

## INSIGHTS

## Supreme Court Reaffirms Registering To Do Business May Subject You to Lawsuits

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Last week the US Supreme Court reaffirmed the constitutionality of state laws requiring businesses to consent to lawsuits in the state after registering with state authorities to conduct business there. In [\*Mallory v. Norfolk Southern Railway Co.\*](#),<sup>[1]</sup> the Court resolved conflicting authority and held that such laws do not violate the Due Process Clause of the Fourteenth Amendment. According to the Court, this type of statutory scheme is permissible even if the business is not at home in the forum state and the lawsuit is based on conduct that occurred elsewhere.

Much of the Court's opinion was based upon a 1917 case considering the exact same issue, *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining and Milling Co.* There, Justice Holmes, writing for a unanimous Court, upheld a nearly identical provision of Missouri law and found that such laws comport with the Due Process Clause. In the century that followed, state legislatures, courts, and litigants have grappled with the question of whether subsequent Supreme Court opinions like *International Shoe Co. v. Washington* and its progeny cast doubt on the validity of *Pennsylvania Fire*. The Supreme Court put this confusion to rest in *Mallory*, confirming the continuing validity of *Pennsylvania Fire*.

In *Mallory*, Justice Gorsuch, who wrote on behalf of a five-justice majority, held that a Pennsylvania statute requiring any company registered to do business in the state to consent to suit in Pennsylvania did not violate the Due Process Clause. The plaintiff, Robert Mallory, was from Virginia and had worked for Norfolk Southern Railway Company, in both Virginia and Ohio, but never in Pennsylvania. During Mallory's employment as a freight-car mechanic, he handled asbestos and chemicals for Norfolk Southern, in addition to demolishing box-car interiors, which he alleged contained carcinogens. After Mallory left Norfolk Southern, he moved to Pennsylvania, where he discovered he had cancer, and later moved back to Virginia, where he lived when he filed his complaint. But rather than filing suit in Virginia or Ohio, he chose to commence his lawsuit in Pennsylvania state court.

Under the Pennsylvania statute, Norfolk Southern "filed paperwork consenting to appear in Pennsylvania courts as a condition of registering to do business in the Commonwealth."<sup>[2]</sup> That statute "requires out-of-state companies that register to do business in the Commonwealth to agree to appear in its courts on 'any cause of action' against them."<sup>[3]</sup> Since 1998, Norfolk Southern complied with Pennsylvania's law. Plus, at the time of suit, Norfolk Southern employed nearly 5,000 people, maintained more than 2,400 miles of track, operated 11 rail yards, and ran three locomotive repair shops in Pennsylvania, one of which spans 70 acres. As

the majority noted, “the company even proclaimed itself a proud part of ‘the Pennsylvania community.’” [4] Nevertheless, Norfolk Southern challenged the Pennsylvania statute, arguing that to the extent it provides a basis for personal jurisdiction the law violated the Due Process Clause. The Pennsylvania Supreme Court agreed with Norfolk Southern, but the Georgia Supreme Court had recently rejected a similar argument, resulting in a split of authority.

In holding that Pennsylvania’s law was constitutional, the Court turned to traditional concepts of jurisdiction and reminded lower courts that “the law ha[s] long permitted suits against individuals in any jurisdiction where they can be found, no matter where the underlying cause of action happened to arise.” [5] This principle was the basis of the decision in *Pennsylvania Fire* and one of the key reasons why the Court reaffirmed that holding.

Accordingly, in *Mallory*, the Court rejected Norfolk Southern’s argument that the Court’s decisions in cases such as *International Shoe* “seriously undermined” the holding of *Pennsylvania Fire*. [6] As the majority put it, “the two precedents sit comfortably side by side.” [7] The Court distinguished between instances such as those in *International Shoe*, where a corporation had not expressly consented to being haled into court in the forum state, and those in *Mallory* and *Pennsylvania Fire*, where the corporation did expressly consent. In the majority’s view, when an out-of-state defendant submits to suit in the forum state, it would be against “fair play and substantial justice” to require the forum court to turn aside a plaintiff’s suit. Thus, the majority reemphasized that “personal jurisdiction is a *personal* defense that may be waived or forfeited” by a corporation’s compliance with a statute like Pennsylvania’s. [8]

Despite Norfolk Southern’s arguments, the Court further distinguished *Mallory* from seemingly on-point precedent that could have cast doubt on *Pennsylvania Fire*, such as *BSNF Railroad Co. v. Tyrell*, *Daimler AG v. Bauman*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, and *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*. According to Justice Barrett’s dissent, joined by Chief Justice Roberts, Justice Kagan, and Justice Kavanaugh, these cases collectively stand for the proposition that “[a]bsent an exceptional circumstance, a corporation is subject to general jurisdiction only where it is incorporated or has its principal place of business.” [9] As Norfolk Southern argued and the dissent asserts, the Court’s precedent “makes crystal clear, simply doing business is *insufficient*.” [10] But the majority distinguished these cases from *Mallory* by focusing on the fact that Norfolk Southern waived its personal jurisdiction defense, and it drew a line between general jurisdiction and jurisdiction based on consent. As Justice Jackson wrote in her concurrence, “[w]hether Pennsylvania could have asserted general jurisdiction over Norfolk Southern *absent* any waiver is beside the point.” [11]

Going forward, registration statutes that include consent to personal jurisdiction like Pennsylvania’s may be instituted in other states, and corporations should be particularly mindful that registering to do business in a state could subject them to lawsuits there, even if the parties are from outside the state and the conduct at issue took place elsewhere.

Bracewell advises clients at every stage of the litigation and corporate formation process. Your Bracewell contact can help you learn more about this issue.

\*Bracewell summer associate Matt Mussalli provided invaluable assistance with this client alert.

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[1] *Mallory v. Norfolk S. Ry. Co.*, No. 21-1168 (US Jun. 27, 2023) (slip op.).

[\[2\]](#) *Id.* at 2.

[\[3\]](#) *Id.* at 1.

[\[4\]](#) *Id.* at 20.

[\[5\]](#) *Id.* at 9.

[\[6\]](#) *Id.* at 13.

[\[7\]](#) *Id.* at 13.

[\[8\]](#) *Id.* at 21 (emphasis in original).

[\[9\]](#) *Id.* at 4 (Barrett, J. dissenting).

[\[10\]](#) *Id.* (emphasis in original).

[\[11\]](#) *Id.* at 4 (Jackson, J. concurring) (emphasis in original).