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Commentary

I Do? *Mallory v. Norfolk Southern Railway Company* and the General Jurisdiction Consent Battle

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A. The Due Process Clause and Personal Jurisdiction

Facing issues worthy of a civil procedure final exam, courts have continued to address the theory that a corporate defendant consents to personal jurisdiction in a state's courts merely by registering to do business in that state. Such cases raise serious issues of Constitutional interpretation.

In the seminal decision *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the United States Supreme Court clarified that the Due Process Clause of the Fourteenth Amendment protects the defendant's liberty interest in not being subject to the binding judgment of a forum with which the defendant has insufficient "contacts, ties, or relations." *Id.* at 319. *International Shoe* made it clear that a tribunal's authority depends upon the defendant's minimum contacts with the forum state such that the maintenance of the suit "does not offend traditional notions of fair play and substantial justice." *Id.* at

316. Focusing on the nature and extent of a corporate defendant's relationship with the forum state led to the recognition of two categories of personal jurisdiction: specific and general. *Ford Motor Co., v. Mont. Eighth Judicial Dist. Court*, 141 S.Ct. 1017, 1024 (2021). The exercise of specific jurisdiction requires an adequate affiliation between the forum state and the underlying case or controversy. *Id.* at 1025. General jurisdiction, when it exists, extends to all claims brought against a foreign corporation in that forum. *Id.* at 1024.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), the Supreme Court explained that a court may only assert general jurisdiction over foreign corporations where "their affiliations with the [forum] State are so 'continuous and systematic' as to render them essentially at home" there. *Id.* at 919. *Daimler AG v. Bauman* later clarified that the general jurisdiction inquiry concerns whether that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." 571 U.S. 117, 139 (2014) (citing *Goodyear*, 564 U.S. at 919). The Court noted, "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* at 139 n.20. After *Goodyear* and *Daimler*, it was recognized that general jurisdiction will usually not obtain in a "forum other than the place of incorporation or principal place of business." E.g., *Monkton Insurance Services, Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014).

B. Consent to General Jurisdiction by Registering to Do Business

Consenting to jurisdiction – voluntarily waiving one’s due process rights – is an independent basis for jurisdiction. See *Brady v. United States*, 397 U.S. 742, 748 (1970) (observing that waivers of constitutional rights must be voluntary, knowing, and intelligent). After the roadblocks of *Daimler*, plaintiffs increasingly argued that corporate defendants had consented to general jurisdiction based on their compliance with a state’s mandatory business registration statute. Virtually every state has some form of business registration law, often covering such things as fictitious names, service of process, and, often, consent to jurisdiction in the state’s courts. Generally, the argument goes, by registering or qualifying to do business in a state or appointing an agent for service of process, a company has expressly or impliedly consented to general jurisdiction.

The contrary view is that it would violate the Due Process Clause to construe a foreign corporation’s compliance with a state’s *mandatory* registration statute as *voluntary* consent. In light of the Supreme Court’s repeated admonishment that due process prohibits a state from claiming general jurisdiction over every corporation doing business within its borders, it logically follows that the Due Process Clause also prohibits a state from forcing every corporation doing business within its borders to consent to general jurisdiction. Only voluntary consent or affiliations within the state that are so continuous and systematic as to render the foreign corporation essentially at home in the state will suffice.

The year 2021 saw several decisions by state supreme courts addressing this issue. In *Chavez v. Bridgestone Ams. Tire Operations, LLC*, Nos. S-1-SC-37489, S-1-SC-37490, S-1-SC-37491, S-1-SC-37536, 2021 N.M. LEXIS 74 (Nov. 15, 2021), the Supreme Court of New Mexico rejected the theory that corporate registration to do business constitutes consent to personal jurisdiction. In contrast, the Supreme Court of Georgia held in *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021), that corporate registration is consent to general jurisdiction, and this does not violate federal due process. In the waning days of the year, the Supreme Court of Pennsylvania addressed the issue in *Mallory v. Norfolk S. Ry. Co.*, No. 3 EAP 2021, 2021 Pa. LEXIS 4318 (Dec. 22, 2021).

C. *Mallory v. Norfolk Southern Railway Company*

A Virginia resident filed an action against Norfolk Southern Railway alleging toxic chemical exposure in Virginia and Ohio. The defendant was incorporated in Virginia and maintained its principal place of business there; however, the plaintiff filed suit in the Philadelphia Court of Common Pleas. The defendant sought dismissal for lack of jurisdiction, as the case did not arise in Pennsylvania and the company was not “at home” in Pennsylvania. Plaintiff asserted that the defendant had consented to personal jurisdiction by registering to do business in Pennsylvania. The trial court dismissed the action for lack of personal jurisdiction, finding the state’s business registration statute unconstitutional to the extent it purported to provide general jurisdiction over registered foreign corporations. The appeal of this decision was ultimately transferred to the state Supreme Court.

In tandem with the business registration statute, Pennsylvania’s long-arm statute 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. 42 Pa.C.S. § 5301(a)(2)(i). In effect, this provision purported to afford Pennsylvania courts general jurisdiction over foreign corporations regardless of whether the corporation was incorporated in the Commonwealth, or had established its principal place of business there, so as to be “at home” in Pennsylvania. Indeed, the mere completion of the act of registering appeared to afford Pennsylvania general jurisdiction over the foreign corporation. *Id.*

On appeal, plaintiff argued that the language of Pennsylvania’s long-arm statute gives express notice that a foreign corporation voluntarily registering to do business in Pennsylvania consents to general jurisdiction. The plaintiff maintained that, therefore, the statute does not coerce involuntary consent. Instead, Pennsylvania merely gives corporations a choice: avail themselves of the privilege of doing business in Pennsylvania by submitting to jurisdiction, or do not conduct business in Pennsylvania. In support, the plaintiff noted that some federal district courts in the Third Circuit have held that registering to do business in Pennsylvania constitutes valid consent after *Daimler*. *Mallory*, 2021 Pa. LEXIS 4318, at *52.

In response, the defendant asserted *Daimler* held that a corporate defendant is “essentially at home” typically only where it incorporates and/or maintains its principal place of business. As a Virginia corporation with its principal place of business in Virginia, the defendant argued that it was not at home in Pennsylvania under *Daimler* merely because it registered to do business there. *Id.* at *31. Moreover, the defendant contended that it did not consent to general jurisdiction just by complying with mandatory registration laws, and any finding to the contrary would violate due process. *Id.* at *29. Because Pennsylvania requires *all* foreign corporations to register, the defendant argued compliance with mandatory registration provisions cannot serve as a voluntary relinquishment of due process rights. *Id.* The defendant alleged that the statutory scheme of forcing either relinquishing due process rights or foregoing the privilege of doing business clearly violated the doctrine of “unconstitutional conditions,” which provides, in essence, that “the government may not deny a benefit to a person because he exercises a constitutional right.” *Id.* at *30 (citing *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013)). The defendant warned that because every state maintains a mandatory corporate registration statute, large corporations with nationwide reach could theoretically be subject to general jurisdiction in all fifty states—a premise, the defendant claimed, that is flatly inconsistent with *Daimler*. *Id.* at *29-30. Finally, the defendant alleged the Commonwealth infringed upon the doctrine of federalism because the Pennsylvania long-arm statute cannot override the sovereignty of the individual states, nor can it alter the Constitution’s deliberate framework of interstate federalism. *Id.* at *32-33. According to the defendant, Pennsylvania reached beyond proper limits by seeking to adjudicate an action involving a Virginia plaintiff, a Virginia defendant, and a cause of action based on events that occurred outside of Pennsylvania. *Id.* at 33.

The state Supreme Court rejected the plaintiff’s argument that registering as a foreign corporation invokes general jurisdiction because it “eviscerates the Supreme Court’s general jurisdiction framework set forth in *Goodyear* and *Daimler* and violates federal due process by failing to comport with *International Shoe*’s traditional conception of fair play and substantial justice.” *Id.* at *30-31 (citing *International Shoe*, 326 U.S. at 320). Moreover, the Court observed, “It would also be 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.* (citing *Daimler*, 571 U.S. at 138). Finally, the Court held, pursuant to the unconstitutional conditions doctrine, a foreign corporation’s registration to do business in Pennsylvania does not constitute a voluntary consent to jurisdiction but, rather, compelled submission to general jurisdiction by legislative command. *Id.* at *59. The statutory scheme of requiring foreign corporations to submit to general jurisdiction as a condition of doing business in the state also runs contrary to the concept of federalism as set forth by the Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). *Id.* at *52.

D. Looking Ahead: Consenting to General Jurisdiction by Registering to Do Business

The U.S. Supreme Court has not yet directly addressed the question whether a state violates due process by requiring a foreign corporation to consent to general jurisdiction to conduct business in the state. Since *Daimler*, a majority of courts have found due process concerns, but state and federal courts across the nation have reached differing results. Indeed, the Pennsylvania Supreme Court in *Mallory* took note of the tension between its decision and the Georgia Supreme Court’s analysis in *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021). There, notwithstanding *Goodyear* and *Daimler*, the Georgia Supreme Court believed itself constrained by the pre-*International Shoe* decision in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93, 96, 37 S. Ct. 344, 345, 61 L. Ed. 610 (1917), which sanctioned an early concept of general corporate jurisdiction by consent. The Georgia court concluded that when a state statute notifies an out-of-state corporation that by registering and appointing an agent for service of process in the state, the corporation has consented to general personal jurisdiction there, and the corporation has not been deprived of the Fourteenth Amendment’s guarantee of due process of law when it is sued in that state.

It would not be surprising to see the Court settle this debate in the near future. Given the Supreme Court’s continued resistance to “litigation tourism” in *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, the attempt by plaintiffs to rely on business registration to establish jurisdiction in their preferred forum remains a crucial battleground. ■

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