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Consent to General Jurisdiction by Registration Affirmed ... But Only In Pennsylvania, and Perhaps Not For Long

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In a much anticipated ruling, the U.S. Supreme Court vacated a Pennsylvania Supreme Court opinion that prohibited an out-of-state plaintiff from suing an out-of-state defendant for out-of-state behavior. While the decision in *Mallory v. Norfolk Southern Railway* [1] seems like a win for out-of-state plaintiffs who crowd the nation's most pro-plaintiff courthouses, the ruling suggests there is still another shoe yet to be dropped. Unlike the very first jurisdictional shoe which favored a plaintiff – *International Shoe Co. v. Washington* [2] – the key, swing-vote Justice's writing in *Mallory* suggests that the next shoe favors out-of-state corporate defendants.

The *Mallory* decision saw some of the often polarized Justices of the U.S. Supreme Court align themselves with colleagues from the opposite wing. While five Justices agreed on the result – vacating the Pennsylvania Supreme Court's decision and remanding the case back to the state court for further proceedings – only four Justices (Gorsuch, Thomas, Jackson, Sotomayor) agreed on the rationale for vacating judgment. The lack of the crucial fifth vote renders their written explanation to the level of informative, but neither dispositive nor precedential. Likewise, four Justices (Barrett, Roberts, Kagan, and Kavanaugh) found common ground in an equally informative but not dispositive nor precedential explanation for why the Pennsylvania Supreme Court should have been affirmed. Only upon the narrowest of judicial reasoning did Justice Alito agree with the opinion of the four vacating Justices so as to produce the binding precedent of a majority opinion. Even in so doing, Justice Alito cautioned that upon remand in state court, a seemingly long-dormant Constitutional argument might end up flipping the case result back in favor many of out-of-state corporate defendants.

Mallory involves the concept of general personal jurisdiction – that is, the power of a court (state or federal) to adjudicate a lawsuit involving an out-of-state defendant for something that did not arise from the defendant's in-state conduct.[3] General jurisdiction is often referred to as "all-claims" jurisdiction because the doctrine allows a court to rule on all claims or disputes that a corporate defendant might face, regardless of whether or not the action arose within the state. *Mallory* arose from a workman's claim under the Federal Employers' Liability Act (FELA).[4] Mallory alleged occupational cancer due to worksite chemical exposure in Ohio and Virginia. The defendant railroad company was both based and incorporated in Virginia, but Mallory sued in the Philadelphia Court of Common Pleas, a state court with a reputation for being pro-plaintiff.

The railroad objected to personal jurisdiction, noting that the claim did not arise from the defendant's behavior in Pennsylvania (which could have been the basis for specific personal jurisdiction) and that the defendant corporation was both based and incorporated out-of-state (which could have been the basis for general personal jurisdiction). Plaintiff contended that Pennsylvania's long-arm statute asserts general jurisdiction over an out-of-state corporation which registers to do business in Pennsylvania. The railroad countered that a long line of U.S. Supreme Court opinions defining personal jurisdiction rendered the "consent" part of Pennsylvania's long-arm statute unconstitutional. On appeal from a trial court dismissal for lack of personal jurisdiction, the Pennsylvania Supreme Court ruled that registration-based general jurisdiction violated the Due Process clause of the U.S. Constitution.

Five Supreme Court Justices believe that the Pennsylvania Supreme Court was wrong and that the case has to go back to Pennsylvania for more legal wrangling, but they had a hard time finding common ground as to "why." Four Justices agreed on a dissenting opinion in which they outlined why they would have affirmed the Pennsylvania Supreme Court. Four Justices – but not a fifth – agreed on other points about general jurisdiction. The only legal point on which a five Justice majority arose was that a 1917 Supreme Court decision "directly controls" the outcome of *Mallory*. Those five Justices agreed that on the narrow opinion that

Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.,[5] allows states to authorize its courts to exercise general jurisdiction over out-of-state defendants if, as in Pennsylvania, the state's long-arm statute provides that an out-of-state company "consents" to such general jurisdiction whenever it registers to conduct business in the state. The nine Justice court could find no other common ground to form a majority opinion.

Thus, *Mallory* is a fragmented decision. "When a fragmented [U.S. Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of [a majority of] five Justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[6] Because the legal plank on which five Justices found agreement is so slender, *Mallory* may be of very limited precedential value.

Pennsylvania is the only state which has express statutory language that confers its courts with general personal jurisdiction over corporate registrants. High courts in Georgia, Minnesota, and Puerto Rico have reached similar conclusions by interpreting statutes that are less clear than Pennsylvania's. Likewise, federal courts in both Kansas and Iowa have construed those state statutes as supporting general jurisdiction by consent through registration, but neither state's long-arm statute actually so provides.

Justice Alito's swing-vote concurrence further limits the effect of *Mallory.* While Justice Alito voted in favor of the plaintiff's interest, he outlines an entirely different theory for why the out-of-state railroad defendant should be immune from defending in Pennsylvania – even in light of its apparent "consent" by registration. Turning to the "so-called dormant Commerce Clause" of Article I of the U.S. Constitution, Justice Alito reminded that the Clause prohibits state laws that unduly restrict interstate commerce. That issue was not addressed by the Pennsylvania Supreme Court (although it was raised by the out-of-state defendant). Justice Alito expressed his view that just as the Commerce Clause entitles out-of-state defendants to do business in all other states, it also limits a state's authority to place conditions on that right. Despite being the crucial fifth vote to form a majority that favors the plaintiff, Justice Alito also warned that the out-of-state defendant might ultimately win. "In my view, there is a good prospect that Pennsylvania's assertion of jurisdiction here – over an out-of-state company in a suit brought by an out-of-state plaintiff on claims wholly unrelated to Pennsylvania – violates the Commerce Clause." He added, "Pennsylvania's law seems to discriminate against out-of-state companies by forcing them to increase their exposure to suits on all claims in order to access Pennsylvania's market while Pennsylvania companies generally face no reciprocal burden for expanding operations into another State."

Still, while there may be a Commerce Clause shoe left to be dropped in *Mallory,* the majority opinion is a setback for out-of-state companies – particularly small companies which may have to balance the risk of being sued in far-flung, pro-plaintiff courthouses for conduct that has nothing to do with the state in which the courthouse sits. Justice Alito, as the majority-maker, noted that "Small companies may prudently choose not to enter an out-of-state market due to the increased risk of remote litigation. Some companies may forgo registration altogether, preferring to risk the consequences rather than expand their exposure to general jurisdiction." In the meantime, plaintiff-advocates will lobby for amendments to other pro-plaintiff states' long-arm statutes to conform to *Mallory,* which could make its impact much broader.

White and Williams LLP counsels, represents, and, when needed, defends makers of both durable and digital products throughout all industries, including automotive, healthcare, robotic and construction sectors. Likewise, it recovers subrogation proceeds for insurers. If you have questions or would like more information, please contact Bill Kennedy (kennedyw@whiteandwilliams.com; 215.864.6816); Patricia B. Santelle (santellep@whiteandwilliams.com; 215.864.6205); Marc Penchansky (penchanskym@whiteandwilliams.com; 215.864.6279); David R. Zaslow (zaslowd@whiteandwilliams.com; 215.864.6844); Mark Paladino (paladinom@whiteandwilliams.com; 215.864.8617) or Timothy J. Keough (keought@whiteandwilliams.com; 617.748.5228).

[1] 2023 U.S. LEXIS 2786 (June 27, 2023)

[2] 326 U.S. 310, 311 (1945)

[3] In a fleet of prior U.S. Supreme Court decisions, suits arising from a corporate defendant's in-state conduct is known as "specific personal jurisdiction."

[4] Under this federal workers compensation statute, both state and federal courts have subject matter jurisdiction over FELA claims.

[5] 243 U. S. 93 (1917).

[6] *Marks v. U.S.*, 430 U.S. 188, 193 (1977).