

## Does Jurisdiction-by-Consent Survive ‘Daimler AG v. Bauman’?

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For more than a century, the decision of the Supreme Court of the United States in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U.S. 93 (1917), had been read to permit a state, consistent with due process, to require an out-of-state defendant to consent to general jurisdiction as a condition for 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 so-called “jurisdiction-by-consent” theory was thrown into doubt in 2014, when the Supreme Court in

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*Daimler AG v. Bauman*, 571 U.S. 117 (2014), limited the locations where a corporate defendant could be subject to general jurisdiction to only those jurisdictions where it is “at home,” which, absent exceptional circumstances, means its principal place of business or its place of incorporation. *Id.* at 130.

Many courts since *Daimler* have avoided the constitutional question by reading business registration statutes narrowly, as not requiring consent to general jurisdiction. 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). Some states, including New York, have considered amending their statutes to require consent to general jurisdiction, raising the potential question of whether such statutes comport with due process. 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).

A split has emerged, however, among the courts that have directly addressed the issue, and the Supreme Court has now granted certiorari in a case that squarely raises the issue. On the one hand, the Supreme Court of Pennsylvania has held that a state statute that requires consent to general jurisdiction in order for a foreign corporation to register to do business in the state violates due process. See *Mallory v. Norfolk Southern Railway Co.*, 266 A.3d 542 (Pa. 2021). On the other hand, the Georgia Supreme Court has held that such a statute does not violate due process. See *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021). On April 25, 2022, the Supreme Court of the United States granted a

petition for certiorari challenging the Supreme Court of Pennsylvania's decision in *Mallory. Mallory*, 266 A.3d 542 (Pa. 2021), cert. granted, No. 21-1168 (April 25, 2022).

**Background.** In 2014, the Supreme Court in *Daimler* narrowed the circumstances in which a court may exercise general jurisdiction and held that even substantial and continuous business activity in a state is insufficient to establish general jurisdiction. The court limited general jurisdiction over a company to only those forums where it is "at home," 571 U.S. at 137-39, which it defined to be the corporation's principal place of business and state of incorporation in all but the most extraordinary of cases. *Id.* at 130 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)).

The *Daimler* decision brought into doubt a line of cases that had relied on *Pennsylvania Fire* in holding that a state could, consistent with due process, require an out-of-state company to consent to general jurisdiction when it registered to do business in that state. See, e.g., *Merriman v. Crompton*, 146 P.3d 162, 174-77 (Kan. 2006); *Rykoff-Sexton v. Am. Appraisal Assocs.*, 49 N.W.2d 88, 90-91 (Minn. 1991); *Bane v. Netlink*, 925 F.2d 637, 640-41 (3d Cir. 1991); *Sternberg v. O'Neil*, 550 A.2d 1105, 1110-12 (Del. 1988); *Budde v. Kentron Haw., Ltd.*, 565 F.2d 1145, 1149 (10th Cir. 1977).

In *Pennsylvania Fire*, a Pennsylvania company insured buildings in Colorado under a policy issued in Colorado. Seeking to recover on the policy, the policyholder sued the insurer in Missouri, where the

insurer had obtained a license to conduct business. In applying for the license, the insurer had filed with the Missouri insurance superintendent "a power of attorney consenting that service of process upon the superintendent [of insurance] should be deemed personal service upon the company." 243 U.S. at 94. The Supreme Court concluded that this statutory power of attorney subjected the Pennsylvania company to general personal jurisdiction in Missouri. *Id.* at 95-96. The Court determined that the state, in allowing the foreign corporation to do business, may compel consent to general jurisdiction in the state. *Id.*

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The Supreme Court of the United States will likely **soon resolve the issue** when it considers 'Mallory'.

After *Daimler*, the lower courts were left to resolve whether *Pennsylvania Fire* and its progeny could still be read to permit a reading of the Due Process Clause of the U.S. Constitution that would permit a "jurisdiction-by-consent" theory. Many courts, however, have tried to avoid the constitutional question.

**The Lower Courts Avoid Resolving Whether the Due Process Clause Permits Jurisdiction-by-Consent.**

Following *Daimler*, many courts have avoided directly addressing whether jurisdiction-by-consent violates due process. For example, in *Brown v. Lockheed Martin*, 814 F.3d 619 (2d Cir. 2016), 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. *Id.* at 641. 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." *Id.* at 640.

New York's highest court also has construed registration statutes narrowly to avoid potential due process concerns. In *Aybar*, survivors of a motor vehicle accident in Virginia brought an action in New York against the driver, the car manufacturer, and the manufacturer of the tires that allegedly failed, causing the accident. The driver was a New York resident, while both the manufacturer (Ford) and the tire manufacturer (Goodyear) were incorporated and maintained principal places of business outside of the state. The New York Court of Appeals held that both Ford and Goodyear were not subject to general jurisdiction in New York by virtue of registering to do business there and appointing a local agent for service. The Court of

Appeals observed that the New York Business Corporation Law lists certain requirements that foreign corporations must comply with to do business in the state, but the statute does not “condition the right to do business on consent to the general jurisdiction of New York courts or otherwise afford general jurisdiction to New York courts over foreign corporations that comply with these conditions.” 177 N.E.3d at 1260. While the court expressly declined to address whether jurisdiction-by-consent comports with federal due process, *id.* at 1266, it stated the “evolution in Supreme Court case law” following *Daimler* limits general jurisdiction to where the defendant is “at home” in almost all cases. *Id.*

Several other courts have followed this approach. See, e.g., *Chavez v. Bridgestone Americas Tire Operations*, 503 P.3d 332, 348 (N.M. 2021) (“Considering the constitutional constraints involved, we conclude that it would be particularly inappropriate to infer a foreign corporation’s consent to general personal jurisdiction in the absence of clear statutory language expressing a requirement of this consent.”); *Lanham v. BNSF Ry. Co.*, 939 N.W.2d 363, 371 (Neb. 2020) (corporation’s registration in Nebraska does not subject the corporation to the “global reach” jurisdiction in every state in which it does business, which the Supreme Court rejects as being inconsistent with due process); *Facebook v. K.G.S.*, 294 So. 3d 122, 133 (Ala. 2019) (“[I]n both *Daimler* and *BNSF [Railway Co. v. Tyrell]*, 137 S. Ct. 1549, 1559 (2017)], the Supreme Court made it abundantly clear that

any precedent that supported the notion that the exercise of general jurisdiction could be based on a simple assertion that an out-of-state corporation does business in the forum state has become obsolete”); *DeLeon v. BNSF Ry. Co.*, 426 P.3d 1, 8 (Mont. 2018) (rejecting plaintiff’s argument that the combination of defendant’s business activities in Montana and its appointment of a registered agent for service of process is sufficient to confer general jurisdiction and holding “extending general personal jurisdiction over all foreign corporations that registered to do business in Montana and subsequently conducted in-state business activities would extend our exercise of general personal jurisdiction beyond the narrow limits recently articulated by the Supreme Court”); *Segregated Acct. of Ambac Assurance v. Countrywide Home Loans*, 898 N.W.2d 70, 80-82 (Wis. 2017) (“[S]ubjecting foreign corporations to general jurisdiction wherever they register an agent for service of process would reflect the ‘sprawling view of general jurisdiction’ rejected by the Supreme Court in *Goodyear*”); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 142 (Del. 2016) (“In light of *Daimler*, [Delaware’s registration statute] can be given a sensible reading by construing it as requiring a foreign corporation to allow service of process to be made upon it in a convenient way in proper cases, but not as a consent to general jurisdiction.”); *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 884 (Cal. 2016) (appointment of a registered agent for service of process, registration to do business,

and substantial or long-term profits arising out of a connection with the forum are insufficient to confer general jurisdiction over a defendant corporation); *AM Tr. v. UBS AG*, 681 F. App’x 587, 588-89 (9th Cir. 2017) (“California does not require corporations to consent to general personal jurisdiction in that state when they designate an agent for service of process or register to do business .... Nor does [defendant’s] acceptance of service of process in California in this case amount to consent to personal jurisdiction in that state. Service of process and personal jurisdiction are two different things.”).

By interpreting state business registration statutes narrowly, these cases did not definitively resolve the issue of whether it would violate due process to require foreign corporations to consent to general jurisdiction in order to do business in a state. State legislatures remained free to amend their statutes to add express language requiring consent to general jurisdiction as a condition of registering to do business. For example, in response to the *Aybar* decision, the New York state legislature passed a bill that explicitly provides for consent to general jurisdiction by registering to do business in the state, which the governor subsequently vetoed. See S. 7253, 2021-2022 Leg., Reg. Sess. (N.Y. 2021) (vetoed 2021). There is nothing to prevent the New York state legislature (or other legislatures) from pursuing similar legislation again.

**Confronting the Constitutional Question.** While many courts have

avoided the constitutional question, at least two state courts of last resort have squarely addressed it and reached opposite conclusions.

In *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542 (Pa. 2021), a Virginia plaintiff sued a Virginia railroad corporation in Pennsylvania for injuries suffered in Virginia and Ohio. Plaintiff argued that jurisdiction was proper based upon defendant's compliance with Pennsylvania's mandatory business registration statute. With regard to the business registration statute, Pennsylvania's long-arm statute specifically provides that "qualification as a foreign corporation under the laws of this Commonwealth' constitutes a sufficient basis to enable Pennsylvania courts to exercise general personal jurisdiction over the foreign corporation." Id. at 566, quoting 42 Pa.C.S. §5301(a)(2)(i). Resolving the question for the first time, the Pennsylvania Supreme Court held "the Legislature's grant of such broad jurisdictional authority is incompatible with the Fourteenth Amendment" and "a statute may not require what the Constitution prohibits." Id.

The court provided two primary bases for its decision. First, jurisdiction-by-consent is "contrary to *Daimler's* directive that a court cannot subject a foreign corporation to general all-purpose jurisdiction based exclusively on the fact that it conducts business in the forum state." Id. Second, federalism does not support jurisdiction-by-consent as a basis for jurisdiction. "[W]hen determining whether personal jurisdiction is present, courts should consider the effect

of the defendant's [submission] to the coercive power of a State that may have little legitimate interest in the claims in question, as the sovereignty of each state implies a limitation of the sovereignty of all its sister states." Id. at 567, citing *Bristol-Myers*, 137 S. Ct. 1773, 1780 (2017) (citations omitted). The court stated that Pennsylvania has no interest—and would infringe on its sister-states—in resolving a controversy filed by a non-resident against a foreign corporation where the forum has no connection to the suit.

The Georgia Supreme Court reached the opposite conclusion in *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021). In *Cooper Tire*, a Florida plaintiff argued that the Georgia court had general jurisdiction over a Delaware corporation headquartered in Ohio for injuries in a Florida motor vehicle accident that allegedly resulted from the failure of a tire that petitioner designed in Ohio and was manufactured in Arkansas. While Georgia's business registration statute for foreign corporations does not explicitly subject foreign corporations to general jurisdiction in the state (OCGA §14-2-1501(a), OCGA §14-2-1507), Georgia precedent pre-dating *Daimler*—which adheres to the Supreme Court's decision in *Pennsylvania Fire*—treats corporate registration as consent to general jurisdiction. See *Allstate Ins. Co. v. Klein*, 262 Ga. 599, 422 S.E.2d 863 (1992). The Georgia Supreme Court recognized the "tension" between *Klein* and "the trajectory of recent United States Supreme Court decisions addressing a state's authority to exercise general

personal jurisdiction over corporations," yet declined to abandon *Klein*. *Cooper Tire*, 863 S.E.2d at 92. "Unless and until the United States Supreme Court overrules *Pennsylvania Fire*, that federal due process precedent remains binding on this Court and lower federal courts." Id. at 90.

To date, the Georgia Supreme Court is the only high court to follow *Pennsylvania Fire* after *Daimler*. The split caused by *Cooper Tire* could very well be resolved soon. On Dec. 20, 2021, defendants in *Cooper Tire* filed a writ of certiorari on this very question, and on April 25, 2022, the Supreme Court granted certiorari.

**Conclusion.** Since *Daimler*, many courts that considered whether jurisdiction-by-consent is consistent with due process have read business registrations statutes narrowly to avoid the issue. In doing so, these courts have implied that the theory of jurisdiction-by-consent is not viable. However, efforts by state legislatures to amend their business registration statutes to expressly require consent to general jurisdiction and the Georgia Supreme Court's decision in *Cooper Tire* make clear the issue is not going away. The Supreme Court of the United States will likely soon resolve the issue when it considers *Mallory*.