ALM | LAW.COM

New York Law Journal

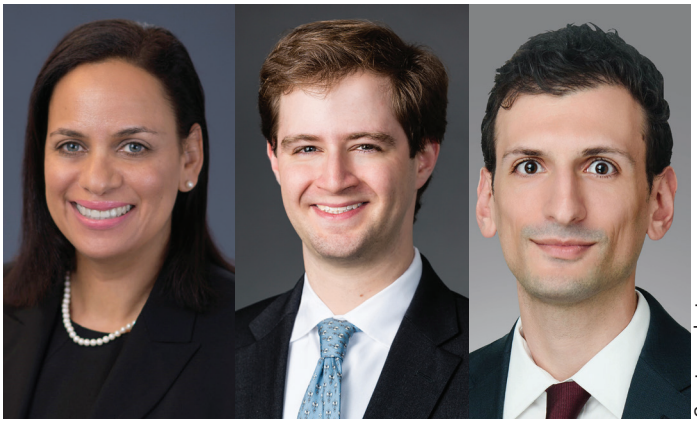
Coming Soon to Court: General Personal Jurisdiction of All Out-of-State Businesses in NY

By Mylan Denerstein, Lee R. Crain and Gregory V. Momjian
July 4, 2023

On June 7, the New York Legislature passed a bill that would require every corporation registered to do business in New York to consent to be sued in New York courts. See N.Y. Senate-Assembly Bill S7476 (2023). If Gov. Kathy Hochul signs the bill, New York state and federal courts would be able to hear lawsuits against out-of-state corporations based on conduct that took place outside of New York simply because the corporation does unrelated business here. The practical effects of this bill on corporations registered to do business in New York—big and small—as well as on the New York courts which already have substantial dockets could be significant.

Prior to S7476, New York courts held that the text of New York's preexisting general jurisdiction statute did not require consent to general jurisdiction in New York State. See, e.g., *Aybar v. Aybar*, 37 N.Y.3d 274, 283 (2021); *Chufen Chen v. Dunkin' Brands,* 954 F.3d 492 (2d Cir. 2020). Previously, courts even suggested that if New York law required general-jurisdiction-by-registration (as S7476 would do), that requirement would be unconstitutional. In *Chufen Chen*, for instance, the U.S. Court of Appeals for the Second Circuit noted that while "nothing in the statutory text of [New York's general jurisdiction statute] expressly conditions registration on consent to general jurisdiction" there would be serious constitutional concerns in "exercising general jurisdiction over a corporation in a state in which the corporation had done no business at all." 954 F.3d at 499; see also *Aybar v. Aybar*, 169 A.D.3d 137, 152 (2d Dep't 2019), aff'd, 37 N.Y.3d at 274.

That constitutional landscape changed, however, just yesterday when the U.S. Supreme Court decided *Mallory v. Norfolk Southern Railway. Mallory* involved a challenge to a Pennsylvania law that likewise requires any company registered to do business in Pennsylvania to consent to general personal jurisdiction in Pennsylvania courts. On June 27, the court held in an 5-4 opinion that laws conditioning registration to do business in a state on a consent to general jurisdiction are constitutional under the federal due process clause. The court concluded that a 1917 case directly controlled the outcome and had not been "implicitly overruled" by the court's later personal jurisdiction cases such as *Daimler AG v. Bauman. Daimler*, 571 U.S. 117, 137 (2014), decided in 2014, held that general jurisdiction over a corporation only exists where that corporation is "at home"—i.e., the state of its incorporation and the state of its principal place of business. But the court in *Mallory* found that general-jurisdiction-by-registration was not inconsistent with cases like *Daimler* since *Daimler* did not involve consent. As a consequence, New York can essentially compel any



Courtesy photos

L-R: Mylan L. Denerstein, Lee R. Crain, and Gregory V. Momjian of Gibson, Dunn & Crutcher.

corporation registered to do business to make New York its "home" for purposes of general jurisdiction.

With *Mallory* now decided, Hochul's signature of S7476 could pose significant practical implications for companies registered to do business in New York. Many multinational corporations headquartered and incorporated outside of New York are still often registered to do business here given New York City's status as the financial capital of the world and global hub for business and commerce. In fact, of Fortune's Global 500, eight of the top ten companies are registered to do some sort of business in New York. None of those eight are otherwise "at home" here. Thus, if S7476 becomes law, each of those eight corporations could theoretically be sued in New York courts for any conduct occurring anywhere in the world as long as those companies are registered to do business in New York.

The sponsor memo to S7476 outlining the legislative findings in support of the bill offers businesses concerned about the consequences of general-jurisdiction-by-registration two options. First, the Legislature suggests that if a company registered to do business in New York does not wish to be amenable to general jurisdiction in New York, it can simply revoke its New York registration and stop doing business here. But that's not a realistic solution for many companies that do business in the epicenter of the American economy. Second, the Legislature suggests that businesses may invoke other legal doctrines like forum non conveniens (i.e., that New York is an inconvenient forum to litigate in) which will prevent plaintiffs from filing lawsuits based on conduct without a real connection to New York. Id. While forum non conveniens arguments could win the day in court, the doctrine "impose[s] high administrative costs" for businesses that, absent S7476, would never have been subject to any sort of general jurisdiction in the first place.

S7476 also risks further burdening New York's already overloaded courts. In 2022, there were more than 169,965 pending civil cases on New York state dockets—a 32% increase from 2020—with courts still playing catch-up due to the major backlog of cases brought on by the COVID-19 pandemic. S7476 risks making that concern even more significant by adding more cases to the docket in New York that, under the prior law, needed to be filed elsewhere. Similarly, the risk of litigation may well cause some companies to leave our state and its main city's shores. If businesses decide that the risk of litigation in New York courts is too grave, they may pack up and go home. That cannot possibly be considered a good result.

Fortunately, *Mallory* may not foreclose constitutional challenges to S7476. Recognizing the above-mentioned commercial implications of general-jurisdiction-by-registration statutes, Justice Samuel Alito, concurring in the judgment, wrote that while Pennsylvania's consent-based jurisdiction statute may still violate the federal Constitution's commerce clause, an issue not before the court. Specifically, Alito wrote that there is a "good prospect" that Pennsylvania's scheme violates the commerce clause by imposing "undue burdens" on interstate commerce by "requiring a foreign corporation … to defend itself with reference to all transactions," including those with no connection to the forum. Such suits would substantially burden interstate commerce by "injecting intolerable unpredictability into doing business across state borders" for large companies such that they might "resort to creative corporate structuring to limit their amenability to suit" or "choose not to enter an out-of-state market due to the increased risk of remote litigation." Alito invited Norfolk Southern—the out of state defendant in *Mallory*—to take up this argument on remand. Other constitutional arguments—both under the federal Constitution and state constitutions—may also exist to limit the effect of S7476.

At oral argument in *Mallory,* Justice Sonia Sotomayor predicted that few states would pass laws like the statute the court addressed in that case. She reasoned that states would not want their courts crowded with cases with weak connections to those fora. That prediction may be disproved if the governor signs S7476 into law. It is now up to the governor to consider the implications of S7476 both on corporations registered to do business in New York and on already crowded state court dockets.

Mylan Denerstein *is a partner, and* **Lee R. Crain** *and* **Gregory V. Momjian** *are associates are Gibson, Dunn & Crutcher.*