ALERT MEMORANDUM

U.S. Supreme Court Rejects Due Process Challenge to Statute Requiring Out-of-State Corporations to Submit to General Personal Jurisdiction

July 5, 2023

On June 27, 2023, the United States Supreme Court ruled 5-4 in *Mallory v. Norfolk Southern Railway Co.*, that a state may, consistent with the U.S. Constitution's Due Process Clause, require out-of-state corporations to submit to the general personal jurisdiction of the state's courts as a condition of registering to do business in the state.[1] The majority rejected the argument that its modern personal jurisdiction decisions had implicitly overruled earlier precedent permitting states to subject registered foreign corporations to general jurisdiction. This decision stands in contrast to a series of decisions in the last decade limiting states' exercise of personal jurisdiction over corporate defendants. However, in a concurrence, Justice Alito suggested he would likely see jurisdiction-by-registration statutes as invalid under the U.S. Constitution's Commerce Clause, but that this argument was not properly before the Court. Accordingly, another constitutional challenge to such statutes may be available, including in this very case on remand.

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[1] *Mallory v. Norfolk S. Ry.*, 600 U.S. ___ , No. 21-1168, slip op. (2023) ("*Mallory*").

Background

In recent years, the Supreme Court has decided a number of cases limiting the circumstances in which a corporation is subject to general or "all purpose" personal jurisdiction in state courts—that is, jurisdiction over any claim, whether or not it has any connection with the forum state. Most significantly, in 2014, the Court held in *Daimler* that a corporation could be subject to general personal jurisdiction only where it is "at home," defining this as the corporation's state of incorporation and the state where it has its principal place of business, with only rare exceptions.[2] Thus, even when a nondomiciliary corporation has significant business operations in a state, the Fourteenth Amendment's Due Process Clause prevents it from being forced to face suit in that state's courts unless the claims "arise out of or relate to the defendant's contacts with the forum" (subjecting it to "specific" personal jurisdiction).[3]

It was an open question, however, whether a corporation could still be forced to *consent* to the general jurisdiction of a state's courts as a condition of doing business there. The Supreme Court had held in its 1917 *Pennsylvania Fire* decision that statutes imposing such a condition were not inconsistent with the Fourteenth Amendment.[4] But many, including the court below in *Mallory*, questioned whether that ruling had survived intervening legal developments.

The plaintiff in *Mallory* was a former railroad worker who sued his former employer, Norfolk Southern, in Pennsylvania state court, alleging he had developed cancer as a result of workplace chemical exposure. Mr. Mallory had worked for Norfolk Southern in Ohio and Virginia and lived in Virginia when he brought his lawsuit. At that time, Norfolk Southern was both incorporated and had its headquarters in Virginia, so it ordinarily could not be sued in Pennsylvania for conduct unconnected to the state.

However, Norfolk Southern had registered to do business in Pennsylvania for over 20 years, and, under Pennsylvania law, registration to do business in the state subjects the registrant to the general jurisdiction of Pennsylvania courts. Norfolk Southern argued that this was inconsistent with the Due Process Clause. The Pennsylvania Supreme Court agreed, holding that the U.S. Supreme Court's 1917 ruling in *Pennsylvania Fire* had been implicitly superseded by the "minimum contacts" personal jurisdiction regime announced in *International Shoe Co. v. Washington*.[5] Accordingly, the U.S. Constitution prevented the Pennsylvania statute from conferring general jurisdiction over out-of-state corporations. Plaintiff sought review by the U.S. Supreme Court.

The Supreme Court's Decision

In a narrow majority ruling, with Justice Alito joining only in portions of the majority opinion, the Supreme Court held that its 1917 decision remained good law and controlled the case. Writing for the majority, Justice Gorsuch opined that *International Shoe* and its progeny, like *Daimler*, had only concerned the due process considerations that attend a suit against a defendant who "*has not consented* to suit in the forum."[6] As the Supreme Court had routinely recognized, defendants can consent to personal jurisdiction in many ways, including based on laws like Pennsylvania's that subject registered foreign corporations to general jurisdiction.

Here, especially in light of Norfolk Southern's extensive business operations in Pennsylvania, the majority reasoned that Norfolk Southern could not complain of the unfairness of being forced to face suit in the state. In a brief concurrence, Justice Jackson emphasized that personal jurisdiction has been deemed "an individual, waivable right," and that individuals can waive even very serious constitutional protections, including those attending criminal proceedings.[7] Accordingly, there was no unfairness in subjecting Norfolk Southern to jurisdiction based on its choice to waive that right by registering to do business in Pennsylvania.

In his concurrence, Justice Alito agreed that *Pennsylvania Fire* controlled the case, and that in any event he was not persuaded by the argument that corporate registration statutes like Pennsylvania's offend the Due Process Clause. He suggested that, to the extent jurisdiction in this case seemed unfair, it was not because of Norfolk Southern's lack of contacts with Pennsylvania—which were in fact extensive—but because the plaintiff appeared to

[2] *Daimler AG v. Bauman*, 571 U.S. 117, 137–38 (2014).
[3] *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021) (quotation marks omitted).
[4] *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.* 243 U.S. 93 (1917).
[5] *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 567–68 (Pa. 2021), *vacated*, 600 U.S. ___ , No. 21-1168 (2023).
[6] *Mallory* at 14 (citation omitted) (emphasis in original).
[7] *Mallory v. Norfolk S. Ry.*, 600 U.S. ___ , No. 21-1168, slip op. at 1, 3 (2023) (Jackson, J., concurring).

have chosen to sue in Pennsylvania because it "is reputed to be especially favorable to tort plaintiffs." Justice Alito observed that Supreme Court precedent has never "held that the Due Process Clause protects against forum shopping."[8]

Justice Alito suggested that the Pennsylvania registration statute may be deficient on federalism grounds. To the extent it conditions business by an out-of-state corporation on an agreement to defend all claims in Pennsylvania courts—even claims with no connection to Pennsylvania—the statute could discriminate against out-of-state corporations or at least unreasonably burden interstate commerce, potentially offending the dormant Commerce Clause. Because the Pennsylvania Supreme Court had not addressed this argument, the question was not directly before the U.S. Supreme Court, but an issue that Norfolk Southern could pursue on remand.

Justice Barrett, in a dissent joined by Chief Justice Roberts and Justices Kagan and Kavanaugh, questioned whether Norfolk Southern had meaningfully consented to jurisdiction. The dissent contended that the Pennsylvania statute was in effect an assertion of jurisdiction over any corporation "doing business" in the state, which had been deemed unconstitutional in *Goodyear*[9] and *Daimler*. In the dissenters' view, the registration statute was essentially a "relabel[ed] long-arm statute" that "manufacture[d] 'consent'" to "circumvent constitutional limits" on the assertion of jurisdiction by state courts.[10] The "bargain" out-of-state corporations were required to strike in return for the right to operate in the state was, for the dissenters, unconstitutional overreaching by Pennsylvania.[11] Federalism interests prevent any state from imposing this choice on foreign businesses.

Recognizing the substantial overlap between the facts of *Mallory* and those of *Pennsylvania Fire*, the dissent relied on precedent stating that earlier decisions inconsistent with *International Shoe* should be considered overruled. For the dissent, the majority's reliance on 1917's *Pennsylvania Fire* turned back the clock on personal jurisdiction and made the *Daimler* regime "obsolete."[12]

Practical Impact

The Supreme Court decisions on personal jurisdiction from the last decade, including *Goodyear*, *Daimler*, *Bristol-Myers Squibb Co.*,[13] and *Walden*,[14] supplied critical defenses for individuals and corporations haled into court in distant jurisdictions by forum-shopping plaintiffs. They significantly limited the places where a corporate defendant can be forced to defend against a lawsuit.

Mallory, on the other hand, along with the Supreme Court's 2021 ruling for the plaintiff in *Ford Motor Co. v. Eighth Montana Judicial District*, extends the exercise of jurisdiction over corporate defendants. At present, only two states (Pennsylvania and Georgia) assert general jurisdiction over foreign corporations based on their registration to do business. But the Supreme Court's decision may lead to additional states adopting such statutes as a way around the jurisdiction-limiting decisions of the past decade.

In *Ford*, Justice Gorsuch expressed dissatisfaction with *International Shoe* and the difficulties of applying its paradigms to an age of international and digital commerce.[15] He recalled the simplicity of a prior era when corporations, like individuals, could be sued wherever an employee could be found and served with process, or wherever they could be required to consent to service of process.[16] *Mallory* appears to be an outgrowth of that dissatisfaction, and may presage future departures from the *International Shoe* paradigm. On the other hand, Justice Alito indicated he would have joined four other justices to rule the Pennsylvania statute unconstitutional, albeit on different grounds—so a majority of the Supreme Court might ultimately find that states cannot compel corporations to effectively subject themselves to general personal jurisdiction as a condition of doing business in the state.

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[8] *Mallory v. Norfolk S. Ry.*, 600 U.S. ___ , No. 21-1168, slip op. at 5 (2023) (Alito, J., concurring).
[9] *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915 (2011).
[10] *Mallory v. Norfolk S. Ry.*, 600 U.S. ___ , No. 21-1168, slip op. at 1 (2023) (Barrett, J., dissenting)
[11] *Id.* at 4-6.
[12] *Id.* at 18.
[13] 582 U.S. 255 (2017).
[14] 571 U.S. 277 (2014).
[15] *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1038-39 (Gorsuch, J., concurring).
[16] *Id.* at 1036-37.