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Aftershocks: Where Do Businesses Go After 'Mallory'?

Businesses operating in multiple states should take heed of the U.S. Supreme Court's recent opinion in *Mallory v. Norfolk Southern Railway Co.*^[1] In *Mallory*, the Supreme Court held that personal jurisdiction obtained over a defendant via "consent-by-registration" does not violate the Constitution's Due Process Clause. In the pursuit of new market opportunities, too often businesses register to do business in sister states without always reading the fine print. Now the proverbial law of the land, *Mallory* requires more attention to these details, which can otherwise land businesses in out-of-state courts they did not expect.

Mallory, a split 4-1-4 decision, involved a Virginia-based railroad that registered to do business in Pennsylvania. Pennsylvania law requires the foreign company to consent to personal jurisdiction in the state for litigation purposes.^[2] In essence, all foreign corporations doing business in Pennsylvania must consent to jurisdiction in Pennsylvania state courts on the same terms as domestic businesses.

The Supreme Court explained that personal jurisdiction via consent-by-registration, previously recognized in *Pennsylvania Fire*, exists in harmony with *International Shoe* and progeny, which dealt with obtaining personal jurisdiction over a nonconsenting corporation.^[3] Corporate counsel have long recognized that under *Goodyear*, *Daimler*, *Ford Motor Co.*, and others, corporations were subject to personal jurisdiction in only three locations: their state of incorporation, their principal place of business, and states where the claim at issue "arises out of or relates to" the defendant's contacts with the forum.^[4] While there was always the risk of being sued in a far-flung jurisdiction due to the defendant's activities there, the perceived risk of being sued somewhere simply because a corporation was qualified to do business there was small. This is no longer the case under *Mallory*.

New Risks

Mallory poses several risks that bear close attention. First, and perhaps most obvious, is whether other states, whose registration laws do not presently impose a consent-by-registration, will adopt Pennsylvania's approach in the wake of *Mallory*. Second, *Mallory* effectively creates different classes of businesses with disparate procedural rights. Certain businesses, such as nationally chartered banks, need not file a certificate of registration with Pennsylvania, even if it is a foreign corporation. But other foreign banks, if they are state chartered by a sister state, must register. Two foreign banks—but one class is not subject to the personal jurisdiction in the Commonwealth's state court while the other will be.

There are some off-ramps from the heightened risk under *Mallory*. First, future courtroom battles likely will shift from jurisdiction to venue. Corporate defendants can still argue that suit in a particular forum is inappropriate or burdensome. Second, there are backstops to the improper application of state law. Imagine a suit based on Ohio law—the case may now be litigated in Pennsylvania, but Ohio law will still apply. Finally, it is not clear how long *Mallory* will be good law. As hinted by Justice Samuel Alito in his concurrence, consent-by-registration laws similar to Pennsylvania's may yet be violations of the Dormant Commerce Clause.

Venue Disputes

Mallory concerns personal jurisdiction, which involves the power of the court over a person, but disputes over venue will go on. Under the general federal venue provision, 28 U.S.C. § 1391, venue is appropriate in a judicial district where a defendant resides and in judicial districts where a substantial part of the events giving rise to the claim occurred. If there is no district in which an action may otherwise be brought, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action is also a proper venue. Notably, this may present, in many cases, a line of defense should a plaintiff bring suit in a "favorable" jurisdiction, even if the foreign entity consented to jurisdiction under a state's foreign corporation registration protocol.

It is too early to tell exactly how *Mallory* will shift the landscape, but companies of all sizes should be prepared to vigorously litigate venue, especially when plaintiffs pick forums that are arguably inconvenient for everyone.

Choice of Law

Another issue to consider is the application of one state's substantive law by the courts of another state. In theory, traditional choice-of-law principles should guard against plaintiffs engaging in rampant forum shopping for states with consent-by-registration statutes and favorable laws. But in practice, there is sometimes very little review of state courts that get another state's law wrong. A constitutional violation does not arise simply when "a state court misconstrue[s] the law of another State."^[5] Instead, "the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention."^[6]

Choice of law is a nuanced topic that varies across states, requiring careful attention to any state in which a corporation is registered. The presence of personal jurisdiction does not mean the law of the forum will always apply.

Dormant Commerce Clause

The decision in *Mallory* was narrow, with Justice Alito concurring in part and concurring in judgment. Justice Alito suggested that the "dormant" Commerce Clause might prohibit "consent-by-registration" statutes because they discriminate against out-of-state corporations, or at least impermissibly burden interstate commerce. Arguably, these statutes burden out-of-state corporations by forcing them to defend themselves against actions that have no forum connection, increasing unpredictability and even encouraging some businesses to simply stay out of a particular forum—effectively privileging small, local companies on their own turf. However, Justice Alito also suggested that a state "may have an interest 'in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.'"^[7] Justice Alito would seemingly accept consent-by-registration statutes that

involve the most dangerous class of plaintiff post-*Mallory*—i.e., plaintiffs from states with consent-by-registration statutes suing in their home states.

It is worth considering that the Supreme Court has roughly addressed this topic in the past. Back in 1923, in *Davis v. Farmers Co-op Equity Co.*, it was held that a statute allowing suit against a corporation based solely on the presence of its agent—where neither it nor the plaintiff had any other connection to the forum—was a violation of the Commerce Clause.^[8] However, dormant Commerce Clause doctrine has evolved much since 1923, and there is no guarantee *Davis* is still good law. Without reading too much into Supreme Court tea leaves, the Dormant Commerce Clause may provide grounds for challenging these consent-to-jurisdiction statutes in the future.

Moving Forward

Whether *Mallory* will usher in a new trend in forum shopping is an open question. But once corporations find themselves litigating in unexpected, far-flung forums, there will still be options, though these options may be expensive and time-consuming in their own right. At a minimum, *Mallory* likely will increase litigation costs, especially if corporate defendants look to take advantage of these doctrinal off-ramps. For more information, contact the author of this article or any attorney with Frost Brown Todd's [Business & Commercial Litigation](#) practice group.

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^[1] *Mallory v. Norfolk Southern Railway Co.*, No. 21-1168 (U.S. June 27, 2023).

^[2] 42 Pa. Stat. and Cons. Stat. Ann. § 5301; 15 Pa. Stat. and Cons. Stat. Ann. § 411.

^[3] *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93 (1917); *Int'l Shoe Co. v. State of Wash.*, Off. of

Unemployment Comp. & Placement, 326 U.S. 310 (1945).

[4] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); Daimler AG v. Bauman, 571 U.S. 117 (2014); Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).

[5] Sun Oil Co. v. Wortman, 486 U.S. 717, 730–31 (1988).

[6] *Id.*

[7] *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985)).

[8] Davis v. Farmers Co-op Equity Co., 262 U.S. 312 (1923).

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