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US Law Week

How the Supreme Court Might Impact Business Activity in States

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*Taft Stettinius & Hollister's Sohan Dasgupta analyzes the potential impact of the US Supreme Court's upcoming decision in *Mallory v. Norfolk Southern* on business activities in states.*

Courts are divided on whether a state may require a corporation to consent to personal jurisdiction as a prerequisite for doing business in that state.

The US Supreme Court soon will decide, in *Mallory v. Norfolk Southern Railway Co.*, whether the Fourteenth Amendment's Due Process Clause allows a state to mandate that. That Clause says, "No State shall ... deprive any person of life, liberty, or property, without due process of law."

Pennsylvania Law

Pennsylvania's long-arm statute says a foreign corporation "may not do business in this Commonwealth until it registers" with the Commonwealth's Department of State.

Pennsylvania law also says that "qualification as a foreign corporation under the laws of this Commonwealth" enables state courts to exercise general jurisdiction over those defendants, just by virtue of such a corporation's mandatory registration.

The Commonwealth's courts concluded that state law's assuming a defendant's "voluntary consent to Pennsylvania courts' exercise of general personal jurisdiction" is repugnant to due process.

A state court typically has general jurisdiction only if the defendant is at home—its state of incorporation or the state where its principal place of business is located—in that state.

By contrast, a state court has specific jurisdiction only if the defendant has purposefully availed itself of the business opportunities provided by the state in question and the suit arises out of or relates to the defendant's contacts with that forum state.

Pennsylvania law permits its courts to exercise general jurisdiction so long as that corporation has registered to do business in that state, regardless of where the events leading up to the suit occurred.

Norfolk Southern

In support of Norfolk Southern, the US argues that Pennsylvania's statute "imposes unfair burdens on defendants [and] it serves no legitimate countervailing interest of the forum State or of plaintiffs." This argument suggests Pennsylvania obtains "consent" through a certain quantum of coercion.

The fact that Pennsylvania obtains "consent" is more pressure on the defendant than a meaningful assent freely given by the corporation, this argument goes.

Norfolk Southern contends that Pennsylvania law's mandatory-consent loophole eviscerates the difference between general and specific jurisdiction because "[e]very national corporation could be 'at home' everywhere."

Under this theory, and to paraphrase Justice Neil Gorsuch from a 2021 case, Pennsylvania law "batter[s]" (and perhaps undermines) the "distinct[ion]" between general and specific jurisdiction. States with far greater interest in having their courts decide these disputes would be excluded, thus creating significant interstate tension.

On the opposite side of the ledger, plaintiff Robert Mallory argues that the original public meaning of the Due Process Clause permits Pennsylvania's registration-via-consent scheme.

He suggests that around the time of the Fourteenth Amendment's ratification, "every State in the Union had a statute requiring out-of-state corporations to consent to personal jurisdiction to which they otherwise would not be subject."

Precedent and Scope

Congress also enacted a similar federal law in 1867. This body of historical evidence meant, argues Mallory, that the original public meaning of the Fourteenth Amendment deems this kind of consent to be "operative" and "voluntary." Mallory further cites several US Supreme Court precedents to make his broader point.

Unless the US Supreme Court is prepared to shrink the scope of general jurisdiction or shrink the difference between general and specific jurisdiction, it likely would hesitate to reverse Pennsylvania's highest court. Consent-by-registration might strike the US Supreme Court as a tool for circumventing the crux of general jurisdiction.

The US Supreme Court consists of a majority of justices with originalist inclinations. Even if the original public meaning of the Due Process Clause supports Mallory's view, the question then for some of the Court's originalists is whether that is so clear as to render a contrary view—namely the “divi[sion]” of “the world of personal jurisdiction” into general and specific jurisdiction (in Justice Gorsuch's words), which has been the prevailing doctrine since 1945—to be “demonstrably erroneous.”

That 2019 standard of overruling precedent set forth by Justice Clarence Thomas might not be met here, so the court might be unprepared to part company with an entire postwar edifice of its general-jurisdiction precedents.

Stare Decisis

In effect, the principle of stare decisis—a Latin term referring to the overall judicial commitment to adhering to precedents, subject to well-reasoned caveats—might not easily allow some of the originalist Justices to reject general jurisdiction or to ignore it into oblivion.

Stare decisis is believed to provide stability and continuity to the legal system, enabling people to rely on judicial liquidations and ascertainties of existing law as they go about their lives.

The rest of the court's originalists likely would be inclined to engage in a more complete stare decisis inquiry, by asking whether the old decision has proven to be unworkable, whether and to what extent people have relied on it, whether the old decision has been left obsolete by factual developments, whether it is consistent with related decisions, and so on.

The non-originalist justices are expected to adhere to the prevailing framework separating the world into general and specific jurisdiction or to “contemporary notions of due process” (as Justice William Brennan proposed in a 1990 case).

It remains to be seen what the Supreme Court will do in *Mallory*. But there has been no clear indication that the court is prepared to jettison the traditional demarcation between general and specific jurisdiction.

In the end, Pennsylvania's consent-by-registration scheme might fall—perhaps reflecting the fate of many such schemes nationwide.

The case is Robert Mallory, Petitioner v. Norfolk Southern Railway Co., 3 EAP 2021, decision due March 25, 2022.

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