiction survive as a valid basis for jurisdiction over a person who is not domiciled in New York?

“Tag” jurisdiction refers to jurisdiction based on an individual’s physical presence within the forum, regardless of whether the individual is domiciled there.³³ Tag jurisdiction has traditionally been recognized as a valid basis for general jurisdiction over an individual under CPLR 301 and federal law. *See* 2 Weinstein, Korn & Miller ¶ 301.05; 2 Haig, Commercial Litigation in New York State Courts (Fourth Ed.) Jurisdiction § 2:21, at 58-59 (hereafter “2 Commercial Litigation in New York State Courts”); *Kadic v. Karadzic*, 70 F.3d 232, 247 (2d Cir. 1995) (“Fed.R.Civ.P. 4(e)(2) specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States, and such personal service comports with the requirements of due process for the assertion of personal jurisdiction.”). In *Burnham v. Superior Court of Ca., Cty. of Marin*, 495 U.S. 604 (1990), the Supreme Court upheld the constitutionality under the Due Process Clause of general jurisdiction based on personal service on non-domiciliary natural person while in the state. 495 U.S. at 610 (“Among the most firmly established principles

of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.”).

While nothing in *Daimler* expressly states that “tag” jurisdiction over individuals is inconsistent with the “essentially at home” standard announced for corporations, one passage from *Daimler* could be read to suggest so:

Goodyear made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”

Daimler, 134 S. Ct. at 760 (quoting *Goodyear*, 564 U.S. at 924). In stating that an individual’s domicile is the “paradigm” forum in which she is subject to general jurisdiction, the decision could be interpreted to suggest that the circumstances under which an individual can be subjected to general jurisdiction outside of her domicile state are as narrow as those in which a corporation may be served outside of the jurisdiction in which it is “essentially at home”—which, as explained above, are exceedingly narrow—and that tag jurisdiction cannot survive under such a standard.

Such a result seems unlikely. If the *Daimler* majority had intended to overturn *Burnham*, it could have stated so directly. But the opinion’s only reference to *Burnham* was a citation to *Burnham*’s discussion of the relaxation of *Pennoyer*’s strict limits on jurisdiction in the late 19th and early 20th centuries. *Id.* at 753-54. *Daimler* did not even discuss tag jurisdiction generally.

That said, no New York court has yet directly held that tag jurisdiction survives *Daimler*.³⁴

D. General jurisdiction based on “consent-by-registration”

“Consent-by-registration” is a doctrine by which the courts of New York and other states exercise general jurisdiction over foreign entities registered to do business within their borders. Akin in some respects to “doing business” jurisdiction, it is founded on a notion of voluntary consent to personal jurisdiction by the foreign entity and thus is arguably less constrained by contacts-based due-process considerations.³⁵ The doctrine holds that, by registering to do business in a particular state and appointing an in-state agent for service of process—as all states in some form require of foreign entities seeking to

do business within their borders—an entity consents to the general jurisdiction of the state’s courts.

Daimler raises the question of whether consent-by-registration remains viable where a state statute provides, or is construed to provide, that registration to do business in the state will be deemed consent to general jurisdiction. While the question is far from settled, it appears that, unlike “doing business” jurisdiction, consent-by-registration will remain viable, at least in narrowed form, for the foreseeable future.

1. State registration statutes

Statutes requiring out-of-state entities to register before doing business in a state have been in place for over 100 years.³⁶ Every state has one.³⁷ Most require a registrant to, among other things, appoint an in-state agent—typically the Secretary of State—to accept service of process on the registered entity.

New York’s relevant provisions are contained in Articles 3 and 13 of the Business Corporation Law (and analogous provisions in the LLC, partnerships, and general associations laws). Article 13 prohibits foreign companies from doing business in New York without receiving authorization to do so. N.Y. Bus. Corp. Law §1301(a). As part of the authorization process, it requires a foreign entity to designate the Secretary of State as agent for service of process. *Id.* § 1304(a)(6). Even absent such designation, the BCL deems the Secretary of State to be the agent for service of process against any authorized foreign corporation. *Id.* § 304(a).

Like New York’s statute, however, most states’ registration statutes do not explicitly address the jurisdictional consequences that may arise as a result of a company’s registration. Only Pennsylvania’s long-arm statute does so explicitly.³⁸ Nevertheless, many states’ courts—including New York’s—have over time construed their registration statutes to require jurisdictional consent, and on that basis have upheld the assertion of general jurisdiction within their borders based on consent-by-registration.³⁹

2. Historical evolution of the consent-by-registration doctrine

In 1917, the U.S. Supreme Court decided *Pennsylvania Fire*, 243 U.S. 93 (1917), a case that, until *Daimler*, was widely cited as authority for the constitutionality of general jurisdiction based on consent-by-registration.⁴⁰ *Pennsylvania Fire* involved a suit filed in Missouri against a Pennsylvania insurance company that issued an insurance policy in Colorado covering certain buildings in Colorado owned by the plaintiff, an Arizona corporation. *Id.* at 94. The defendant had registered to do business in Missouri and, as required by Missouri law, had appoint-

ed Missouri’s superintendent of insurance as its agent for service of process. *Id.* The defendant challenged the suit on due process grounds, arguing that Missouri did not have jurisdiction over it because the case involved a contract originating outside Missouri. *Id.* at 94-95. The Supreme Court, in a cursory opinion, held that the Missouri registration statute “hardly leaves a constitutional question open” and that, by voluntarily appointing an agent for service of process under the statute, the defendant had subjected itself to jurisdiction in Missouri. *Id.* at 95.

The Supreme Court reaffirmed the constitutionality of consent-by-registration in 1939. *See Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939) (citing *Pennsylvania Fire*, 243 U.S. at 96, for proposition that “[a] statute calling for such a designation [of in-state agent] is constitutional, and the designation of the agent ‘a voluntary act’”). In the years since, the Supreme Court has mentioned consent-by-registration only rarely and in *dicta*. *See, e.g., Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 892-93, (1988) (assuming, without deciding, that “[t]he designation of an agent subjects the foreign corporation to the general jurisdiction of the Ohio courts in matters to which Ohio’s tenuous relation would not otherwise extend”); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952) (“The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide a helpful but not a conclusive test.”).

Since 1945, when *International Shoe* fundamentally shifted the constitutional analysis of jurisdictional issues from the presence-based focus of the *Pennoyer*-era to the contacts-based analyses that have governed since *International Shoe*, the federal circuits disagreed on whether consent-by-registration was a valid basis for general jurisdiction.⁴¹ Part of the inconsistency can be explained by the substantive differences among the various underlying state registration statutes and their construction by state courts.⁴² But even apart from the substantive differences in states’ registration statutes, the circuits—and district courts within certain circuits—diverged on the fundamental issue of whether consent-by-registration is consistent with constitutional due process under *International Shoe* and its progeny.⁴³

3. Consent-by-registration in New York

The New York Court of Appeals first recognized consent-by-registration 100 years ago, in *Bagdon v. Phila. & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916). The plaintiff, a resident of New York, had sued a Pennsylvania corporation for breach of a contract that arose out of injuries that the plaintiff had suffered in Pennsylvania while working for the defendant. *Id.* at 433. In addressing the

parties' dispute as to whether general jurisdiction existed by virtue of the defendant's designation of an in-state agent for service of process, Judge Cardozo held that general jurisdiction existed, reasoning:

The person designated is a true agent. The consent that he shall represent the corporation is a real consent. He is made the person "upon whom process against the corporation may be served." The actions in which he is to represent the corporation are not limited. The meaning must, therefore, be that the appointment is for any action which under the laws of this state may be brought against a foreign corporation. . . . The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject-matter. It means that whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person.

217 N.Y. at 436–37 (citations omitted).

In the 98 years between *Bagdon* and *Daimler*, state and federal courts in New York consistently found consent-by-registration to be a valid and constitutional basis for exercising general jurisdiction over authorized foreign corporations.⁴⁴

4. *Daimler*

While *Daimler* did not discuss consent-by-registration directly, as discussed above, the Court made an observation in footnote 18 that could affect the precedential authority of *Pennsylvania Fire* and other *Pennoyer*-era jurisdictional opinions that have long been cited in support of consent-by-registration's constitutionality. The plaintiff in *Daimler* argued that *Tauza*—which, as discussed previously, had upheld "doing business" jurisdiction in New York—was still good law because the Court had cited it favorably in *Perkins*, decided in 1952. In rejecting that argument, *Daimler* warned that "unadorned citations" to "cases . . . decided in the era dominated by *Pennoyer*'s territorial thinking . . . should not attract heavy reliance today." *Daimler*, 134 S. Ct. at 761 n.18. Given the cursoriness with which *Pennsylvania Fire* treated the consent-by-registration issue—as well as several scholars' contentions that the case does not in fact fully support the consent-by-registration doctrine⁴⁵—it is not hard to imagine this statement in *Daimler* being interpreted in the future to mean that *Pennsylvania Fire* alone cannot support the continued vitality of consent-by-registration. And, as discussed below, the Second Circuit in *Brown v. Lockheed Martin* came very close to such an interpretation, hold-

ing that *Pennsylvania Fire* can no longer be used to justify wide and undiscriminating application of the consent-by-registration doctrine without explicit statutory authority.

5. *Post-Daimler*

Courts that have addressed the issue of whether consent-by-registration survives *Daimler* have diverged widely, even within individual circuits.⁴⁶ No federal appellate court has decided the issue. Only the Second Circuit has confronted it—in *Brown*—but, as discussed below, the court in that case expressly declined to decide whether consent to jurisdiction by registration is consistent with *Daimler*, instead construing the Connecticut statute at issue so as not to raise the constitutional question.⁴⁷

i. *Brown v. Lockheed Martin*

As discussed previously, *Brown* involved a personal injury (asbestos) claim brought in Connecticut federal court against Lockheed Martin, a corporation formed and headquartered in Maryland. 814 F.3d at 622. In addition to her contacts-based arguments discussed above, the plaintiff also maintained that, because Lockheed had registered to do business and appointed an agent in Connecticut, it was subject to general jurisdiction under a theory of consent-by-registration. *Id.* at 625. The district court rejected that argument and dismissed the case.

The Second Circuit affirmed. After a lengthy analysis of Connecticut's registration statute, it held that the statute could not reasonably be interpreted as "expressly provid[ing] that foreign corporations that register to transact business in the state shall be subject to the 'general jurisdiction' of the Connecticut courts or direct[ing] that Connecticut courts may exercise their power over registered corporations on any cause." *Id.* at 634. Therefore, the court concluded, Lockheed's compliance with the registration statute could not be construed as consent to general jurisdiction in Connecticut. *See id.* at 641.

The Second Circuit acknowledged the "nettlesome and increasingly contentious question about the import of a foreign corporation's registration to conduct business and appointment of an agent for service of process in a state for the exercise of jurisdiction by that state's courts over the registered corporation." *Id.* at 622. The court further stated that "the validity of [consent-by-registration] after *Daimler*" was a "difficult constitutional question" in light of "*Daimler*'s strong admonition against the expansive exercise of general jurisdiction." *Id.* at 640. But the court expressly declined to decide that question under *Brown*'s facts.

ii. **Brown's implications for consent-by-registration**

Despite side-stepping the central question, *Brown* is notable in several respects for its potential impact on whether consent-by-registration can survive *Daimler* in the Second Circuit.

First, the court made clear that it viewed the history of state registration statutes generally to indicate that they originated primarily to protect states' interests in asserting *specific*, not *general*, jurisdiction over foreign corporations doing business within their borders. The court noted that every state in the country had enacted such a statute, *id.* at 640, and that most had done so in the *Pennoyer* era, when jurisdiction was conceived as arising from physical presence in the jurisdiction. The statutes, the court noted, were intended "primarily to allow states to exercise jurisdiction over corporations that, although not formed under its laws, were transacting business within a state's borders and thus potentially giving rise to state citizens' claims against them." *Id.* at 632. The court concluded that "[a] corporation's 'consent' through registration has thus always been something of a fiction, born of the necessity of exercising jurisdiction over corporations outside of their state of incorporation: Consent was perhaps more of a promise, fairly extracted, to appear in state court on actions by a state's citizens arising from the corporation's operations in the jurisdiction." *Id.* at 633. Speaking specifically to the Connecticut registration statute at issue in *Brown*, the Second Circuit stated that "the history of such statutes suggests that assent only to specific jurisdiction is what the statute required." *Id.* at 637.

Second, *Brown* indicates clearly the Second Circuit's view that *Daimler* must be construed to have had *some* narrowing impact on the consent-by-registration doctrine—even though *Brown's* facts did not require the court to determine exactly what that impact was. For example, the court stated that the doctrinal evolution from *International Shoe's* "minimum contacts" analysis to the "more demanding 'essentially at home' test enunciated in *Goodyear* and *Daimler*" means that "federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate 'consent' . . . to the exercise of general jurisdiction by state courts, particularly in circumstances where the state's interests seem limited." *Id.* By allowing courts to assert general jurisdiction by a "slender inference of consent" based on a foreign company's "routine bureaucratic" compliance with a state registration statute, the court explained, "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." *Id.* at 639-40. Likewise,

in rejecting the plaintiff's argument that *Daimler* had no bearing on *Pennsylvania Fire*, the Second Circuit pegged *Pennsylvania Fire* to the *Pennoyer* era in which it was decided, stating:

Pennsylvania Fire is now simply too much at odds with the approach to general jurisdiction adopted in *Daimler* to govern as categorically as *Brown* suggests; in our view, the Supreme Court's analysis in recent decades, and in particular in *Daimler* and *Goodyear*, forecloses such an easy use of *Pennsylvania Fire* to establish general jurisdiction over a corporation based solely on the corporation's registration to do business and appointment of an agent under a state statute lacking explicit reference to any jurisdictional implications. . . . So here, we believe that the holding in *Pennsylvania Fire* cannot be divorced from the outdated jurisprudential assumptions of its era. The sweeping interpretation that a state court gave to a routine registration statute and an accompanying power of attorney that *Pennsylvania Fire* credited as a general "consent" has yielded to the doctrinal refinement reflected in *Goodyear* and *Daimler* and the Court's 21st century approach to general and specific jurisdiction in light of expectations created by the continuing expansion of interstate and global business.

Id. at 638-39.

Third, just as clearly as the opinion indicates a likely narrowing of the consent-by-registration doctrine, *Brown* also suggests that the Second Circuit would be inclined not to abrogate the doctrine entirely, at least in cases where consent is manifested by compliance with a registration statute that expressly requires such consent. In contrasting the Connecticut statute at issue in *Brown* with other state statutes that "more plainly advise the registrant that enrolling in the state as a foreign corporation and transacting business will vest the local courts with general jurisdiction over the corporation," the court pointed to the registration statutes of Pennsylvania and New York as examples. *Id.* at 640. After surveying several other circuit courts' pre-*Daimler* opinions upholding the use of consent-by-registration, the Second Circuit stated that "it could be concluded that 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, at least in cases brought by state residents, might well be constitutional.” *Id.* at 641.

Fourth, by avoiding the constitutional issue through its conclusion that the Connecticut statute did not require consent to general jurisdiction as a condition of registering in the state, the Second Circuit gave surprisingly little deference to contrary holdings by Connecticut state courts on the same issue. When *Brown* was decided, Connecticut’s intermediate appellate court had recently interpreted the state’s registration statute as requiring foreign companies to consent to general jurisdiction. *Talenti v. Morgan & Brother Manhattan Storage Co.*, 968 A.2d 933 (Conn. 2009). *Talenti* involved claims against a New York corporation registered in Connecticut. In denying a motion to dismiss for lack of personal jurisdiction, the Connecticut Appellate Court cited several prior state cases for the general rule that “by authorizing a public official to accept service of process” under the state’s registration statute, a foreign corporation “has consented to the exercise of jurisdiction over it by the courts of this state . . . even though no other basis exists for the exercise of jurisdiction over the corporation.” *Id.* at 940 (internal quotation marks and citation omitted).⁴⁸

In *Brown*, the Second Circuit declined to follow *Talenti* and instead conducted its own *de novo* textual analysis of Connecticut’s registration statute. In doing so, the Second Circuit criticized the *Talenti* court for not conducting a “detailed legislative analysis” and for “not seriously address[ing] any of the due process or other constitutional concerns that finding such a broad ‘consent’ implicit in registration and appointment might raise.” *Id.*, 814 F.3d at 637 n.19. The Second Circuit concluded that the Connecticut statute “nowhere expressly provides that foreign corporations that register to transact business in the state shall be subject to the ‘general jurisdiction’ of the Connecticut courts,” *id.* at 634, and that it was “entirely possible that the Connecticut state legislature envisioned that foreign corporations that registered to do business in the state would be submitting to jurisdiction over only matters arising from the corporate transaction of business within the state,” *id.* at 636. It could not be inferred that Lockheed had consented to general jurisdiction, the court held, because there was “no basis on which [Lockheed] should have understood that, by registering and appointing an agent, it could be haled into Connecticut court on non-Connecticut based actions.” *Id.* at 637.

6. The future of consent-by-registration in New York

Brown leaves open at least two questions with respect to the continued viability of consent-by-registration in New York. First, under the type of close scrutiny applied in *Brown*, is the New York registration statute susceptible

of implying consent to general jurisdiction by foreign entities that register under it? Second, if so, is asserting jurisdiction based on such implied consent consistent with due process after *Daimler*? While we cannot know how a future court will answer these questions, several relevant observations can be made about the text of New York’s registration statute, the lower courts’ treatment of the issue, and New York legislative efforts to lend clarity.

i. Text and judicial interpretation of relevant New York provisions

The relevant provisions of New York’s registration statute are similar to Connecticut’s in that they nowhere explicitly state that a foreign entity shall be deemed to have consented to general jurisdiction by registering to do business in the state. Section 304(b) of the Business Corporation Law provides that a non-domiciliary corporation may not be authorized to do business in New York State unless it designates the Secretary of State as its agent for service of process. N.Y. Bus. Corp. Law § 304(b). Any foreign corporation applying to do business in New York must include “[a] designation of the secretary of state as its agent upon whom process against it may be served.” *Id.* § 1304(a)(6). Section 304(a) also provides that “[t]he secretary of state shall be the agent of every domestic corporation and every authorized foreign corporation upon whom process against the corporation may be served.” *Id.* § 304(a). Service on the Secretary of State has been held to confer jurisdiction over a defendant on the ground that, by designating the Secretary as its agent for service of process, a corporation is deemed to have consented to personal jurisdiction in New York. *See Doubet*, 99 A.D.3d at 434-35; *Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173, 175-76 (3d Dep’t 1983); 2 Weinstein, Korn & Miller at ¶ C301:06 at 3-20.

Like the Connecticut statute, however, New York’s does not speak directly to the type or subject matter of action in which a foreign corporation may be served. Nor does the New York statute “contain express language alerting the potential registrant that by complying with the statute and appointing an agent it would be agreeing to submit to the general jurisdiction of the state courts.” *Brown*, 814 F.3d at 636.

Standing alone, this lack of explicitness as to jurisdictional consequences of registration suggests that, like Connecticut’s, the New York statute cannot be read as fairly apprising registrants of what scope of jurisdiction they may be consenting to. As discussed, however, New York courts have long interpreted the statute as requiring consent and, on that basis, have upheld the assertion of general jurisdiction based on registrants’ compliance with it. Indeed, in contrasting the Connecticut statute at issue in *Brown* with the analogous provisions in Penn-

sylvania and New York, the court specifically noted that, unlike Connecticut's, "[t]he registration statute in the state of New York has been definitively construed" by New York's courts to "more plainly advise the registrant that enrolling in the state as a foreign corporation and transacting business will vest the local courts with general jurisdiction over the corporation." *Id.* at 640. Thus, even if the statute does not explicitly warn foreign companies of the jurisdictional consequences of registering in New York, the judiciary's pronouncements on the issue may serve the same notice function. One question for future cases will be whether the Second Circuit is willing to accept judicial opinions interpreting the New York statute as a substitute for the "carefully drawn statute" that *Brown* suggested would be necessary for a finding of consent-by-registration post-*Daimler*. *Id.* at 641.

ii. Differing conclusions between New York's lower state and federal courts assessing consent-by-registration post-*Daimler*

The state and lower federal courts in New York have largely come to different conclusions about whether consent-by-registration can survive *Daimler*.⁴⁹ The federal district courts in New York have reached relative consensus that consent-by-registration cannot survive. Since *Daimler*, six New York federal district court opinions have addressed the issue. Five found that consent-by-registration could not survive *Daimler*.⁵⁰ The one opinion upholding consent-by-registration after *Daimler* was decided before *Brown*.⁵¹

New York's state courts have gone the opposite way, with all but one decision upholding consent-by-registration after *Daimler*. Most recently, in *Mischel v. Safe Haven Enterprises, LLC, at al.*, the defendant, a foreign LLC registered to do business in New York, was held *not* to have consented to general jurisdiction. The court acknowledged that, prior to *Daimler*, "the courts of this state held that a foreign corporation is deemed to have consented to personal jurisdiction over it when it registers to do business in New York." 2017 WL 1384214, at *1, 2017 N.Y. Slip Op. 30774(U) (Sup. Ct., N.Y. Cty. Apr. 17, 2017). Citing *Brown* and the lower federal court decisions cited above, however, the court held that prior doctrine could not survive:

All 50 states require registration of foreign corporations to do business (Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L Rev 1343 [2015]). If, after *Daimler*, these statutes were deemed to meet due process standards, foreign corporations seeking to avoid general jurisdiction in a state would be faced

with unenviable choices: (1) not doing business in the state; (2) registering and subjecting themselves to general jurisdiction; or (3) doing business in the state without registration and thereby breaking the law (*id.*). As Monestier suggests, the net effect of finding jurisdiction by registration would be coercive.

Id. at *2. The court also noted that, like BCL § 304, the text of the Limited Liability Company Law "is silent on the jurisdictional effect of registering to do business here," that a bill had been introduced in the New York State Assembly containing language "to make plain that registration constituted consent to the general jurisdiction of the courts of this state," but that the bill has not been enacted. *Id.*⁵²

Before *Mischel*, however, every New York court to consider the issue after *Daimler* upheld consent-by-registration. In the latest of those decisions, *Serov v. Kerzner International Resorts, Inc.*, the defendant Delaware corporations were sued in New York County for injuries suffered by the plaintiff at a resort owned by defendants in the Bahamas. 52 Misc. 3d 1214(a), 2016 WL 4083725 (Sup. Ct., N.Y. Cty. July 26, 2016). In denying defendants' motion to dismiss, the Supreme Court held that their registration to do business in New York effected consent to general jurisdiction. *Id.* at *3-5. The court further held that the exercise of such jurisdiction did not violate the defendant corporations' due process rights. *Id.* at *5. Although the court did not explicitly address *Daimler*'s impact on the consent-by-registration doctrine, the import of the opinion was that *Daimler* had no effect on the doctrine because "the due process rights of [defendants] are not violated through the exercise of such jurisdiction." *Id.* at 5; accord *Aybar v. Aybar*, No. 706909/2015, 2016 WL 3389890, at *4 (Sup. Ct., N.Y. Cty. May 31, 2016) ("This court agrees with those courts that hold that general jurisdiction based on consent through registration and appointment survives *Bauman*."); *Zucker v. Waldmann*, 46 Misc. 3d 1214(A), 9 N.Y.S.3d 596 (Sup. Ct., N.Y. Cty. 2015) ("[P]laintiff may still have a viable claim against Basel Group, which is registered to do business in New York."); *Bailen v. Air & Liquid Sys. Corp.*, No. 19031/12, 2014 WL 3885949, at *4-5 (Sup. Ct., N.Y. Cty. Aug. 5, 2015) ("Although *Daimler* clearly narrows the reach of New York courts in terms of its exercise of general jurisdiction over foreign entities, it does not change the law with respect to personal jurisdiction based on consent. . . . [A] New York court may exercise general personal jurisdiction over a corporation, regardless of whether it is 'at home' in New York, so long as it is registered to do business here as a foreign corporation and designates a local agent for service of process.").

It remains to be seen whether the federal and state courts will reach consensus on this issue.

iii. The New York State legislature’s attempts to clarify

Each year since *Daimler* was decided, the New York State legislature, at the request of the Chief Administrative Judge, has considered a bill that would amend Section 1301 of the Business Corporation Law to add a new paragraph (e), stating:

A foreign Corporation’s application for authority to do business in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation. A surrender of such application shall constitute a withdrawal of consent to jurisdiction.

2017 NY A.B. No. 5918, New York Two Hundred Fortieth Legislative Session, available at <https://www.ny-senate.gov/legislation/bills/2017/a5918/amendment/original>.⁵³ The sponsor’s memorandum of New York Assemblywoman Helene Weinstein, which contains the text of the January 2017 Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York, acknowledges that the applicable statutes “do not explicitly state that registration to do business or designation of a local agent to accept service of process constitutes consent to general jurisdiction.”⁵⁴ It states, however, that “judicial interpretation of the statutes is what matters” and contends that “almost all New York courts have held that consent to general personal jurisdiction is the inherent by-product of registration to do business in New York” and that “foreign corporations have been on notice [of that rule] for nearly a century.” *Id.* The purpose of the proposed amendments, it states, is to “codify the case law and provide a forceful legislative declaration as to the effect of a foreign corporation’s registration to do business in New York.” *Id.*

Despite multiple introductions of this bill and the courts’ backing of it, the legislature has not yet passed it. We have seen no indication of increased momentum behind the bill introduced in the current legislative session, and therefore have no reason to believe that the legislature will act quickly on this. If it does, the legislation is likely to be challenged in the courts.

iv. Constitutional issues

It is worth noting that, long before *Daimler*, courts and scholars challenged the constitutionality of consent-by-registration—raising questions about whether the doctrine is consistent with the Due Process Clause, the Commerce Clause, and the constitutional “unconstitutional conditions” doctrine, among others.⁵⁵ Indeed, when opposing the bill explained in the previous section of this report, the New York City Bar issued a report in April 2015 (and again in March 2016) contending, *inter alia*, that the bill would violate the constitutional “dormant Commerce Clause” doctrine.⁵⁶ Some commentators believe that consent-by-registration is likely to be the next front in the battle over general jurisdiction.⁵⁷

III. Conclusion

When *Daimler* was decided, it cemented the announcement of *Goodyear’s* “essentially at home” standard as a watershed event that would drastically alter the law of general jurisdiction as it had been understood for decades. The “doing business” theory of general jurisdiction—long the accepted law of New York and other states—is dead. Generally, foreign business entities may conduct any amount of business in New York and, as long as they maintain principal offices outside New York, can rest assured that New York’s courts will not assert general jurisdiction over them on the basis of their contacts within the state. Thus, in the nearly four years since *Daimler* was decided, the range of circumstances under which a state may subject a foreign corporation to general jurisdiction on the basis of the “essentially at home” standard has been narrowed to a sliver. While it remains to be seen whether consent-by-registration can survive *Daimler* in New York, the Second Circuit’s decision in *Brown* makes clear that the doctrine has been narrowed dramatically.

Mitchell J. Katz, Chair
 Robert N. Holtzman, Chair-Elect*
 Committee on Federal Procedure
 Michael C. Rakower, Co-Chair*
 Stephen T. Roberts, Co-chair*
 Amy J. Agnew
 Gregory K. Arenson*
 Scott A. Barbour
 Matthew P. Barry
 Robert E. Bartkus
 Ernest T. Bartol
 James A. Beha, II
 Leonard Benowich
 Howard E. Berger
 William J. Brennan
 Andre G. Castaybert
 Julie E. Cohen

J. Peter Coll, Jr.
Colleen A. Connolly*
Matthew G. Coogan*
Megan K. Dorritie
Samantha V. Ettari
Alfred L. Fatale, III
Tom M. Fini
Michael L. Fox
Stephen J. Ginsberg*
Robert E. Glanville
Alan A. Harley
Jeffrey J. Harradine
Peter C. Hein
Michael T. Hensley
Bryan D. Hetherington
Stuart E. Kahan
Armin Kaiser*
Joshua Katz
Henry J. Kelston
Patrick A. Klingman
Desmond C.B. Lyons
Charles E. Miller
Mark S. Morgan
Lori G. Nuckolls
James J. O’Shea
Christos G. Papapetrou
Joon H. Park
James F. Parver*
Sharon M. Porcellio
Thomas J. Quigley
Shawn P. Ricardo
Jorge Rodriguez
Dennis M. Rothman
Joshua A. Roy
Samuel J. Rubin
William R. Samuels
Doreen A. Simmons
Jamie Sinclair

***Principal authors of the report**

Endnotes

1. In the case of a natural person, the Court reiterated that “the paradigm forum for the exercise of general jurisdiction is the individual’s domicile.” *Id.* at 760 (quoting *Goodyear*, 564 U.S. at 924, 131 S. Ct. at 2853).
2. *See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984) (“When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum, the State has been said to be exercising ‘general jurisdiction’ over the defendant.”).
3. *Perkins*, in which the Court found general jurisdiction, involved a Philippine mining company that had ceased all operations in the Philippines during World War II, while the company’s president moved to Ohio, where he maintained an office and company bank accounts and supervised the company’s limited wartime activities. *Helicopteros*, in which the Court found general jurisdiction lacking, involved a Columbian corporation whose personnel had made several trips to Texas, accepted checks drawn on a Texas bank, and purchased helicopters and equipment from a Texas manufacturer, but otherwise had conducted no business in Texas.
4. *Goodyear USA* did not contest personal jurisdiction. *Goodyear*, 564 U.S. at 921.
5. Daimler had not objected in the lower courts to the plaintiffs’ contention that MBUSA was subject to general jurisdiction in California. *See id.*
6. In *Perkins*, the defendant was Benguet Consolidated Mining Company, a Philippines entity that was sued in Ohio state court on various causes of action not arising from its activities in Ohio. *Perkins*, 342 U.S. at 438-39. Benguet had been engaged in mining operations in the Philippine Islands, but the operations were halted during the Japanese occupation of the Philippines in World War II. *Id.* at 447. At that time, Benguet’s president returned to his home in Ohio, where he maintained an office in which he conducted substantially all affairs of the company—activities that the Court concluded represented “a continuous and systematic supervision of the necessarily limited wartime activities of the company.” *Id.* at 447-48. On that basis, the Court held that it would not violate federal due process for Ohio courts to exercise general jurisdiction over the company. *Id.* at 448.
7. *Monkton’s* facts did not present a close case. The defendant was a bank incorporated in the Cayman Islands with a principal place of business in Grand Cayman. 768 F.3d at 432. Its only contacts with Texas, the forum at issue, were several telephone conversations with an individual in Texas, wire transfers to Texas banks, and maintenance of an interactive website visited by Texas users. *Id.* at 431-32. The Fifth Circuit held that these contacts were not sufficient to establish general jurisdiction. *Id.* at 432.
8. *See, e.g., Thompson v. Carnival Corp.*, 174 F. Supp. 3d 1327 (S.D. Fla. 2016) (holding that corporation’s relationships with Florida entities, Florida bank accounts, and consent to jurisdiction in Florida on unrelated matter were insufficient to exercise general jurisdiction over St. Kitts entities); *Otsuka Pharm. Co. v. Mylan Inc.*, 106 F. Supp. 3d 456 (D.N.J. 2015) (holding that pharmaceutical manufacturer incorporated and headquartered in Pennsylvania was not subject to general jurisdiction in New Jersey despite that it and its subsidiaries held distribution licenses in New Jersey and generated revenue attributable to sales in New Jersey); *Stroud v. Tyson Foods, Inc.*, 91 F. Supp. 3d 381, 387 (E.D.N.Y. 2015) (holding that foreign food companies with subsidiaries operating in New York were not subject to general jurisdiction in New York); *Farber v. Tennant Truck Lines, Inc.*, 84 F. Supp. 3d 421, 430-32 (E.D. Pa. 2015) (holding that Illinois trucking company was not subject to general jurisdiction in Pennsylvania where during a four-year period it completed 4600 deliveries and pickups (involving over 600,000 miles driven within the state), maintained employees based in Pennsylvania, kept company vehicles in Pennsylvania, and paid taxes in Pennsylvania); *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL Docket No. 874, 2014 WL 5394310, at *3 (E.D. Pa. Oct 23, 2014) (holding that “an ‘exceptional case’ authorizing general jurisdiction is one in which the defendant’s forum contacts are so pervasive that they may substitute for its place of incorporation or principal place of business”); *see also Xilinx, Inc. v. Papst Licensing GMBH & Co. KG*, Nos. 14-CV-4963, 14-CV-4794 LHK, 2015 WL 4149166, at *5 (N.D. Cal. July 9, 2015) (“Papst is not incorporated in California, nor does it have its principal place of business here. These facts, alone, are strong evidence that Papst is not at home in California.”); *Robatech Midwest, Inc. v. Leuthner*, No. 14-CV-1230-JPS, 2015 WL 1219642, at *9 (E.D. Wis. Mar. 17, 2015) (“Perhaps that paradigm is non-exclusive and general jurisdiction can be appropriate in more forums than a person’s domicile alone, but that will only be in the exceptional case.”).

9. In another decision issued by the Central District of California, the court found the question of general jurisdiction to be “a close one on the factual record,” but found the issue unnecessary to decide. *Lions Gate Entm’t. Inc. v. TD Ameritrade Servs. Co.*, 170 F. Supp. 3d 1249 (C.D. Cal. 2016). In that case, the plaintiff claimed that defendant, a New York advertising agency incorporated in Delaware, had “large California-based clients and clients that have a substantial California presence.” *Id.* at 1258 (internal quotation marks omitted). Plaintiff also claimed that defendant did business with eight “sister entities” in California that had overlapping corporate officers and that defendant maintained two offices in California. *Id.* Based on these facts, the court held, “the Court could see an argument for general jurisdiction in this case.” *Id.* at 1259. Nevertheless, the court did not decide the question of general jurisdiction, finding instead that the plaintiff had adequately pleaded specific jurisdiction. *Id.* at 1262-63.
10. In *Tyrrell v. BNSF Ry. Co.*, 383 Mont. 417 (Mont. 2016), the Montana courts found jurisdiction over the foreign defendant railroad on the ground that it had 2,000 employees in Montana, maintained facilities and owned real estate in Montana, had a telephone listing in Montana, and conducted direct advertising in Montana. 383 Mont. at 428-29. However, as explained above, the Supreme Court recently reversed that decision. *BNSF Ry.*, 137 S. Ct. 1549.
11. *Aspen Ins.* provoked a strong dissenting opinion arguing that *Daimler* precluded general jurisdiction. *Aspen*, 57 N.E.3d at 669-71 (Lampkin, J., dissenting).
12. See *Brown*, 814 F. 3d at 627 (“[I]n our view *Daimler* established that, except in a truly ‘exceptional’ case, a corporate defendant may be treated as ‘essentially at home’ only where it is incorporated or maintains its principal place of business—the ‘paradigm’ cases.” (citing *Monkton*, 768 F.3d at 432, *Kipp v. Ski Enter. Corp. of Wis.*, 783 F.3d 695, 698 (7th Cir. 2015), and *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014))).
13. In one case involving claims against the Palestine Liberation Organization (“PLO”) and the Palestinian Authority (“PA”) by victims of terrorist acts in Israel and the West Bank, Judge Daniels in the Southern District of New York held that the PLO and PA represented an “exceptional case” under *Daimler* because of their “continuous and systematic business and commercial contacts within the United States” and the fact that they did not submit evidence “to conclude that either defendant is ‘at home’ in a particular jurisdiction other than the United States.” *Sokolow v. Palestine Liberation Org.*, No. 04 Civ. 397, 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014). The Second Circuit reversed that decision, holding that the defendants’ contacts with New York “plainly do not approach the required level of contact to qualify as exceptional” because “[t]he PLO and PA have not transported their principle ‘home’ to the United States, even temporarily.” *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 335, (2d Cir. 2016) (internal quotation marks omitted). The decision in *Waldman* was consistent with decisions of federal courts for the District of Columbia in several cases involving the same defendants and claims. See *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237 (D.D.C. 2015); *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19 (D.D.C. 2015); *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 49 (D.D.C. 2015).
14. The court also rejected the plaintiff’s argument that Lockheed’s registration to do business in Connecticut operated as a consent to general jurisdiction. See *id.* at 631-41. That holding is discussed *infra*.
15. *Minholz v. Lockheed Martin Corp.*, 227 F. Supp. 3d 249, 261–62 (N.D.N.Y. Dec. 30, 2016) (holding that Lockheed Martin’s business operations and employees in New York compose only a small percentage of its worldwide and United States business operations, thus not constituting an “exceptional case” pursuant to *Daimler*); *Weiss v. Nat’l Westminster Bank PLC*, 176 F. Supp. 3d 264, 277-78 (E.D.N.Y. 2016) (holding that a foreign bank was not subject to general jurisdiction where it established a New York branch); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789 (LGS), 2016 WL 1268267, at *3–4 (S.D.N.Y. Mar. 31, 2016) (holding that pursuant to *Daimler*, plaintiffs failed to make a *prima facie* showing of general jurisdiction over foreign corporate defendants where their place of business was abroad and their U.S. operations constituted only a small part of their worldwide activities); *Cortlandt St. Recovery Corp. v. Deutsche Bank AG, London Branch*, No. 14-cv-01568(JPO), 2015 WL 5091170, at *4 (S.D.N.Y. Aug. 28, 2015) (holding that alleged significant business operations out of a head office located in New York City were insufficient to warrant exercise of general jurisdiction over a German bank); *In re M/V MSC FLAMINIA*, 107 F. Supp. 3d 313, 320-321 (S.D.N.Y. 2015) (German medical company’s minimal contacts with New York were insufficient for purposes of general jurisdiction, even if its subsidiary would be “at home” in the state); *Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 290 (S.D.N.Y. 2015) (holding that the sale of products in New York does not amount to an exceptional case pursuant to *Daimler*).
16. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 NRB, 2015 WL 6243526, at *27 n.43 (S.D.N.Y. Oct. 20, 2015) (rejecting plaintiffs’ reliance on *Hellas* and holding that “we cannot agree with the bankruptcy court’s conclusion that even very substantial corporate operations (regardless of whether measured in money, personnel, space, or time) in a given forum suffice to make a defendant at home in the forum”); *Cortlandt St. Recovery*, 2015 WL 5091170, at *4 (distinguishing *Hellas* and holding that Deutsche Bank “is not ‘at home’ in New York, and exercising general jurisdiction would not comport with the requirements of due process”).
17. See generally Tanya J. Monestier, *Where Is Home Depot “At Home”?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 Hastings L.J. 233, 240-42 (2014); Meir Feder, *Goodyear, “Home,” and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. Rev. 671, 675-76 & nn.18-19 (2012).
18. See CPLR § 301 (providing that New York courts “may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore”); *McGowan v. Smith*, 52 N.Y.2d 268, 272 (1981) (holding that, under § 301, authority of New York courts to exercise general jurisdiction “is based solely upon the fact that the defendant is ‘engaged in such a continuous and systematic course of ‘doing business’ here as to warrant a finding of its ‘presence’ in this jurisdiction” (quoting *Simonson v. Int’l Bank*, 14 N.Y.2d 281, 285 (1964))); *Landoil Res. Corp. v. Alexander & Alexander Servs., Inc.*, 77 N.Y.2d 28, 33-34 (1990) (same); *Laufer v. Ostrow*, 55 N.Y.2d 305, 309-10 (1982) (same).
19. *Wiwa*, 226 F.3d at 93.
20. *Dietrich v. Bauer*, No. 95 Civ. 7051(RWS), 2000 WL 1171132, at *4 n.4 (S.D.N.Y. Aug. 16, 2000) (holding that “a foreign bank with a branch in New York is ‘doing business’ in New York for purposes of personal jurisdiction”).
21. *Rates Tech. Inc. v. Broadvox Holding Co., LLC*, No. 13 Civ. 0152(SAS), 2014 WL 46538, at *4 (S.D.N.Y. Jan. 6, 2014).
22. *SEB S.A. v. Montgomery Ward & Co.*, No. 99 Civ. 9284(RCC), 2002 WL 31175244, at *2-*4 (S.D.N.Y. Oct. 1, 2002).
23. Monestier, 66 Hastings L.J. at 265 (“The message in *Daimler* has come through loud and clear: doing business jurisdiction is a dead letter.”) (citing David D. Siegel, *U.S. Supreme Court Severely Circumscribes “Presence” as Basis for Personal Jurisdiction of Foreign Corporations—Claim Itself Must Have Local Roots; If It*

COMMITTEE REPORTS

- Hasn't, Corporation's Overall Contacts with State Won't Support Jurisdiction, 265 Siegel's Prac. Rev. 1, i (2014)).
24. See also Alexander, Practice Commentary C301:8(c), McKinney's Cons. Laws of N.Y., C.P.L.R. 301 ("Daimler AG v. Bauman, 2014, 134 S.Ct. 746, has brought an end to doing business jurisdiction of the type manifested in *Tauza v. Susquehanna Coal Co.*, 1917, 220 N.Y. 259, 115 N.E. 915, and *Bryant v. Finnish National Airline*, 1965, 15 N.Y.2d 426, 260 N.Y.S.2d 625, 208 N.E.2d 439. No longer can general personal jurisdiction be asserted against a foreign corporation based solely on the corporation's continuous and systematic business activity in New York. *Tauza*-type general jurisdiction . . . is no longer available in New York for plaintiffs seeking to sue foreign corporations on claims that arose outside the state.")
 25. Lower courts in the Second Circuit have since recognized that *Daimler* and *Gucci* abrogated the prior rule recognizing general jurisdiction where a foreign bank had branch offices in New York. See, e.g., *Strauss v. Credit Lyonnais, S.A.*, 175 F. Supp. 3d 3, 18 (E.D.N.Y. 2016); *7 W. 57th St. Realty Co., LLC v. Citigroup, Inc.*, No. 13 Civ. 981(PGG), 2015 WL 1514539, at *6 (S.D.N.Y. Mar. 31, 2015).
 26. See, e.g., *Int'l Diamond Imps., Inc. v. Oriental Gemco (N.Y.), Inc.*, 64 F. Supp. 3d 494, 518 (S.D.N.Y. 2014) ("Even if Foreign Defendants satisfy the 'doing business' standard, Plaintiff has not alleged that Foreign Defendants' operations in New York are 'so substantial and of such a nature as to render the corporation at home in that State' making this one of the 'exceptional case[s]' alluded to in *Daimler*." (citing *Daimler*, 134 S. Ct. at 761 n.19)).
 27. See *Otsuka*, 106 F. Supp. 3d at 466.
 28. See, e.g., *Stroud v. Tyson Foods, Inc.*, 91 F. Supp. 3d 381, 387 (E.D.N.Y. 2015); *Ingenito v. Riri USA, Inc.*, 89 F. Supp. 3d 462, 474-75 (E.D.N.Y. 2015); *BWP Media USA Inc. v. Hollywood Fan Sites, LLC*, 69 F. Supp. 3d 342, 350 (S.D.N.Y. 2014); *Reich*, 38 F. Supp. 3d at 454-55.
 29. See, e.g., *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 160 n.4 (2014) (stating that *Daimler* "held that general jurisdiction over a foreign corporation may not be predicated solely on the ground that the corporation 'engages in a substantial, continuous, and systematic course of business' in the state"); *D & R Glob. Selections, S.L. v. Pineiro*, 128 A.D.3d 486, 487, 9 N.Y.S.3d 234, 235 (1st Dep't 2015) ("As defendant neither is incorporated in New York State nor has its principal place of business here, New York courts may not exercise jurisdiction over it under CPLR 301."), *leave to appeal granted*, 26 N.Y.3d 914, 44 N.E.3d 937 (2015); *Magdalena v. Lins*, 123 A.D.3d 600, 601 (1st Dep't 2014) ("[T]here is no basis for general jurisdiction pursuant to CPLR 301, since [defendant] is not incorporated in New York and does not have its principal place of business in New York."); *Norex Petroleum Ltd. v. Blavatnik*, 48 Misc. 3d 1226(A), 22 N.Y.S.3d 138, 2015 WL 5057693, at *20 (Sup. Ct., N.Y. Cty. 2015) ("In *Daimler*, the Supreme Court brought an end to 'doing business' jurisdiction. . . . The only kind of corporate activity that ordinarily will satisfy the general jurisdiction test is incorporation in the state or maintenance of a corporation's principal place of business in the state."); *Serov v. Kerzner Int'l Resorts, Inc.*, 52 Misc. 3d 1214(A), 2016 WL 4083725 (Sup. Ct., N.Y. Cty. July 26, 2016); *Ace Decade Holdings Ltd. v. UBS AG*, No. 653316/2015, 2016 WL 7158077, at *12-13 (Sup. Ct., N.Y. Cty. Dec. 7, 2016).
 30. See *Fernandez v. DaimlerChrysler, A.G.*, 143 A.D. 3d 765, 40 N.Y.S. 3d 128 (2d Dep't 2016); *Serov ex rel. Serova v. Kerzner Int'l Resorts, Inc.*, 52 Misc. 3d 1214(A), 43 N.Y.S. 3d 769 (Sup. Ct., N.Y. Cty. July 26, 2016); *Davis v. Scottish Re Grp., Ltd.*, 46 Misc. 3d 1206(A), 9 N.Y.S. 3d 592 (Sup. Ct., N.Y. Cty. 2014), *modified on other grounds*, 138 A.D.3d 230, 28 N.Y.S. 3d 18 (1st Dep't 2016); *Carrs v. Avco Corp.*, 124 A.D.3d 710, 2 N.Y.S.3d 533 (2d Dep't 2015); *D & R Glob. Selections, S.L. v. Pineiro*, 128 A.D.3d 486, 9 N.Y.S. 3d 234 (1st Dep't 2015), *leave to appeal granted*, 26 N.Y.3d 914 (2015); *Norex Petroleum*, 48 Misc. 3d 1226(A); *Zucker v. Waldmann*, 46 Misc. 3d 1214(A), 9 N.Y.S. 3d 596 (Sup. Ct., N.Y. Cty. 2015); *Rachel's Children Reclamation Found., Inc. v. Elon*, 49 Misc. 3d 1208(A), 26 N.Y.S. 3d 215 (Sup. Ct., N.Y. Cty. 2015); *Magdalena v. Lins*, 123 A.D.3d 600, 999 N.Y.S. 2d 44 (1st Dep't 2014); *Transasia Commodities Ltd. v. Newlead JMEG, LLC*, 45 Misc. 3d 1217(A), 7 N.Y.S. 3d 245 (Sup. Ct., N.Y. Cty. 2014); *Chambers v. Weinstein*, 44 Misc. 3d 1224(A), 997 N.Y.S. 2d 668 (Sup. Ct., N.Y. Cty. 2014), *aff'd*, 135 A.D.3d 450 (1st Dep't 2016); *Putnam Leasing Co. v. Pappas*, 46 Misc. 3d 195, 995 N.Y.S. 2d 457 (Dist. Ct. Nassau Cty. 2014); *Gliklad v. Bank Hapoalim B.M.*, 2014 NY Slip Op 32117 (U) (Sup. Ct., N.Y. Cty. 2014); *Saarstahl A.G. v. Wirthlin Worldwide Consulting LLC*, 2014 WL 2727018 (Sup. Ct., N.Y. Cty. June 13, 2014); *Ace Decade*, 2016 WL 7158077 at *12-13.
 31. See, e.g., *Hood v. Ascent Med. Corp.*, 13cv0628(RWS)(DF), 2016 WL 1366920, at *10 (S.D.N.Y. Mar. 3, 2016), *report and recommendation adopted*, 2016 WL 3453656 (S.D.N.Y. June 20, 2016) (evaluating whether defendant did enough business in New York to "demonstrate that [it] was essentially a New York corporation"); see also *Transasia Commodities*, 45 Misc. 3d 1217(A), at *4 n.2 (Sup. Ct., N.Y. Cty. 2014) (holding that, under *Daimler*, general jurisdiction can "exist under CPLR 301 when an entity has engaged in such continuous and systematic course of 'doing business' that it is deemed 'present' in New York" and an "exceptional case" under *Daimler*).
 32. See, e.g., *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1070 (9th Cir. 2015) (citing *Daimler* for the proposition that "'doing business' has long been abandoned as the test for general jurisdiction"); *Keeley v. Pfizer Inc.*, No. 4:15CV00583ERW, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015) ("This result is contrary to the holding in *Daimler* that merely doing business in a state is not enough to establish general jurisdiction."); *Lanham v. Pilot Travel Ctrs., LLC*, No. 03:14-CV-01923-HZ, 2015 WL 5167268, at *3 (D. Or. Sept. 2, 2015) ("Pilot's activity in Oregon, although continuous, does not render it 'essentially at home' in Oregon."); *Allen v. IM Sols., LLC*, 83 F. Supp. 3d 1196, 1205 (E.D. Okla. 2015) ("*Daimler* rejects the concept that a business organization is 'at home' in a given state merely because it does significant business there.>").
 33. See, e.g., *Estate of Ungar v. Palestinian Auth.*, 400 F. Supp. 2d 541, 553 (S.D.N.Y. 2005).
 34. In one opinion from the Southern District of New York, the court seemed to acknowledge that personal service within New York remained a viable basis, independent of "domicile," for general jurisdiction. See *Reich*, 38 F. Supp. 3d at 455 ("For general jurisdiction over an individual to comport with due process, Defendants must be domiciled in New York, served in New York, or have otherwise consented to the court's jurisdiction."). However, the court in that case had no occasion to apply a tag jurisdiction theory under the facts presented. *Id.* at 455-57.
 35. Consent has long been recognized as a valid independent basis for personal jurisdiction, on the rationale that personal jurisdiction is a right that may be waived without regard to the defendant's contacts with the forum state. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) ("We have noted that, because the personal jurisdiction requirement is a waivable right, there are a 'variety of legal arrangements' by which a litigant may give 'express or implied consent to the personal jurisdiction of the court.'" (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982))).
 36. See, e.g., *Pennsylvania Fire Ins. Co. of Phila. v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93, 94 (1917) (discussing Missouri's registration statute).
 37. See generally Kevin D. Benish, *Penmoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler Ag v.*

- Bauman*, 90 N.Y.U. L. Rev. 1609, 1647-61 (2015) (citing registration statutes); Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 Rev. Litig. 1, 1 n.1 (1990) (same).
38. See Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1368 n.119 (2015). The Pennsylvania statute provides that “qualification as a foreign corporation under the laws of this Commonwealth” shall permit the Pennsylvania courts “to exercise general personal jurisdiction over such [corporation].” 42 Pa. Stat. and Cons. Stat. Ann. § 5301 (West).
39. See Monestier, 36 Cardozo L. Rev. at 1369 n.125 (citing cases).
40. See, e.g., Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in A Twenty-First Century World*, 64 Fla. L. Rev. 387 (2012).
41. See, e.g., *King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570, 576, 578 (9th Cir. 2011) (“The simple act of appointing a statutory agent is not, nor has it ever been, a magical jurisdictional litmus test.”); *STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 131 (2d Cir. 2009) (“It is well-settled under New York law that registration under § 1304 subjects foreign companies to personal jurisdiction in New York.”); *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) (“The casual presence of a corporate agent in the forum is not enough to subject the corporation to suit where the cause of action is unrelated to the agent’s activities.”); *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 184 (5th Cir. 1992) (“Not only does the mere act of registering an agent not create Learjet’s general business presence in Texas, it also does not act as consent to be hauled into Texas courts on any dispute with any party anywhere concerning any matter.”); *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (“We need not decide whether authorization to do business in Pennsylvania is a “continuous and systematic” contact with the Commonwealth for purposes of the dichotomy between “general” and “specific” jurisdiction because such registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts.”); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) (“[A]ppointment of an agent for service of process under § 303.10 gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state.”); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990) (“Registering to do business is a necessary precursor to engaging in business activities in the forum state. However, it cannot satisfy . . . standing alone . . . the demands of due process.” (ellipses in original)); *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 697 (1st Cir. 1984) (“It is well-settled that a corporation that authorizes an agent to receive service of process in compliance with the requirements of a state statute, consents to the exercise of personal jurisdiction in any action that is within the scope of the agent’s authority.”); *Budde v. Kentron Haw., Ltd.*, 565 F.2d 1145, 1149 (10th Cir. 1977) (“[W]e conclude that Colorado state courts . . . have jurisdiction over a foreign corporation qualified to do business in the state where personal service on the foreign corporation is effected within the state, regardless of the fact that the cause of action does not arise out of the foreign corporation’s business activity within the state and to the contrary arises out of a transaction occurring in another state.”); *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) (“The principles of due process require a firmer foundation than mere compliance with state domestication statutes.”).
42. See, e.g., *Robert Mitchell Furniture Co. v. Selden Breck Const. Co.*, 257 U.S. 213, 216 (1921) (“Unless the state law either expressly or by local construction gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere”); *King*, 632 F.3d at 576 (“*Pennsylvania Fire, Chipman, and Robert Mitchell* thus collectively stand for the proposition that federal courts must, subject to federal constitutional restraints, look to state statutes and case law in order to determine whether a foreign corporation is subject to personal jurisdiction in a given case because the corporation has appointed an agent for service of process.”); *Budde*, 565 F.2d at 1149 (discussing different jurisdictional results reached under New Mexico and Colorado law).
43. Compare, e.g., *Rosenruist-Gestao E Servicos LDA v. Virgin Enters. Ltd.*, 511 F.3d 437, 451 (4th Cir. 2007) (“Appointment of an agent for service of process is a contact so minimal that our circuit has held it cannot render a company subject to judicial compulsion under any statute consistent with Due Process principles limiting personal jurisdiction” (citing *Ratliff*, 444 F.2d at 748 (“The principles of due process require a firmer foundation than mere compliance with state domestication statutes.”))), *Consol. Dev. Corp.*, 216 F.3d at 1293 (citing *International Shoe* for proposition that “[t]he casual presence of a corporate agent in the forum is not enough to subject the corporation to suit where the cause of action is unrelated to the agent’s activities”), *Wilson*, 916 F.2d at 1245 (holding that reading of Indiana registration statute as conferring general jurisdiction “would render it constitutionally suspect”), and *Wenche Siemer*, 966 F.2d at 183 (“To assert, as plaintiffs do, that mere service on a corporate agent automatically confers general jurisdiction displays a fundamental misconception of corporate jurisdictional principles. This concept is directly contrary to the historical rationale of *International Shoe* and subsequent Supreme Court decisions.”), with cases cited in footnote 40, *supra*. See also *Takeda GmbH v. Mylan Pharm. Inc.*, No: 15-3384 (FLW)(DEA), 2016 WL 146443, at *3 (D.N.J. Jan. 12, 2016) (discussing circuit split); *AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp. 3d 549, 555-56 (D. Del. 2014) (same), *motion to certify appeal granted sub nom. AstraZeneca AB v. Aurobindo Pharma Ltd.*, No. 14-664-GMS, 2014 WL 7533913 (D. Del. Dec. 17, 2014), and *aff’d sub nom. Accordia Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755 (Fed. Cir. 2016).
44. See, e.g., *STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 131 (2d Cir. 2009) (“It is well-settled under New York law that registration under § 1304 subjects foreign companies to personal jurisdiction in New York.”); *Eastboro Found. Charitable Trust v. Penzer*, 950 F. Supp. 2d 648, 655 (S.D.N.Y. 2013) (“It is undisputed that an out-of-state company’s registration to do business in New York is deemed a consent to general personal jurisdiction in New York.”); *Steuben Foods, Inc. v. Oystar Grp.*, No. 10-CV-7805, 2013 WL 2105894, at *3 (W.D.N.Y. May 14, 2013) (“For more than sixty years, New York courts have determined that general jurisdiction may be asserted over a corporation solely on the basis that it has registered to do business in the forum.”); *Weisman Celler Spett & Modlin, P.C. v. Trans-Lux Corp.*, No. 12 Civ. 5141(JMF), 2012 WL 5512164, at *2 (S.D.N.Y. Nov. 14, 2012) (“New York law is ‘well-settled’ that a corporation that has registered to do business in New York pursuant to New York Business Corporation Law . . . Section 1304 is deemed to be ‘doing business’ here and thus subject to personal jurisdiction.” (citing *STX Panocean*, 560 F.3d at 131)); *The Rockefeller Univ. v. Ligand Pharm., Inc.*, 581 F. Supp. 2d 461, 466 (S.D.N.Y. 2008) (“In maintaining an active authorization to do business and not taking steps to surrender it as it has a right to do, defendant was on constructive notice that New York deems an authorization to do business as consent to jurisdiction.”); *Doubet LLC v. Trustees of Columbia Univ. in City of N.Y.*, 99 A.D.3d 433, 434-35 (1st Dep’t 2012); *Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173, 175-76 (3d Dep’t 1983) (holding that Delaware corporation’s registration to do business in New York and designation of the New York Secretary of State as agent constituted “constructive consent to personal jurisdiction” and that “[t]he privilege of doing business in New York is accompanied by an automatic basis for personal jurisdiction”); *Le Vine v. Isoserve, Inc.*, 70 Misc. 2d 747, 749 (Sup.

- Ct., Albany Cty. 1972) (“When a foreign corporation is licensed to do business in New York, it consents to be sued on causes of action arising within and without the State.” (citing *Bagdon*)); see also *Greatship (India) Ltd. v. Marine Logistics Sols. (Marsol) LLC*, No. 11 Civ. 420(RJH), 2012 WL 204102, at *3 (S.D.N.Y. Jan. 24, 2012); *Doubet*, 99 A.D.3d at 434-35.
45. See, e.g., Monestier, *supra* note 38, at 1361 (“There is ample scholarly work to suggest that courts have misread precedent concerning registration statutes and that *Pennsylvania Fire* does not stand for the proposition that registration to do business amounts to consent to general jurisdiction.”).
 46. See, e.g., *State ex rel. Norfolk S. Ry. Co. v. Dolan*, No. SC95514, 2017 WL 770977, at *8 (Mo. Feb. 28, 2017) (“Even before *Daimler*, . . . this Court noted there was a split of authority as to whether a registration statute constitutionally can require consent to general jurisdiction in order to register to do business in a state.”); *Regal Beloit Am., Inc. v. Broad Ocean Motor LLC*, No. 4:16-CV-00111-JCH, 2016 WL 3549624, at *4-5 (E.D. Mo. June 30, 2016) (noting inconsistent treatment by Missouri federal district courts); *Forest Labs., Inc. v. Amneal Pharm. LLC*, No. 14-508-LPS, 2015 WL 880599, at *2 (D. Del. Feb. 26, 2015), *report and recommendation adopted*, No. 14-508-LPS, 2015 WL 1467321 (D. Del. Mar. 30, 2015) (noting inconsistent treatment by Delaware district courts); *Display Works, LLC v. Bartley*, No. 16-583, 2016 WL 1644451, at *6 (D.N.J. Apr. 25, 2016) (noting inconsistency in New Jersey district courts’ treatment of the issue); see also *Gulf Coast Bank v. Designed Conveyor Sys., LLC*, No. 16-412-JJB-RLB, 2017 WL 120645, at *8 (M.D. La. Jan. 12, 2017) (holding that the theoretical underpinnings of *Pennsylvania Fire* and *Neirbo* have been continuously eroded in the past half century and that these decisions have little value in today’s personal jurisdictional analysis.); *Snyder Ins. Servs., Inc. v. Sohn*, No. 16-CV-2535-DDC-GLR, 2016 WL 6996265, at *4 (D. Kan. Nov. 30, 2016) (holding that defendant consented to general personal jurisdiction by its registration to do business in Kansas); *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-md-2591-JWL, 2016 WL 2866166, at *2 (D. Kan. May 17, 2016) (“[T]his Court remains unpersuaded that *Daimler* effectively overruled *Pennsylvania Fire*.”).
 47. The Ninth Circuit recently noted that it was an “open question” whether consent-by-registration survives *Daimler*, but did not have occasion to decide the issue. *AM Trust v. UBS AG*, No. 15-15343, 2017 WL 836080, at *1 (9th Cir. Mar. 3, 2017) (“It is an open question whether, after *Daimler*, a state may require a corporation to consent to general personal jurisdiction as a condition of registering to do business in the state.”). The Federal Circuit was expected recently to address the issue in a pair of appeals relating to ANDA litigation in Delaware under the Hatch-Waxman Act. In *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, 78 F. Supp. 3d 572, 587 (D. Del. 2015), the district court held that the foreign defendant’s compliance with Delaware’s registration statute constituted consent to general jurisdiction. In *AstraZeneca AB*, 72 F. Supp. 3d at 556, *motion to certify appeal granted*, 2014 WL 7533913 (D. Del. Dec. 17, 2014), and *aff’d*, 817 F.3d 755 (Fed. Cir. 2016), the court reached the opposite conclusion, holding that, in light of *Daimler*, a registration-as-consent basis of jurisdiction “can no longer be said to comport with federal due process.” On interlocutory appeal, the Federal Circuit declined to address the conflict between these cases’ holdings with respect to general jurisdiction, finding instead that the defendants in both cases were subject to specific jurisdiction. *Id.*, 817 F.3d at 767. As a result, this issue remains unsettled in the Federal Circuit. Confusing matters further, the Delaware Supreme Court has since reversed itself on the underlying issue of whether compliance with the Delaware registration statute subjects a foreign corporation to general jurisdiction, holding that the prior rule permitting such jurisdiction “rested on a view of federal jurisprudence that has now been fundamentally undermined by *Daimler* and its predecessor *Goodyear*.” *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 126 (Del. 2016).
 48. By the time *Brown* was decided, the Second Circuit was aware of at least one lower Connecticut court after *Talenti* holding that a foreign corporation consented to jurisdiction by complying with the registration statute. *Brown*, 814 F.3d at 635 & n.16 (citing *Lake Rd. Trust, LTD. v. ABB, Inc.*, 2011 WL 1734458, at *6 (Conn. Super. Ct. Apr. 11, 2011)).
 49. Commentators also disagree on this issue. Compare, e.g., 2 Weinstein, Korn & Miller at ¶ C301:06, at 3-20 (stating *Daimler* does not affect it) with 2 N.Y. Prac., Com. Litig. in New York State Courts § 2:21 (4th ed.) at 57-58 (2015) (“Even the longstanding rule that a corporation may become amenable to suit in New York under CPLR 301 by designating an agent for service of process with the Secretary of State—as required by New York Business Corporation Law [§ 304]—seems inconsistent with *Daimler*.”)
 50. See *Famular v. Whirlpool Corp.*, 16 CV 944 (VB), 2017 WL 280821, at *4 (S.D.N.Y. Jan. 19, 2017) (“[D]espite the uncertain status of the law in this area, a foreign defendant is not subject to the general personal jurisdiction of the forum state merely by registering to do business with the state, whether that be through a theory of consent by registration or otherwise”); *Minholz*, 2016 WL 7496129, at *9 (“Because New York Business Corporations Law § 1301 is absent an explicit indication that registration subjects a registrant to general jurisdiction in New York, an exercise of general personal jurisdiction based on registration alone would be counter to the principles of due process articulated in *Daimler*”); *Taormina v. Thrifty Car Rental*, 16-cv-3255 (VEC), 2016 WL 7392214, at *7 (S.D.N.Y. Dec. 21, 2016) (“New York’s business registration statutes do not expressly require consent to general jurisdiction, and in the absence of any clearer legislative authority or any post-*Daimler* authority on the issue, this Court declines to conclude that Hertz’s registration to do business and appointment of an agent for service of process constitute consent to general jurisdiction.”); *Bonkowski v. HP Hood LLC*, 15-CV-4956 (RRM)(PK), 2016 WL 4536868, at *3 (E.D.N.Y. Aug. 30, 2016) (citing *Brown v. Lockheed Martin Corp.* to support holding that court lacked jurisdiction over foreign corporation registered to do business in New York, and noting that New York “cases post-*Daimler* that have considered the continued viability of consent to jurisdiction through registration have done so without analysis, relying on the long-standing, pre-*Daimler* Appellate Division authority”); *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015) (“After *Daimler*, . . . the mere fact of [defendant’s] being registered to do business [in New York] is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business.”).
 51. See *Beach v. Citigroup Alternative Invs. LLC*, 2014 WL 904650, at *6 (S.D.N.Y. Mar. 7, 2014) (“Notwithstanding these limitations, a corporation may consent to jurisdiction in New York under CPLR § 301 by registering as a foreign corporation and designating a local agent.”).
 52. For a discussion of this bill, see the next subsection below.
 53. See also 2015 NY S.B. No. 4846, New York Two Hundred Thirty-Eighth Legislative Session, available at <https://www.nysenate.gov/legislation/bills/2015/S4846> (same); 2015 NY A.B. No. 6714, New York Two Hundred Thirty-Eighth Legislative Session, available at <https://www.nysenate.gov/legislation/bills/2015/a6714/amendment/original> (same). The proposed amendments would also cover general associations, limited liability companies, not-for-profit corporations, and partnerships.
 54. http://assembly.state.ny.us/leg/?default_fld=&bn=A5918&term=&Memo=Y.

55. See, e.g., Benish, *supra* note 37 (arguing that consent-by-registration violates due process and constitutes an unconstitutional condition); Rhodes, *supra* note 40, at 443-44 & n.343 (stating that “[m]ost commentators agree that exacted consent for unrelated claims is unconstitutional,” and citing sources); Charles W. “Rocky” Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of A “Generally” Too Broad, but “Specifically” Too Narrow Approach to Minimum Contacts*, 57 *Baylor L. Rev.* 135, 235 (2005) (noting “the somewhat doubtful proposition that a state may constitutionally exact consent from a nonresident corporation to suit for any and all causes of action as a condition to registering to do business in the state”); Mark Schuck, *Foreign Corporations and the Issue of Consent to Jurisdiction Through Registration to Do Business in Texas: Analysis and Proposal*, 40 *Hous. L. Rev.* 1455, 1476-80 (2004); D. Craig Lewis, *Jurisdiction over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 *Del. J. Corp. L.* 1, 14-42 (1990) (arguing that consent-by-registration constitutes an unconstitutional condition and violates the commerce, equal protection, and due process clauses of the U.S. Constitution); Matthew Kipp, *Inferring*

Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction, 9 *Rev. Litig.* 1, 33-47 (1990); Lea Brilmayer, Jennifer Haverkamp, & Buck Logan, *A General Look at General Jurisdiction*, 66 *Tex. L. Rev.* 721, 755-59 (1988).

- 56. Report on Legislation, available at <http://www2.nycbar.org/pdf/report/uploads/20072900-OppositiontoBilltoConsenttoJurisdictionbyForeignBusinessOrganizationsAuthorizedtodoBusinessinNewYork.pdf>. See Marc J. Gottridge and Lisa J. Fried, *A.5918: Unconstitutional, Unwise and Futile Effort to Expand N.Y. Courts’ Jurisdiction*, *NYLJ*, Apr. 25, 2017, at 4, col. 3 (arguing that New York’s bill is an unconstitutional forfeiture of Due Process right).
- 57. Monestier, *supra* at 1358 (“Now that plaintiffs will have a much harder time establishing general jurisdiction over defendants in all but the most obvious of cases, a different ground of jurisdiction will most certainly take center stage: that of corporate registration. Plaintiffs who are foreclosed from arguing that general jurisdiction is appropriate under the *Daimler* “at home” standard will recast their jurisdictional analysis and attempt to premise general jurisdiction on a corporation’s act of registering to do business pursuant to the operative state statute.”).

Proposed Amendment to the Rules of the Commercial Division to Include a Sample Choice of Law Clause for Use in Commercial Contracts

To: John W. McConnell,
Counsel, Office of Court Administration

From: Commercial and Federal Litigation Section of the
New York State Bar Association

Date: August __, 2017

Re: Proposed Amendment to the Rules of the Commercial Division to Include a Sample Choice of Law Clause for Use in Commercial Contracts

The Commercial and Federal Litigation Section of the New York State Bar Association (the “Section”) is pleased to submit these comments in response to the Memorandum of John W. McConnell, Counsel to Chief Administrative Judge Lawrence K. Marks, dated June 28, 2017 (“Memorandum”), proposing an amendment to the Rules of the Commercial Division (the “Rules”) to include a sample choice of law clause for use in commercial contracts. As stated in the Memorandum, the Commercial Division Advisory Council’s (“CDAC”) proposal seeks “to (1) provide guidance and assistance to litigants who wish to choose New York law to govern their disputes; (2) reduce litigation over choice-of-law issues; and (3) both ‘assist the Advisory Council in showcasing New York’s comprehensive body of predictable and sensible commercial law’ and facilitate use of New York courts in commercial disputes.” *Id.* (internal citations omitted). The proposal by the CDAC (“CDAC Memorandum”) is attached as Exhibit A.

I. EXECUTIVE SUMMARY

Previously, the Administrative Board of the Courts adopted CDAC’s prior recommendation to amend the Rules to include with it “an Appendix containing a sample Forum Selection Clause,” and, as amended, provides that “parties to a contract may consent to the exclusive jurisdiction of the Commercial Division of the Supreme Court or the federal courts in New York State by including such consent in their contract.” The proposal by CDAC now seeks to provide practitioners with a sample choice of law clause for use in commercial contracts.

II. SUMMARY OF PROPOSAL

As stated in the Memorandum, an agreement which designates New York as its choice of law will have such provision upheld if “that choice bears a reasonable relationship to the parties’ agreement.” *CDAC at 2.* (internal citation omitted). In addition, New York’s statutory scheme also accommodates those wishing to utilize New York’s law in commercial contracts. For example, Section 5-1401 of the General Obligations Law, provides, among other things, that “parties to contracts may agree to have their disputes governed by New York law, regardless of whether the agreement bears a reasonable relation to New York, provided that the amount in controversy is at least \$250,000.” *Id.* (internal citation omitted). Additionally, “Section 1-105(1) of the Uniform Commercial Code codifies ‘the general