

Corporations: Are you voluntarily consenting to general jurisdiction in Pennsylvania?

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In its landmark decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the U.S. Supreme Court limited the places in which a corporation may be subject to general or “all purpose” jurisdiction.

The high court said a corporation is subject to general jurisdiction where it is “essentially at home,” which is generally its state of incorporation and its principal place of business.

Following the Supreme Court’s decision, plaintiffs have advanced various legal theories in an attempt to obtain general jurisdiction over corporations in states where those corporations are not “at home.”

Some plaintiffs have claimed that foreign corporations (i.e., those incorporated in another state or country) are subject to general jurisdiction in all states in which they are registered to do business.

Every state has a business registration statute, which generally requires foreign corporations and other entities that “do business” in the state to register, designate an agent for service of process and comply with other state-specific obligations.

Pennsylvania is unique insofar as it is the only state whose jurisdictional long-arm statute explicitly informs foreign corporations that registering to do business “shall constitute a sufficient basis of jurisdiction to enable the tribunals of this commonwealth to exercise general personal jurisdiction.” 42 Pa. Cons. Stat. Ann. § 5301(a).

Although defendants have argued that the exercise of general jurisdiction based on compliance with state business registration statutes does not comport with minimum guarantees of due process post-*Daimler*, courts have reached differing conclusions, and the law is currently in flux.

Unless the U.S. Supreme Court resolves this conflict, companies are at risk of being subject to general jurisdiction in each state where they register to do business.

To minimize this risk, companies should evaluate whether they are registered in states where they are not obligated to do so. Many states only require registration if a foreign company engages in activities that meet a statutory definition of “doing business.”

Companies whose activities in a particular state do not meet the criteria should consider withdrawing their registration, and not registering in states where they are not required.

Ensuring that a corporation is only registered in the states where it is obligated to do so will minimize the possibility that it will be forced to defend itself in a lawsuit filed in a state where it is not “at home” and has no connection to the dispute.

Pennsylvania federal court rejects due process challenge to general jurisdiction based on compliance with Pennsylvania’s business registration statute

In September 2016 the U.S. District Court for the Eastern District of Pennsylvania rejected a Delaware corporation’s challenge against the court’s exercise of general jurisdiction, after finding that the corporation complied with Pennsylvania’s business registration statute. *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648 (E.D. Pa. 2016).¹

In *Bors* the administrator of the estate of Maureen Milliken sued Johnson & Johnson and Imerys Talc America Inc., alleging that Milliken developed ovarian cancer and died from using baby powder manufactured by Johnson & Johnson and purchased in Pennsylvania.

Imerys, a Delaware corporation, moved to dismiss based on lack of personal jurisdiction and argued that dismissal was warranted because it was not subject to general jurisdiction in Pennsylvania.

The plaintiff alleged personal jurisdiction over Imerys solely based on the company’s registration to do business. The plaintiff also admitted that Imerys’ only connection with Pennsylvania stemmed from its 2007 registration as a foreign corporation in the state.²

At that time, Pennsylvania law under 42 Pa. Cons. Stat. Ann. § 5301 informed foreign corporations that registering to do business would subject them to general personal jurisdiction, by stating that:

The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person ...

(2) Corporations

(i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

Imerys argued that “constructive consent to personal jurisdiction in Pennsylvania after simply registering as a foreign corporation in the Commonwealth runs afoul of the due process guaranteed under the 14th Amendment following ... *Daimler*.” In support of this argument, Imerys cited multiple cases from other courts rejecting “jurisdiction by consent” post-*Daimler*.³

The District Court rejected this argument and held that “Imerys’ compliance with Pennsylvania’s registration statute amounted to consent to personal jurisdiction.”

The court began its analysis by explaining that “[c]ourts can find personal jurisdiction in three ways: consent to general jurisdiction, general jurisdiction, or specific jurisdiction.”

The court explained the rationale for jurisdiction by consent:

Personal jurisdiction may be established through a party’s expressed or implied consent. One way a party can consent to jurisdiction is through “state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures.” The law of the state determines whether a corporation consents to the personal jurisdiction of the courts.

The *Bors* court said the cases Imerys cited were “not persuasive” because they did not apply Pennsylvania’s specific registration statute and also did not analyze statutes that specifically place foreign corporations on notice about personal jurisdiction.

Rather, the District Court relied on a decision from the 3rd U.S. Circuit Court of Appeals that “confirmed over 25 years ago [that] companies with no business ties or contacts in Pennsylvania but who choose to register as a foreign corporation in Pennsylvania consent to this court’s exercise of personal jurisdiction over them.”⁴

The District Court held that the Supreme Court’s ruling in *Daimler* “does not eliminate consent to general personal jurisdiction over a corporation registered to do business in Pennsylvania.”

The court distinguished *Daimler* by explaining that “when, as here, a foreign corporation registers to do business under the Pennsylvania corporate statute specifically advising the registrant of its consent to personal jurisdiction through registration, ... general and specific jurisdiction principles applying to non-consensual personal jurisdiction do not apply.”

The court therefore concluded that *Daimler* did not impair a plaintiff’s ability to establish general jurisdiction based on consent. Consent remains a valid form of establishing personal jurisdiction under the Pennsylvania registration statute after *Daimler*. The Supreme Court did not eliminate consent. Parties can agree to waive challenges

to personal jurisdiction by agreements in forum selection clauses or, as here, by registering to do business under a statute which specifically advises the registrant of its consent by registration. We do not see a distinction between enforcing a forum selection clause waiving challenges to personal jurisdiction and enforcing a corporation’s choice to do business in the Commonwealth. Imerys does not, and cannot, claim prejudice from its known choice to register in Pennsylvania.⁵

Under the decision in *Bors*, a foreign company’s “compliance with Pennsylvania’s registration statute amount[s] to consent to personal jurisdiction.” Thus, a foreign company that registers to do business in Pennsylvania may be subject to general or “all purpose” jurisdiction for cases with no connection to the company’s acts, if any, in Pennsylvania.

Pennsylvania’s business registration statute: Only corporations that ‘do business’ in the commonwealth must register

Under Pennsylvania’s business registration statute, a foreign filing association or foreign limited liability partnership may not do business in the Commonwealth until it registers with the Pennsylvania State Department.⁶

The statute identifies numerous activities that do not constitute “doing business” for purposes of Pennsylvania’s business registration statute:

Activities of a foreign filing association or foreign limited liability partnership that do not constitute doing business in this commonwealth under this chapter shall include the following:

- (1) Maintaining, defending, mediating, arbitrating or settling an action or proceeding.
- (2) Carrying on any activity concerning its internal affairs, including holding meetings of its interest holders or governors.
- (3) Maintaining accounts in financial institutions.
- (4) Maintaining offices or agencies for the transfer, exchange and registration of securities of the association or maintaining trustees or depositories with respect to the securities.
- (5) Selling through independent contractors.
- (6) Soliciting or obtaining orders by any means if the orders require acceptance outside of [the] commonwealth before the orders become contracts.
- (7) Creating or acquiring indebtedness, mortgages or security interests in property.
- (8) Securing or collecting debts or enforcing mortgages or security interests in property securing the debts and holding, protecting or maintaining property so acquired.
- (9) Conducting an isolated transaction that is not in the course of similar transactions.

(10) Owning, without more, property.

(11) Doing business in interstate or foreign commerce.⁷

The statute further says that “[b]eing an interest holder or governor of a foreign association that does business in [the] commonwealth shall not by itself constitute doing business in [the] commonwealth.” 15 Pa. Cons. Stat. Ann. § 403(b).

The legislative committee comments for this section explain that the list of activities mentioned in subsection (a) is not exhaustive and also explain that the section is not meant to be read as an inclusive definition of what constitutes doing business in Pennsylvania.⁸

The Pennsylvania Supreme Court has likewise confirmed that state law “does not provide a definition of ‘doing business.’” According to the court, “[i]t is well-established that the test for whether a corporation is ‘doing business’ in [the] commonwealth is a question of fact, to be resolved on a case-by-case basis.” *Am. Hous. Trust III v. Jones*, 696 A.2d 1181, 1184 (Pa. 1997).

If a foreign corporation fails to register in Pennsylvania, the sole penalty is that it “may not maintain an action or proceeding in [the] commonwealth unless it is registered to do business under [the business registration statute].” 15 Pa. Cons. Stat. Ann. § 411(b).

The statute’s committee comments explain that the law was designed to persuade foreign associations to register, without imposing “harsh or erratic sanctions.”

“Often the failure to register is a result of inadvertence or bona fide disagreement as to the scope of 15 Pa. Cons. Stat. Ann. § 403 which is necessarily imprecise; and the imposition of harsh sanctions in those situations is inappropriate.” 15 Pa. Cons. Stat. Ann. § 411, Committee Comment — 2014.

The comments add, however, that closing Pennsylvania courts to suits filed by unregistered foreign entities is not a punitive sanction, since foreign corporations may still enforce their contracts by registering. 15 Pa. Cons. Stat. Ann. § 411, Committee Comment — 2014; *see also, e.g., Step Plan Servs. Inc. v. Koresko*, 12 A.3d 401, 418 (Pa. Super. Ct. 2010) (“Under Pennsylvania law, compliance with the registration statute during the course of the lawsuit is sufficient to entitle a foreign corporation to continue its prosecution of that lawsuit.”).⁹

Moreover, Pennsylvania’s business registration statute specifically protects foreign entities that fail to register from other, more draconian penalties. *See generally* 15 Pa. Cons. Stat. Ann. § 411(c), (d).

For example, failing to register “does not impair the validity of a contract or act of the foreign [entity] or preclude it from defending an action or proceeding in [the] commonwealth.” 15 Pa. Cons. Stat. Ann. § 411(c).

Failing to register also does not cause a foreign corporation or business entity to waive any “limitation on the liability of an interest holder or governor.” 15 Pa. Cons. Stat. Ann. § 411(d).

Foreign corporations should therefore consider whether their activities in Pennsylvania require them to register to

do business in the state, with an understanding that the definition of “doing business” in Pennsylvania “is necessarily imprecise,” and there may be a “bona fide disagreement” about the scope of the definition. 15 Pa. Cons. Stat. Ann. § 411, Committee Comment — 2014.

If a corporation’s activities in Pennsylvania do not require it to register, then the corporation should not register with the Pennsylvania State Department or should consider withdrawing any previously filed registration.

Under Pennsylvania law, a foreign corporation derives no benefits from registering to do business if it is not obligated to do so, but the risk of being subject to general jurisdiction in Pennsylvania as a consequence of registration cannot be overstated.

Conclusion

Although foreign corporations may not be able to avoid being subject to general or “all purpose” jurisdiction based on the mere fact that they registered to do business in Pennsylvania under *Bors*, corporations should carefully evaluate whether they are unnecessarily registered to do business in Pennsylvania or other jurisdictions.

After undertaking this analysis, corporations should consider withdrawing their registrations in any jurisdictions in which their activities do not require them to register and only register to do business in the states in which they are legally obligated to do so.

Taking these steps will minimize the risk that a corporation will be forced to defend itself in a lawsuit filed in a state where it is not “at home” and that has no connection to the dispute.

NOTES

¹ The only other federal court in Pennsylvania to consider this issue after *Daimler* concluded that it “need not resolve the split-in-authority” because of prior precedent from the U.S. District Court for the Western District of Pennsylvania in which the court held that “consent by registration was only viable where the events underlying the lawsuit took place during the period of registration.” *George v. A.W. Chesterton Co.*, No. 16-115, 2016 WL 4945331, at *2 (W.D. Pa. Sept. 16, 2016) (citing *In re Enterprise Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 735 F. Supp. 2d 277, 310 (W.D. Pa. 2010)). In *George*, the plaintiff claimed that her deceased husband was exposed to asbestos in the defendant’s products when he was in the military from 1955 to 1961, but the defendant had only “been registered to do business in Pennsylvania from 1996 through the present.” The court granted the defendant’s motion to dismiss for lack of personal jurisdiction and explained that “[a]ssuming, without deciding, that consent-by-registration remains viable post-*Daimler*, [the defendant’s] registration to do business in Pennsylvania occurred decades after the alleged injury, and it provides no basis for exercising jurisdiction.”

² The court explained that it was undisputed that Imerys lacked any connection to Pennsylvania — other than registering to do business — that would allow courts to exercise general jurisdiction. *Bors*, 208 F. Supp. 3d at 651 (“Imerys is a Delaware corporation with its principal place of business in California. Imerys does not own, possess, or lease property in Pennsylvania. It does not have an address, phone number, or bank account in Pennsylvania, and does not sell talc in Pennsylvania for baby powder or ship or distribute talc in Pennsylvania for baby powder. The commercial transactions between Imerys and Johnson & Johnson did not occur in Pennsylvania.”).

³ *See Bors*, 208 F. Supp. 3d at 653, n. 17 (citing three cases: “*Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016) (holding interpreting

registration statute as corporate consent to general jurisdiction is limited by federal due process rights); *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015) ('being registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of corporation or its principal place of business'); *Astrazeneca AB v. Mylan Pharms. Inc.*, 72 F. Supp. 3d 549, 556 (D. Del. 2014) (holding compliance with registration statutes that are mandatory for doing business in the state cannot constitute consent to jurisdiction following *Daimler*⁴). More recently, two state supreme courts declined to reach the issue of whether their respective state business registration statutes provide a basis for asserting general jurisdiction over foreign corporations. See *Barrett v. Union Pac. R.R. Co.*, 361 Or. 115, n.19 (Or. 2017) ("We accordingly do not decide in this case whether Oregon's statute purports to confer personal jurisdiction over out-of-state defendants; whether, if it does, it purports to confer jurisdiction only over claims that arise out of a corporation's activities within this state; or whether, if it purports to confer general jurisdiction, Oregon could do so consistently with the federal constitution."); *State ex rel. Norfolk S. Ry. Co., v. Dolan*, 512 S.W.3d 41, 52 (Mo. 2017) ("Similarly, here, this court finds there is no need to determine whether Missouri's registration statutes constitutionally could condition doing business in Missouri on consent to general jurisdiction. ... The plain language of Missouri's registration statutes does not mention consent to personal jurisdiction for unrelated claims, nor does it purport to provide an independent basis for jurisdiction over foreign corporations that register in Missouri.").

⁴ See *Bors*, 208 F. Supp. 3d at 652, n.13 (citing two cases: "*Bane*, 925 F.2d at 640 (3d Cir. 1991) (concluding a foreign corporation consents to be sued in Pennsylvania courts after registering to do business in Pennsylvania). See also *RX Returns Inc. v. PDI Enters. Inc.*, No. 97-cv-1855, 1997 WL 330360, at *2 (E.D. Pa. June 6, 1997) (recognizing the 3rd Circuit 'flatly held that when a foreign corporation registers to do business in Pennsylvania, a court may constitutionally exercise jurisdiction over that defendant pursuant to 42 Pa. Cons. Stat. Ann. § 5301(a)(2)(i)').").

⁵ Another judge in the Eastern District of Pennsylvania concluded that the district court lacked general jurisdiction over entities who owned and operated a hotel in Puerto Rico even though the plaintiff "[a]ttached to her response in opposition to defendants' motion to dismiss ... documents purporting to show that defendants are registered to do business in the state of Pennsylvania." *Spear v. Marriott Hotel Servs. Inc.*, No. 15-cv-6447, 2016 WL 194071, at *1 (E.D. Pa. Jan. 15, 2016). The court explained that the plaintiff "relies solely on the fact that defendants are registered to do business and, as she says, operate [in] Pennsylvania" in her attempt to establish general jurisdiction. The court found these links to Pennsylvania inadequate and held that "[a]pplying the considerations of *Daimler* ..., the mere allegation that defendants operate in the state does not render defendants 'at home' in Pennsylvania and subject it [sic] to general jurisdiction here." Notably, it does not appear that the plaintiff in *Spear* argued that a foreign corporation's registration to do business in Pennsylvania acts as consent to general jurisdiction.

⁶ 15 Pa. Cons. Stat. Ann. § 411(a). "Association" is defined as "[a] corporation, for profit or not-for-profit, a partnership, a limited liability company, a business or statutory trust, an entity or two or more persons associated in a common enterprise or undertaking." 15 Pa. Cons. Stat. Ann. § 102.

⁷ 15 Pa. Cons. Stat. Ann. § 403(a). The 2014 committee comments to Section 403 provide detailed guidance on whether certain activities related to those listed in this section may constitute doing business in Pennsylvania. See 15 Pa. Cons. Stat. Ann. § 403, Committee Comment — 2014.

⁸ 15 Pa. Cons. Stat. Ann. § 403, Committee Comment — 2014. The committee comments explain that a business may be required to register in Pennsylvania if its conduct is "more regular, systematic, or extensive than that described in subsection (a)" of Section 403. Conduct that may constitute doing business in Pennsylvania and require registration "includes maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general purposes. But the passive owning of real estate for investment purposes does not constitute doing business."

⁹ Although a foreign corporation that failed to register before filing a lawsuit may avoid dismissal by registering while the case is pending, the Pennsylvania Superior Court has held that a plaintiff cannot wait until after trial to register. See *Drake Mfg. Co. v. Polyflow Inc.*, 109 A.3d 250, 254-56 (Pa. Super. Ct. 2015) (reversing trial court and remanding for entry of judgment in favor of defendant because plaintiff did not file application to register to do business until day of trial and did not file "certificate of authority to do business in Pennsylvania as a foreign corporation" with the trial court until almost two months after trial and in response to the defendant's post-trial motions).

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