

## LITIGATION SERVICES

# ALERT

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## Pennsylvania Supreme Court Holds that Requiring Consent to Personal Jurisdiction in Order to Do Business in Pennsylvania Violates Due Process

By Barry S. Alexander and Peter Moomjian

In a December 22, 2021 decision that will have far-reaching effects, the Pennsylvania Supreme Court held in *Robert Mallory v. Norfolk Southern Railway Company* that Pennsylvania's consent-by-registration statutory framework is unconstitutional, and thus could not provide a basis for finding personal jurisdiction.<sup>1</sup> The Court noted: "Our statutory scheme of conditioning the privilege of doing business in the Commonwealth on the submission of the foreign corporation to general jurisdiction in Pennsylvania courts strips foreign corporations of the due process safeguards guaranteed in *Goodyear* and *Daimler*."

### Background

In deciding *Daimler AG v. Bauman*, the U.S. Supreme Court said in 2014 that its holding – only in the exceptional case will general personal jurisdiction exist over a corporate entity in a forum other than in its state of incorporation or principal place of business – merely applied prior case law; it did not overrule or modify it. In practice, however, this decision, as well as the Court's 2011 decision in *Goodyear Dunlop Tires Operations*, have had a profound effect on litigation in the United States, dramatically narrowing the scope of general personal jurisdiction and requiring plaintiffs' attorneys to rely on alternative arguments to support personal jurisdiction.

One argument that frequently has been raised in the wake of *Goodyear* and *Daimler* is that a company's registration to do business in a state and concomitant appointment of an agent for service in the forum constitute consent to personal jurisdiction in that forum. This issue has been of particular note in Pennsylvania, which is the only state whose law expressly provides that registering to do business allows Pennsylvania courts to exercise personal jurisdiction over a company incorporated elsewhere. 42 Pa. C.S. § 5301(a)(2)(i).

### The Trial Court Decision

Robert Mallory, a Virginia resident, filed suit against Norfolk Southern Railway Company ("Norfolk Southern"), a Virginia corporation, in the Philadelphia Court of Common Pleas, asserting a claim pursuant to the Federal Employer's Liability Act ("FELA"). Mallory asserted that he suffered harm due to exposure to carcinogens while working for Norfolk Southern in Ohio and Virginia. Norfolk Southern filed preliminary objections seeking dismissal of the complaint based on a lack of personal jurisdiction.

As there was no other reasonable basis for finding personal jurisdiction, the central issue was whether Norfolk Southern consented to general jurisdiction in Pennsylvania by registering to do business in the state. In arguing that it had, Mallory relied on 42 Pa. C.S. § 5301(a)(2)(i), which provides that Pennsylvania courts

<sup>1</sup> Schnader Harrison Segal & Lewis LLP argued the case before the Pennsylvania Supreme Court and prepared supplemental briefing requested by the Court, on behalf of Norfolk Southern.

may exercise general personal jurisdiction over corporations that qualify as foreign corporations under the law, while such qualification required registration to do business within the state.

Norfolk Southern, on the other hand, argued that because “all foreign corporations doing business in Pennsylvania are required to register ..., the ability to do business in the Commonwealth hinges upon compliance with mandatory registration provisions and cannot serve as a voluntary relinquishment of due process rights.”

The trial court sustained Norfolk Southern’s objections and dismissed the complaint with prejudice. The trial court rejected the plaintiff’s argument that Norfolk Southern consented to general personal jurisdiction merely by registering to do business in Pennsylvania. Instead, the court adopted Norfolk Southern’s argument that its consent was not voluntary because Norfolk Southern was required to register as a foreign corporation by Pennsylvania law. The trial court found that “Pennsylvania’s statutory scheme creates an impermissible Hobson’s choice between relinquishing its right to due process by registering to do business in the Commonwealth and thereby submitting to the general jurisdiction of Pennsylvania courts, or foregoing the privilege of doing business in Pennsylvania.”

The trial court also found that Pennsylvania’s statutory scheme unconstitutionally infringes upon other states’ ability to adjudicate cases involving their own corporate citizens.

Because the trial court’s ruling determined the Pennsylvania general personal jurisdiction statute was unconstitutional, Mallory’s appeal bypassed the intermediate appellate court and went directly to the Pennsylvania Supreme Court.

### ***The Pennsylvania Supreme Court Decision***

On December 22, 2021, the Pennsylvania Supreme Court issued a unanimous decision affirming the trial court’s holding that Pennsylvania’s general jurisdiction

statute was unconstitutional to the extent it imposed jurisdiction on foreign corporations solely because they had registered to do business in Pennsylvania.<sup>2</sup> The Court held that: “Upon a close examination of the High Court’s most recent directives, we are persuaded that our statutory scheme fails to comport with the guarantees of the Fourteenth Amendment; thus, it clearly, palpably, and plainly violates the Constitution.”

Citing to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Court explained that “to find that Defendant consented to the general jurisdiction of Pennsylvania courts when it registered to do business here, we must conclude that it voluntarily, knowingly, and intelligently waived its due process liberty interest in not being subject to the binding judgments of a forum with which it has no meaningful ‘contacts, ties, or relations.’” Here, however, while Norfolk Southern might have had notice that it would be subject to personal jurisdiction by registering to do business, “notice [] does not render the consent voluntary.” Rather, because a foreign corporation’s only choice is to consent to personal jurisdiction or not do business in Pennsylvania, any “consent” to personal jurisdiction is coerced, not voluntary.

### ***Takeaways***

Defendants should take comfort in this decision for several reasons. First and foremost, it provides a basis for foreign defendants to avoid litigation in Pennsylvania for cases that otherwise have no relation to the state. As Philadelphia County may have a reputation as a plaintiff-friendly jurisdiction, this is a significant positive development for defendants.

Second, while courts around the United States have struggled with the question of implied consent by registration, with mixed results, there always has been concern that additional states might try to legislate around this question entirely by expressly requiring foreign corporations to consent to personal jurisdiction when they register to do business in the state. As Penn-

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<sup>2</sup> The Pennsylvania Supreme Court acknowledged that its decision rejected the Pennsylvania Superior Court’s 2018 holding in *Webb-Benjamin, LLC v. Int’l Rug Grp.*, that consent-by-registration was a valid basis for personal jurisdiction.

sylvania is the only state with such a statutory provision, the *Mallory* decision provides a clear framework for challenging any attempt to enforce such a law in other states.

Finally, the Pennsylvania Supreme Court's decision underscores the importance of making timely objections to personal jurisdiction. Norfolk Southern's preliminary objection on this basis preserved the argument for ultimate determination.

The U.S. Supreme Court's recent holdings on general and specific personal jurisdiction have created significant uncertainty for corporations doing business in the United States, narrowing the scope of general personal jurisdiction while appearing to widen the scope of specific personal jurisdiction. Ultimately, in aviation, as in many other industries, we have seen a significant increase in the filing of motions to dismiss on personal jurisdiction grounds, and courts have been granting these motions with increasing frequency. We expect that the Pennsylvania Supreme Court's holding in *Mallory* will continue that trend when general jurisdiction is at issue. Defendants based outside of Pennsylvania should consider carefully, and early in the litigation, the issue of personal jurisdiction. ♦

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