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HOME SWEET HOME: HOW NEW YORK COURTS HAVE  
DEALT WITH *DAIMLER*'S "AT HOME" REQUIREMENT FOR  
GENERAL JURISDICTION

*Burton N. Lipshie*\*

I. INTRODUCTION

In *Daimler AG v. Bauman*,<sup>1</sup> almost certainly its most important jurisdiction decision in some seventy years, an eight-Justice majority of the Supreme Court essentially rewrote the law of general jurisdiction.<sup>2</sup> The result is that a corporation will, with narrow exceptions, only be subject to general jurisdiction in the states in which it is either incorporated or maintains its principal place of business; in the Court's language, a state in which the corporation is "at home."<sup>3</sup> The once familiar standard for general jurisdiction—corporate "presence" in a state in which it "does business" both "continuously and systematically"—has been abrogated, except, possibly, in "exceptional" cases.<sup>4</sup> Additionally, the Court announced that the "paradigm" place where an individual is "at home" is where that individual is domiciled.<sup>5</sup>

The Court issued a sweeping opinion on the constitutional limits of presence jurisdiction and, in the process, swept away decades of New York CPLR 301 jurisprudence.<sup>6</sup> First, the Court rejected the argument, accepted and followed by many Circuits, that when a local

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<sup>1</sup> *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

<sup>2</sup> *Id.* at 122.

<sup>3</sup> *Id.* at 137 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)).

<sup>4</sup> *Daimler*, 571 U.S. at 132, 138 nn.18–19.

<sup>5</sup> *Id.* at 137 (quoting *Goodyear*, 564 U.S. at 924).

<sup>6</sup> See Jay C. Carlisle, *Paterno v. Laser Spine Institute: Did the New York Court of Appeals' Misapplication of Unjustified Policy Fears Lead to a Miscarriage of Justice and the Creation of Inadequate Precedent for the Proper Use of Empire State's Long Arm-Statute?*, 79 ALB. L. REV. 1371, 1374 (2016) ("It seems clear that the broad general jurisdiction of CPLR 301 permitted under *Tauza* and its progeny is no longer constitutionally permitted in New York [following *Daimler*].").

agent performs services for the foreign principal that are so important that “if it did not have a representative to perform them, the corporation’s own officials would undertake to perform substantially similar services,” the presence of the agent in the state makes the principal present in that state.<sup>7</sup> That test, said the Court, “stacks the deck,” because “it will always yield a pro-jurisdiction answer.”<sup>8</sup>

Instead, the Court relied heavily on—and expanded upon—its decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, saying that

*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*.”<sup>9</sup>

And, for a corporation, “the place of incorporation and principal place of business are ‘paradig[m] . . . bases for general jurisdiction.’”<sup>10</sup> The Court recognized that “*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.”<sup>11</sup> The Court went on to state, “[p]laintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation ‘engages in a substantial, continuous, and systematic course of business.’ That formulation, we hold, is unacceptably grasping.”<sup>12</sup>

This marks a dramatic change in the law. In New York, the formulation proposed by the *Daimler* plaintiffs had been the law since then-Judge Cardozo’s 1917 opinion in *Tauza v. Susquehanna*

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<sup>7</sup> *Daimler*, 571 U.S. at 134, 135, 136. This principle was set forth by the Second Circuit in *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967), which has been cited and followed numerous times by the courts of New York State. See *Airtran N.Y., LLC v. Midwest Air Group, Inc.*, 844 N.Y.S.2d 233, 241 (App. Div. 2007); see, e.g., *Delagi v. Volkswagenwerk AG*, 278 N.E.2d 895, 898 (N.Y. 1972); *Pacamor Bearings, Inc. v. Molon Motors & Coil, Inc.*, 477 N.Y.S.2d 856, 857 (App. Div. 1984).

<sup>8</sup> *Daimler*, 571 U.S. at 135–36.

<sup>9</sup> *Id.* at 137 (quoting *Goodyear*, 564 U.S. at 924) (emphasis added).

<sup>10</sup> *Daimler*, 571 U.S. at 137 (quoting *Goodyear*, 564 U.S. at 924) (alterations in original).

<sup>11</sup> *Daimler*, 571 U.S. at 137.

<sup>12</sup> *Id.* at 137–38 (internal citations omitted).

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*Coal Company*.<sup>13</sup> The majority opinion cites *Tauza*, and proclaims that it was "decided in the era dominated by *Pennoyer [v. Neff]*'s territorial thinking, [and] should not attract heavy reliance today."<sup>14</sup> The new standard articulated by the Court is that the inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State."<sup>15</sup> The Court acknowledged

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. But this case presents no occasion to explore that question, because *Daimler's* activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State, quite another to expose it to suit on claims having no connection whatever to the forum State.<sup>16</sup>

Finally, and importantly, the Court noted that

[T]he general jurisdiction inquiry does not "focu[s] solely on the magnitude of the defendant's in-state contacts." General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. 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. Nothing in *International Shoe [Co. v. Washington]* and its progeny suggests that "a particular quantum of local activity" should give a State authority over a "far larger quantum of . . .

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<sup>13</sup> Compare *id.* (proposing that the Court should adopt a "continuous and systematic" view of general jurisdiction), with *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 917–18 (N.Y. 1917) ("All that is requisite is that enough be done [by the corporation] to enable us to say that the corporation is here.").

<sup>14</sup> *Daimler*, 571 U.S. at 138 n.18 (internal citations omitted) (discussing *Pennoyer v. Neff*, 95 U.S. 714 (1878)).

<sup>15</sup> *Daimler*, 571 U.S. at 138–39 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

<sup>16</sup> *Daimler*, 571 U.S. at 139 n.19 (internal citations omitted).

activity” having no connection to any in-state activity.<sup>17</sup>

In this Article, we will first place the *Daimler* decision in its context, both historical and technological, in an attempt to understand the flow of Supreme Court jurisdiction jurisprudence, and how *Daimler* fits into that jurisprudence. Then, we will explore the issues in New York law that *Daimler* left open, and which, more than five years after it was decided, remain open, and, indeed, often confused.

## II. PUTTING *DAIMLER* IN ITS HISTORICAL CONTEXT

To understand the sea-change that *Daimler* appears to have created, it may be useful to put it in its historical context, and follow the train of Supreme Court jurisdiction jurisprudence, to see how we got here, and where “here” in fact is.

If we could travel back to 1878, we would see an obviously very different United States. To put it in a timeline perspective, in 1878 the country was closer in time to the last bloody years of the Civil War than we, in 2019, are to the atrocities of September 11, 2001.<sup>18</sup> How clear the memory, and how raw the wounds, still were. The awful struggle of the Civil War was in large part a battle about “states’ rights”—the individual states’ power to impose slavery, and, importantly, to reach beyond their borders to require non-slave states to respect that hideous institution when masters and slaves traveled to those non-slave states.<sup>19</sup> And, at the most basic level, the war was about their right to leave the union.<sup>20</sup> There are those who say the Civil War was, in significant part, fought over a point of grammar.<sup>21</sup> Is it “the United States *is* . . .” or “the United States *are* . . .”?<sup>22</sup> The national government had won the dreadful war, but the aftermath—

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<sup>17</sup> *Id.* at 139 n.20 (discussing *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (internal citations omitted)).

<sup>18</sup> 1878 was only thirteen years after the end of the American Civil War in 1865, while it has been almost eighteen years since the attacks on 9/11. See Peter L. Bergen, *September 11 Attacks*, BRITANNICA, <https://www.britannica.com/event/September-11-attacks> (last visited Apr. 7, 2019); James McPherson, *A Brief Overview of the American Civil War*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/articles/brief-overview-american-civil-war> (last visited Apr. 7, 2019).

<sup>19</sup> See *Scott v. Sandford*, 60 U.S. (1 How.) 393, 431 (1857); McPherson, *supra* note 18.

<sup>20</sup> See *10 Facts: What Everyone Should Know About the Civil War*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/articles/10-facts-what-everyone-should-know-about-civil-war> (last visited Apr. 7, 2019).

<sup>21</sup> See *Life in These, Uh, This United States*, U. PA.: LANGUAGE LOG, <http://itre.cis.upenn.edu/myl/languageelog/archives/002663.html> (last visited Apr. 7, 2019).

<sup>22</sup> *Id.*

Reconstruction—was, to say the very least, ugly.<sup>23</sup> It saw the great hopes of reunification of the nation under Thomas Jefferson's soaring promise that "all men are created equal"<sup>24</sup> devolve into sectionalism and violence.<sup>25</sup> And in 1878, with Reconstruction still unfolding, no one in federal authority, including the Supreme Court, was eager to extend the powers of individual states to reach beyond their borders to impose their will.<sup>26</sup>

The nature of society, in general, was also quite different in 1878. Travel, for example, was, to a large extent, not much easier than it had been in 1778.<sup>27</sup> It would be another thirty years before the first Fords would roll off the assembly line.<sup>28</sup> Railroads were available, but not used much for passenger travel except by the wealthy.<sup>29</sup> Generally, travel was still mostly by horse.<sup>30</sup> It was arduous and time-consuming to get anywhere beyond one's local area.<sup>31</sup> Business in 1878 was still mostly local.<sup>32</sup> There were a few large corporations, but most business was still small.<sup>33</sup> Alexander Graham Bell had

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<sup>23</sup> See *10 Facts: What Everyone Should Know About the Civil War*, *supra* note 20; Eric Foner, *Civil War and Reconstruction, 1861-1877*, GILDER LEHRMAN INST. AM. HIST., <https://www.gilderlehrman.org/history-now/civil-war-and-reconstruction-1861-1877> (last visited Apr. 7, 2019).

<sup>24</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>25</sup> See Foner, *supra* note 23.

<sup>26</sup> See *Pennoyer v. Neff*, 95 U.S. 714, 732–33 (1878) (limiting a state's ability to obtain jurisdiction over out of state defendants); e.g. Jeffery M. Schmitt, *In Defense of Shelby County's Principle of Equal State Sovereignty*, 68 Okla. L. Rev. 206, 246 (2016) ("Together, the Reconstruction Amendments limited state power and significantly enhanced the authority of the federal government.").

<sup>27</sup> *Contra Historical Background on Traveling in the Early 19th Century*, TEACH US HIST., <http://www.teachushistory.org/detocqueville-visit-united-states/articles/historical-background-traveling-early-19th-century> (last visited Mar. 16, 2019) ("The years between 1790 and 1840 saw a true revolution in transportation even before the coming of the railroad.").

<sup>28</sup> See *1908: Ford Motor Company Unveils the Model T*, HIST., <https://www.history.com/this-day-in-history/ford-motor-company-unveils-the-model-t> (last updated Feb. 25, 2019).

<sup>29</sup> Compare Jimmy Stamp, *Traveling in Style and Comfort: The Pullman Sleeping Car*, SMITHSONIAN (Dec. 11, 2013), <https://www.smithsonianmag.com/arts-culture/traveling-style-and-comfort-pullman-sleeping-car-180949300/> ("[C]ivilized travel came with a slightly steeper price tag[,] [b]ut in the 19th Century, and even into the 20th, long-distance train travel was almost exclusively enjoyed by the wealthy and growing middle class."), *with Historical Background on Traveling in the Early 19th Century*, *supra* note 27 ("[By 1960] the railroad, growing ever faster, more powerful and more efficient, would become America's dominant mode of transportation east of Mississippi, sweeping away stage lines and even making some canals obsolete.").

<sup>30</sup> See Joel A. Tarr & Clay McShane, *The Horse as an Urban Technology*, 15 J. URB. TECH. 5, 6 (2008).

<sup>31</sup> See, e.g., *Historical Background on Traveling in the Early 19th Century*, *supra* note 27; *Oregon Trail*, HIST., <https://www.history.com/topics/westward-expansion/oregon-trail> (last updated Aug. 21, 2018).

<sup>32</sup> See *History of American Small Business*, SQUARE UP, <https://squareup.com/townsquare/history-of-american-small-business> (last visited Apr. 7, 2019).

<sup>33</sup> See *America's Gilded Age: Robber Barons and Captains of Industry*, MARYVILLE U., <https://online.maryville.edu/business-degrees/americas-gilded-age/> (last visited Mar. 16, 2019);

invented the telephone only two years earlier, and it would be some time before it was generally available.<sup>34</sup>

In that political and cultural context, it is not at all surprising that, faced with the question of the power of a state court to exercise personal jurisdiction over a defendant, the Supreme Court would hold that a state could exercise that power *only* over any one, or anything, found within the borders of the state, with no state authority to reach beyond its borders to exercise that power and force non-residents to come to the state to mount a defense to a lawsuit.<sup>35</sup> And so it did, in *Pennoyer v. Neff*.<sup>36</sup>

While it was easy to determine whether an individual was within a particular state when, by service of process, the state sought to exercise jurisdiction over that individual, the question, over the succeeding years, became just what does it mean for a *corporation* to be "found" within a state.<sup>37</sup> Courts, most famously the New York Court of Appeals in then Judge Cardozo's opinion in *Tauza v. Susquehanna Coal Corp.*, began to hold that if a corporation was "present" in the state, by regularly and continuously doing business there, the artificial detail of where it happened to be incorporated or had its main office, did not prevent it from being "found" within the state, and subject to that state's general jurisdiction.<sup>38</sup> A court would look at such things as the existence of an office, of employees, of bank accounts.<sup>39</sup> All of these were indicia of "presence."<sup>40</sup>

If we could fast-forward from 1878 to 1945, we would find significant changes in the political and cultural landscape of the United States in those almost seventy years. The country was very different politically. It had just fought and won the "good war" against fascist tyranny.<sup>41</sup> We were a united country in many respects, without the struggles of the Civil War era (of course, "states' rights," in a related but different context, would later become another roiling issue).<sup>42</sup> So, limiting the power of individual states was not

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*History of American Small Business*, *supra* note 32.

<sup>34</sup> See *1870s-1940s: Telephone*, IMAGINING THE INTERNET, <http://www.elon.edu/e-web/predictions/150/1870.xhtml> (last visited Mar. 16, 2019).

<sup>35</sup> See *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878).

<sup>36</sup> See *id.*

<sup>37</sup> See *id.* at 735; see, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918 (2011).

<sup>38</sup> See *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 917-18 (N.Y. 1917).

<sup>39</sup> See *id.* at 916-17.

<sup>40</sup> *Id.* at 918.

<sup>41</sup> Mark A. Stoler, *The Second World War in U.S. History and Memory*, 25 *DIPLOMATIC HIST.* 383, 386 (2001).

<sup>42</sup> See *id.* at 385.

on the nation's political agenda.<sup>43</sup> Travel was also very different from what it had been in 1878. Not only were railroads and automobiles ubiquitous, but commercial air flights were becoming more common.<sup>44</sup> The country was getting smaller, and easier to navigate.<sup>45</sup> The world of business was also very different. The nationwide corporation was no longer a rarity.<sup>46</sup> Corporations, wherever their home bases might be, could reach their tentacles throughout the country, by physical travel or by telephone, affecting commerce and committing torts, everywhere.<sup>47</sup>

In that very different context, the Supreme Court, faced with a case in which an out-of-state corporation sent its salesmen into a state and sold its product there, without paying the taxes that a local business would, could reasonably find that, regardless of where the corporation was physically located, when it conducted activities in a state, and the cause of action arose out of those activities, the state's "long arm" could reach out and exercise its jurisdiction over that corporation.<sup>48</sup> And so it did, in *International Shoe v. Washington*.<sup>49</sup>

In the wake of *International Shoe*, states began enacting their own versions of long-arm jurisdiction.<sup>50</sup> One of the more ground-breaking was in New York, with the enactment, in the early 1960s, of the Civil Practice Law and Rules.<sup>51</sup> In CPLR 302, New York adopted a "single act" statute.<sup>52</sup> The defendant need not have extensive activity in New York, so long as the cause of action arose from—was somehow connected to—even one New York act, whether a transaction of business, or the commission of a tort.<sup>53</sup> New York even extended jurisdiction to a tortfeasor who committed the tort outside of the state, so long as it caused injury in the state, and the defendant either had other significant contacts with the state, or had reason to believe

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<sup>43</sup> *Id.* at 386, 387, 390.

<sup>44</sup> See Tim Lambert, *A Brief History of Transport*, LOCAL HISTORIES (last revised 2018), <http://www.localhistories.org/transport.html>; *The Heyday of Propeller Airlines, 1941-1958: The Era of Mass Air Travel Begins*, SMITHSONIAN: NAT'L AIR & SPACE MUSEUM, <https://airandsp.ace.si.edu/exhibitions/america-by-air/online/heyday/heyday11.cfm> (last visited Apr. 9, 2019).

<sup>45</sup> See Richard F. Weingroff, *Federal-Aid Highway Act of 1956: Creating the Interstate System*, U.S. DEP'T OF TRANSP.: FED. HIGHWAY ADMIN. (Jan. 1, 2017), <https://www.fhwa.dot.gov/publications/publicroads/96summer/p96su10.cfm>.

<sup>46</sup> See *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124, 126 (2d Cir. 1963).

<sup>47</sup> See *id.*

<sup>48</sup> See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 311, 313–14, 322 (1945).

<sup>49</sup> See *id.*

<sup>50</sup> See, e.g., CAL. CIV. PROC. CODE § 410.10 (West 2019); FLA. STAT. § 48.193 (2018); 735 ILL. COMP. STAT. 5/2-208 (2019); MASS. GEN. LAWS ch. 223A, § 3 (2018).

<sup>51</sup> See N.Y. C.P.L.R. 101 (McKinney 2019).

<sup>52</sup> See *id.* § 302.

<sup>53</sup> See *id.*

its act would have consequences here and was large enough to garner significant revenue from interstate or international (but not necessarily New York) commerce.<sup>54</sup> Other states enacted similar far-reaching long-arm statutes.<sup>55</sup> Thus, corporations and individuals were subject to being compelled to litigate in a foreign state either because of some sort of "presence" there, or because the cause of action arose from some conduct committed or aimed at that state.<sup>56</sup>

Once again, let us leap forward in time, from 1945 to 2014. Another almost seventy-year span. It goes without saying that the world of 2014 was completely different. Coast-to-coast flights that involved various refueling stops in 1945, and took more than a day, now took just a few hours.<sup>57</sup> And even when we were not face-to-face, we were in constant communication with each other via all of the technology that seemed like science fiction in 1945.<sup>58</sup> Anything that happened anywhere in the country, indeed, anywhere in the world, was at our fingertips within moments. Corporations that once strained to do business in various parts of the country at once, were now global.<sup>59</sup> Gigantic corporations had proliferated.<sup>60</sup> They had offices, and did regular and continuous business, almost everywhere in the country, and throughout the world.<sup>61</sup> And that dramatic change in the business and technological context is a large part of what drove the Supreme Court's analysis in *Daimler*.

The Court considered the significant expansion of long-arm jurisdiction since its *International Shoe* decision created the concept, and saw that it was good.<sup>62</sup> It is fair to hale a corporation into a forum state when the cause of action arises out of conduct committed in, or directed to, that state.<sup>63</sup> But, in light of that expansion, the Court

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<sup>54</sup> See *id.*

<sup>55</sup> See COLO. REV. STAT. § 13-1-124 (West 2017); e.g., DEL. CODE ANN. tit. 10, § 3104 (2008); FLA. STAT. § 48.193 (2016).

<sup>56</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

<sup>57</sup> See Marc Llewellyn, *What Flying Was Like in the 1950s and 1960s Compared to Now*, HERALD SUN (Apr. 9, 2017), <https://www.heraldsun.com.au/travel/news/what-flying-was-like-in-the-1950s-and-1960s-compared-to-now/news-story/690b0f6f9b16b27ab384e146ca854882>.

<sup>58</sup> See Hayley Eastman, *Communication Changes with Technology, Social Media*, DAILY UNIVERSE (July 7, 2013), <https://universe.byu.edu/2013/07/07/1communication-changes-with-technology-social-media/>.

<sup>59</sup> See Parag Khanna, *The New World Order Is Ruled by Global Corporations and Megacities—Not Countries*, FAST CO. (Apr. 20, 2016), <https://www.fastcompany.com/3059005/the-new-world-order-is-ruled-by-global-corporations-and-megacities-not-countries>.

<sup>60</sup> See George Serafeim, *The Role of the Corporation in Society: An Alternative View and Opportunities for Future Research* 6 (Harvard Bus. Sch., Working Paper No. 14-110, 2014).

<sup>61</sup> See *How Did the Corporation Become Global?*, YALE INSIGHTS (Sept. 16, 2013), <https://insights.som.yale.edu/insights/how-did-the-corporation-become-global>.

<sup>62</sup> See *Daimler AG v. Bauman*, 571 U.S. 117, 128 (2014).

<sup>63</sup> See *id.* at 126–27.

concluded that the expansion of *general* jurisdiction—jurisdiction based on mere “presence” without the need of a connection between the cause of action and conduct in the forum—had gone too far.<sup>64</sup> It is in that context that the Court rejected *Tauza* as a relic of the *Pennoyer* era—the era of small business, no telephones, little long-distance travel, and no concept of long-arm jurisdiction.

Because global corporations—which are more and more commonplace—are “present” wherever they do business, the *Tauza* standard would not, the Court concluded, be consonant with due process today.<sup>65</sup> For it would make such a corporation subject to general jurisdiction anywhere a plaintiff chose to sue, regardless how or where the cause of action arose.<sup>66</sup> And, to determine whether a foreign corporation’s contacts with the forum are so significant as to qualify as an “exceptional” case, it is not enough to look at how much business, in an absolute sense, the corporation does in the forum—for that would simply apply the old “presence” test.<sup>67</sup> The Court must look at how much of the corporation’s *global* business is done in the forum.<sup>68</sup> For, as quoted above, “[a] corporation that operates in many places can scarcely be deemed at home in all of them.”<sup>69</sup>

Thus, the concept of limiting general jurisdiction to where a corporation—or, indeed, an individual—is “at home,” while a major shift from the law that came before it, fits within the political, cultural and technological times in which the Court faced the issue. *Daimler*, like *Pennoyer* and *International Shoe* before it, is to a large extent a product of its times, and based on what the Supreme Court sees as “fair” under current circumstances.

### III. HOW *DAIMLER* UNSETTLES PREVIOUSLY SETTLED NEW YORK LAW

#### A. *Pre-Daimler Law*

In the pre-*Daimler* universe, New York law was reasonably well-settled as to the circumstances under which the courts could exercise general jurisdiction over a defendant pursuant to CPLR 301.<sup>70</sup> For

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<sup>64</sup> *See id.* at 137–38.

<sup>65</sup> *See id.* at 142 (quoting *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945)).

<sup>66</sup> *See Daimler*, 571 U.S. at 132.

<sup>67</sup> *See id.* at 138–39.

<sup>68</sup> *See id.*

<sup>69</sup> *Id.* at 139 n.20.

<sup>70</sup> *Article III of the New York Civil Practice Law and Rules: Jurisdiction, Service and Appearance*, 37 ST. JOHN'S L. REV. 285, 288, 290 (1963).

an individual, residence in New York was sufficient, even if the defendant was not a New York domiciliary.<sup>71</sup> The First and Second Departments disagreed as to whether a non-resident individual could be subject to general jurisdiction in New York by virtue of regular and continuous business activities in the state.<sup>72</sup> It was also settled law that a non-resident of the state who was physically served with process while within the state, so-called "tagging jurisdiction," was subject to general jurisdiction.<sup>73</sup> So long as the defendant was not lured into the state for the purpose of being served, and was not in the state for the sole purpose of voluntarily testifying in a proceeding, tagging was a sufficient basis for general jurisdiction in the state no matter where and how the cause of action accrued.<sup>74</sup>

Tagging jurisdiction was also the subject of a due process inquiry by the Supreme Court. The Court had previously held, in *Shaffer v. Heitner*,<sup>75</sup> that minimum contacts with a state was a constitutional requirement for the exercise of *any* form of jurisdiction—whether *in personam* or *quasi-in rem*.<sup>76</sup> In the wake of *Shaffer*, it was generally believed, among the procedure law commentariat, that the Court would eventually take a tagging jurisdiction case and declare that general jurisdiction based solely upon the defendant being served with process during a perhaps fortuitous and brief presence in the state did not qualify as sufficient contacts to provide due process.<sup>77</sup> The Court did take such a case, *Burnham v. Superior Court*, and unanimously held that tagging jurisdiction was, in fact, consonant

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<sup>71</sup> See *Dobkin v. Chapman*, 236 N.E.2d 451, 460 (N.Y. 1968) ("Residence itself may provide a foundation for the exercise of personal jurisdiction over an absent defendant by means of substituted service.") (citing *Fishman v. Sanders*, 206 N.E.2d 326, 329 (N.Y. 1965)); *Spirgel v. Henry H. Ackerman & Co.*, 633 N.Y.S.2d 144, 145 (App. Div. 1995).

<sup>72</sup> Compare *Nilsa B. v. Clyde Blackwell H.*, 445 N.Y.S.2d 579, 587 (App. Div. 1981) ("The legislature has authorized jurisdiction over a nondomiciliary who transacts business in the State where the cause of action arises out of the transaction of that business, but it has gone no further.") (internal citation omitted), with *ABKCO Indus., Inc. v. Lennon*, 384 N.Y.S.2d 781, 784 (App. Div. 1976) ("[First Department] reject[s] the assertion that CPLR 301 has preserved the provision contained in section 229-b of the Civil Practice Act limiting the exercise of jurisdiction over nonresident individuals doing business in New York to claims arising from such business in the State.").

<sup>73</sup> See *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 612 (1990); see, e.g., *Nilsa B.*, 445 N.Y.S.2d at 585 (quoting *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 918 (N.Y. 1917)); *ABKCO Industries, Inc.*, 384 N.Y.S.2d at 784 (citing *Public Administrator v. Royal Bank of Can.*, 224 N.E.2d 877, 878 (N.Y. 1967)).

<sup>74</sup> See *Thermoid Co. v. Fabel*, 151 N.E.2d 883, 886 (N.Y. 1958); *Hammett v. Hammett*, 424 N.Y.S.2d 913, 915 (App. Div. 1980).

<sup>75</sup> See *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>76</sup> See *id.* at 204 (quoting *Int'l Shoe v. Washington*, 326 U.S. 310, 319 (1945)).

<sup>77</sup> See, e.g., Joseph J. Kalo, *The Meaning of Contact and Minimum National Contacts: Reflections on Admiralty In Rem and Quasi In Rem Jurisdiction* 59 TUL. L. REV. 24, 29–30 (1984).

with due process.<sup>78</sup> The Court split four to four on *why* it was constitutional (Justice Stevens declining to participate in that intellectual debate), but all nine agreed that it was.<sup>79</sup>

Thus, pre-*Daimler*, an individual was subject to general jurisdiction in New York by being a domiciliary, or at least a resident, of the state, by having been served with process in the state, or, at least in the First Department, by regularly and continuously doing business in the state.<sup>80</sup>

The law concerning general jurisdiction over corporations was also reasonably clear. Certainly, if a corporation was a New York corporation, incorporated in the state, it was subject to general jurisdiction.<sup>81</sup> Nevertheless, even if the corporation was incorporated elsewhere, but had become authorized to do business in New York, registering with the New York Secretary of State—and thereby designating that official as agent for service of process—and becoming liable for franchise taxes, the corporation was subject to general jurisdiction in New York.<sup>82</sup>

But even a completely foreign corporation could become subject to general jurisdiction in New York in various ways. One, we have described at length above—by becoming “present” in the forum by doing business here, as Judge Cardozo wrote in *Tauza*, “not casually and occasionally, but systematically and regularly.”<sup>83</sup> General jurisdiction could also be obtained over a foreign corporation that did regular business in New York through an in-state agent.<sup>84</sup> New York Courts had established what was referred to as the “mere solicitation” rule.<sup>85</sup> It was not enough for general jurisdiction over a foreign corporation that its New York-based agent merely solicited business on the corporation’s behalf.<sup>86</sup> But if the New York agent performed sufficiently important services for the foreign principal that, if it did not employ the agent, it would have to send its own

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<sup>78</sup> See *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 628 (1990).

<sup>79</sup> See *id.*; *id.* at 640 (Stevens, J., concurring).

<sup>80</sup> See *In re Nilsa B.B. v. Clyde Blackwell H.*, 445 N.Y.S.2d 579, 587 (App. Div. 1981); *ABKCO Industries, Inc. v. Lennon*, 384 N.Y.S.2d 781, 784 (App. Div. 1976); e.g. Kelly S. Foss, *Suing Foreign Entities in NY: Changes to the Law of Personal Jurisdiction*, HARRIS BEACH PLLC (Sept. 19, 2017), <https://www.harrisbeach.com/news/suing-foreign-entities-ny-changes-law-personal-jurisdiction/>.

<sup>81</sup> See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

<sup>82</sup> See N.Y. BUS. CORP. LAW §§ 304(b), 1301(a) (McKinney 2019); *Flame S.A. v. Worldlink Int'l (Holding) Ltd.*, 967 N.Y.S.2d 328, 330 (App. Div. 2013).

<sup>83</sup> *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 917 (N.Y. 1917).

<sup>84</sup> See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

<sup>85</sup> See *Laufer v. Ostrow*, 434 N.E.2d 692, 694–95 (N.Y. 1982).

<sup>86</sup> See *id.* Unless business solicitation *was* the business of the foreign corporation. See *Miller v. Surf Prop.*, 151 N.E.2d 874, 877 (N.Y. 1958).

employees here, then the presence of the agent in New York was sufficient to make the foreign corporation present here as well.<sup>87</sup> Even if the New York agent did not do a significant amount of the foreign corporation's business, if the New York agent was a subsidiary of the foreign corporation, jurisdiction might be obtained over the foreign corporation if it treated the New York subsidiary as a "mere department."<sup>88</sup> The Second Circuit, in applying New York law, had established a four-part test that the New York State courts had regularly applied.<sup>89</sup> The presence of the subsidiary in New York would constitute the presence of the parent in New York if: (1) there was common ownership; (2) the subsidiary was financially dependent upon the parent; (3) the parent assigned executive personnel to the subsidiary and did not observe corporate formalities; and (4) the parent controlled the subsidiary's marketing and operational policies.<sup>90</sup>

### B. *What Hath Daimler Wrought?*

It has now been more than five years since the Supreme Court's decision in *Daimler*. It took a significant amount of time for the New York courts, both state and federal, to recognize the sea-change that decision made with respect to the power of New York to exercise general jurisdiction.<sup>91</sup> For example, several months after *Daimler*, the Appellate Division, First Department, ignoring *Daimler*, and still applying its old "doing business" test for general jurisdiction over individuals, claimed jurisdiction over a non-resident who had "long-term employment" in New York.<sup>92</sup> *That* decision was cited with approval in a Southern District decision.<sup>93</sup> Similarly, the Second Department, even years after *Daimler*, did not cite it, and, instead, applied its old cases to hold that an individual's business activity in New York cannot ever be the basis of general jurisdiction.<sup>94</sup> The same

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<sup>87</sup> See *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 120–21 (2d Cir. 1967).

<sup>88</sup> See *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984).

<sup>89</sup> See *id.* at 120–22.

<sup>90</sup> See *id.* at 120, 121, 122; *Goel v. Ramachandran*, 975 N.Y.S.2d 428, 434 (App. Div. 2013).

<sup>91</sup> See *Pinto-Thomaz v. Cusi*, No. 15-cv-1993 (PKC), 2015 U.S. Dist. LEXIS 158518, at \*9, \*10 (S.D.N.Y. Nov. 24, 2015); *Hardware v. Ardwork Corp.*, 986 N.Y.S.2d 445, 446 (App. Div. 2014).

<sup>92</sup> *Hardware*, 986 N.Y.S.2d at 446.

<sup>93</sup> See *Pinto-Thomaz*, 2015 U.S. Dist. LEXIS 158518 at \*9, \*10.

<sup>94</sup> See *Chen v. Guo Liang Lu*, 41 N.Y.S.3d 517, 521 (App. Div. 2016) (citing *Opticare Acquisition Corp. v. Castillo*, 806 N.Y.S.2d 84, 91 (App. Div. 2005)); *Pichardo v. Zayas*, 996 N.Y.S.2d 176, 180 (App. Div. 2014) (citing *In re Nilsa B.B. v. Clyde Blackwell H.*, 445 N.Y.S.2d 579, 586 (App. Div. 1981)).

slowness in recognizing the effects of *Daimler* was apparent in how courts dealt with jurisdiction over corporations. Months after the decision, the Second Department was still applying the "mere solicitation" rule of the earlier cases.<sup>95</sup> And a full two years after *Daimler*, the Second Department was still applying the "presence" test of *Tauza*.<sup>96</sup> The federal courts, meanwhile, were sometimes conflating the old "presence" test with the new "at home" test, and applying a mixture of both, even some two years after the *Daimler* decision.<sup>97</sup>

Eventually, however, the Courts were able to put aside what Justice Sotomayor, in her concurring opinion in *Daimler*, referred to as what "has been taught to generations of first-year law students," and acknowledged the change in the law brought about by *Daimler*.<sup>98</sup> Thus, in *Magdalena v. Lins*,<sup>99</sup> the First Department, citing *Daimler*, held that New York lacked jurisdiction over an individual, although he owned an apartment in the state, because he was not "domiciled" in New York.<sup>100</sup> And, eventually, the courts began applying *Daimler* to corporations, as well, applying the "at home" test rather than "presence."<sup>101</sup> Although one court, in applying an exceptionally liberal definition of the "exceptional" case which the Supreme Court said might still exist, found a corporation "at home" here because of its ongoing New York contacts.<sup>102</sup> But, inevitably, questions about *Daimler's* effect upon other, formerly settled areas of jurisdiction law, began to emerge.<sup>103</sup> Most of them remain unsettled.<sup>104</sup>

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<sup>95</sup> See *Mejia-Haffner v. Killington, Ltd.*, 990 N.Y.S.2d 561, 563 (App. Div. 2014) (citing *Cardone v. Jiminy Peak, Inc.*, 667 N.Y.S.2d 82, 82 (App. Div. 1997)).

<sup>96</sup> See *Okeke v. Momah*, 17 N.Y.S.3d 746, 748 (App. Div. 2015) (citing *Sedig v. Okemo Mountain*, 612 N.Y.S.2d 643, 644 (App. Div. 1994)).

<sup>97</sup> See *Minnie Rose LLC v. Yu*, 169 F. Supp. 3d 504, 512–13 (S.D.N.Y. 2016) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)); *Beem v. Noble Grp. Ltd.*, No. 14 Civ. 9046, 2015 WL 8781333, at \*3 (S.D.N.Y. Dec. 14, 2015) (quoting *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014); *Brown v. Web.com Grp., Inc.*, 57 F. Supp. 3d 345, 354 (S.D.N.Y. 2014)).

<sup>98</sup> *Daimler*, 571 U.S. at 153 (Sotomayor, J., concurring).

<sup>99</sup> *Magdalena v. Lins*, 999 N.Y.S.2d 44 (App. Div. 2014).

<sup>100</sup> See *id.* at 45; see, e.g., *IMAX Corp. v. Essel Grp.*, 62 N.Y.S.3d 107, 109 (App. Div. 2017).

<sup>101</sup> See *Gucci Am., Inc., v. Bank of China*, 768 F.3d 122, 135 (2d Cir. 2014); *Ace Decade Holdings, Ltd. v. UBS AG*, No. 653316/2015, 2016 N.Y. Misc. LEXIS 4541, at \*12–13 (Sup. Ct. Dec. 7, 2016).

<sup>102</sup> See *Amtrust N. Am., Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp., LLC*, No. 15-cv-7505, 2016 WL 6208288, at \*3 (S.D.N.Y. Oct. 18, 2016).

<sup>103</sup> See Gwynne L. Skinner, *Expanding General Personal Jurisdiction Over Transnational Corporations for Federal Causes of Action*, 121 PENN. ST. L. REV. 617, 656–57 (2017).

<sup>104</sup> See *id.*

*C. Is Tagging Jurisdiction Still Viable?*

While generally citing the *Burnham* case discussed above, the *Daimler* majority opinion did not discuss in any way the issue of tagging jurisdiction. Indeed, in her “concurring” opinion, Justice Sotomayor noted the incongruity of continuing to permit tagging jurisdiction while otherwise limiting general jurisdiction over individuals to the narrow ground of domicile. But, surely, an individual served with process while passing through a state is not “at home” there in the way *Daimler* defined that term—that “[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile.”<sup>105</sup> Has tagging jurisdiction survived *Daimler*? Thus far, only one lower Court decision in New York has addressed the question, although it did not cite *Burnham*.

In *Ford v. Bhatoe*,<sup>106</sup> the court held that, in light of *Daimler*, “[t]he fact that service was effectuated in accordance with CPLR 308 on an individual who is not domiciled in the State of New York is not sufficient by itself to confer constitutional personal jurisdiction.”<sup>107</sup>

Certainly the language of *Daimler* would suggest that the *Ford* decision is correct. On the other hand, would the Supreme Court have overruled its own unanimous *Burnham* decision *sub silentio*? The four Justices in *Burnham* who concluded that tagging jurisdiction was constitutional because of its pedigree, and despite the holding in *Shaffer*, distinguished the latter on the ground that physical presence in a state was a substitute for “minimum contacts.”<sup>108</sup> Would a majority of the Court apply that reasoning post-*Daimler* to continue to validate the practice? That is an issue that will, perforce, require further development.

*D. Does a Corporation’s Registration in a State Make It “at Home” There?*

As noted above, New York law was clear, pre-*Daimler*, that a corporation that registered to do business here, thus naming the New York Secretary of State as agent for service of process, became subject to general jurisdiction in the state.<sup>109</sup> Most, if not all, states have similar provisions for authorizing foreign corporations to do business

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<sup>105</sup> See *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)).

<sup>106</sup> *Ford v. Bhatoe*, No. 501642/17, 2017 N.Y. Misc. LEXIS 4820 (Sup. Ct. Dec. 19, 2017).

<sup>107</sup> See *id.* at \*6–7.

<sup>108</sup> See *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 621 (1990).

<sup>109</sup> See N.Y. BUS. CORP. LAW § 304(a) (McKinney 2019).

in the state.<sup>110</sup> The penalty to a corporation which regularly does business in New York, but does not become authorized, is an inability to sue in a New York court.<sup>111</sup> Whether this long-standing rule, that becoming authorized creates general jurisdiction, has survived *Daimler*, has divided the courts—both federal and state—in New York. Some trial courts have held that *Daimler* has not changed the rule, reasoning that registration constitutes a consent to jurisdiction.<sup>112</sup> Others have argued that *Daimler* has nullified that body of law.<sup>113</sup>

The first New York appellate decision in this area was *Matter of B&M Kingstone, LLC v. Mega International Commercial Bank Co.*<sup>114</sup> There, the petitioner/judgment creditor served an information subpoena on the New York branch of a Taiwanese bank, seeking information from all of the bank's branches with respect to petitioner's judgment debtor, in order to enforce a judgment.<sup>115</sup> Respondent argued that, because it was not "at home" in New York, the court lacked jurisdiction over it, and could not compel it to produce non-New York information.<sup>116</sup> The appellate division, relying heavily on the Southern District decision in *Vera v. Republic of Cuba*,<sup>117</sup> held that, because respondent had registered with, and obtained a license from, the Department of Financial Services, under Banking Law section 200, the court had jurisdiction over it, quoting with approval the *Vera* court's holding that "[f]oreign corporations which do business in New York are bound by the laws of both the state of New York and the United States, and are bound by the same judicial constraints as domestic corporations."<sup>118</sup>

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<sup>110</sup> See Jack B. Harrison, *Registration, Fairness, and General Jurisdiction*, 95 NEB. L. REV. 477, 508 (2016).

<sup>111</sup> BUS. CORP. § 1312(a).

<sup>112</sup> See *In re Application of Amarnick*, 558 F.2d 110, 113 (2d Cir. 1977); *Beach v. Citigroup Alt. Invs. LLC*, 12 Civ. 7717 (PKC), 2014 U.S. Dist. LEXIS 30032, at \*18 (S.D.N.Y. Mar. 7, 2014) (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 170, 175 (1939); *Rockefeller Univ. v. Ligand Pharms. Inc.*, 581 F. Supp. 2d 461, 466 (S.D.N.Y. 2008)); *Serov v. Kerzner Int'l Resorts, Inc.*, No. 162184/2015, 2016 N.Y. Misc. LEXIS 2818, at \*11 (Sup. Ct. July 26, 2016); *Bailen v. Air & Liquid Sys. Corp.*, No. 190318/12, 2014 N.Y. Misc. LEXIS 3554, at \*9 (Sup. Ct. Aug. 5, 2014).

<sup>113</sup> See *Kyowa Seni, Co. v. ANA Aircraft Technics, Co.*, 80 N.Y.S.3d 866, 870 (Sup. Ct. 2018); *Mischel v. Safe Haven Enters., LLC*, No. 653651/2016, 2017 N.Y. Misc. LEXIS 1402, at \*5–6 (Sup. Ct. Apr. 17, 2017); *Ortiz v. Great Eastern Resort Corp.*, N.Y.L.J., Apr. 1, 2016, at 50 (Sup. Ct. Mar. 11, 2016).

<sup>114</sup> *B&M Kingstone, LLC v. Mega Int'l Commercial Bank Co.*, 15 N.Y.S.3d 318 (App. Div. 2015).

<sup>115</sup> See *id.* at 319, 320.

<sup>116</sup> See *id.* at 321.

<sup>117</sup> *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561 (S.D.N.Y. 2015).

<sup>118</sup> *In re B&M Kingstone*, 15 N.Y.S.3d at 323 (quoting *Vera*, 91 F. Supp. 3d at 570).

Since *B&M*, trial courts in New York have generally sought to limit it to its particular facts—that respondent was a bank, and had, by registering in New York, subjected itself to a complex regulatory scheme under the Banking Law.<sup>119</sup> By contrast, a non-bank corporation becoming authorized pursuant to the Business Corporation Law had no such regulations imposed upon it.<sup>120</sup>

More recently, and more directly, the Second Department has weighed in on the issue. In *Aybar v. Aybar*,<sup>121</sup> the issue was whether Ford Motor Company, a Delaware corporation with its principal place of business in Michigan, but authorized to do business in New York, with hundreds of dealerships and a manufacturing plant in the state, was subject to general jurisdiction in New York.<sup>122</sup> The Court began its decision with a fairly broad statement:

We consider on these appeals whether, following the United States Supreme Court decision in *Daimler*, a foreign corporation may still be deemed to have consented to the general jurisdiction of New York courts by virtue of having registered to do business in New York and appointed a local agent for the service of process. We conclude that it may not.<sup>123</sup>

Later in the opinion, the court summarized its holding as follows:

We hold that in view of the evolution of *in personam* jurisdiction jurisprudence, and, particularly the way in which *Daimler* has altered that jurisprudential landscape, it cannot be said that a corporation's compliance with the existing business registration statutes constitutes consent to the general jurisdiction of New York courts, to be sued upon causes of action that have no relation to New York.<sup>124</sup>

And yet, in a footnote immediately after that quoted language, the court appears to suggest that, despite the sweeping references to

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<sup>119</sup> See, e.g., *Kline v. Facebook, Inc.*, No. 150022/2018, 2019 N.Y. Misc. LEXIS 127, at \*4 (Sup. Ct. Jan. 10, 2019); *Amelius v. Grand Imperial LLC*, 64 N.Y.S.3d 855, 867 (Sup. Ct. 2017); *Aybar v. Aybar*, No. 706909/2015, 2016 N.Y. Misc. LEXIS 2263, at \*9 (Sup. Ct. May 25, 2016).

<sup>120</sup> See, e.g., *Amelius*, 64 N.Y.S.3d at 867, 869.

<sup>121</sup> *Aybar v. Aybar*, 93 N.Y.S.3d 159 (App. Div. 2019).

<sup>122</sup> See *id.* at 161.

<sup>123</sup> *Id.* at 160 (internal citation omitted).

<sup>124</sup> *Id.* at 166.

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*Daimler* and due process, its decision might be merely based on statutory construction.<sup>125</sup> For, the Court noted,

The parties observe that post *Daimler*, some New York lawmakers have proposed amending Business Corporation Law § 1301 to expressly provide that a corporation's application to do business in New York constitutes consent to personal jurisdiction in lawsuits in New York for all actions against the corporation. No such changes in the law have been effected to date, and *we decline the appellants' invitation to opine on the constitutionality of any such possible amendment*.<sup>126</sup>

Certainly, the ultimate holding, at least of the New York courts, is still in the future. Hopefully before the passage of lives in being plus twenty-one years.

It should be noted that courts in other jurisdictions have passed upon the continued viability of the rule that a foreign corporation's registration makes it "at home" in the state of registration.<sup>127</sup> For example, the Supreme Court of Delaware, interpreting its own similar statute, concluded that *Daimler* had rendered its own prior decisions, which echoed New York's pre-*Daimler* cases, no longer valid.<sup>128</sup> The Second Circuit, interpreting Connecticut's similar law, concluded that it need not reach the constitutional question because the Connecticut courts' decisions, pre-*Daimler*, were inconclusive as to whether a foreign corporation became subject to general jurisdiction by registering there.<sup>129</sup> But, in powerful *dicta*, the court made pretty clear that, faced with a statute with no such ambiguity, it would strike it down as inconsistent with *Daimler*.<sup>130</sup> For, the global corporations that were the Supreme Court's concern in *Daimler* become authorized to do business everywhere.<sup>131</sup> Allowing that authorization to create general, as opposed to long-arm, jurisdiction wherever the corporation has become authorized,

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<sup>125</sup> *See id.* at 166 n.3.

<sup>126</sup> *Id.* (internal citation omitted) (emphasis added).

<sup>127</sup> *See generally* Harrison, *supra* note 110 at 531–37 (discussing cases that have invalidated consent by registration statutes).

<sup>128</sup> *See* *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 126 (Del. 2016).

<sup>129</sup> *See* *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 623, 634–35, 636 (2d Cir. 2016) (citing *WorldCare Ltd., Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 354 (D. Conn. 2011); *Talenti v. Morgan & Brother Manhattan Storage Co.*, 968 A.2d 933, 940 (Conn. App. Ct. 2009)).

<sup>130</sup> *See* *Brown*, 814 F.3d at 640.

<sup>131</sup> *See id.*

regardless where the cause of action arose, would, in the court's words, defeat *Daimler* through the "back-door."<sup>132</sup>

However, an intermediate appellate court in Pennsylvania has held that, because Pennsylvania's similar statute specifically provides that registration there constitutes consent to general jurisdiction, the statute does not run afoul of *Daimler*'s interpretation of due process.<sup>133</sup>

At this writing, therefore, it is not certain whether a foreign corporation becomes subject to New York general jurisdiction by registering with the Secretary of State and becoming authorized to do business. But the likelihood is that it does not. The one state court appellate decision that approves jurisdiction is distinguishable.<sup>134</sup> Despite some equivocal language, another state appellate decision holds that registration alone is insufficient.<sup>135</sup> And the Second Circuit has made it fairly clear that, if it were confronted with a case involving New York law, it would hold such a reading of the statute to be unconstitutional.<sup>136</sup>

*E. Does the Presence in New York of a "Mere Department"  
Subsidiary Create General Jurisdiction over the Non-New York  
Parent Corporation?*

As noted above, the pre-*Daimler* standard for determining whether a non-New York corporation was subject to general jurisdiction because of the "presence" in New York of a subsidiary, was set by the oft-quoted Second Circuit decision in *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*<sup>137</sup> Essentially, the question was whether the parent treated the subsidiary—although it was technically a separate corporation—as a "mere department."<sup>138</sup> If so, then the subsidiary was, in reality, merely a branch office, and, under *Tauza*, and its progeny, its "presence" in New York created

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<sup>132</sup> *See id.*

<sup>133</sup> *See Webb-Benjamin, LLC v. Int'l Rug Grp., LLC*, 192 A.3d 1133, 1137, 1139 (Pa. Super. Ct. 2018).

<sup>134</sup> *See In re B&M Kingstone, LLC v. Mega Int'l Commercial Bank Co.*, 15 N.Y.S.3d 318, 322–23 (App. Div. 2015) (quoting *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561, 571 (S.D.N.Y. 2015)); *Kline v. Facebook, Inc.*, No. 150022/2018, 2019 N.Y. Misc. LEXIS 127, at \*4 (Sup. Ct. Jan. 10, 2019) (citing *In re B&M Kingstone, LLC*, 15 N.Y.S.3d at 322–23).

<sup>135</sup> *See Aybar v. Aybar*, 93 N.Y.S.3d 159, 160, 166 n.3 (App. Div. 2019) (citing *Daimler AG v. Bauman*, 571 U.S. 117 (2014)); *supra* notes 121–26 and accompanying text.

<sup>136</sup> *See Brown*, 814 F.3d at 640; *supra* notes 129–30 and accompanying text.

<sup>137</sup> *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120, 121, 122 (2d Cir. 1984) (citing *Delagi v. Volkswagenwerk AG*, 278 N.E.2d 895, 897, 898 (N.Y. 1972)); *supra* note 90 and accompanying text.

<sup>138</sup> *Volkswagenwerk Aktiengesellschaft*, 751 F.2d at 120.

jurisdiction over the non-New York parent.<sup>139</sup>

But, since *Daimler* specifically rejected *Tauza's* continued viability, does the *Volkswagenwerk* analysis still apply? Again, the courts in New York, both state and federal, have been split.

Initially, in two New York Supreme Court cases, the courts suggested that, post-*Daimler*, the "mere department" rule was abrogated,<sup>140</sup> while Southern District cases held that the rule was not abrogated.<sup>141</sup>

More recently, New York courts have apparently assumed, without deciding, that the *Volkswagenwerk* analysis still applies, in holding that jurisdiction was lacking because the standards under *Volkswagenwerk* had not been met.<sup>142</sup>

In sum, this issue is still largely unresolved. The decisions that appear to have fully appreciated the impact of *Daimler* on parent-subsidiary jurisdiction<sup>143</sup> have held that, under *Daimler*, the "mere department" analysis will create general jurisdiction over a non-New York parent corporation only if the activities of the New York subsidiary create the "exceptional" case that makes the parent "at home" in New York, or create jurisdiction over a non-New York subsidiary only if the parent is "at home" in New York.<sup>144</sup>

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<sup>139</sup> *Laufer v. Ostrow*, 434 N.E.2d 692, 696 (N.Y. 1982) (citing *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 918 (N.Y. 1917); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447 (1952); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

<sup>140</sup> See *Smart Trike, MNF, PTE, Ltd. v. Piermont Prods. LLC*, No. 650376/2012, 2014 N.Y. Misc. LEXIS 2294, at \*7–8 n.3 (Sup. Ct. May 16, 2014) (citing *Deutsche Zentral-Genossenschaftsbank AG v. UBS AG*, No. 652575/2012, 2014 N.Y. Misc. LEXIS 1858, at \*12 (Sup. Ct. Apr. 17, 2014)); *Deutsche Zentral-Genossenschaftsbank AG*, slip op. at 8 (citing *Daimler*, 571 U.S. at 141).

<sup>141</sup> See *Paysys Int'l, Inc. v. Atos SE*, No. 14 Civ. 10105 (SAS), 2015 U.S. Dist. LEXIS 97460, at \*11 (S.D.N.Y. July 24, 2015), *vacated on other grounds*, 901 F.3d 105 (2d Cir. 2018); *Nykool A.B. v. Pac. Int'l Servs., Inc.*, 66 F. Supp. 3d 385, 392 (S.D.N.Y. 2014); *Newlead Holdings Ltd. v. Ironridge Glob. IV Ltd.*, No. 14cv3945, 2014 U.S. Dist. LEXIS 80563, at \*11 (S.D.N.Y. June 11, 2014) (quoting *Dorfman v. Marriott Int'l Hotels, Inc.*, No. 99 Civ. 10496 (CSH), 2002 U.S. Dist. LEXIS 72, at \*6–7 (S.D.N.Y. Jan. 3, 2002)).

<sup>142</sup> See *Wolberg v. IAI N. Am., Inc.*, 77 N.Y.S.3d 348, 350 (App. Div. 2018) (citing *Volkswagenwerk Aktiengesellschaft*, 751 F.2d at 120, 121, 122); *FIA Leveraged Fund Ltd. v. Grant Thornton LLP*, 56 N.Y.S.3d 12, 16 (App. Div. 2017) (citing *Volkswagenwerk Aktiengesellschaft*, 751 F.2d at 120, 121, 122).

<sup>143</sup> See *SPV OSUS Ltd. v. UBS AG*, 114 F. Supp. 3d 161, 167–68 (S.D.N.Y. 2015) (citing *Daimler*, 571 U.S. at 121, 123, 139); *In re M/V MSC Flaminia*, 107 F. Supp. 3d 313, 320 (S.D.N.Y. 2015).

<sup>144</sup> See *SPV OSUS Ltd.*, 114 F. Supp. 3d at 168, 169 (citing *Daimler*, 571 U.S. at 139 n.19; *Volkswagenwerk Aktiengesellschaft*, 751 F.2d at 120); *In re M/V MSC Flaminia*, 107 F. Supp. 3d at 320–21.

## IV. CONCLUSION

Five years after the Supreme Court changed all the rules respecting general jurisdiction, the courts in New York continue to wrestle with the fallout.<sup>145</sup> The limitations the Court announced in *Daimler* appear simple on the surface—that in almost every case an individual will only be subject to general jurisdiction where that individual is domiciled, and a corporation will only be subject to general jurisdiction where it is incorporated, or has its principal place of business.<sup>146</sup> But application of this new rule to previously well-settled New York jurisdiction law has proven not simple at all.

Thus far, New York appellate authority on any of these open issues has been slim. Presumably, at some point, the Court of Appeals will weigh in, and authoritatively resolve them. Until then, the lower courts, and practitioners, will have to continue to keep looking for the comforts of home.

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<sup>145</sup> See *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016); *Aybar v. Aybar*, 93 N.Y.S.3d 159, 160, 166 n.3 (App. Div. 2019) (citing *Daimler*, 571 U.S. 117); *supra* notes 133–36 and accompanying text.

<sup>146</sup> See *Daimler*, 571 U.S. at 137 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)).