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Commercial Disputes Alert

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Personal jurisdiction examined in *Mallory v. Norfolk Southern Railway Co.*—Did SCOTUS go off the rails?

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Supreme Court upholds Pennsylvania law providing that companies registered to do business in Pennsylvania agree to be sued in the Commonwealth.



What's the Impact?

- / The Court's holding may prompt other states to enact similar laws to try to broaden personal jurisdiction over companies that register to do business in their state.
- / Further litigation is likely on this issue including whether this and similar laws violate the Dormant Commerce Clause.

On June 27, 2023, in *Mallory v. Norfolk Southern Railway Co.*, No. 21-1168, 2023 WL 4187749, 600 U.S. ____ (June 27, 2023), an unlikely alliance of five Justices of the United States Supreme Court agreed that a Pennsylvania law requiring foreign corporations (those not headquartered or

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incorporated in the Commonwealth) to agree to be subject to any suit in its courts does not violate the Fourteenth Amendment's Due Process Clause.

Background

Robert Mallory, a former freight-car mechanic employed by Norfolk Southern Railway Co. ("Norfolk Southern"), sued Norfolk Southern under a federal workers' compensation statute, claiming that exposure to carcinogens during his employment caused his subsequent cancer. Mr. Mallory had worked for Norfolk Southern for almost twenty years in Ohio and Virginia (but not Pennsylvania). While he had previously lived in Pennsylvania, Mr. Mallory was a Virginia resident when he initiated his lawsuit in Pennsylvania state court. Norfolk Southern was a Virginia corporation with its corporate headquarters there but registered to do business in Pennsylvania. Pennsylvania law requires foreign corporations that register to do business in the Commonwealth to agree to appear in its courts on "any cause of action" against them. See 42 Pa. Cons. Stat. § 5301(a)(2)(i),(b). Norfolk Southern moved to dismiss the lawsuit, arguing that the exercise of personal jurisdiction by the Pennsylvania court under this provision violated due process. Mr. Mallory responded that, along with Norfolk Southern's "regular, systemic [and] extensive" operations in the Commonwealth, Norfolk Southern's registration there constituted the company's consent to personal jurisdiction. *Mallory v. Norfolk S. Ry. Co.*, No. 21-1168, slip op. at 3 (U.S. June 27, 2023) (quoting *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 562 (Pa. 2021)). The Pennsylvania Supreme Court sided with Norfolk Southern, finding that the Pennsylvania law violates the Due Process Clause, even though a recent decision from the Georgia Supreme Court had rejected a similar due process challenge from a corporate defendant. See *Mallory*, 266 A.3d at 547, 560 n.13.

The Supreme Court's Decision

The U.S. Supreme Court reversed and held that the century-old decision of *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917) was controlling precedent. *Mallory*, slip op. at 10. There, the Supreme Court held that an analogous Missouri statute did not deny a defendant due process. *Pa. Fire Ins. Co.*, 243 U.S. at 95.

Justice Gorsuch's opinion (joined by Justices Thomas, Sotomayor, and Jackson, with Justice Jackson concurring in the result) held that *Pennsylvania Fire* remained good law, and the Pennsylvania law and the facts of this case fell within the scope of the rule of *Pennsylvania Fire*. *Mallory*, slip op. at 10. The Court said that while *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) created specific personal jurisdiction (for suits that arise out of or relate to a corporate defendant's activities in the forum state) and general jurisdiction (allowing any suit against a company in those states where it is incorporated or has its principal place of business), *Pennsylvania Fire* validated yet another basis for exercising personal jurisdiction: where out-of-state corporations consent to suit in the forum state in order to do business. As the Supreme Court reasoned, *International Shoe* and its progeny apply to the distinct situation where out-of-state corporations *have not* consented to in-state suits, but nevertheless were susceptible to suits based on the quality and nature of their activity in the forum. *Id.* at 14. Yet the Court took pains to limit its holding to the specific statutory scheme and the facts of *Mallory*, declining to

“speculate whether any other statutory scheme and set of facts would suffice to establish consent to suit.” *Id.* at 12. Despite teasing the idea of “consent by registration,” the Court emphasized Norfolk Southern’s substantial connections to Pennsylvania, including the facts that Norfolk Southern managed more miles of track there than it did in any other State and employed more people in Pennsylvania than in Virginia. *Id.* at 20.

The jurisdictional issue, however, may not yet be finally resolved. Justice Alito’s concurring opinion joined Justice Gorsuch’s opinion in concluding that subjecting Norfolk Southern to jurisdiction would not offend traditional notions of “fair play and substantial justice,” describing it as a “large out-of-state corporation with substantial operations in a state.” *Mallory*, slip op. at 1 (Alito, J., concurring) (quoting *Int’l Shoe*, 326 U.S. at 316). Justice Alito cautioned that, in a future case, under different facts, the Pennsylvania law may still run afoul of the infrequently invoked Dormant Commerce Clause doctrine, which forbids state laws that overly inhibit interstate commerce. See *id.* at 1–2. Specifically, Justice Alito expressed concern that such a law might have a different impact on small businesses that lack sufficient resources to structure their operations to avoid excessive exposure to defending out-of-state lawsuits. *Id.* at 13. Justice Gorsuch’s opinion left room to argue this theory on remand, noting that the Pennsylvania Supreme Court had not addressed the Dormant Commerce Clause argument and thus the issue was outside the grant of certiorari. *Mallory*, slip op. at 4 n.3 (plurality opinion) (citing *Mallory*, 266 A.3d at 559–60 nn. 9, 11).

In dissent, Justice Barrett (joined by another interesting alliance of Chief Justice Roberts, Justice Kagan, and Justice Kavanaugh) wrote that the Court’s holding “permit[s] state governments to circumvent constitutional limits,” flying in the face of the Due Process Clause. *Mallory*, slip op. at 1 (Barrett, J., dissenting). The dissent also disagreed with the validity of *Pennsylvania Fire*, because it viewed that decision as overruled by *International Shoe*, decided nearly thirty years later. *Id.* at 15. Justice Barrett described Justice Gorsuch’s attempt to distinguish *International Shoe* “as fictional as the old concept of ‘corporate presence,’” *id.* at 16 (citation omitted), and questioned the logic of the Court’s decision, suggesting that, “[a] State could defeat the Due Process Clause by adopting a law at odds with the Due Process Clause.” *Id.* at 6. The dissent warns that other states may now “manufacture ‘consent’” to personal jurisdiction “[b]y relabeling their long-arm statutes,” inviting “suits, like this one, with no connection whatsoever to the forum.” *Id.* at 1.

Consequences of the Decision

Although few (if any) states have a statute like Pennsylvania’s, some predict, as the dissent recognizes, that additional states (including those considered to be friendly to plaintiffs), will accept the Court’s invitation to similarly condition registration to do business upon consent to general jurisdiction. Companies with multistate operations should monitor the states in which they are registered to do business for such legislation. Still unanswered is the question whether such law is constitutional as applied to a corporation with minimal operations within a state. But, for now, companies registered to do business in Pennsylvania and Georgia should understand that they may be subject to personal jurisdiction in the courts of those states for any suits of any sort. And, of course, we will all stay tuned to see whether the infrequently invoked Dormant Commerce Clause doctrine surfaces on remand of *Mallory*.

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