Analysis of the United States Supreme Court's ruling in *Mallory v. Norfolk Southern Railway Co.* Regarding Pennsylvania's Jurisdiction Consent Statute

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The United States Supreme Court's ruling in *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. ___, 143 S. Ct. 2008 (2023) has created significant ambiguity with respect to jurisdictional protection for corporations. This memo analyzes the *Mallory* holding, examines how the decision fits into the Supreme Court's recent directives on jurisdiction, considers the likelihood of state legislative action to copy the Pennsylvania statutes addressed in *Mallory*, and identifies a number of possible responses to minimize any lasting harmful effects of the *Mallory* result.

Mallory v. Norfolk Southern Railway Co.

On June 27, 2023, a fragmented Supreme Court handed down the *Mallory* decision – a plurality opinion that may broaden plaintiffs' opportunity to pursue lawsuits in problematic trial courts that have no connection with the events or involved parties. Specifically, the Court rejected a constitutional due process challenge to Pennsylvania's statutory arrangement providing that a corporation's registration to conduct business within the state constitutes consent to allow Pennsylvania courts to "exercise general personal jurisdiction" in any lawsuit brought against that corporate entity. A plurality of four justices concluded that constitutional due process concerns are not implicated "when an out-of-state defendant submits to suit in the forum State" as the Pennsylvania business registration statutes require. *Id*. at 2043.

Four justices dissented from this conclusion. These justices recognized that the absence of constitutional limitations on consent-by-corporate-registration statutes will open the door to a free-for-all with no practical limits on state courts' exercise of jurisdiction. *Id*. at 2065 (Barrett, J., dissenting) ("If States take up the Court's invitation to manipulate registration, *Daimler* and *Goodyear* will be obsolete, and, at least for corporations, specific jurisdiction will be 'superfluous.'"). The dissenting justices would not allow state legislatures the ability to eliminate constitutional protections by following the Pennsylvania statutory model. *Id*. at 2055.

Justice Alito's concurring opinion determined the direction of the *Mallory* ruling, and his constitutional analysis contains competing elements. On the one hand, Justice Alito concluded that Pennsylvania's statutory arrangement did not run afoul of due process limitations even though the statutes enable abusive litigation tactics to require corporate defendants to defend lawsuits in infamous trial courts having no connection to the parties or the events at issue. He acknowledged:

> If having to defend this suit in Pennsylvania seems unfair to Norfolk Southern, it is only because it is hard to see Mallory's decision to sue in Philadelphia as anything other than the selection of a venue that is reputed to be especially favorable to tort plaintiffs. But we have never held that the Due Process Clause protects against forum shopping. Perhaps for that understandable reason, no party has suggested that we go so far.

Id. at 2049 (Alito, J., concurring). On the other hand, Justice Alito observed that other constitutional protections, including state sovereignty, federalism, and the dormant commerce clause, are likely infringed by the consent-by-registration statutory arrangement. *Id.* at 2050–51. Justice Alito identified the potentially "devastating" consequences of consent-by-registration laws, which will be most severe for small businesses that cannot afford the risks of remote litigation and may therefore forgo out-of-state expansion altogether. *Id.* at 2054. Accordingly, if constitutional arguments on the alternative grounds he identified had been properly raised, he seemingly would have struck down the statutes. *Id.* at 2053 ("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."). Justice Alito's assessment therefore leaves the constitutionality of Pennsylvania's consent-by-registration statutes unresolved and subject to further litigation on remand.

Mallory in the Context of the Supreme Court's Other Jurisdictional Decisions

The impact of the *Mallory* decision will largely depend on how courts decide the alternative constitutional bases for invalidating the Pennsylvania statutes that Justice Alito raised. The issues Justice Alito raised, including the dormant commerce clause argument for invalidating the Pennsylvania statute, will almost certainly be addressed after Mallory is returned to the state court. If the Pennsylvania courts follow Justice Alito's suggestion and invalidate the consent-to-jurisdiction statutory scheme, any significance of the *Mallory* due process ruling will be quite limited.

Nonetheless, the *Mallory* decision seems to continue the Court's retreat from clear limitations on state courts' ability to exercise personal jurisdiction over foreign corporate defendants. Prior rulings had signaled certain defined boundaries that state courts could not cross when attempting to exercise jurisdiction. For example, in *BNSF v. Tyrell*, 581 U.S. 402 (2017), the Court concluded that due process allows general jurisdiction over a corporate defendant only where the defendant is "essentially at home," typically just its state of incorporation and where its principal place of business is located. *Id*. at 413. The fact that the corporation does substantial business in the forum state, even employing thousands of people and operating extensive facilities, "does not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in [the forum state]." *Id*. at 414. In contrast, *Mallory* found general jurisdiction less constrained, concluding that a corporation's simple act of registering to do business in Pennsylvania is sufficient to enable the state to exercise general jurisdiction pursuant to the statute's consent provision. *Mallory*, 143 S. Ct. at 2043.

The less exacting requirements for establishing jurisdiction seen in the *Mallory* plurality decision also seem to comport with the softening of the specific jurisdiction analysis employed in *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct*., 141 S. Ct. 1017 (2021). Prior to *Ford*, the Court had indicated that due process considerations limited the exercise of specific jurisdiction to situations in which the lawsuit "arises out of or relates to the defendant's contact with the forum," meaning that the lawsuit stems from an "activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Bristol-Meyers Squibb Co. v. Superior Ct*., 137 S. Ct. 1773, 1780 (2017). Even though the defendant in *Bristol-Meyers Squibb* sold its pharmaceutical product nationally, the fact that specific non-resident plaintiffs did not purchase, ingest or suffer

injury from the product in California deprived the courts in that state of specific jurisdiction over the non-residents' claims due to the lack of a "connection between the forum and the specific claims at issue[.]" *Id*. at 1781. But in *Ford*, the Court concluded that the state courts could exercise specific jurisdiction even though Ford did not sell the accident-involved vehicles in the forum state. The Court ruled that Ford's forum state advertisement, sale and servicing of the same model as the vehicles at issue was sufficient to establish that lawsuits "relate to" the defendant's contacts with the forum sufficient to allow specific jurisdiction. *Id*. at 1028. Lower courts have struggled to find consistency in deciding what facts will establish adequate contacts by a corporation with the forum state that "relate to" the subject matter of a lawsuit. *Compare Sullivan v. LG Chem, Ltd*., ___ F. 4th ___ 2023 WL 5286965 (6th Cir. Aug. 17, 2023) (due process allowed exercise of specific jurisdiction over lawsuit addressing alleged explosion of 18650 lithium-ion battery acquired from vape store for use in e-cigarette device, despite no involvement by the defendant in the consumer market and sale of the subject batteries in the forum state only to manufacturer of vacuum cleaners) *with Ethridge v. Samsung SDI Co*., ___ F Supp. 3d ___, 2022 WL 2920429 (S.D. Tex. July 26, 2022) (due process prevented exercise of specific jurisdiction in lawsuit addressing 18650 lithium-ion battery alleged to have exploded during use of e-cigarette device, because "there is evidence that Samsung shipped batteries to companies in Texas engaged in the manufacturing or repair of other products, but no evidence that the presence of the offending battery in Texas was the result of purposeful availment by Samsung as opposed to an unauthorized act by third parties."). As observed by the dissenting justices, the conclusion in *Mallory* that the act of registering to conduct business within the forum state may be sufficient on its own to allow exercise of general jurisdiction has the potential to render superfluous the entire concept of specific jurisdiction if state legislatures follow the model of Pennsylvania's consent-by-registration statutes. *See Mallory*, 143 S. Ct. at 2065 (Barrett, J., dissenting).

Expected State Legislative Actions in Response to *Mallory*

The plaintiffs' bar has already recognized that the *Mallory* ruling both opens the door to the pursuit of cases in Pennsylvania that have no connection to that state other than the corporate defendant's registration, and to other states' adoption of similar consent-by-registration statutes. For example, lawyers from the prominent national plaintiffs' firm Robins Kaplan LLP published an article shortly after issuance of the *Mallory* decision. *See* Rayna Kessler and Ethen Seiderberg, "Mallory Gives Plaintiffs a Better Shot at Justice," Law360 (July 27, 2023). These authors observe that the *Mallory* ruling, if allowed to stand, will allow plaintiffs who have no connection to Pennsylvania to bring their lawsuits in local courts typically problematic for corporate defendants, such as the Philadelphia County Court of Common Pleas:

> Hypothetically, then, *Mallory* would enable a plaintiff from New Jersey, injured in California by a pharmaceutical company based in Florida, to sue in Pennsylvania federal court – assuming the company was registered to do business there and all other jurisdictional requirements were met.

Id. at 2. This fact pattern is remarkable, as it parallels the circumstances of the non-resident plaintiffs' claims in *Bristol-Meyers Squibb* which the Supreme Court found could not be pursued due to the absence of specific personal jurisdiction. In the minds of these plaintiffs' attorneys, in

Pennsylvania *Mallory* overrides the constitutional restrictions that the Court established elsewhere against the exercise of jurisdiction.

Further, these authors note that "the effects of this decision have the potential to reach far beyond the Keystone State." *Id*. (emphasis added). Although Pennsylvania is presently the only state to have enacted a statute that equates a corporation's registration to do business with consent to general jurisdiction, "[t]he court's ruling in *Mallory* may also encourage other states to follow Pennsylvania's lead." *Id*. The authors suggest that New York in particular is a candidate to adopt the Pennsylvania statutory model:

> In New York, for instance, a bill that would create a consent-by-registration scheme has already been passed by the Assembly by a wide margin. Although Gov. Kathy Hochul vetoed a similar bill in 2021, the *Mallory* decision may increase pressure on Hochul to sign it into law. With the blessing of the Supreme Court, other states may follow suit.

Id. Enactment of New York S.7476/A.7351 presently appears unlikely, and any state action to adopt the Pennsylvania statutory scheme is doubtful until courts clarify the dormant commerce clause and other constitutional issues identified in Justice Alito's *Mallory* concurrence. Nonetheless, the plaintiffs' bar has identified Pennsylvania's statutory model as creating an opportunity for "plaintiffs to sue in a wider range of fora – increasing the likelihood that the suit will proceed in the best possible court." *Id*.

Limiting Forum Shopping Opportunities that May Be Enabled by Corporate-Registration-as-Consent Statutes

If, as signaled by the Kessler and Seidenberg publication, plaintiffs' attorneys and their allies will likely press consent-by-registration legislation similar to the Pennsylvania model, several approaches could ameliorate the adverse effects of any such enactments and give corporate parties at least some opportunity to limit abusive forum shopping.

1. ***Pursue constitutional challenges to registration-as-consent statutes***.

Eliminating general jurisdiction consent statutes at their root provides the best solution to consent-by-registration statutes such Pennsylvania's. Justice Alito's concurring opinion indicates that he is "hard-pressed to identify any *legitimate local* interest that is advanced by requiring an out-of-state company to defend a suit brought by an out-of-state plaintiff on claims wholly unconnected to the forum State," leaving him "skeptical that any local benefits of the State's assertion of jurisdiction in these circumstances could overcome the serious burdens on interstate commerce that it imposes." *Mallory,* 143 S. Ct. at 2054 (Alito, J., concurring) (emphasis original). The four *Mallory* dissenting justices seem likely to accept Justice Alito's conclusion as an alternative to the due process restriction that they would have found. *Id*. at 2055 (Barrett, J., dissenting) ("By relabeling their long-arm statutes, States may now manufacture "consent" to personal jurisdiction. Because I would not permit state governments to circumvent constitutional limits so easily, I respectfully dissent.").

Because Pennsylvania's statutory scheme remains constitutionally vulnerable, raising and supporting challenges under both the U.S. constitutional provisions identified by Justice Alito and also applicable state constitutional provisions would provide the most direct and complete response to the fairness threat posed by the Pennsylvania statute. Such litigation would also deter other states from pursuing legislation mirroring the Pennsylvania approach.

2. *Codify the forum non conveniens doctrine.*

The *forum non conveniens* doctrine allows trial courts to dismiss an action if there is a more appropriate forum available to the plaintiff, even if venue and jurisdiction are proper in the trial court selected by the plaintiff. Courts, however, are usually quite reluctant to apply the *forum non conveniens* doctrine except in the most extreme circumstance. As the Missouri Court of Appeals recently stating in overturning a trial court's decision to invoke the doctrine, "a plaintiff's choice of forum is not to be disturbed except for weighty reasons and the case should be dismissed only if the balance is strongly in favor of the defendant." *Loew v. Heartland Trophy Properties, Inc*., 665 S.W.3d 339, 346 (Mo. Ct. App. 2023). Additionally, applying the doctrine is a matter of judicial discretion that will be overturned only on a finding of abuse of that discretion. *See Crawford v. Fam. Tree, Inc*., 670 S.W. 3d 55, 65 (Mo. Ct. App. 2023).

Although *forum non conveniens* usually exists as a common law doctrine, some states, most notably Georgia, Texas and West Virginia, have adopted *forum non conveniens* statutes. *See* OCGA § 9-10-31.1; Tex. Civ. Prac. & Rem. Code §71.051(b); W. Va. Code §56-1-1a. These enactments could serve as model legislation for other states. Further, *forum non conveniens* statutes could act as vehicles for inserting very specific criteria for courts to accept a case, such as the occurrence of an injury or the residence of the plaintiff within the judicial district in which the lawsuit is filed. *Forum non conveniens* statutes could also scale back judicial discretion to accept jurisdiction and mandate dismissal if certain circumstances are present.

3. *Expand considerations and provide constraints in venue statutes.*

Many states have venue statutes that identify the particular trial courts in which a particular lawsuit may be filed. These statutes may also provide a pathway for limiting plaintiffs' ability to file cases in problematic trial courts that have no connection to the parties of to the dispute, and may even afford corporate entities the opportunity to influence what fora are available. For example, Missouri's statute provides that the venue for tort actions brought against corporations "shall be" in the county where the corporation's registered agent is located or in the county in which the corporation has its principal place of business. Mo. Rev. Stat. §508.010.5(1). *See also* OCGA §14-2-510(b)(1) (venue is acceptable in the judicial district in which the corporation's registered agent is located). Other states have also incorporated provisions in venue statutes requiring placement in a specific court if certain conditions are present. *See*, *e.g*., Miss. Code §11-45-17 (establishing placement of lawsuits against counties to occur in that county's court, even if the presence and location of other parties might make venue proper elsewhere). Adding provisions to venue statutes that designate the trial courts in which tort claims against foreign corporations are allowed could minimize the negative impact of consent-by-registration statutes.

4. ***Enable removal through innocent seller statutes and similar provisions to prevent attachment of local defendants in product liability lawsuits.***

Approximately 19 states have enacted innocent seller statutes that protect retailers and distributors against joinder in product liability lawsuits in the absence of exceptional circumstances. *See*, *e.g.*, Colo. Rev. Stat. §13-21-402; Okla. Stat. §76-57.2. Although the primary purpose of these statutes is to protect product sellers that did not actively participate in the design and manufacturing processes at the core of product liability lawsuits, these statutes have the serendipitous effect in most states of enabling removal to federal courts. In general, corporate defendants prefer to litigate lawsuits in federal courts. Federal juries generally come from a broader geographic area that is less subject to local influence, and procedural protections such as discovery limitations and more coherent expert admissibility standards are applied. By opening a pathway to move product liability cases to federal court, innocent seller statutes may reduce the negative consequences of consent-by-registration statutes.