

To Be Argued By
Melanie L. Oxhorn

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

-----X
BARKLEE REALTY COMPANY LLC and BARKLEE
94 LLC,

Plaintiffs-Respondents,

-against-

New York County
Index No. 120546/99

GEORGE E. PATAKI, as Governor of The
State of New York,

Defendant-Appellant.

-----X

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Preliminary Statement

As plaintiffs acknowledge in their response to defendant's opening brief (Pltfs. Br. at 10, 21, 27), economic legislation like Limited Liability Company ("LLC") Law § 206,¹ which neither involves a fundamental right nor targets a suspect class, carries with it a strong presumption of validity that can only be overcome by a clear showing of arbitrariness and irrationality. Accordingly, Section 206 should be upheld against plaintiffs' various constitutional challenges as long as the restrictions that it imposes on LLCs are at least arguably related to a conceivably legitimate state interest -- even if there might have been a better or less imperfect means of achieving the same objective, and even if those restrictions might have been extended to other types of business

¹Section 206 requires newly-formed LLCs to publish their articles of organization or an equivalent notice for six successive weeks in two local newspapers elected by the county clerk where each LLC has its principal office, and prohibits any LLC failing to make the requisite publication within 120 days after formation from "maintaining any action or proceeding" in state court "unless and until" it complies.

entities.

POINT I

LIMITED LIABILITY COMPANY LAW § 206 HAS A RATIONAL
BASIS AND ENJOYS A STRONG PRESUMPTION OF
CONSTITUTIONALITY

A. Limited Liability Company Law § 206 Has A Rational Basis

As defendant previously contended (Def. Br. 2-3, 13-14, 21-22, 27-29), Section 206's publication requirement is a rational, if not optimal, means of making information about each LLC's organization and structure available to interested members of the public -- namely, those persons who live or work in the community where the LLC is based and who are consequently most likely to have dealings with that company. This public disclosure is, in turn, certainly at least arguably connected to the State's legitimate interest in protecting its citizens -- and particularly less sophisticated consumers and investors who might otherwise mistake this newer type of business entity for a standard partnership having unlimited liability, or for a corporation having independent management -- from companies that might use their operating flexibility and limited liability to the detriment of the unwary.

Section 206's second provision, which bars the maintenance of a court proceeding by LLCs that have not complied with the publication requirement within 120 days of their formation, is clearly related to the State's legitimate goal of ensuring that those companies will in fact publish the designated information. Accordingly, that conditional bar on litigation provides LLCs with an incentive, that might not otherwise

exist, to gain compliance with the relevant statutory requirements. While that provision restricts access to state courts by non-complying LLCs, the Legislature's adoption of this restriction need not have been in furtherance of the court system or litigation process, as long as it otherwise is in furtherance of a legitimate state goal. See Def. Br. 30-32. In addition, the restriction at issue is fairly limited in its impact on LLCs, inasmuch as an LLC can avoid dismissal of its lawsuit and the possibility of forfeiture under a statute of limitations by complying after filing suit, although the LLC will be barred from "maintaining" or continuing to litigate that suit until it establishes its compliance. See Def. Br. 32-35.

B. Plaintiffs Have Applied The Wrong Standard

In their response, plaintiffs seek to establish that Section 206 is clearly arbitrary and irrational, and thereby violates their rights to due process, equal protection and access to the courts of this State. However, in purporting to address defendant's arguments, plaintiffs repeatedly apply the wrong standard. Thus, as discussed below, they wrongly assume, among other things, that the Legislature may not impose a publication requirement on LLCs (as well as other unincorporated limited liability business entities such as limited partnerships) to protect the State's citizens unless it also imposes that requirement on corporations and other types of business entities that may or may not present similar concerns (see Pltfs. Br. 18); that the Legislature cannot condition a business entity's access to state courts on that entity's

compliance with legitimate statutory or regulatory requirements, unless those requirements are themselves connected to the furtherance of the court system or adjudicative process (see Pltfs. Br. 10-14); and that Section 206 may be invalidated by this Court based purely on speculation about its wisdom and/or efficacy as a means of disseminating the desired information to the public, or about the superiority of other possible approaches to attain that objective (see Pltfs. Br. 18-20).

With respect to the issue of the rationality of Section 206, plaintiffs continue to insist (Pltfs. Br. 10-14) that the publication requirement must be found irrational unless publication of the designated information would somehow enhance "the adjudication of legal disputes." However, as defendant previously noted (Def. Br. 6 n.2, 31-32), Section 206 is typical of similar statutes in New York and elsewhere that condition access to state courts on compliance with various administrative requirements that benefit the public but are themselves unrelated to the court system or adjudication of justice.² It is

²While plaintiffs attempt (Pltfs. Br. 11) to distinguish those statutes that require compliance with unrelated business licensing requirements as a condition for maintaining a state court action, on the ground that those requirements affect the entity's legal existence for purposes of court actions or its right to do business in the State at all, this has no bearing on the issue of whether conditions on an entity's access to state court must themselves be related to the court system. Clearly, the purpose of requiring payment of corporate franchise taxes, for example, as a condition for access to the State's courts is not to enhance the litigation process but to encourage payment of those taxes. In any case, there is no reason why the Legislature could not have required such publication as a condition for the LLC's formation (as it originally did in the case of limited partnerships), as opposed to a condition merely for acquiring legal capacity to maintain litigation in state court and thereby enjoy the full scope of the LLC's privilege to

irrelevant whether or not Section 206 (and, in particular, its conditional bar on an LLC's power to maintain state court actions previously commenced by it) enhances the adjudication of justice, inasmuch as the only relevant question in applying the rational-basis test is whether Section 206's provisions are rationally related to the promotion of a legitimate State interest. As stated earlier, the clear goal of the conditional litigation bar is to obtain compliance with other statutory requirements (specifically, the publication requirement) enacted for the benefit of the State and its citizens. Plaintiffs' criticism (Pltfs. Br. 13-14) that permitting the Legislature to "deny court access as an incentive to . . . comply with any . . . statutory mandate" would "open[] the door to a judicial system available not uniformly as of right but selectively as a reward for good conduct," is misguided, both because there are in fact numerous examples, both in New York and elsewhere, of statutes denying access to state courts where a corporation or other business entity fails to comply with another "statutory mandate" (see Def. Br. 6 n.2), and, even more fundamentally, because there is nothing inherently irrational or arbitrary about imposing such a condition as a means of inducing compliance with statutory or regulatory requirements that might otherwise be ignored.

Plaintiffs next take issue (Pltfs. Br. 15-17) with defendant's contention that judicial enforcement of Section 206 would not be as

do business in New York. See infra, at 12-13.

prejudicial to a suing LLC's interests as Supreme Court assumed. As defendant previously explained (Def. Br. 5-6 nn.1 & 2, 32-35), noncompliance with Section 206's condition on court access would not in practice result in forfeiture of claims under short statutes of limitations, inasmuch as courts have construed other statutory conditions that, like Section 206, prohibit a business entity from "maintaining any action or proceeding in this state unless and until" it complies with certain statutory requirements, to permit that entity to comply after filing suit and thereby avoid dismissal. See Def. Br. 5-6 nn.1 & 2 (discussing examples). Courts adopting this construction, premised on the distinction between bringing or commencing an action and "maintaining" or continuing an existing action, have concluded that permitting compliance after filing is more consistent with the purpose of the conditional litigation bar, which is to encourage such compliance rather than punish for past non-compliance. See Def. Br. 32-35.

In response, plaintiffs note that both the parties and the court below had assumed that Section 206 would prohibit the commencement, and not merely the continuation, of litigation (see Pltfs. Br. 16); that the Department of State has itself construed the provision to require publication to be made by an LLC upon formation (see id.); and that even if LLCs could avoid dismissal of filed actions by making the requisite publication, any delay pending compliance or pending resolution of "protracted litigation to determine the effect of noncompliance" might still result in "adverse consequences." See Pltfs. Br. 15-16. However,

any mis-statement by defendant below with respect to the meaning of Section 206 (see Def. Br. 5-6 n.1) is of course in no way binding on this Court or on other courts determining whether Section 206 requires dismissal, even after the running of the statute of limitations, of an action brought by a non-complying LLC. Moreover, while compliance with Section 206 is supposed to take place shortly after formation, the statute recognizes that LLCs may not comply within this time frame and therefore prohibits those LLCs that have not complied within 120 days following their formation from maintaining an action in state court "unless and until" they do comply. For this reason, courts applying similar statutory language have construed such a prohibition as an inducement to obtain compliance rather than an absolute bar to commencing litigation. See Def. Br. 5 n.1, 32-35 (discussing cases). And, while compliance with the publication requirement after commencing suit would result in a delay of at least six weeks, such a delay is minimal in the context of litigation and would certainly be far less prejudicial than outright dismissal, while there is no reason to believe that "the effect of noncompliance" would require protracted litigation as plaintiffs claim.

In sum, while plaintiffs seek to interpret Section 206's prohibition in the manner most detrimental to their interests in order to support the unconstitutionality of the statute, this ignores the well-established principle that where as here there can be several interpretations of a statute, courts will choose an interpretation that "avoids constitutional

doubts." Courtesy Sandwich Shop, Inc. v. Port of New York Auth., 12 N.Y.2d 379, 389 (1963).

Finally, plaintiffs contend (Pltfs. Br. 18-20) that publication of an LLC's articles of organization or the equivalent information in local newspapers is not reasonably calculated to achieve its stated objective, inasmuch as: (a) "[i]f the State had a legitimate interest in publication of information about the formation of legal entities, it would require all legal entities to publish notices"; (b) the information provided in published notices is unhelpful for investors, and the publication method chosen "is not designed to reach all or any significant portion of the public ['at large']," which could better be reached by "government mailings, enclosures with utility bills, or internet postings"; and (c) "[t]he Department of State makes current updates of all of the information in the notices readily available to the public by telephone, mail and internet at minimal or no charge, rendering newspaper publication superfluous and potentially misleading."

However, in the context of the challenges made in this case, the Legislature is not required to solve a given economic or social problem all at once, but can do so in stages, or by categories, provided that the restrictions it imposes are rationally related to a legitimate state interest. See Def. Br. 28-30. Moreover, the means chosen to inform citizens about LLCs need not be optimal as long as those means could conceivably further the stated objective. In particular, the possibility that some or many members of the public might derive little useful

information from the required publications does not mean that such publications can have no utility at all. See id. And, in this case it bears noting that, contrary to what plaintiffs assume, publication in local newspapers in the community where the LLC is based is directed not so much at the "public at large" as it is at those citizens who are most likely to have dealings with that local business -- i.e., members of that same community. Finally, the fact that members of the public could obtain similar information from existing sources such as the Department of State does not make it unreasonable for the Legislature to also require this local publication, particularly where the targeted audience is likely to include a large number of unsophisticated consumers/investors unaware of those sources. See id.

POINT II

LIMITED LIABILITY COMPANY LAW § 206 DOES NOT DEPRIVE PLAINTIFFS OF THEIR DUE PROCESS RIGHTS

With respect to their due process claim, plaintiffs acknowledge (Pltfs. Br. 7-8) that the same legislation that authorized formation of LLCs and granted them the power to sue and be sued in the courts of this State in their own name also expressly made that power "subject to any limitations provided in this chapter" (LLC Law § 202) and conditioned their right to maintain an action in those courts on their compliance with the publication requirement of Section 206. Therefore, as defendant observed (Def. Br. 20-21), under state law, plaintiffs have never enjoyed an unrestricted right to maintain actions in state court, such as would create the predicate for any deprivation of due process.

In response, plaintiffs make the following assertions (Pltfs. Br. 8-9, 14): (a) whenever the Legislature "authorizes formation of a business entity" having only conditional or otherwise restricted rights (such as a conditional right to maintain state court actions), "federal due process clothes the entity with constitutional protections that override state restrictions"; (b) the publication requirement should be disregarded as a restriction on LLC Law § 202, which grants LLCs the power to sue, because prior to its enactment, various professional and political groups, as well as then-Attorney General G. Oliver Koppell, opposed that requirement as not serving any public purpose; and (c) "[l]ack of court access or delay in prosecution impairs Plaintiffs' property rights and could seriously jeopardize cases which Plaintiffs and similar businesses must customarily prosecute in New York courts."

However, contrary to what plaintiffs assume, federal due process cannot create rights that were never granted by state law, because absent a protectible property right or liberty interest granted under state law, there is no predicate for a claim alleging a denial of due process. See Def. Br. 19-21. Because plaintiffs never had a right of access to state courts unencumbered by those restrictions contained in Section 206, they cannot claim that Section 206 deprived them of any right created by state law, let alone that it did so without affording them due process of law. See id. Plaintiffs' emphasis on the fact that the publication requirements met with some opposition prior to being adopted by the Legislature and signed into law by the Governor amounts to an untenable

assertion that such opposition by legislators and political organizations justifies disregarding a properly enacted statutory restriction on a business entity's powers.³ This would effectively circumvent the democratic lawmaking process, by enabling courts to ignore important parts of a statute that were approved by a majority in the Legislature (and perhaps critical for the enactment of that statute) and then ratified by the Governor, simply because those parts were rejected by a minority of the members of one or both legislative houses or by other persons having no lawmaking role. Finally, the fact that plaintiffs' inability to maintain an action in state court as a result of their prior refusal to comply with the publication requirement may have consequences for them or their property does not mean that they have a due process right to maintain such an action, where state law fails to grant them

³In particular, the views of then-Attorney General G. Oliver Koppell, as set forth in a memorandum to the Governor advising against enactment of Section 206, should carry little weight in evaluating the constitutionality of that legislation. First, as Attorney General Koppell acknowledges in his letter to Judge Schlesinger, he was in the Assembly at the time that the bill was sponsored and opposed the publication requirement at that time, even though "[t]here was considerable debate in the Assembly as to whether a publication requirement should be included." Thus, the fact that he subsequently opposed that requirement in his role as Attorney General is unsurprising and also of no relevance, because a legislator who votes on a bill cannot make that legislation more or less valid by later taking the same position as Attorney General. Second, as a general matter, the mere fact that any one official believes that a given bill serves no useful purpose does not make that bill unreasonable, since the Attorney General is not a lawmaker responsible for drafting legislation to address social and economic problems and holding hearings to assess its relative advantages and disadvantages. A majority of legislators (as well as the Governor) ultimately supported section 206, and Attorney General Koppell also admitted that the LLC Law would not have passed without this provision. See Supplemental Record ("Supp. R.") 6-7.

this right. See id.

Assuming that plaintiffs had established a predicate for a due process claim, however, they then go on (Pltfs. Br. 12) to distort defendants' reading of Boddie v. Connecticut, 401 U.S. 371 (1971), to suggest that "access to the court is protected only when personal relationships are involved." In fact, defendants' actual point (Def. Br. 17-18), which plaintiffs do not dispute, is that under Boddie and its progeny, access to a state's courts in and of itself is not an independent constitutional right, but will be accorded special due process protection only where the underlying right sought to be asserted through such access is a right recognized in the constitutional sense as carrying a preferred status and so entitled to special protection, and then only where there is no alternative forum in which vindication of that constitutionally protected right may be sought. See Def. Br. 17-19. Otherwise, restrictions on a right of access granted under state law will violate due process only where they are found to be irrational and/or arbitrary. See id.

POINT III

PLAINTIFF'S EQUAL PROTECTION AND COURT ACCESS CLAIMS ARE MERITLESS

A. Equal Protection

With respect to their equal protection or disparate treatment claim, which asserts that LLCs are subject to an unfairly discriminatory restriction on their court access, plaintiffs initially attempt (Pltfs. Br. 22-23) to distinguish Section 206's condition on maintaining state

court litigation from numerous similar conditions identified by defendant (see Def. Br. 6 n.2, 23-24 n.4), on the ground that those other conditions are related to the formation or legal existence of business entities. However, plaintiffs acknowledge (Pltfs. Br. 23) that for more than a hundred years, the Legislature made publication a necessary condition for the formation and legal existence of limited partnerships (although with the enactment of Section 206, this was subsequently changed to a condition only for maintaining a state court action), and they do not dispute that the Legislature could likewise have made publication a condition for an LLC's formation and exercise of legal rights (including the right to maintain state court actions). Certainly the Legislature's greater right to make publication by LLCs a condition for doing business at all within the State should include a lesser right to make publication a condition for maintaining a state court action, provided that the required disclosure could conceivably further a public purpose.

Plaintiffs further assert (Pltfs. Br. 24) that it is "irrelevant to this proceeding" whether or not the Legislature also imposes publication requirements on limited partnerships and other limited liability business associations. However, because plaintiffs have asserted (and Supreme Court found) that LLCs have been singled out for disparate treatment, it is certainly relevant that the Legislature has sought to address the problems posed by all such unincorporated limited liability business associations. As noted earlier (see supra at 2), it is at least

conceivable that the Legislature was concerned that newly-formed LLCs or limited partnerships might take advantage of their operating flexibility and limited liability to the detriment of those doing business with them (especially those who were less sophisticated or wary in their dealings). As a result, the Legislature could reasonably have adopted the publication requirement as a means of ensuring that members of the public most likely to invest in and/or do business with such unincorporated limited liability associations would be able to obtain information about those entities that might be of some value to them.

Contrary to what plaintiffs next assert (Pltfs. Br. 23-24), the fact that they each "have only one member and modest assets" does not mean that Section 206 categorically "single[s] out the smallest and most vulnerable businesses for burdensome limits on court access." As previously noted, Section 206 is rationally designed to protect those members of the public most likely to come into contact or have dealings with LLCs, regardless of the size of the business entity involved. In any case, while plaintiffs may be smaller, there certainly are much larger LLCs doing business throughout the State, just as there are both small and large limited partnerships (which are also subject to publication requirements). Moreover, even if the public could also benefit from publication of similar information by corporations or other business entities, plaintiffs appear to concede (Pltfs. Br. 25) that the Legislature could still single out LLCs for restrictions on court access rationally designed to protect the interests of the State's citizens

because, as plaintiffs themselves note, "the Legislature can act in stages or one step at a time to address economic and social problems."

B. Access To Courts

Finally, plaintiffs argue (Pltfs. Br. 29) that because Article 10, § 4 of the New York State Constitution grants LLCs the same right to sue as individuals and corporations, and because neither individuals nor corporations "must publish notices before qualifying for court access," the LLCs should likewise be entitled to access unimpeded by a publication requirement. However, under the State Constitution, both individuals and corporations can have their court access restricted by conditions -- including publication requirements -- that are rationally related to a public purpose, at least where as here no fundamental (i.e., constitutionally preferred) interest or suspect class is at stake. Thus, for example, foreign corporations as well as individuals transacting business under an assumed name are required to fulfill certain conditions before they can maintain an action or proceeding in the courts of this State. Accordingly, because Section 206's restriction on the right of LLCs to maintain actions in state court could conceivably serve a legitimate governmental purpose, it does not deny them any right of equal access guaranteed under Article 10, § 4.

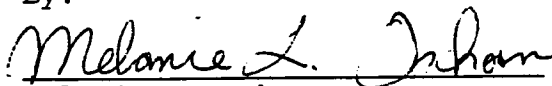
CONCLUSION

For all the foregoing reasons as well as those reasons stated in defendant's opening brief, this Court should reverse the order below awarding plaintiffs summary judgment, grant defendant's cross-motion and declare Section 206 to be constitutional.

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