SCOTUS Overturns Pa. Supreme Court, Approves General Jurisdiction Via Corporate Registration

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Any regular reader of this newsletter was familiar with the case of *Mallory v. Norfolk Southern Railway Co.* long before the Supreme Court of the United States' opinion was published on June 27, 2023. In the Winter 2019 edition of this newsletter (Volume 22, No. 1), an article appeared titled, "Unsettled Jurisdiction: Does a Foreign Corp. Consent to be Sued In Pennsylvania When It Registers to Do Business Here?" by A. Christopher Young of Pepper Hamilton.

This summer, the U.S. Supreme Court answered that question with a clear, "Yes."

To many, the *Mallory* decision was a surprise. When this newsletter first discussed the case, Judge Arnold New of the Philadelphia Court of Common Pleas had recently dismissed the case for lack of personal jurisdiction. Judge New examined Pennsylvania's law that effectively required businesses to consent to general jurisdiction when registering to do business in this commonwealth and found it to be unconstitutional, citing *Daimler AG v. Bauman*, 571 U.S. 117 (2014). Less than a month after Judge New's decision, the Pennsylvania Superior Court took up the same question in *Webb-Benjamin, LLC v. Int'l Rug Grp.* and came to the opposite conclusion: Pennsylvania's statute was constitutional. 192 A.3d 1133 (PA Super 2018). A conflict was clearly brewing.

Pursuant to Pennsylvania's Judiciary Code, the trial court's finding that a state statute was unconstitutional fast-tracked the appeal to the Pennsylvania Supreme Court, without the Superior Court weighing in on the merits of the arguments.

In its *Mallory* decision, the Pennsylvania Supreme Court rejected the *Webb* decision and affirmed Judge New's holding that Pennsylvania's "consent by registration" statute violated the due process clause of the 14th Amendment of the United States Constitution. Indeed, the Pennsylvania Supreme Court unanimously found that the practical realities of Pennsylvania's consent by registration statute "fl[y] in the face of" recent U.S. Supreme Court precedent "and cannot be condoned."

As it turns out, the U. S. Supreme Court disagreed.

Before looking at *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. -- (2023) and its practical consequences, the facts of the case and the statute in question merit some explanation.

The plaintiff, Robert Mallory, worked for Norfolk Southern Railway Company as a freight mechanic for nearly 20 years in Ohio and Virginia. After leaving the company, Mallory was diagnosed with colon cancer. He filed an action pursuant to the Federal Employer's Liability Act (commonly referred to as FELA), alleging that his employment for Norfolk Southern had exposed him to asbestos and other carcinogenic chemicals.

While the plaintiff did not allege that any of the harm occurred in Pennsylvania, he sued Norfolk Southern in this commonwealth. Norfolk Southern filed preliminary objections seeking to dismiss the case for lack of personal jurisdiction. The plaintiff argued that Norfolk Southern was subject to general jurisdiction in Pennsylvania pursuant to Pennsylvania's long-arm statute, 42 Pa.C.S. § 5301(a)(2)(ii), which provided that Pennsylvania could exercise jurisdiction over any corporation that consented to jurisdiction in Pennsylvania. Mallory argued that Norfolk Southern had consented to jurisdiction in Pennsylvania by registering to do business here.

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An out-of-state corporation cannot do business in Pennsylvania without registering. To register, an out-of-state corporation must identify an office it will continuously maintain here. 15 Pa.C.S. § 411(a), (f). Once registered, the foreign corporation enjoys the same rights and privileges as domestic corporations, but is also subject to the same liabilities, restrictions, duties and penalties. 15 Pa.C.S. § 402(d).

Norfolk Southern registered to do business in Pennsylvania in 1998 and named a "Commercial Registered Office Provider" in Philadelphia County. Norfolk Southern went on to regularly conduct business in Pennsylvania and periodically update its filings with the Pennsylvania Department of State, including moving its registered office to Dauphin County in 2009.

In recent U.S. Supreme Court opinions, the Court had restricted personal jurisdiction, particularly in *Daimler* and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011). In *Daimler*, an opinion less than 10 years old, the Supreme Court found that general jurisdiction did *not* exist in every state that a corporation engaged in substantial, continuous and systematic business.

With *Mallory*, SCOTUS bucked its recent trend, overturned the

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Pennsylvania Supreme Court's decision, and found that corporations *could* be properly sued in states with consent by registration statutes.

Central to Justice Gorsuch's opinion (to which five justices signed on to some parts and only four for others) was a century-old case, *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). In *Pennsylvania Fire*, the Supreme Court unanimously approved a Missouri law that, like the Pennsylvania statute at issue in *Mallory*, required foreign companies registering to do business to appoint an official as the company's agent for service of process in that state.

To Justice Gorsuch and the majority, *Pennsylvania Fire* was on all fours with *Mallory* and controlled, even if other recent Supreme Court decisions seemed to be trending differently, which the court implicitly acknowledged. But the court's analysis went beyond just noting that Norfolk Southern had registered to do business and addressed the defendant's fairness concerns. In so doing, the court noted that Norfolk Southern had not only been registered in Pennsylvania for many years and designated agents to accept service, it also publicly boasted of its presence in the commonwealth with a map of its Pennsylvania tracks and a fact sheet of the annual freight it carries in the Keystone State.

The majority found that the question of whether foreign corporations can be found to have consented to jurisdiction in a particular state by registering to do business in that state was answered in the affirmative a century ago. That decision, and its reasoning, was untouched in interim.

It is too early to see the practical consequences of *Mallory*, but not too early to speculate. Members of the defense bar have already publicly commented that *Mallory* and Pennsylvania's consent by registration statute will result in bald-forum shopping that will clog Pennsylvania courts and punish the out-of-state corporations that complied with Pennsylvania law to do business here. Some corporate attorneys have gone so far as to suggest foreign corporations will reconsider doing business in Pennsylvania.

Members of the plaintiffs' bar, meanwhile, see *Mallory* as a victory for the rights of individuals and push back on the notion that a case with injuries that occurred elsewhere has "nothing to do with" Pennsylvania when the defendant corporation is registered and conducts business in this commonwealth.

After all, it seemed incongruous that individuals could be hauled into court wherever they may be served, even if only there temporarily, but corporations could not be sued where they were registered to do business. *See Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604 (1990) (finding personal jurisdiction in a divorce proceeding proper where the husband was served with a California summons while on a short business trip to the Golden State, even though the couple resided in New Jersey for nearly their entire marriage and the husband still lived in that state). This is known as tag jurisdiction and it remains proper against individuals. Unlike tag jurisdiction, consent by registration involves corporate acknowledgment at the time it registers.

But all such speculation about the effects of *Mallory* is mired by the perceived uncertainty that still surrounds *Mallory*. The case was remanded to the Pennsylvania Supreme Court and a concurring opinion by Justice Samuel A. Alito Jr. raised another potential argument for striking down the statute under the dormant commerce clause. However, no other justices joined his opinion, signaling that the defense bar's trumpeting of Justice Alito's roadmap is likely overblown. Judge Abbe F. Fletman of the Philadelphia Court of Common Pleas has already rejected the commerce clause argument against consent by registration in the ongoing Paraquat litigation.

For now, the decision is most impactful for Pennsylvania litigators, as few other states have similar consent by registration statutes. But that may be changing, as at least New York is considering such a statute. Fearing a wave of consent by registration statutes, Justice Coney Barrett wrote in her dissent that *Daimler* and *Goodyear* may soon be obsolete.

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