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The U.S. Supreme Court Takes on Consent by Registration

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We previously wrote about how, under the Georgia Supreme Court's decision in *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021), merely registering to do business with the Georgia Secretary of State confers general personal jurisdiction in Georgia over a foreign business. Georgia is currently in the minority of states permitting a finding of general personal jurisdiction based on registration to do business in a state, known as "consent by registration."

Now, the U.S. Supreme Court has agreed to hear a similar case out of Pennsylvania, where that state's Supreme Court recently invalidated a statute that permitted consent by registration as violating due process. *Mallory v. Norfolk S. Ry. Co*., --- S.Ct. ---, No. 21-1168, 2022 WL 1205835, at *1 (Apr. 25, 2022) (granting certiorari).

If the U.S. Supreme Court reverses the Pennsylvania Supreme Court and recognizes the "consent by jurisdiction" doctrine, it could vastly expand the jurisdictions where corporations could be sued and potentially disincentivize corporations from registering to do business in other states.

Background of corporate "consent by registration"

By way of background, in 1917, the U.S. Supreme Court held that a state statute notifying a foreign corporation that it consented to general personal jurisdiction in that state by registering to do business in the state did not violate due process. *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling*, 243 U.S. 93, 95 (1917).

Since then, without expressly overruling *Pennsylvania Fire*, the U.S. Supreme Court has limited the reach of general personal jurisdiction by repeatedly holding that general jurisdiction can be exercised only in those states where a corporation is essentially "at home" – *i.e*., its state of incorporation and the state of its principal place of business. *See Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915, 919 (2011); Daimler AG v. Bauman, 571 U.S. 117, 137 (2014); *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct*., -- U.S. --, 141 S. Ct. 1017, 1024 (2021).

States split on "consent by registration" doctrine

As detailed in our first post, Georgia is currently one of a minority of jurisdictions that recognizes consent by registration. In *Cooper Tire*, the plaintiff sued a tire manufacturer incorporated in Delaware, with its principal place of business in Ohio, in Georgia state court. 863 S.E.2d at 83. Cooper Tire moved to dismiss on personal jurisdiction grounds, but the plaintiff argued that Cooper Tire had consented to general personal jurisdiction in

Georgia by securing authorization to transact business in the state. *Id*. at 83-84. The trial court granted Cooper Tire's motion to dismiss, but the Court of Appeals reversed.

The Georgia Supreme Court affirmed the Court of Appeals' reversal, relying on the U.S. Supreme Court's 1917 *Pennsylvania Fire* decision as well as its prior ruling in *Allstate Insurance Co. v. Klein*, 262 Ga. 599, 601 (1992), where it previously held that any corporation registered to do business in Georgia is considered a Georgia resident for purposes of personal jurisdiction.

Since the Georgia Supreme Court issued its opinion in *Cooper Tire* in September 2021, however, at least three state supreme courts (in Pennsylvania, New York, and New Mexico) have invalidated or declined to recognize a "consent by registration" approach to general personal jurisdiction. *Mallory v. Norfolk S. Ry. Co*., 266 A.3d 542, 567 (Pa. 2021), *cert. granted*, No. 21-1168, 2022 WL 1205835 (U.S. Apr. 25, 2022); *Aybar v. Aybar*, 37 N.Y.3d 274, 283, 177 N.E.3d 1257, 1261, 156 N.Y.S.3d 104, 107 (2021) ("Accordingly, a foreign corporation's registration to do business and designation of an agent for service of process in New York does not constitute consent to general jurisdiction under the Business Corporation Law's plain terms."); *Chavez v. Bridgestone Americas Tire Operations, LLC*, 503 P.3d 332, No. S-1-SC-37489, 2021 WL 5294978, at *9 (N.M. Nov. 15, 2021).

The U.S. Supreme Court wades into the "consent by registration" fight

The U.S. Supreme Court has now agreed to hear an appeal of the Pennsylvania decision, which involves a claim brought by a former railroad worker under the Federal Employers' Liability Act against Norfolk Southern Railway alleging that he developed colon cancer from exposure to chemicals during his decades of work for Norfolk Southern. *Mallory*, 266 A.3d at 551.

The railroad worker brought the action in Pennsylvania state court under Pennsylvania's long-arm statute and under a state law that requires an out-of-state company to register with Pennsylvania's Department of State in order to do business in the state – the so-called "mandatory registration requirement." While not set forth in the mandatory registration requirement itself, Pennsylvania's long-arm statute provides that "qualification as a foreign corporation under the laws of this Commonwealth" constitutes a sufficient basis to enable Pennsylvania courts to exercise general personal jurisdiction over the foreign corporation. 42 Pa.C.S. § 5301(a)(2)(i).

The trial court dismissed the action for lack of personal jurisdiction, reasoning that Norfolk Southern did not consent to personal jurisdiction by registering to do business in Pennsylvania. *Mallory v. Norfolk Southern Ry. Co.*, Nos. 1961, 2018 WL 3025283, at *2 (Pa. Com. Pl. May 30, 2018). On appeal, the Pennsylvania Supreme Court held the provision of Pennsylvania's long-arm statute at issue unconstitutional "to the extent that it confers upon Pennsylvania courts general jurisdiction over foreign corporations that are not 'at home' in Pennsylvania." *Mallory v. Norfolk S. Ry. Co*., 266 A.3d at 567.

Bottom line: The U.S. Supreme Court's decision to weigh in on this issue should hopefully provide clarity on whether a company may be subject to general personal jurisdiction in another state merely by registering to do business in that state. If the answer is yes, companies will need to reevaluate the states in which they register to do business in order to minimize the risk of being hauled into those states on general personal jurisdiction grounds.