

Litigation Alert: A Company May Be Sued In A State Merely By Registering To Do Business There

08.10.2023 By [Dasha Chestukhin](#)



In [Mallory v. Norfolk Southern Railway Co.](#), the U.S. Supreme Court held that registering to do business in a state can result in a company being brought into court there on all claims, even ones that have nothing to do with that state or its residents.

Companies that need to register in a state outside the one(s) where they are incorporated or headquartered should familiarize themselves not only with that state's registration statute but also any judicial decisions interpreting it. For companies that have already registered in such states they should recognize they may have agreed to more than they realized.

Facts

Norfolk Southern is a railway company incorporated and headquartered in Virginia. Robert Mallory worked for Norfolk Southern for 20 years, first in Ohio, then Virginia. After leaving the company, Mallory moved to Pennsylvania for a time before returning to Virginia. Following a cancer diagnosis that he attributed to his work for Norfolk Southern, Mallory (still residing in Virginia) sued Norfolk Southern in Pennsylvania.

Pennsylvania has a statute providing that foreign (out-of-state) companies may not do business in Pennsylvania until they register with the Department of State. Pennsylvania law also provides that its courts may exercise general jurisdiction over registered foreign companies—that is, such companies can be sued in Pennsylvania courts on any claim, even one that has no connection to Pennsylvania.

Norfolk Southern moved to dismiss Mallory's suit on constitutional grounds, arguing that a Pennsylvania court's exercise of personal jurisdiction over Norfolk Southern (neither incorporated nor headquartered in Pennsylvania) in connection with a claim that did not accrue there would violate the Due Process Clause of the U.S. Constitution. Crucially, Norfolk Southern

had been registered to do business in Pennsylvania for over 15 years when Mallory commenced its action.

Pennsylvania's Supreme Court sided with Norfolk Southern, concluding that Pennsylvania's consent-by-registration clause was unconstitutional.

Mallory then convinced the U.S. Supreme Court to hear the case.

The Majority Holds Norfolk Southern Subject to General Jurisdiction in Pennsylvania

In *Mallory*, a partially split coalition of conservative and liberal justices held that a state can require any foreign (out-of-state) company that registers to do business there to consent to be sued in that state's courts on *any* claim. Specifically, the majority held that corporate registration to do business can be conditioned on a company's consent to general jurisdiction in that state's courts without offending the U.S. Constitution's Due Process Clause.

The majority's decision was relatively narrow and controlled by a 100-year-old Supreme Court decision, which held that an out-of-state defendant could consent to general jurisdiction in another state merely by registering to do business there. *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U. S. 93 (1917). The Court pointed out that, in the 19th century, many states adopted consent-by-corporate-registration statutes with varying kinds and degrees of consent.

Analogously, when Norfolk Southern registered to do business in Pennsylvania and established an office there for service of process, it agreed to be subject to general jurisdiction in Pennsylvania. Because Norfolk Southern had consented to general jurisdiction, its level of contacts with Pennsylvania were irrelevant and *Pennsylvania Fire* meant it could be sued there on any claim.

The Plurality Explains Why *International Shoe* Is Irrelevant

A plurality made up of Justices Gorsuch, Thomas, Sotomayor and Jackson elaborated that the Supreme Court's 1945 decision in *International Shoe Co. v. Washington*, 326 U. S. 310 (1945) and its progeny (including the Supreme Court's jurisdictional decisions in the past 75 or so years), with their emphasis on "minimum contacts" and "fair play," were inapplicable. These decisions dealt with defendants that had *not* consented to general jurisdiction, thus they merely provided an *additional* basis to exercise jurisdiction.

Justice Jackson Concurs Based on a Waiver Theory

Justice Jackson wrote a separate concurrence expressing her belief that the Due Process Clause was not violated because, by registering to do business, Norfolk Southern waived its rights to object to jurisdiction in Pennsylvania on due process grounds. A defendant can waive such rights by signing an agreement consenting to litigate in a particular forum, by failing to follow certain procedural rules or by agreeing to register in a given state to reap some benefit from it.

Justice Alito Concurs with the Decision But Frames Another Possible Constitutional Challenge

Justice Alito wrote a partial concurrence, agreeing that the Due Process Clause did not prohibit the exercise of general jurisdiction over Norfolk Southern based on Pennsylvania's consent-by-

registration statute. However, he posited that the statute may be unconstitutional under the dormant Commerce Clause, which prohibits state laws that unduly restrict interstate commerce.

The Dissent

Justice Coney-Barrett, joined by Justices Roberts, Kagan and Kavanaugh, wrote a spirited dissent. The Court's decision, they argued, eviscerates post-*International Shoe* jurisprudence, which had uniformly held that a state court could not assert general jurisdiction over out-of-state defendants merely because they do business there. Now, however, a state can get around this stricture by conditioning companies' registration to do business upon their consent to general jurisdiction.

The dissent raised a slew of other issues with the majority's (or, in many cases, the plurality's) holding. By passing a law that manufactures "consent" to general jurisdiction by registering to do business, a state is circumventing the constitutional limits of the Due Process Clause. Moreover, such a registration is unreasonable and intrudes on the rights of other states. Consent to *general* jurisdiction by registration was not favored at the time that the Fourteenth Amendment was adopted in 1868, so the Court's decision is not firmly approved by tradition. In any event, the Supreme Court had previously abandoned even "ancient" bases of jurisdiction based on their incompatibility with *International Shoe*.

What Happens Next?

Mallory's holding was limited to Pennsylvania's statute, which provides, on its face, that registration is sufficient for general jurisdiction. The parties conceded that it is the only state with such a statute. However, as the dissent pointed out, any state could enact such a statute now that it has been deemed constitutional.

This decision's repercussions may be wider even if other states do not follow Pennsylvania by adopting express consent-by-registration statutes. Specifically, even if a state statute's express terms do not predicate registration on jurisdictional consent, it may have this effect if that state's highest court has interpreted the statute that way. For example, Georgia's registration statute does not explicitly condition registration on consent to general jurisdiction, but, in 2021, Georgia's highest court interpreted the statute as having such a condition.

Other state courts (including New York and Delaware) have historically interpreted their state's registration statutes as requiring consent to registration, even where the statutes themselves did not expressly include such a provision. The viability of this approach was questioned after the Supreme Court's 2014 decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), in which the Supreme Court held that a company must be "at home" in a state to be subject to general jurisdiction there. For example, appellate courts in both New York and Delaware rejected their own states' historical interpretations as prohibited by *Daimler*. Now that *Mallory* has made clear that *Daimler* is no bar to consent by registration, some plaintiffs will surely urge a return to pre-*Daimler* reasoning even in states that had previously abandoned it.

One potential way around *Mallory's* holding is the argument that consent-by-registration statutes violate the Constitution's dormant Commerce Clause, as suggested in Justice Alito's concurrence. Pennsylvania's law, Justice Alito reasoned, both places an undue burden on interstate commerce by requiring foreign companies to defend themselves against all claims (including those with no forum connection) as well as discriminates against foreign companies by exposing them to suits to which Pennsylvania companies are not reciprocally subject in other states. Whether such arguments will carry the day remains to be seen.

Author's Note:

The Supreme Court's jurisdictional jurisprudence for over 70 years has focused on a defendant's contacts with a state in assessing whether, and to what extent, that defendant could be sued in its courts. Whether *Mallory* radically guts that precedent or merely acknowledges a time-honored jurisdictional basis depends on which four (or, in part, five) justices you ask.

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