

# Locke Lord QuickStudy: Supreme Court Reinvigorates Forum Shopping in *Mallory v. Norfolk Southern Railway Co.*?

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On June 27, 2023, the Supreme Court in *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. \_\_\_\_ (2023) substantially broadened (at least temporarily) the bases for general personal jurisdiction over out-of-state corporations in claims brought by out-of-state plaintiffs. A 5-4 majority reversed the dismissal of such a case and upheld Pennsylvania's corporate-registration statute, under which out-of-state corporations that register to do business in the state thereby consent to general personal jurisdiction in Pennsylvania. As the dissent recognizes, *Mallory* is a "sea change" to a series of the Court's own decisions in the last nine years that had sharply restricted general personal jurisdiction over out-of-state corporations.

This sea change will certainly increase forum shopping by plaintiffs and uncertainty for defendants. Whether out-of-state corporations are subject to personal jurisdiction will, for now, depend on the details of state law rather than on a uniform, national doctrine of due process.

But this change may be short-lived. While *Mallory* rejected a due-process challenge, the five-justice majority specifically noted that corporate defendants could assert a separate potential challenge against similar registration statutes under the Dormant Commerce Clause. Based on today's opinion and past decisions, some line-up of five or more justices may be open to such a challenge. For now, corporations that do business in multiple states will need to closely monitor developments and take state-specific approaches to challenging jurisdiction where appropriate.

### **Statutes in Pennsylvania and elsewhere authorize general jurisdiction over any out-of-state corporation that registers to do business.**

*Mallory* arose out of a Pennsylvania case with no factual connection to Pennsylvania. Plaintiff was a Virginia resident, defendant was a Virginia railroad, and the injuries allegedly occurred in Ohio and Virginia. Pennsylvania's only connection was that Norfolk Southern registered to do business (and did do business) there. Plaintiff nonetheless sued Norfolk Southern in Pennsylvania, relying on a Pennsylvania statute providing that registering to do business constitutes consent to general jurisdiction.

Pennsylvania is not alone in having such a statute. Supreme Court briefing in this case identified at least 20 other states with similar statutes. Although the details of the statutes—and state-court cases interpreting the

statutes—vary significantly, these statutes purport to authorize general personal jurisdiction over out-of-state companies based solely on a company’s registration to do business in that state.

### **Pennsylvania’s Supreme Court joined other states in finding the registration statutes violated due process.**

The trial court dismissed the suit for lack of personal jurisdiction, and Pennsylvania’s highest court affirmed. The court relied on the Supreme Court’s recent decisions in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017), and *Ford Motor Co., v. Mont. Eighth Judicial Dist. Court*, 141 S.Ct. 1017(2021). Those cases were also filed in states with no connection to the parties or the underlying injury, so there was no basis for specific personal jurisdiction. The Supreme Court consistently held in those cases that, under the Due Process Clause of the U.S. Constitution, general personal jurisdiction cannot be based solely on a corporate defendant doing business in a state. Instead, due process limits general jurisdiction to only those states where a corporation is “at home,” *i.e.*, a corporation’s state of incorporation or principal place of business. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (“*Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there.... [F]or a corporation, ... one in which the corporation is fairly regarded as at home.”).

The Pennsylvania court rejected the argument that Norfolk Southern consented to general jurisdiction by registering to do business, holding that the statute violated due process. 266 A.3d 542, 571 (“Our statutory scheme of conditioning the privilege of doing business in the Commonwealth on the submission of a foreign corporation to general jurisdiction in Pennsylvania courts strips foreign corporations of the due process safeguards guaranteed in *Goodyear* and *Daimler*.”). Other state courts had reached the same conclusion. *See, e.g., Facebook, Inc. v. K.G.S.*, 294 So. 3d 122 (Ala. 2019); *Lanham v. BNSF Ry. Co.*, 939 N.W.2d 363 (Neb. 2020). Others went the other way. *See, e.g., Cooper Tire & Rubber Co. v. McCall*, 312 Ga. 422 (2021); *Merriman v. Crompton Corp.*, 146 P.3d 162 (Kan. 2006).

### **The United States Supreme Court relied on a 1917 case to reject a due-process challenge to consent-by-registration statutes.**

The *Mallory* Court held that the question before it was resolved over one hundred years ago in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). There, an Arizona plaintiff and a Pennsylvania defendant entered into a contract in Colorado, but the plaintiff sued for breach in Missouri state court, relying on a Missouri corporate-registration statute. The Court unanimously upheld the jurisdiction statute, finding “no doubt” that it comported with defendant’s due process rights. The *Mallory* Court disagreed that *Pennsylvania Fire* was implicitly overruled by more recent opinions and refused to overrule it now. Slip op., at 11 (“*Pennsylvania Fire* held that suits premised on these grounds do not deny a defendant due process of law.”).

A plurality of four justices (Justice Alito, the fifth member of the majority, did not join this portion of the opinion) stated that decisions (such as *Daimler* and *BNSF*) did not overrule *Pennsylvania Fire* because those cases were limited to situations where corporate defendants had not consented to jurisdiction through registration. *Id.* at 14-15.

A four-justice dissent could not reconcile the majority opinion with earlier decisions, including *Daimler* and *BNSF*, which limited general jurisdiction to states where corporations were incorporated or headquartered. *Id.* (Barrett, J.,

dissenting) (slip op., at 4) (under majority opinion, “every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler’s* ruling would be robbed of meaning by a back-door thief.”); *id.* at 14 (majority’s holding “would gut *Daimler.*”).

### **The Court left the door open to further litigation to re-establish limits on general jurisdiction.**

While rejecting a due-process challenge, the majority noted that defendants could potentially challenge registration statutes under the Dormant Commerce Clause. Slip op., at 4, n.3. Justice Alito voiced support for that argument in his concurring opinion, observing that the Commerce Clause “remains a vital constraint on States’ power over out-of-state corporations.” (Alito, J., concurring) (slip op., at 11). Both the majority and Justice Alito noted that defendant could raise this challenge on remand. *Id.*, at 5 (“While that is the end of the case before us, it is not the end of the story for registration-based jurisdiction.”).

In the short-term, companies should expect plaintiffs to engage in forum shopping in any state where the company registered to do business under a statute similar to the one in Pennsylvania. Out-of-state defendants facing such claims should be knowledgeable regarding the details of the state statute on which the plaintiff bases jurisdiction and be prepared to challenge jurisdiction under the Commerce Clause theory left open in *Mallory*.

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