Published on *The National Law Review* https://natlawreview.com

Shoe on the Other Foot? Why International Shoe May No Longer Be the Litmus Test for General Jurisdiction (Part One)

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In its upcoming October 2022 Term, the US Supreme Court is set to take up a challenge to how states are permitted to exercise jurisdiction over corporations. Mallory v. Norfolk Southern Railway Co., No. 21-1168, offers the Court a prime opportunity to clarify the boundaries of "general jurisdiction," which it last addressed in a series of decisions from 2011 to 2017.

Factual and Procedural Background

The case concerns a lawsuit brought by a former railroad worker, Robert Mallory, who sued Norfolk Southern after he contracted colon cancer, alleging that he was exposed to dangerous chemicals while working for the railroad in Ohio and Virginia. He brought the case in Pennsylvania state court under the state's "long-arm statute," utilizing the subsection providing for jurisdiction over any company that previously registered to conduct business in Pennsylvania. *See* 42 Pa.C.S. § 5301(a)(2)(i).

The railroad, based in Atlanta, argued to the State Supreme Court that the statute violates the company's due process rights because Norfolk Southern conducts virtually no business in Pennsylvania, and the facts at issue in Mallory's lawsuit did not even occur there. The Pennsylvania Supreme Court agreed with Norfolk Southern, holding the statute does not comport with constitutional standards, and the company did not voluntarily consent to jurisdiction by simply registering to do business in the state. Thus, so-called "registration jurisdiction" is an improper mechanism to invoke the general jurisdictional power of a State, according to the Pennsylvania Supreme Court.

Current Principles of General Jurisdiction

When determining if jurisdiction is appropriate, courts frequently consider whether a company has sufficient connections with the forum state to make it fair for the company to be sued there. The seminal "minimum contacts" test from *International Shoe Co. v. Washington*, 326 US 310 (1945), first

established that concept and nullified *Pennoyer v. Neff*'s requirement of actual, physical presence. More than a half century later, the Supreme Court, in two cases – *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US 915 (2011) and *Daimler AG V. Bauman*, 571 US 117 (2014) (collectively, "*Daimler/Goodyear*") – further held that a company must have such "continuous and systematic" affiliations with the forum state that render it "essentially at home" there. Put another way, *Daimler/Goodyear* typically only allows general jurisdiction over a company if that entity is incorporated in a particular state or utilizes it as its principal place of business, *see Goodyear*, at 924, seemingly narrowing the standard from *International Shoe*.[1] Two subsequent decisions issued in 2017 solidified *Daimler/Goodyear* and further minimized *International Shoe*'s impact. *See BNSF Railway Co. v. Tyrell*, 137 S. Ct. 1549 (2017); *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

In an interesting legal twist, Mallory relies upon a different precedent which predates *International Shoe* by nearly 30 years. To argue that jurisdiction in Pennsylvania is proper, Mallory invokes *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 US 93 (1917), which held that a similar "registration jurisdiction" statute from Missouri did not violate a company's due process right. *Id.* at 95. Despite the subsequent line of case law trending the other way, Mallory contends that *Pennsylvania Fire* has never been explicitly overruled and thus, the Court may have effectively sanctioned its constitutionality.

What to Watch For

Both parties advance positions that carry weight. Norfolk Southern argues that permitting "registration jurisdiction" to continue will completely undermine the Court's *Daimler/Goodyear* holdings, which rest heavily upon principles of precluding unrelated litigation against a company which has only trivial, attenuated links with a particular state. But on the flip side, Mallory counters that neither *International Shoe* nor *Daimler/Goodyear* ever addressed whether constitutional concerns remain present if a company *consents* to jurisdiction, such as through a registration statute.

Mallory will allow the Supreme Court to examine all of this prior jurisprudence to determine whether the various puzzle pieces can be reconciled. There may very well be conflicts or gaps between *Daimler/Goodyear*, *International Shoe*, and *Pennsylvania Fire* that have thus far gone unnoticed, whether intentionally or not. Either way, *Mallory* promises to be one of the "must watch" cases in the Court's October 2022 Term because of the potential impact on litigation against corporations nationwide.

We will continue to monitor the case and will provide an update as developments unfold. Oral argument is scheduled to occur on November 8, 2022.

FOOTNOTES

[1] The *Daimler/Goodyear* cases were both authored by Justice Ruth Bader Ginsburg. Interestingly, the "at home" principles underlying those holdings can be traced back to a DC Circuit opinion written by then-Judge Ginsburg. *See Crane v. Carr*, 814 F.2d 758, 763 (D.C. Cir. 1987) (first using the "at home" terminology and skeptically observing how a party with "scant" affiliations to a particular forum state could nevertheless be subject to jurisdiction based upon its "transacting business" there). Given how much the composition of the Supreme Court has evolved since *Daimler/Goodyear* were decided – including Justice Ginsburg's passing – there is uncertainty as to whether the current Court will fully adhere to those precedents.

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National Law Review, Volumess XII, Number 263

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