

### Justices' Jurisdiction Ruling Could Increase Business Liability

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"Can we be sued for that?" In all likelihood, this is the most frequent question corporate clients ask their lawyers. But a slightly different inquiry, of perhaps equal importance, is not far behind: "Where can we be sued for that?"

Depending on the outcome of a new U.S. Supreme Court case, the answer to this question could become much more complicated for businesses everywhere. On April 26, the court agreed to hear a case that could create a seismic shift in business litigation across the country.

In no uncertain terms, the case's outcome has the potential to subject companies to personal jurisdiction in any state where they are merely registered to do business, provided the state's long-arm statute confers jurisdiction by registration.

The case at issue is *Mallory v. Norfolk Southern Railway Company*. In 2017, Robert Mallory – a Virginia resident – filed suit in the Philadelphia County Court of Common Pleas. Mallory alleges Norfolk – a Virginia corporation whose principal office is also in Virginia – is liable for colon cancer Mallory developed after decades of work for Norfolk in Virginia and Ohio.

In short, neither the plaintiff nor the defendant's corporate home was located in Pennsylvania. And the plaintiff's alleged injuries did not occur in Pennsylvania to afford specific personal jurisdiction. So why are we in Pennsylvania?

Enter Pennsylvania's long-arm statute, which provides as follows:

(a) General rule. –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, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative: ...

(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.

Mallory argued that a literal reading of Pennsylvania's long-arm statute dictates that, by merely registering to do business in Pennsylvania, Norfolk subjected itself to general personal jurisdiction in the state. Norfolk immediately filed preliminary objections to jurisdiction, requesting the matter be dismissed.

The trial court sustained Norfolk's jurisdictional objection, and Mallory appealed to the Pennsylvania Supreme Court. On appeal, the high court affirmed the trial court's ruling.

In so doing, the Pennsylvania Supreme Court held that the state's long-arm statute violates the due process clause of the Fourteenth Amendment to the U.S. Constitution. Specifically, the court reasoned, the long-arm statute is unconstitutional because "it allows for general jurisdiction over foreign corporations, absent affiliations within the state that are so continuous and systematic as to render the foreign corporation essentially at home in Pennsylvania."

The court also concluded that the statute's mandatory business registration requirement – prohibiting out-of-state companies from doing business in the state until they register – negated any argument that Norfolk voluntarily consented to jurisdiction in Pennsylvania.

Mallory immediately appealed to the U.S. Supreme Court, and on April 25 of this year, it agreed to hear the case. In the petition for certiorari, Mallory argues that the Pennsylvania Supreme Court erred when it "improperly imported principles of personal jurisdiction based on non-consenting defendant's contacts with a forum state into the analysis of personal jurisdiction over a consenting defendant."

Mallory's point is that if a state has a long-arm statute that confers jurisdiction on companies who choose to register, the very act of registration is, in fact, a consent to general jurisdiction.

For well over 75 years, the question of general jurisdiction has focused on meaningful contacts and ties to the putative forum state.[1] In the past decade, the Supreme Court has twice prominently refined the test, and raised the bar for what contacts may satisfy the courts' exercise of general jurisdiction over a defendant entity – specifically, in 2011's *Goodyear Dunlop Tires Operations SA v. Brown*,[2] and in 2014's *Daimler AG v. Bauman*. [3]

As a brief refresher, general personal jurisdiction arises over a foreign corporation when the company's business operations within a state are so substantial and of such a nature as to justify suit against it on causes of action arising from matters distinct from its operations. Accordingly, if a defendant is subject to general jurisdiction in a particular state, it means the individual or entity may be sued in that state for any claim – regardless of the nature and location of the underlying acts.

In contrast, specific jurisdiction covers a narrower class of claims, and comes from a defendant's specific acts – or a single act – directed at or within the forum state, which a plaintiff's claims must arise out of or relate to.

In the wake of *Goodyear* and *Daimler*, asserting general jurisdiction over a defendant is proper only if the defendant's affiliation and contacts with the state "are so continuous and systematic as to render [the defendant] essentially at home" there. [4] Some argue that this more conservative Supreme Court is less likely to erode these well-established corporate protections.

Against that backdrop, one might opine that Mallory's chances on appeal are relatively slim. But there are signs that the outcome in Mallory is far from certain.

One such clue emanates from Justice Neil Gorsuch's own words in a 2021 case, *Ford Motor Co. v. Montana Eighth Judicial District Court*. In *Ford*, a unified high court held the Detroit automaker was subject to specific personal jurisdiction in Montana and Minnesota based on accidents involving cars initially manufactured and sold in other states.

In opposing specific jurisdiction in Montana and Minnesota, Ford argued that due process required a causal link to the underlying suit — and that because Ford neither designed, manufactured nor sold the cars at issue in Minnesota or Montana, jurisdiction was improper. The court unanimously disagreed, noting that demonstrating specific jurisdiction is not a causation-only analysis. Writing for the court, Justice Elena Kagan stated:

Ford's causation-only approach finds no support in this Court's requirement of a "connection" between a plaintiff's suit and a defendant's activities. The most common formulation of that rule demands that the suit arise out of or relate to the defendant's contacts with the forum. The second half of that formulation, following the word "or," extends beyond causality. So the inquiry is not over if a causal test would put jurisdiction elsewhere. Another State's courts may yet have jurisdiction, because of a non-causal affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence involving the defendant that takes place within the State's borders.

Justice Gorsuch's concurrence — joined by Justice Clarence Thomas — may provide some insight into the possible outcome of *Mallory*. In particular, Justice Gorsuch seemed troubled by the massive expansion of global corporations' reach, on the one hand, with antiquated notions of what facts give rise to jurisdiction, on the other.

Even today, this Court usually considers corporations "at home" and thus subject to general jurisdiction in only one or two States. All in a world where global conglomerates boast of their many "headquarters." The Court has issued these restrictive rulings, too, even though individual defendants remain subject to the old "tag" rule, allowing them to be sued on any claim anywhere they can be found. Nearly 80 years removed from *International Shoe*, it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why.

Thus, even the court's more conservative members have expressed reservations about the viability of certain corporate-centered jurisdictional protections that have been enshrined in decades of jurisprudence. The net result is that *Mallory*'s outcome is uncertain. And a liberal-versus-conservative analysis may be unhelpful when attempting to read the tea leaves.

If the high court sides with Norfolk and affirms the Pennsylvania Supreme Court's ruling, business is likely to continue as usual. Most states do not have statutes that confer mandatory jurisdiction via registration to do business, and the ability of plaintiffs to forum-shop will be further limited.

Additionally, a ruling in favor of Norfolk would give ammunition to defendants seeking to oppose general jurisdiction in states where they have registered to do business and, in fact, do business. In short, a Norfolk victory would solidify or enhance corporate protections from forum-shopping plaintiffs.

But if the court sides with *Mallory*, the implications cannot be understated. Some states — including Nebraska, Pennsylvania and Georgia — currently have laws stating that companies consent to general jurisdiction in the state by registering to do business there.

Further, many other states have simply not addressed the issue directly. If the court holds that mere registration can equal consent to general jurisdiction, the ability of plaintiffs to forum-shop will be enhanced in a previously unfathomable way. And it could require businesses to conduct a full-scale review of their litigation risks in conjunction with their corporate structure.

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[1] Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. and Placement, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

[2] Goodyear Dunlop Tires Operations SA v. Brown, 564 U.S. 915, 920, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011).

[3] Daimler AG v. Bauman., 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

[4] Id. at 127 (citations and quotations omitted). As noted above, this is a separate question from specific jurisdiction, whereby a defendant company's in-state activities – even a single act – may give rise to jurisdiction for purposes of the particular liabilities a plaintiff sues upon. Id.

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