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CASE LAW DEVELOPMENTS

MALLORY, REGISTRATION STATUTES AND THE STATE OF GENERAL JURISDICTION

Introduction

In the last edition of the *Law Digest*, we provided some brief comments and observations about the *Mallory* decision. Here we go into some depth.

To review, the U.S. Supreme Court in *Mallory v. Norfolk Southern Railway*, 216 L. Ed. 2d 815 (2023), in a 5-4 decision, upheld consent by registration to general jurisdiction in an action brought in Pennsylvania. In doing so, it rejected a due process challenge. The plurality opinion was written by Justice Gorsuch. There were two concurring opinions by Justices Jackson and Alito, the latter being particularly significant because it raised the possibility that the issue at hand *may not have been finally resolved.*

The Plurality Opinion

A majority of the Supreme Court concluded that the precise issue presented in *Mallory* was decided over 100 years ago in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). In *Mallory*, the plaintiff worked as a freight-car mechanic for the defendant Norfolk Southern for years, first in Ohio, then in Virginia. He alleges that he was diagnosed with cancer as a result of his work spraying boxcar pipes with asbestos, handling chemicals in the railroad's paint shop, and demolishing car interiors containing carcinogens. After plaintiff left Norfolk Southern, he moved to Pennsylvania for some time before returning to Virginia. The plaintiff then brought suit against his employer in Pennsylvania state court under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. §§ 51-60, which creates a workers' compensation scheme allowing railroad employees to recover damages resulting from their employers' negligence. Plaintiff's alleged exposures occurred in Ohio and Virginia but not in Pennsylvania. The defendant is a Virginia corporation with its headquarters there. It claimed that although it had registered as a foreign corporation in Pennsylvania, which under Pennsylvania law is equivalent to consent to general jurisdiction, the action violated the Fourteenth Amendment Due Process Clause.

The Pennsylvania Supreme Court agreed with Norfolk Southern, ruling that Pennsylvania law violated the Due Process Clause. In doing so, it put itself at odds with the Georgia Supreme Court, which rejected a similar due process argument. *See Cooper Tire & Rubber Co. v. McCall,* 312 Ga. 422 (2021).

Five justices of the Supreme Court disagreed with the Pennsylvania Supreme Court, finding that its prior decision in *Pennsylvania Fire* was controlling. There, Pennsylvania Fire was a Pennsylvania incorporated insurance company, which insured a Colorado smelter owned by the Gold Issue Mining & Milling Company, an Arizona corporation. Within a year, lightning struck, and a fire destroyed the insured facility. When Gold Issue Mining sought to collect under the insurance policy, Pennsylvania Fire refused to pay. Gold Issue Mining then brought suit in Missouri. The insurance company argued that the Due Process Clause did not permit such a lawsuit against it with no connection to the forum state. The U.S. Supreme Court unanimously rejected this argument, holding that there was "no doubt" that Pennsylvania Fire was subject to suit in Missouri, even though the action was brought by an out-of-state plaintiff with respect to an out-of-state contract "because it had agreed to accept service of process in Missouri on any suit as a condition of doing business there."

In finding *Pennsylvania Fire* controlling, the *Mallory* Court noted the similarities between the applicable statutes:

> Much like the Missouri law at issue there, the Pennsylvania law at issue here provides that an out-of-state corporation "may not do business in this Commonwealth until it registers with" the Department of State. As part of the registration process, a corporation must identify

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> an "office" it will "continuously maintain" in the Commonwealth. Upon completing these requirements, the corporation "shall enjoy the same rights and privileges as a domestic entity and shall be subject to the same liabilities, restrictions, duties and penalties . . . imposed on domestic entities." Among other things, Pennsylvania law is explicit that "qualification as a foreign corporation" shall permit state courts to "exercise general personal jurisdiction" over a registered foreign corporation, just as they can over domestic corporations (citations omitted).

Id. at 824–25.

The Court noted that the defendant here had complied since 1998 with the law by completing an "Application for Certificate of Authority"; naming a "Commercial Registered Office Provider" in Philadelphia County, agreeing that this was where it "shall be deemed . . . located"; and regularly updating its information on file.

The defendant argued that the intervening decision in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), changed the analysis and that the Court should overrule *Pennsylvania Fire*. It claimed that presently the law only permits two types of personal jurisdiction over a corporate defendant: specific jurisdiction, which allows for actions against nonresidents where the cause of action arises out of or relates to the defendant's activities in the state; and general jurisdiction, permitting any suit regardless of where it arose in a forum where the corporation is incorporated or has its principal place of business.

The majority rejected this interpretation of *International Shoe*. It contended that, in fact, rather than contracting the reach of personal jurisdiction, it expanded it from the previously sanctioned consent-type jurisdiction to permit an out-of-state corporation that did not consent to in-state suits to be found to be in the forum state based on "the quality and nature of [its] activity" in the forum. The Court found support for its position in its decision in *Burnham v. Superior Court of Cal., County of Marin*, 495 U. S. 604 (1990), where it confirmed that "tagging" jurisdiction—serving a nonresident in the state by physically subjecting that individual to general jurisdiction—was still viable after *International Shoe.*

The Court similarly rejected the argument that the decision in *Pennsylvania Fire* was inconsistent with *International Shoe,* which overruled prior inconsistent decisions. It cautioned that *International Shoe* did not do away with all prior traditional methods to secure personal jurisdiction. The Court dispensed with Norfolk Southern's claim that it would be unfair to permit the action to go forward in Pennsylvania because of "local prejudice" against a company that was not "local":

> But if fairness is what Norfolk Southern seeks, pause for a moment to measure this suit against that standard. When Mr. Mallory brought his claim in 2017, Norfolk Southern had registered to do business in Pennsylvania for many years. It had established an office for receiving service of process. It had done so pursuant to a statute that gave the company the right to do business in-state in return for agreeing to answer any suit against it. And the company had taken full advantage of its opportunity to do business in the Commonwealth, boasting of its presence [in an advertisement copied into the decision].

Id. at 829.

Moreover, the Court emphasized the significant presence Northern Suffolk had in Pennsylvania when this action was commenced, including employing 5,000 people in the state (more than it employed in Virginia, its headquarters) and maintaining more than 2,400 miles of track and the largest locomotive shop in North America there. In addition, as of 2020, it managed more miles of track in Pennsylvania than in any other state.

The Court similarly contested the defendant's assertion that

> the Due Process Clause separately prohibits one State from infringing on the sovereignty of another State through exorbitant claims of personal jurisdiction. . .To date, our personal jurisdiction cases have never found a Due Process Clause problem sounding in federalism when an out-of-state defendant submits to suit in the forum State.

Id. at 831.

Finally, the Court found no merit in the defendant's argument that its registration filing and establishment of an office to receive process were merely "meaningless formalities." It noted that there are numerous binding "formalities" in the law with jurisdictional consequences that would need to be "undone" based on the defendant's position. For example, finding general jurisdiction over a corporation in a state where the corporation files a certificate of incorporation, regardless of where the company's actual operations are located; the jurisdictional consequences of the "tag" rule; or signing a forum selection clause, among others.

Justice Jackson Concurrence

While Justice Jackson agreed that *Pennsylvania Fire* controlled, she asserted that there was a separate reason to rule in the plaintiff's favor: Northern Suffolk waived its personal jurisdiction rights by registering as a foreign corporation in Pennsylvania and permitting it to do business there. "A defendant can waive its rights by explicitly or implicitly consenting to litigate future disputes in a particular State's courts." *Id*. at 834. Justice Jackson noted that Norfolk Suffolk was not compelled to register and submit to general jurisdiction; registration was required only if it was conducting business in the state in a "regular, systematic, or extensive" way.

Justice Alito Concurrence

Justice Alito also concurred with the plurality decision that *Pennsylvania Fire* controlled and that the Due Process Clause is not "violated when a large out-of-state corporation with substantial operations in a State complies with a registration requirement that conditions the right to do business in that State on the registrant's submission to personal jurisdiction in any suits that are brought there." *Id.* at 835.

However, and most significantly, Justice Alito posited that another clause in the Constitution might bar such a consent to general jurisdiction by registration: the dormant Commerce Clause. However, since the Pennsylvania Supreme Court did

not address the Commerce Clause argument, after remand that issue could find its way back to the U.S. Supreme Court. Justice Alito described the purpose of the dormant Commerce Clause:

> In its negative aspects, the Commerce Clause serves to "mediate [the States'] competing claims of sovereign authority" to enact regulations that affect commerce among the States. The doctrine recognizes that "one State's power to impose burdens on . . . interstate market[s] . . . is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." It is especially appropriate to look to the dormant Commerce Clause in considering the constitutionality of the authority asserted by Pennsylvania's registration scheme. Because the right of an out-of-state corporation to do business in another State is based on the dormant Commerce Clause, it stands to reason that this doctrine may also limit a State's authority to condition that right (citations omitted).

Id. at 841.

Justice Alito stated outright that there was a "good prospect that Pennsylvania's assertion of jurisdiction here—over an out-of-state company in a suit brought by an out-of-state plaintiff on claims wholly unrelated to Pennsylvania—violates the Commerce Clause." *Id.* at 842. He added that there was "reason to believe" that the registration-based jurisdiction regimen here discriminated against out of state companies; and certainly imposed "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 (citations omitted)." *Id.* at 843.

Justice Alito also highlighted the impact on small companies and that such companies might decide not to do business in the state or to register there:

> Aside from the operational burdens it places on out-of-state companies, Pennsylvania's scheme injects intolerable unpredictability into doing business across state borders. Large companies may be able to manage the patchwork of liability regimes, damages caps, and local rules in each State, but the impact on small companies, which constitute the majority of all U. S. corporations, could be devastating. Large companies may resort to creative corporate structuring to limit their amenability to suit. Small companies may prudently choose not to enter an out-of-state market due to the increased risk of remote litigation. Some companies may forgo registration altogether, preferring to risk the consequences rather than expand their exposure to general jurisdiction.

Id.

Justice Alito could see no legitimate local interest advanced here, and "even if some legitimate local interest could be identified, I am skeptical that any local benefits of the State's assertion of jurisdiction in these circumstances could overcome the serious burdens on interstate commerce that it imposes (citations omitted)." *Id.* at 844.

The Dissent

The Dissent written by Justice Barrett, and joined by Chief Justice Roberts and Justices Kagan and Kavanaugh, can be summarized by the introduction to the opinion, characterizing the effects of the majority's decision:

> All a State must do is compel a corporation to register to conduct business there (as every State does) and enact a law making registration sufficient for suit on any cause (as every State could do). Then, every company doing business in the State is subject to general jurisdiction based on implied "consent"—not contacts. That includes suits, like this one, with no connection whatsoever to the forum.
>
> Such an approach does not formally overrule our traditional contacts-based approach to jurisdiction, but it might as well. By relabeling their long-arm statutes, States may now manufacture "consent" to personal jurisdiction. Because I would not permit state governments to circumvent constitutional limits so easily, I respectfully dissent.

Id. at 844–45.

In essence, the dissent maintained that based on its precedent in *Daimler AG v. Bauman,* 571 U. S. 117 (2014) and *BNSF R. Co. v. Tyrrell*, 581 U. S. 402, 415 (2017) ("a case with remarkably similar facts"), simply doing business in the forum is not enough to compel general jurisdiction. In the absence of exceptional circumstances, a corporation is "at home" where it is incorporated or where it has its principal place of business. "Adding the antecedent step of registration does not change that conclusion. If it did, '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' (citation omitted)." *Mallory,* 216 L. Ed. 2d at 846.

The dissent disagreed that Pennsylvania treats registration as synonymous with consent. It pointed to the fact that there was nothing in the defendant's application for authority setting forth that expectation. The dissent believed, as the Pennsylvania Supreme Court did, that rather than consent, the registration process is "'compelled submission to general jurisdiction by legislative command.' Corporate registration triggers a statutory repercussion, but that is not 'consent' in a conventional sense of the word (citation omitted)." *Id.* at 847.

The dissent acknowledged that although "due process precedent permits States to place reasonable conditions on foreign corporations in exchange for access to their markets, there is nothing reasonable about a State extracting consent in cases where it has 'no connection whatsoever.' The Due Process Clause protects more than the rights of defendants—it also protects interstate federalism (citations omitted)." *Id.* at 848. The dissent concluded that

> Pennsylvania's effort to assert general jurisdiction over every company doing business within its borders infringes on the sovereignty of its sister States in a way no less "exorbitant" and "grasping" than attempts we have previously rejected. Conditions on doing in-state business cannot be "inconsistent with those rules of public law

> which secure the jurisdiction and authority of each State from encroachment by all others." Permitting Pennsylvania to impose a blanket claim of authority over controversies with no connection to the Commonwealth intrudes on the prerogatives of other States—domestic and foreign—to adjudicate the rights of their citizens and enforce their own laws (citations omitted).

Id. at 848–49.

The dissent rejected the argument that because a defendant can waive a personal jurisdiction right, there cannot be a circumstance where a state overreaches in requiring the relinquishment of such a right. "Pennsylvania's power grab infringes on more than just the rights of defendants—it upsets the proper role of the States in our federal system." *Id*. at 849. The dissent found the plurality's analogy of consent by registration to *Burham* tagging jurisdiction to be misplaced because the former did not meet the requirements applied to the latter, that is, it "is not both firmly approved by tradition and still favored," as a basis for jurisdiction to meet *International Shoe's* due process test. Moreover, tagging jurisdiction is not a fiction; it is the actual presence of an individual in the state. "By contrast, Pennsylvania's registration statute is based on deemed consent. And this kind of legally implied consent is one of the very fictions that our decision in *International Shoe* swept away (citation omitted)." *Id.* at 853. Finally, the dissent stated that even if the *Pennsylvania Fire* case remained valid law, it did not control the result here. In *Pennsylvania Fire*, unlike here, the company was required to execute an express power of attorney providing for consent to jurisdiction.

Proposed New York Statutory Framework

In New York, a prior version of a consent by registration statute was vetoed by the governor. More recently, another version was passed by both houses but has not yet been signed into law.

The proposed legislation amends Business Corporation Law § 1301 to add a subsection (e) providing that:

> (e) A foreign corporation's application for authority to do business in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation. A surrender of such application shall constitute a withdrawal of consent to jurisdiction.

Similar amendments were proposed to the general associations law, limited liability company law, not-for-profit corporation law, and partnership law.

Moreover, CPLR 301-a (Termination of consent to jurisdiction in certain cases) was added to provide:

> Where a business organization registered, authorized or designated to do business in this state surrenders, withdraws or otherwise revokes its registration, authorization or certificate of designation, its consent to jurisdiction terminates on the date of such surrender, withdrawal or revocation.

Conclusions and Observations

The decision in *Mallory* answers some questions but leaves others open. The Supreme Court held that the Pennsylvania consent to general jurisdiction statute did not violate the Due Process Clause. However, as noted, Justice Alito raised the specter that a dormant Commerce Clause challenge may be successful. If the four dissenting justices joined Justice Alito, we could have a 5-4 decision striking down such a statute. Of course, on remand this issue will have to be decided by the Pennsylvania Supreme Court before it makes its way back to the U.S. Supreme Court.

Practically, what does the *Mallory* decision mean to other states? Well, that would depend on whether that state has a similar consent to jurisdiction statute. (The dissent in Mallory asserted that Pennsylvania was the only state that currently has such a consent to general jurisdiction by registration statute.) More relevant to us is what *Mallory* will mean here in New York. If the amendment referenced above is signed into law, is it similar enough to the Pennsylvania statute to meet the *Mallory* standard?

While the *Mallory* Court sustained the relevant statute, it went out of its way to stress the significant amount of business and contacts Norfolk Southern had with Pennsylvania (employing 5,000 people in the state, maintaining more than 2,400 miles of track, etc.). Justice Alito similarly phrased the issue as involving "a large out-of-state corporation with substantial operations in the State." Would the Court have reached the same conclusion if the corporation had many fewer significant contacts with the state?

It would not be unreasonable to suggest that there could be companies who file for registration in a particular year but do insignificant business in subsequent years, yet do not surrender their authority. Regardless, would it be beneficial to a state if companies were registering and then surrendering authority with some frequency?

More relevant is whether companies will not register or surrender their authority rather than submit to general jurisdiction after *Mallory* in those states where there are, or will be, a similar consent by registration framework. The only apparent penalty in New York for a company that does continuous business in the state without registering is that it cannot sue in the state. BCL § 1312. However, a company can register at that point and bring suit.

We are in unchartered territories. Prior to *Daimler,* authorized foreign corporations were generally considered to be subject to general jurisdiction. Yet, ironically, the registration issue was less critical because the "doing business" standard was considerably more expansive/liberal than the "at home" requirement. Stated differently, many authorized foreign corporations were also "doing business" in the forum, and hence subject to general jurisdiction. Thus, it is difficult to assess the number of companies who may choose not to register, surrender their authority, or reduce the amount of business they do in New York.

Therefore, states should exercise caution going forward in enacting such consent to jurisdiction by registration statutes. As noted, the issue as to their constitutionality is still up in the air and it would be unfortunate if such newly enacted statutes were struck down in short order, adding further confusion.

In sum, it appears that clarity in the area of personal jurisdiction has not been achieved.

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