

Pennsylvania Court poised to address constitutionality of state's consent-by-registration statute

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The Supreme Court of Pennsylvania will soon hear a case that could impact the exercise of general jurisdiction over businesses within the state. The possible application of general jurisdiction in a forum presents significant concerns for corporate defendants that operate in multiple states.

This is especially true in states where business registration statutes have in the past been interpreted by courts as blanket consents to general jurisdiction in the state.¹ These so-called “consent-by-registration” states allow the exercise of general jurisdiction over defendants solely by virtue of the defendants’ registration to do business there, holding that the registration is implicit consent to suit in the jurisdiction.

The possible application of general jurisdiction in a forum presents significant concerns for corporate defendants that operate in multiple states.

However, in the wake of *Daimler AG v. Bauman*, 571 U.S. 117 (2014), a growing number of state and federal courts are refusing to exercise general jurisdiction over companies that simply register to do business in a state.² But few decisions have made their way to the federal appellate courts or the states’ highest courts.

One state where the issue remains open is Pennsylvania. Unlike other states, Pennsylvania makes consent to general jurisdiction an explicit requirement of registration to do business in the state,³ a statutory scheme that was upheld by the Third Circuit in 1991, pre- *Daimler*.⁴

The Supreme Court of Pennsylvania soon will have the opportunity in *Mallory v. Norfolk Southern Railway Co.*, No. 3 EAP 2021, to revisit the constitutionality of Pennsylvania’s registration statute after *Daimler*, and in particular, to consider whether the statute runs afoul of the “unconstitutional conditions” doctrine.

CONSENT BY REGISTRATION AFTER DAIMLER

Although the outcome in *Mallory* is of particular importance because of the explicit nature of Pennsylvania’s consent-by-registration

scheme, several states have reckoned with consent-by-registration schemes in recent years.

Indeed, courts are divided as to the constitutionality of consent-by-registration schemes after the United States Supreme Court’s landmark decision in *Daimler*. In *Daimler*, the Court held that a corporation is subject to general jurisdiction only in the states where the company is incorporated, headquartered, or, in an “exceptional case,” considered “at home.”⁵

Courts have advanced competing views of *Daimler*’s scope when evaluating the relationship between general jurisdiction and business registration statutes. Although the Supreme Court in *Daimler* did not specifically address the question of consent jurisdiction, it did express reservations toward expanding general jurisdiction beyond states where a company could be considered “at home.”⁶

Most courts assessing the issue have declined to exercise general jurisdiction based solely on a business’s registration in a state, highlighting the importance of notice to a defendant corporation.

For that reason, a federal district court in Arizona recently pronounced that “[a] categorical assertion of general jurisdiction where the corporation complies with a state’s registration and appointment laws would essentially contradict *Daimler*[’s] limitation of general jurisdiction.”⁷

Similarly, in concluding that “the exercise of general jurisdiction” over an out-of-state defendant based solely on the defendant’s business registration “would violate due process,” the Eleventh Circuit emphasized the lack of any explicit language in Florida’s registration statute conferring general jurisdiction over, and thus putting on notice, a corporation that registers to do business in the state.⁸

Courts in Illinois, Delaware, and Nebraska have also established that the mere appointment of an agent to receive service of process within the state does not amount to consent to general jurisdiction by a corporation.⁹

On the other hand, a small number of jurisdictions have concluded a state business registration statute can confer general jurisdiction over an out-of-state corporate defendant. These courts tend to rely on the fact that *Daimler* only contemplates where a corporation is

considered “at home” for purposes of general jurisdiction, not whether the corporation can consent to general jurisdiction elsewhere.¹⁰

In so doing, these courts have cited pre-*Daimler* precedent to conclude that registration may confer general jurisdiction. For example, prior to *Daimler*, the Eighth Circuit, applying Minnesota law, instructed that “[o]ne of the most solidly established ways of giving ... consent [to the exercise of general jurisdiction] is to designate an agent for service of process within the State.”¹¹

Courts in Minnesota and Iowa have cited *Knowlton v. Allied Van Lines*, 900 F.2d 1196 (8th Cir. 1990), as support for their holdings that general jurisdiction through consent is constitutional.¹² Kansas courts have also recognized consent-by-registration and have explained that *Daimler* did not eliminate that means of obtaining general jurisdiction.¹³

PENNSYLVANIA TO ADDRESS EMERGING SPLIT IN AUTHORITY

The Supreme Court of Pennsylvania will soon consider these antithetical interpretations of *Daimler* in *Mallory v. Norfolk Southern*. In *Mallory*, the plaintiff brought claims against a Virginia corporation in a Pennsylvania trial court related to alleged asbestos exposure that took place in Ohio and Virginia.

Unlike other states, Pennsylvania makes consent to general jurisdiction an explicit requirement of registration to do business in the state.

The defendant, who was registered to conduct business in Pennsylvania, argued that it was not subject to general jurisdiction in Pennsylvania, notwithstanding the explicit statutory requirement of the business registration statute.¹⁴ In a departure from other lower courts in Pennsylvania, the trial court dismissed for lack of personal jurisdiction, holding that Pennsylvania’s registration statute violates the Due Process Clause.¹⁵

The plaintiffs appealed that decision to the Superior Court of Pennsylvania, which then transferred the case to the state Supreme Court pursuant to a statute providing “exclusive jurisdiction of appeals from final orders of the courts of common pleas” that hold any Pennsylvania statute “repugnant to the Constitution ... of the United States.”¹⁶

Until recently, appellate resolution of *Mallory* had been deferred pending the outcome of a similar case, *Murray v. American LaFrance LLC*.¹⁷ In *Murray*, plaintiffs failed to raise their consent-by-jurisdiction argument before the trial court, but raised it on appeal.

A three-judge panel of Pennsylvania’s Superior Court held 2-1 that it had general jurisdiction over the out-of-state corporate defendant through Pennsylvania’s business registration statute.¹⁸

The Superior Court then granted en banc reargument and vacated the original decision. Ultimately, the en banc Superior Court declined to resolve the question of consent to general jurisdiction, instead concluding that the issue had been waived by the plaintiffs.¹⁹

With the *Murray* appeal resolved, the Superior Court lifted the stay in *Mallory*.

Mallory will be the first appellate decision on the issue of general jurisdiction in Pennsylvania since *Daimler*. A resolution on the merits will necessarily address the split that has developed among courts considering consent-by-registration under Pennsylvania law.

The Third Circuit in *Bane v. Netlink, Inc.* first addressed the issue in 1991, concluding that Pennsylvania’s registration statute authorizes Pennsylvania courts’ exercise of general jurisdiction over out-of-state defendants that have registered in the state.²⁰ Several Pennsylvania decisions since *Daimler* have held that *Bane* remains good law.²¹

In contrast to this line of cases, the Eastern District of Pennsylvania recently held in *Sullivan v. A.W. Chesterton* that “a mandatory statutory regime purporting to confer consent to general jurisdiction in exchange for the ability to legally do business in a state is contrary to the rule in *Daimler* and, therefore, can no longer stand.”²²

Other courts have agreed, emphasizing that under Pennsylvania law consent cannot be voluntary pursuant to the business registration statute.²³

On appeal, the *Mallory* court will likely address the unconstitutional conditions doctrine, which prohibits the government from conditioning a benefit on the surrender of a constitutional right.²⁴ Defendants have argued on appeal that “Pennsylvania may not condition a corporation’s ability to do business on a waiver of its constitutional right to be free of suits that violate due process.”²⁵

At least one court upholding consent-by-registration has dismissed the unconstitutional conditions argument, concluding that designation of an agent for service of process in New Mexico is a voluntary, constitutional act that amounts to actual consent to general jurisdiction there.²⁶ However, the majority of courts upholding consent-by-registration have made no reference to the unconstitutional conditions doctrine.

In contrast, the court in *Sullivan* found that “the Pa. Statutory Scheme violates the unconstitutional conditions doctrine because it conditions the benefit of doing business in the state with the surrender of constitutional due process protections.”²⁷ Because a company must either consent

to general jurisdiction or be denied the opportunity to do business in the state, the court concluded that such consent was “functionally involuntary.”²⁸

Another Pennsylvania district court agreed that conditioning the right to do business in the state on the surrender to general jurisdiction appeared to violate the unconstitutional conditions doctrine after *Daimler*, observing that “it would seem an odd result if states could circumvent *Daimler* — in theory opening the possibility of corporations being subject to general jurisdiction in all fifty states — through what essentially amount to magic words.”²⁹

While the majority of courts have rejected consent-by-registration, very few have ruled that a statute explicitly conferring general jurisdiction by consent is unconstitutional.

Nonetheless, the court concluded that it was bound by the ruling in *Bane*, and upheld consent-by-registration.³⁰ The Mallory court will not be so bound.

CONCLUSION

In the end, *Mallory* offers a unique opportunity for the Pennsylvania Supreme Court to analyze the issue of consent-by-registration.

The state’s business registration statute explicitly requires such consent, leaving no room for interpretation as to whether a corporation doing business in the state has knowingly consented to general jurisdiction. Thus, the court’s decision in *Mallory* will turn principally on whether such “consent” was voluntary or whether it was coerced in violation of due process.

While the majority of courts have rejected consent-by-registration, very few have ruled that a statute explicitly conferring general jurisdiction by consent is unconstitutional. However, those courts that have allowed consent-by-registration have most often relied on pre-*Daimler* precedent and failed to address the unconstitutional conditions doctrine.

Although it is not clear how Pennsylvania will resolve the constitutional question in *Mallory*, its opinion may have far-reaching consequences for business operations in the state and similar disputes in other jurisdictions.

Notes

¹ See, e.g., *Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (3d Cir. 1991) (interpreting Pennsylvania law); *Knowlton v. Allied Van Lines*, 900 F.2d 1196, 1199 (8th Cir. 1990) (applying Minnesota law); *Merriman v. Crompton Corp.*, 282 Kan. 433, 450 (2006).

² See, e.g., *Humphries v. Allstate Insurance Company*, 2018 WL 1510441, at *3 (D. Ariz. Mar. 27, 2018); *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1320 (11th Cir. 2018).

³ 42 Pa. C.S.A. § 5301.

⁴ *Bane*, 925 F.2d 637 at 641.

⁵ *Daimler*, 571 U.S. 117 at 139.

⁶ *Id.* at 137.

⁷ *Humphries*, 2018 WL 1510441, at *3.

⁸ *Waite*, 901 F.3d 1307 at 1320.

⁹ See *Lanham v. BNSF Railway Company*, 939 N.W.2d 363, 371 (2020); *Perez v. Air and Liquid Systems Corporation*, No. 16-cv-842, 2016 WL 7049153, at *9 (S.D. Ill. Dec. 2, 2016); *Genuine Parts Company v. Cepec*, 137 A.3d 123, 148 (Del. 2016).

¹⁰ *Otsuka Pharmaceutical Co., Ltd. v. Mylan Inc.*, 106 F.Supp.3d 456, 468 (D.N.J. 2015).

¹¹ *Knowlton*, 900 F.2d 1196 at 1199.

¹² See *Murphy v. Labor Source, LLC*, 2020 WL 3633234, at *8 (D. Minn. 2020) (“[A]ppointment of an agent for service of process under §303.10 gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state”); *Spanier v. American Pop Corn Co.*, No. C15-4071-MWB, 2016 WL 1465400, at *4 (N.D. Iowa April 14, 2016) (“[T]he whole purpose of requiring designation of an agent for service is to make nonresidents suable in the local courts.”).

¹³ *Butler v. Daimler Trucks North America, LLC*, 433 F.Supp.3d 1216, 1237 (D. Kansas 2020).

¹⁴ See 42 Pa. C.S.A. § 5301(a)(2)(i).

¹⁵ See 2018 WL 3025283, at *6 (Pa. Comm. Pl. May 30, 2018).

¹⁶ 42 Pa. C.S.A. § 722(7).

¹⁷ 234 A.3d 782 (Pa. Super. Ct. June 25, 2020).

¹⁸ See *id.* at *1.

¹⁹ *Id.* at *4.

²⁰ See 925 F.2d 637 at 641.

²¹ See *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 655 (E.D. Pa. 2016) (“The Supreme Court [in *Daimler*] did not eliminate consent” as a means of obtaining general jurisdiction.); *Diab v. British Airways, PLC*, 2020 WL 6870607, at *5 (E.D. Pa. Nov. 23, 2020) (“Quite simply, *Daimler* did not explicitly abrogate consent as a basis for personal jurisdiction...”); *Gorton v. Air & Liquid Systems*, 303 F. Supp. 3d 278, 293 (M.D. Pa. 2018) (“[A] court may base its general jurisdiction over a defendant-corporation upon . . . the defendant-corporation’s consent to general jurisdiction in the forum state.”); *Webb-Benjamin, LLC v. International Rug Group, LLC*, 192 A.3d 1133, 1139 (Penn. Super. Ct. 2018) (concluding that consent remains a valid means of obtaining general jurisdiction over a corporate defendant).

²² 384 F.Supp.3d 532, 540 (E.D. Pa. 2019) (applying Pennsylvania law).

²³ See, e.g., *Smith v. NMC Wollard, Inc.*, 2020 WL 1975074, at *4 (E.D. Pa. 2020).

²⁴ See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 7 (1988) (“The problem of unconstitutional conditions arises whenever a government seeks to achieve its desired result by obtaining bargained-for consent of the party whose conduct is to be restricted.”) (emphasis in original).

²⁵ Brief of Appellee at 24, *Mallory v. Norfolk Southern Railway Co.*, No. 802 EDA 2018.

²⁶ *Rodriguez v. Ford Motor Co.*, 458 P.3d 569, 578 (N.M. Ct. App. 2018).

²⁷ 384 F.Supp.3d 532 at 542.

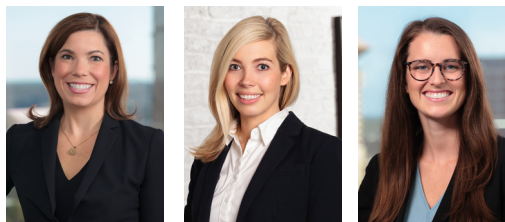
²⁸ *Id.*

²⁹ *Replica Auto Body Panels and Auto Sales Inc. v. inTech Trailers Inc.*, 454 F.Supp.3d 458, 463 (M.D. Pa. 2020).

³⁰ *Id.*

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