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U.S. SUPREME COURT HOLDS THAT REGISTERING TO DO BUSINESS IN A STATE MAY PROVIDE CONSENT TO GENERAL JURISDICTION IN THE STATE

To Our Clients and Friends:

Yesterday, the U.S. Supreme Court approved the "consent by registration" doctrine in a decision that expands the potential jurisdictional reach of state courts. The Court held 5-4 that state laws authorizing courts to exercise general personal jurisdiction over entities that register to do business in the state do not offend the Constitution's Due Process Clause. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. __ (2023). As a result, companies that register to do business in states with such laws can be sued in the state even if the dispute has no connection to the state.

The case involved a Pennsylvania statute providing "that an out-of-state corporation 'may not do business in this Commonwealth until it registers with' the Department of State." *Mallory*, 600 U.S. __ (slip op. at 10) (quoting 15 Pa. Cons. Stat. §411(a)). The statute also provides that "'qualification as a foreign corporation' shall permit state courts to 'exercise general personal jurisdiction' over a registered foreign corporation, just as they can over domestic corporations." *Id.* at 11 (quoting 42 Pa. Cons. Stat. §5301(a)(2)(i)). Norfolk Southern argued that the law violated due process and the "minimum contacts" test established in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Rejecting Norfolk Southern's argument, Justice Gorsuch's majority opinion reasoned that a little-known Supreme Court precedent—*Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917)—controls the outcome. *Id*. at 13, 23-24. *Pennsylvania Fire* held "that an out-of-state corporation that *has* consented to in-state suits in order to do business in the forum is susceptible to suit there." *Id.* at 14 (emphasis in original). So, because Norfolk Southern "consented" to general personal jurisdiction by registering to do business in Pennsylvania, the state's courts could exercise general personal jurisdiction over the company even in lawsuits that have no connection with the state. *Id.* at 14-15.

Norfolk Southern argued that *International Shoe* effectively overturned *Pennsylvania Fire*, but the Court rejected that argument. It concluded that "all *International Shoe* did was stake out an *additional* road to jurisdiction over out-of-state corporations" that had not consented to general jurisdiction in a state. *Id*. at 14.

Justice Alito's concurring opinion provides hope for corporate defendants that *Mallory*'s impact might be relatively short lived. He expressed doubt that Pennsylvania's statute could withstand a Dormant Commerce Clause challenge. In his view, the local benefits of the state's assertion of jurisdiction in these circumstances might not overcome the serious burdens on interstate commerce that it imposes. But that issue was not before the Court. So although "consent by registration" statutes have survived for now, they remain vulnerable to future attacks.

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Mallory means that many corporate defendants will soon find themselves being haled into courts in unexpected, unfavorable jurisdictions. Plaintiffs will now have a tool to forum shop for state courts with plaintiff-friendly rules and jury pools, dragging companies away from their home turf and preferred forums.

We recommend that all corporate entities investigate the states in which they are registered to do business and determine whether those states have a "consent by registration" statute similar to the one at issue in *Mallory*.

Corporate defendants also should consider alternative arguments for avoiding litigation in states with such statutes, including arguments based on *forum non conveniens*.

We also recommend that companies consider adding forum selection clauses to any relevant sales contracts in an effort to steer litigation toward preferred forums.

Finally, companies should monitor state legislatures. Relatively few states have consent-by-registration laws like Pennsylvania's, but *Mallory* might encourage other states to adopt similar laws. And if many more states join Pennsylvania, the "minimum contacts" test could soon become obsolete—at least for corporate defendants that do business nationwide, and at least until the Supreme Court considers a future case squarely presenting the issue whether "consent by registration" statutes violate the Dormant Commerce Clause.

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Our lawyers are happy to address any questions you might have regarding this legal development. Please feel free to contact the KTLF lawyers with whom you usually work or the following authors:

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