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Supreme Court Holds that Consent to General Jurisdiction Through Registration to Do Business Satisfies Due Process

Over a century ago, the Supreme Court of the United States held in *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U.S. 93 (1917), that a state could require out-of-state corporations to consent to general jurisdiction as a condition of registering to do business in that state. Out-of-state companies could, therefore, be sued in a state where they had registered to do business, even if the events giving rise to the suit occurred outside the forum state and were not otherwise sufficiently connected to the state. This so-called "consent to jurisdiction-by-registration" theory was thrown into doubt in 2014 when the Supreme Court held in *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014), that, except in extraordinary cases, a corporate defendant is only subject to general jurisdiction where it is "at home," meaning where the company is incorporated or has its principal place of business. After *Daimler*, a split emerged among the lower courts as to whether "consent to jurisdiction-by-registration" survived *Daimler*. On the one hand, the Pennsylvania Supreme Court had held that, after *Daimler*, consent to jurisdiction-by-registration violated due process because it was essentially an end-run around *Daimler*. On the other hand, the Georgia Supreme Court held that consent to jurisdiction-by-registration survived *Daimler* because *Pennsylvania Fire* remained the law of the land until the Supreme Court revisited the decision.

The Supreme Court granted *certiorari* to resolve the split, and on June 27, 2023 issued its decision in *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122 (2023).[1] In a 5-to-4 decision, the majority sided with the Georgia Supreme Court and concluded that state statutes that require out-of-state corporations to consent to general jurisdiction are consistent with due process, even after *Daimler*. However, one justice in the majority, Justice Alito, filed a concurring opinion that questioned whether other provisions of the U.S. Constitution, including the Dormant Commerce Clause,[2] might render "consent to jurisdiction-by-registration" unconstitutional. It remains to be seen whether "consent to jurisdiction-by-registration" will survive future challenges on these grounds.

I. Background

The Supreme Court in *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.* held that a state could, consistent with due process, require an out-of-state defendant to consent to general jurisdiction as a condition for

[1] Unless otherwise cited, all quoted statements in this memorandum are taken from *Mallory*.

[2] The Dormant Commerce Clause is a legal doctrine that has been inferred from the Commerce Clause, and is used to prohibit state legislation that unduly burdens or discriminates against interstate commerce. *See Mallory*, 600 U.S. at 157, 161 n.7 (Alito, J., concurring).

registering to do business in the state. Out-of-state companies could, therefore, be sued in that state, even if the events giving rise to the suit occurred outside the forum state and were not otherwise sufficiently connected to the state. This has been the law of the land for more than a century.

This theory was, however, thrown into doubt in 2014, when the Supreme Court in *Daimler AG* v. *Bauman* limited the locations where a corporate defendant could be subject to general jurisdiction to those jurisdictions where it is "at home," which the Court generally defined as the company's principal place of business or place of incorporation.[3] Many courts since *Daimler* avoided deciding whether consent to jurisdiction-by-registration survived *Daimler* by reading business registration statutes narrowly, i.e., as not requiring consent to general jurisdiction unless they expressly so provide.[4]

For example, in *Brown* v. *Lockheed Martin*, 814 F.3d 619 (2d Cir. 2016), the United States Court of Appeals for the Second Circuit held that registration under Connecticut's business registration statute did not confer general jurisdiction. The court held that, after *Daimler*, it would not find any business registration statute to constitute consent to general jurisdiction "in the absence of a clear legislative statement" or "a definitive interpretation by the [state's highest court]" to that effect.[5] In *dicta*, the Second Circuit observed that, "[i]f mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief."[6]

Some states, including New York, have considered amending their statutes to expressly provide that registration provides consent to general jurisdiction, raising the question of whether such statutes comport with due process.[7] And some states, such as Georgia, already have statutes providing that registration constitutes consent to general jurisdiction.

Only a few courts addressed the due process implications of such statutes head on and, among those that did, a split emerged. On the one hand, the Supreme Court of Pennsylvania held that, in light of the Supreme Court's decision in *Daimler*, a state statute that was read to require consent to general jurisdiction for an out-of-state corporation to register to do business in the state would violate due process.[8] On the other hand, the Georgia Supreme Court held that *Pennsylvania Fire* remained good law, despite the Supreme Court's decision in *Daimler*, and, therefore, such a statute does not violate due process.[9]

On April 25, 2022, the Supreme Court granted a petition for certiorari in *Mallory* to resolve the split.[10]

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[3] *Id.* at 130.

[4] *See, e.g.*, *Aybar* v. *Aybar*, 177 N.E.3d 1257 (N.Y. 2021) (holding that registration to do business under the New York Business Corporation Law did not amount to consent to general jurisdiction); *State ex rel. Norfolk S. Ry. Co.* v. *Dolan*, 512 S.W.3d 41 (Mo. 2017) (same, interpreting Missouri's registration statute); *Aspen Am. Ins. Co.* v. *Interstate Warehousing*, 90 N.E.3d 440 (Ill. 2017).

[5] *Id.* at 641.

[6] *Id.* at 640.

[7] *See, e.g.*, A. 7769, 2021-2022 Leg., Reg. Sess. (N.Y. 2021) (vetoed 2021); S. S7253, 2021-2022 Leg., Reg. Sess. (N.Y. 2021) (vetoed 2021); A. 7769, 2019-2020 Leg., Reg. Sess. (N.Y. 2019); S. 7253, 2019-2020 Leg., Reg. Sess. (N.Y. 2019); A. 5918, 2017-2018, Reg. Sess. (N.Y. 2017); S. 5889, 2017-2018 Leg., Reg. Sess. (N.Y. 2017); A. A6714, 2015-2016 Leg., Reg. Sess. (N.Y. 2015); S. 4846, 2015-2016 Leg., Reg. Sess. (N.Y. 2015).

[8] *See Mallory* v. *Norfolk Southern Railway Co.*, 266 A.3d 542 (Pa. 2021).

[9] *See Cooper Tire & Rubber Co.* v. *McCall*, 863 S.E.2d 81 (Ga. 2021).

[10] *Mallory*, 266 A.3d 542 (Pa. 2021), cert. granted, No. 21-1168 (April 25, 2022).

II. The Supreme Court's Decision in *Mallory* v. *Norfolk Southern Railway Co.*

Petitioner Robert Mallory ("Mallory") worked for respondent Norfolk Southern Railway Company ("Norfolk Southern") for almost 20 years in Ohio and then in Virginia. During his tenure with the company, Mallory reported that his job duties included spraying boxcar pipes with asbestos, handling chemicals in the railroad's paint shop, and demolishing car interiors that allegedly contained carcinogens. Mallory was later diagnosed with cancer, which he attributed to his work at Norfolk Southern. While still a Virginia resident, Mallory hired Pennsylvania lawyers and sued Norfolk Southern, then incorporated and headquartered in Virginia, in Pennsylvania state court under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. §§ 51-60. The law creates a workers' compensation scheme, allowing employees of railroad companies to recover damages for their employers' negligence.

Norfolk Southern argued that the Pennsylvania court did not—and could not, consistent with the due process requirements of the Fourteenth Amendment—exert personal jurisdiction over it. The company emphasized that it was incorporated and headquartered in Virginia; Mallory resided in Virginia; and Mallory alleged that his injuries occurred in Virginia—therefore, the suit could not be properly brought in Pennsylvania. Mallory asserted that the Pennsylvania court had jurisdiction over Norfolk Southern because of the company's activity in Pennsylvania and because it had registered to do business in Pennsylvania under 42 Pa. Cons. Stat. § 5301(a)(2)(i), (b) (2019), which provides that out-of-state companies that register to do business in Pennsylvania agree to appear in its courts for "any cause of action" against them.

In a 5-to-4 decision, the Supreme Court held that the Fourteenth Amendment's Due Process Clause does not prohibit a state from requiring an out-of-state corporation to consent to general personal jurisdiction to do business there.

Justice Gorsuch, joined by Justices Thomas, Sotomayor, Jackson, and Alito, wrote for the Court, which held that *Pennsylvania Fire Ins. Co. of Philadelphia* v. *Gold Issue Mining & Milling Co.*[11] was squarely on point and controlled. In *Pennsylvania Fire*, an Arizona mining company sued a Philadelphia insurance company in a Missouri court over claims that allegedly occurred in Colorado. The Pennsylvania insurance company had obtained a business license in Missouri, complying with a Missouri statute that required the company to execute a power of attorney consenting to service of process in exchange for licensure. Previously, the Missouri Supreme Court had held that such powers of attorney acted as consent to jurisdiction in Missouri for all claims, including those that did not occur in the state. The United States Supreme Court held that the Missouri statute did not violate the Due Process Clause of the Fourteenth Amendment.

Justice Alito, writing in concurrence in *Mallory*, agreed that *Pennsylvania Fire* controlled, noting that while the Court has "infrequently invoked th[e] decision's due process holding," it has never been expressly or impliedly overruled. Additionally, Justice Alito reasoned that *Pennsylvania Fire*'s holding is not "egregiously wrong" in its application. Nor is it "so deeply unfair that it violates the railroad's constitutional right to due process" to require Norfolk Southern to defend itself against Mallory's suit in Pennsylvania instead of Virginia. Justice Alito noted that the railroad had "extensive" operations in Pennsylvania, it had used Pennsylvania courts on numerous occasions, and it had "clear notice" that registration in Pennsylvania constituted consent to general jurisdiction. Thus, Norfolk Southern's "conduct and connection with [Pennsylvania] are such that [it] should reasonably anticipate being haled

[11] 243 U.S. 93 (1917).

into court there."[12] While Pennsylvania may be reputed to be a favorable forum for tort plaintiffs, Justice Alito noted that the Court has "never held that the Due Process Clause protects against forum shopping."

In dissent, Justice Barrett, joined by Chief Justice Roberts, Justice Kagan, and Justice Kavanaugh, found that for 75 years since *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), the Due Process Clause had prevented state courts from asserting general jurisdiction over out-of-state defendants simply because they do business within the state. The dissent argued that the Court "short-circuit[ed]" precedent by characterizing the case at bar as one about consent rather "contacts-based" jurisdiction, adding that "[b]y relabeling their long-arm statutes, States may now manufacture 'consent' to personal jurisdiction."

III. Justice Alito's Concurring Opinion and the Future of Consent to Jurisdiction-by-Registrations

While Justice Alito agreed that *Pennsylvania Fire* remained good law, he also wrote separately because he was "not convinced" that the U.S. Constitution allows a state to impose a "submission-to-jurisdiction requirement" and that the "most appropriate home for these principles is the so-called dormant Commerce Clause."

Justice Alito noted that a state law may violate the Commerce Clause in two situations: when the law discriminates against interstate commerce or when it imposes an "undue burden" on interstate commerce.[13] Justice Alito surmised that the Pennsylvania law might discriminate against out-of-state companies, but "at the very least, the law imposes a 'significant burden' on interstate commerce by '[r]equiring a foreign corporation . . . to defend itself with reference to all transactions,' including those with no forum connection."[14] Aside from the "operational burdens" on out-of-state companies, Justice Alito argued that the Pennsylvania law "injects intolerable unpredictability into doing business across state borders." Specifically, Justice Alito wrote that large companies may "resort to creative corporate structuring to limit their amenability to suit" or "choose not to enter an out-of-state market due to increased risk of remote litigation" and that the impact on small companies could be "devastating."

To pass muster under the Commerce Clause, the law must advance a "legitimate local public interest" and the burden of the law must not be "clearly excessive in relation to the putative local benefits."[15] Justice Alito argued that he was "hard-pressed to identify any *legitimate local* interest that is advanced"[16] by requiring foreign companies to defend lawsuits by out-of-state plaintiffs on claims with no connection to the forum. Moreover, Justice Alito added that a state generally has no legitimate interest in "vindicating the rights of non-residents harmed by out-of-state actors through conduct outside the State." But because *Pennsylvania Fire* resolved the case in favor of Mallory, and the Court was not faced with a Commerce Clause challenge, Justice Alito concurred in the Court's judgment.

IV. Conclusion

While the U.S. Supreme Court has now decided that "consent to jurisdiction-by-registration" is consistent with due process even after *Daimler*, that is not the end of the story. Currently, a small minority of states have

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[12] *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980).

[13] *South Dakota* v. *Wayfair, Inc.*, 585 U.S. __, __ (2018) (slip op., at 7).

[14] *Bendix* v. *Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (1988).

[15] *Wayfair*, 585 U.S. at __ (slip. op., at 7).

[16] (emphasis in original).

statutes on the books that provide for consent to general jurisdiction by registering to do business. Some states, including New York, are considering whether to include them.[17]

It remains to be seen whether such statutes are constitutional. In *Mallory*, the U.S. Supreme Court vacated and remanded the case to the Pennsylvania Supreme Court, which will have an opportunity to consider Justice Alito's concurrence and whether Pennsylvania's consent to jurisdiction-by-registration statute is, in fact, constitutional under the Dormant Commerce Clause. At least one district court has already held that consent to jurisdiction-by-registration was unconstitutional because it violates the Dormant Commerce Clause.[18]

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or jkurtzberg@cahill.com; Adam Mintz (Counsel) at 212.701.3981 or amintz@cahill.com; or Kayla Gebhardt (Associate) at 212.701.3251 or kgebhardt@cahill.com; or email publications@cahill.com.

[17] S. B. 7476, 2023-2024 Leg., Reg. Sess. (N.Y. 2023).

[18] *In re Syngenta AG MIR 162 Corn Litig.*, 2016 WL 2866166, at *6 (D. Kan. May 17, 2016) (consent-based registration statute was unconstitutional violation of Dormant Commerce Clause).