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Alert | Litigation

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Mallory v. Norfolk Southern Railway Co.: A New 'Third Rail' for Litigation Tourism or a Short-Lived Detour from the At Home Rule?

Go-To Guide:

- In ***Mallory v. Norfolk Southern Railway Co***., a 4-1-4 plurality of the U.S. Supreme Court held that an out-of-state entity may be required to consent to personal jurisdiction in Pennsylvania as a condition to do business in the Commonwealth under Pennsylvania's business registration statute.
- ***Mallory*** is important because it appears to recognize a consent-based test for personal jurisdiction separate and apart from the contacts-based general and specific jurisdictional analysis that has predominated since ***International Shoe***.
- ***Mallory*** is likely to spawn new attempts at litigation tourism in Pennsylvania and elsewhere based on allegations of consent to jurisdiction of far-flung cases otherwise lacking a jurisdictional connection to the forum.
- Justice Alito's concurrence suggests Pennsylvania's business registration statute may still be vulnerable to a dormant Commerce Clause challenge on remand, as five of the justices (Justice Alito and the four dissenters) expressed disapproval of the statute on grounds of interstate federalism—Justice Alito under the dormant Commerce Clause and the four dissenters under the Due Process Clause. That suggests a possibility that plaintiff's victory may be short-lived.

In a 4-1-4 ruling mixing the conservative and liberal wings of the U.S. Supreme Court, Justice Gorsuch announced the Court's plurality opinion in *Mallory v. Norfolk Southern Railway Co*., No. 21-1168, one of the Court's most important personal jurisdiction rulings since *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017). It remains to be seen whether *Mallory* opens a broad new pathway for litigation tourists to claim personal jurisdiction in a forum lacking any contacts with the controversy, or whether it will be a short-lived departure from the prevailing "at home" test of general jurisdiction.

Justice Gorsuch's majority opinion, which was 5-4 with respect to those parts joined by Justice Alito, purports to acknowledge a consent-based rationale for personal jurisdiction separate from the contacts-based framework of general and specific jurisdiction that has dominated analyses of personal jurisdiction since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *Mallory* held that a Pennsylvania state trial court could exercise personal jurisdiction over a non-Pennsylvania company in a suit arising out of non-Pennsylvania conduct. The Court held that Pennsylvania had jurisdiction over the non-resident corporation because it had implicitly consented to personal jurisdiction in Pennsylvania for all matters via Pennsylvania's mandatory business registration statute, which mandates that all companies wishing to do any business in the Commonwealth register to do so. By dint of statutory command, that registration, in turn, subjects the company to any suit in Pennsylvania, regardless of whether the case or the parties have any other Pennsylvania connection. The Court ruled that an entity's accession to Pennsylvania's statutory command amounted to consent to personal jurisdiction and waiver of the right to contest jurisdiction under *Pennsylvania Fire Insurance Company of Philadelphia v. Gold Issue Mining & Milling Co*., 243 U.S. 93 (1917), and *Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

Some observers were surprised by *Mallory*'s result, as it seems to contradict more recent precedent on personal jurisdiction, including the *Bristol-Myers Squibb* case, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), which subject corporations to personal jurisdiction only in forums where (1) they are "at home" (meaning where they are incorporated or have their principal place of business) under general jurisdiction, or (2) they engaged in substantial conduct directly related to the dispute, under specific jurisdiction. Though courts have long held that persons or companies could consent to personal jurisdiction, usually via contract, *Mallory* officially asserts the theory that a state may by statute require out-of-state corporations to consent to personal jurisdiction (for any case) in the state before they may do business there. Justice Gorsuch's opinion, and Justice Jackson's concurrence, further treated this consent analysis as something separate and apart from the contacts-based and conduct-based analysis of general and specific personal jurisdiction under *International Shoe, Bristol-Myers Squibb*, *Daimler*, and *Goodyear*.

Mallory has several notable effects. First, at least in the short term, litigation tourism will likely experience a renaissance in Pennsylvania state courts, which had once been notorious for hosting personal injury litigation with few Pennsylvania connections, though recent changes in the law tempered that trend. Most corporations with sizable interstate operations in the country are registered to do business in Pennsylvania, and plaintiffs may now sue them there for any kind of case.

Second, states interested in opening their courts to litigation with a locus elsewhere may amend their business registration regimes to mimic Pennsylvania's and thereby welcome more litigation tourists. Indeed, several states, including Georgia and Minnesota, have already judicially found registration to do business in the state sufficient to establish personal jurisdiction, and *Mallory* arguably endorses their view.

Third, the status of personal jurisdiction law is now in flux. The *Mallory* majority's reasoning casts doubt on the scope and effect of other recent personal jurisdiction decisions, which held that substantial

business contacts with a forum do not give rise to personal jurisdiction unless the contacts are suit-related or the defendant is "at home" in the state. Justice Barrett noted in her *Mallory* dissent that the majority opinion calls into question the continuing viability of these relatively recent decisions.

Fourth, and perhaps most importantly, Justice Alito's concurrence in part places another substantial constitutional question next in line for decision: does a state statute requiring an out-of-state corporation to consent to personal jurisdiction in the state for all purposes or be denied the right to conduct business in the state offend the "dormant Commerce Clause"? Justice Alito's concurrence suggests the answer is yes, creating the unusual situation where five justices (including Justice Alito) concurred in the outcome of *Mallory*, but five justices (also including Justice Alito) expressed grave reservations about the viability of that outcome from the standpoint of interstate federalism—four on due process grounds (Justice Barrett's dissent) and one on dormant Commerce Clause grounds (Justice Alito's concurrence). This question will be litigated further upon remand to the Pennsylvania Supreme Court and may result in further appeals to the U.S. Supreme Court.

In short, there is an open question post-*Mallory* as to whether this is a true victory and a third rail for litigation tourism going forward, or whether it will be a short-lived pyrrhic victory soon to be relegated on a combination of dormant Commerce Clause and due process grounds.

In *Mallory*, the defendant railroad employed plaintiff for nearly 20 years in Ohio and Virginia, but not Pennsylvania. Plaintiff contracted cancer and blamed the railroad, claiming his on-the-job exposure to alleged carcinogens caused his illness. After being sued in Pennsylvania state court under a federal scheme that allows railroad workers to pursue their employers in court for work-related injuries, the defendant railroad objected on personal jurisdiction grounds, claiming that the Fourteenth Amendment's Due Process clause did not permit it to be sued in Pennsylvania. The company claimed it could only be sued in two places: (1) Virginia, where the defendant was "at home" and also where plaintiff alleged he had been exposed to carcinogens at work, or (2) Ohio, the other place where plaintiff alleged workplace exposure to carcinogens. Plaintiff retorted that Pennsylvania had jurisdiction over the railway on multiple grounds: it had more than 2,000 miles of Pennsylvania track, ran three Pennsylvania locomotive repair shops, and had registered to do business in Pennsylvania, thereby agreeing to appear in Pennsylvania courts on "any cause of action" against it. This last point is most significant because it formed the basis of the Court's ruling.

After the case wound its way through Pennsylvania's lower state courts, the Pennsylvania Supreme Court sided with the railway, finding that, under the U.S. Supreme Court's recent line of jurisdictional case law limiting the forums where corporations could be sued, Pennsylvania's statutory scheme of consent-by-registration violated the defendant's due process rights. The U.S. Supreme Court reversed and remanded.

Ostensibly, the *Mallory* majority based its ruling on the 1917 decision in *Pennsylvania Fire* where the high court found that Missouri state courts could exercise personal jurisdiction over a Pennsylvania insurance company in a lawsuit brought by an Arizona mining company over a fire insurance claim for the mining company's Colorado gold smelter, lost to a lightning strike. Missouri courts were permitted to exercise jurisdiction over the Pennsylvania insurer because it had registered to do business in Missouri under a state statute that required out-of-state companies to appoint an official to accept service of process in Missouri. Because Pennsylvania's statutory scheme operates in a similar manner, the Court held that *Mallory* was governed by *Pennsylvania Fire*.

Contrary to the railway's position, the Court found that *International Shoe*, which looks to a defendant's forum contacts to decide whether exercising personal jurisdiction comports with due process, did not

overrule *Pennsylvania Fire* implicitly or explicitly. The Court noted that the arguments made by the parties in *International Shoe* showed that the forum contacts analysis pioneered in that decision supplemented, but did not replace, the traditional means of exercising jurisdiction over a defendant, either by way of physical presence in the forum or consent to be sued there (via contract or statute). In other words, *International Shoe* was meant to update personal jurisdiction law to meet evolving business realities. Interstate and international commerce had exploded in the late 19th and early 20th centuries with the advent of modern transport and telecommunications technology. As a result, corporations conducted business operations and thus maintained a physical presence in many or most states, and even if a company had not agreed to be sued in a state, its forum conduct could nonetheless subject it to jurisdiction in the forum's courts. According to *Mallory*, in so holding, *International Shoe* was not intended to wipe away more traditional methods of obtaining personal jurisdiction. The much-maligned *Burnham* decision in 1990, upholding so-called "tag" jurisdiction against individuals, proves this concept. The effect of this holding is to place renewed attention on putative "consent" as a potential separate basis to establish personal jurisdiction, distinct from what has become the dominant mode of contacts-based analysis for general or specific jurisdiction under *International Shoe* and its progeny.

Justice Gorsuch and the majority also rejected the railway's argument that it did not really consent to personal jurisdiction in Pennsylvania because it did not state expressly its consent to all-purpose jurisdiction in Pennsylvania. Rather, its consent was inferred from registration and accompanying statutory language in Pennsylvania's business and personal jurisdiction codes that gives registration legal effect. Justice Gorsuch dispatched with this argument, noting jurisdiction is often premised on formalities, giving as examples corporate formation (the basis for "at home" general jurisdiction), tag jurisdiction (premised on a defendant's physical presence, however brief, in the forum), and technical, procedural reasons a defendant might waive a jurisdictional challenge (like counsel's entering a "general" appearance rather than a "special" one). In her concurrence, Justice Jackson expanded on this last point, finding that the railway's Pennsylvania registration constituted a waiver of its personal jurisdiction defense under *Compagnie des Bauxites*.

Though rooted in Missouri's consent-by-registration scheme at issue in *Pennsylvania Fire* and the particulars of the Pennsylvania business registration statute—which for now remains unique to Pennsylvania—the *Mallory* plurality opinion may spawn many attempts by litigation tourists to assert personal jurisdiction based on consent even in the absence of a consent-by-registration scheme, based on a company's substantial business operations in the forum state. Justice Gorsuch's opinion discusses, at length, the railway's non-suit-related forum contacts—Pennsylvania track mileage, employees, repair facilities, and so forth—even going so far as to copy a colorful infographic from the railway's website touting its extensive ties to the "Pennsylvania community." These contacts, as the Court recognizes, did not give rise to plaintiff's cause of action. Nonetheless, when facing a personal jurisdiction challenge from an out-of-state defendant, plaintiffs in other litigation very often have pointed to evidence the defendant maintains a "substantial, continuous, and systematic course of business" in the forum, even if it is not the company's home state and the "systematic" contacts did not give rise to suit. Of late, given the U.S. Supreme Court's decisions in *Bristol-Myers Squibb* and *Daimler*, in which companies marketing and distributing products in every U.S. state were not held to have sufficient contacts with the forum states to exercise specific jurisdiction, lower courts around the country have not given much credence to such arguments. But *Mallory* is likely to resurrect the perceived viability of these arguments if the corporate defendant maintains substantial business operations in the forum, regardless of whether the contacts are suit-related.[1]

[1] Arguably, this portion of the majority opinion is not binding because Justice Alito (the majority's fifth member) did not join in it.

Two members of the five-justice majority, Justice Jackson and Justice Alito, filed full or partial concurrences, with Justice Barrett joined by Chief Justice Roberts and Justices Kagan and Kavanaugh in dissent. Justice Jackson concurred and wrote separately to emphasize the waivable nature of personal jurisdiction—specifically as it applies, in this instance, to an entity knowingly choosing to engage in commerce by registering to do business in a state where such activity includes statutory language alerting the entity to waiver of the right to challenge personal jurisdiction having done so.

Justice Jackson's waiver analysis is superficially straightforward—how could a corporation not know it was submitting to personal jurisdiction when it is explicitly spelled out in the statute? The railway registered to do business in Pennsylvania with full knowledge of the implications of state law, a fact its counsel conceded at argument. Justice Jackson's view, thus, is that due process rights are individual and waivable, and were waived by the railway in this case. But Justice Jackson's concurrence does not go beyond the facial waiver analysis to consider the constitutional consequences for interstate federalism and interstate commerce of states forcing foreign corporations to submit to burdensome litigation in a potentially far-flung venue on claims lacking any connection to the forum state. That problem is the focus of Justice Alito's concurrence and Justice Barrett's dissent.

Justice Alito takes Justice Jackson's waiver analysis to the next logical step, concurring in part and concurring in the judgment remanding the case to the Pennsylvania Supreme Court, but flagging the dormant Commerce Clause challenges as not yet addressed by the Pennsylvania Supreme Court. Notably, the railway raised the dormant Commerce Clause issue in its appeal to the Pennsylvania Supreme Court, but the Pennsylvania Supreme Court did not reference the issue in its decision. Justice Alito states explicitly that the railway nonetheless preserved the issue to raise again on remand.

Setting aside the constitutionality of the Pennsylvania statute for a moment, Justice Alito "*assumes*" (emphasis supplied) the Constitution permits a state to impose such a registration requirement on an out-of-state corporation, before he lays out precisely the argument the railway may raise on remand as to why such a statute is unconstitutional. Namely, he observes that the dormant Commerce Clause prohibits the Pennsylvania statute from imposing a discriminatory or unduly restrictive limitation on interstate commerce. His concurrence acknowledges that the railway consented to all *valid* conditions imposed by state law upon registering, but he telegraphs his position on the constitutionality of the statute. If a state law "is shown to discriminate against interstate commerce 'either on its face or in practical effect'" it is "subject to 'a virtually *per se* rule of invalidity.'"

Justice Alito's remaining analysis tracks much of Justice Jackson's concurrence—emphasizing that a corporation may consent to valid restrictions or consequences as a cost of doing business—while previewing some of the arguments in Justice Barrett's dissent why the jurisdiction-by-registration requirement would effectively upend the Court's entire modern personal jurisdiction jurisprudence. For purposes of *Mallory*, however, the similarity to *Pennsylvania Fire* and the lack of a ripe issue as to the Pennsylvania statute's unconstitutionality informed Justice Alito's analysis, but it also indicates which way he may lean were the proper challenge brought before the Court later. Thus, the peculiar result is a concurrence of five justices in the results of *Mallory*, but also the apparent agreement of five justices that the ultimate outcome of allowing Pennsylvania to require consent to personal jurisdiction as a condition to do business in the Commonwealth is likely repugnant either to the Due Process Clause or the dormant Commerce Clause under principles of interstate federalism.

Finally, taking a more straightforward, practical approach, Justice Barrett's dissent explains how allowing Pennsylvania's registration statute to stand would in effect overturn *Daimler* and *Bristol-Myers Squibb*, and likely subject any major corporation to the type of nationwide jurisdiction those decisions specifically

curtailed. Justice Barrett grounds her analysis not in the dormant Commerce Clause, but in the Due Process Clause and "75 years" of personal jurisdiction jurisprudence, beginning with *International Shoe*. The practical implications of the Court's decision are laid out and not seriously disputed by the majority—a state may require any corporation desiring to do business in that state to consent to personal jurisdiction for any and all purposes, or otherwise run afoul of state regulatory requirements. An incentive created by this result includes that a corporation may violate state regulations and refuse to provide an agent for service of process and suffer the consequences, or subject itself to the burdens of suit in that state no matter how attenuated the underlying matter.

To close, Justice Barrett's dissent points out that courts have routinely held that registration of an agent for service of process is not sufficient to subject a foreign corporation to local jurisdiction in an unrelated suit. She addresses *Pennsylvania Fire*, though her analysis hinges far more on intervening precedent, which (some might argue plainly) contradicts the result in that case, than any distinction between *Mallory* and *Pennsylvania Fire*'s facts.

The (possibly temporary) effect of the *Mallory* decision is to upend decades of U.S. Supreme Court jurisprudence on personal jurisdiction by adding a non-contacts-based consent analysis separate from and alongside the contacts-based general and specific jurisdiction analysis that has prevailed since *International Shoe*. At the same time, the interesting 4-1-4 split of justices along non-typical ideological lines emphasizes just how unusual the decision is and foreshadows how it may turn out. Justice Alito's partial concurrence signals clearly to the railway how to approach remand, but it remains to be seen whether the dormant Commerce Clause will strike down the Pennsylvania statute. Even if it does, personal jurisdiction law is unlikely to revert promptly to its pre-*Mallory* state. At a minimum, litigation tourists now have an alternative mode of analysis they can invoke to assert personal jurisdiction in a chosen forum that lacks jurisdictional contacts with the underlying suit. Defendants should be prepared to assert challenges grounded in both Due Process and the dormant Commerce Clause to turn back such efforts.

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