Trend Watch: Out-of-Staters Finding the Basis for Personal Jurisdiction

This article explores the history of consent by registration in personal jurisdiction case law, recent decisions at the federal and state level and a proposed amendment in the New York Legislature to change the current law in New York.

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By Adam C. Calvert and Brian Ramkissoon

Recent decisions from the U.S. Supreme Court and New York Court of Appeals significantly changed personal jurisdiction case law; specifically, whether registration to do business with the Secretary of State amounts to consent to general personal jurisdiction in the state.

This article explores the history of consent by registration in personal jurisdiction case law, recent decisions at the federal and state level and a proposed amendment in the New York Legislature to change the current law in New York.

History of Personal Jurisdiction and Consent by Registration

There are two types of personal jurisdiction: specific and general. Specific personal jurisdiction applies where the cause of action arose out of contacts with the forum state. General personal jurisdiction applies where there is no connection to the forum state, but the defendant has connections to the forum state sufficient for it to be sued in the state on any cause of action.

Recent Supreme Court cases, such as *Daimler AG v. Bauman*, 571 U. S. 117 (2014) and *BNSF Railway Co. v. Tyrrell*, 581 U. S. 402, 415 (2017), recognize several instances where a defendant would be subject to general personal jurisdiction.

Daimler permits a state to exercise general jurisdiction over a corporation in three instances: (1) when the corporation is incorporated in the state, (2) when the corporation has its principal place of business in the state or (3) "in an exceptional case" where the corporation's activities in the state are "so substantial and of such a nature as to render the corporation at home in that state." The third factor is rarely applicable, and the court found that the "exceptional case" does not exist merely because a company has substantial business or employees in the state.

For over 100 years, New York and other states recognized another instance where a company would be subject to general personal jurisdiction in the state—where the company registered to do business with the Secretary of State and consented to service of process. Prior decisions held that registration to do business was tantamount to consent to general personal jurisdiction.

A trio of statutes in the Business Corporation Law (BCL) govern foreign corporations obtaining a license to do business in New York. BCL section 1301(a) states that "[a] foreign corporation shall not do business in this state until it has been authorized to do so." BCL section 304(b) requires a foreign corporation seeking to do business in New York to designate the secretary of state as its agent for service of process on any claim. Similarly, BCL section 1304(a)(6) requires a foreign corporation, in its application to do business in New York, to designate "the secretary of state as its agent upon whom process against it may be served and [to provide] the post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon him."

That precedent changed in *Aybar v. Aybar*, 169 A.D.3d 137 (2d Dep't 2019). In this case, the Second Department emphasized that "New York's business registration statutes do not expressly require consent to general jurisdiction as a cost of doing business in New York, nor do they expressly notify a foreign corporation that registering to do business here has such an effect."

The Court of Appeals affirmed the appellate division's order, ruling that a foreign corporation does not consent to the exercise of general jurisdiction in New York when it registers to do business in New York and thereby designates the secretary of state as its agent for service of process. *Aybar v. Aybar*, 37 N.Y.3d 274, 280, 282 (2021).

The court concluded that a foreign corporation's compliance with the relevant statutory provisions in the BCL merely constitutes consent to accept service of process in New York. The principal continues to be upheld in cases such as *Vaval v. Stanco*, 2023 NY Slip Op 04683 (2d Dept Sept. 20, 2023), where the plaintiff was injured using a press brake that was designed and manufactured in Japan by a Japanese company and was intended only for use in Japan. The company had registered to do business in New York, but that was insufficient to confer general personal jurisdiction.

The Court of Appeals in *Aybar* stressed that there was nothing in the BCL that specifically stated that registration to do business amounts to consent to general personal jurisdiction in the state. But what about other states where there is explicit language in the business registration statute saying that registration is consent to general personal jurisdiction?

The Supreme Court took up that issue this year in *Mallory v. Norfolk Southern Railway*, 216 L. Ed. 2d 815 (2023), which upheld consent by registration to general jurisdiction in an action brought in Pennsylvania. In doing so, the court held that Pennsylvania's consent to the general jurisdiction statute did not violate the Due Process Clause.

It reasoned that when the plaintiff filed his claim in 2017, Norfolk Southern had been conducting business in Pennsylvania for an extended period. The company had established an office to receive legal notices and had done so in accordance with a statute that allowed it to conduct business in the state in exchange for accepting lawsuits. Norfolk Southern had actively taken advantage of its business opportunities in Pennsylvania, as evident from an advertisement cited in the decision.

Moreover, the court emphasized the substantial presence of Norfolk Southern in

Pennsylvania, including employing over 5,000 people (more than in its home state of Virginia), maintaining extensive track infrastructure and operating the largest locomotive shop in North America within the state. As of 2020, it also managed more miles of track in Pennsylvania than in any other state.

Additionally, it refuted the defendant's argument that the Due Process Clause prevented one state from encroaching on another state's sovereignty through excessive claims of personal jurisdiction. The court noted that previous personal jurisdiction cases had not raised federalism concerns when an out-of-state defendant willingly submitted to being sued in the forum state.

Lastly, the court dismissed the defendant's assertion that its registration filing and the establishment of an office to receive legal documents were mere "meaningless formalities." It pointed out that many legal formalities carry jurisdictional implications, and following the defendant's position would necessitate undoing several such formalities, including recognizing general jurisdiction over a corporation based solely on the filing of a certificate of incorporation in a state, irrespective of the company's actual operations, and the jurisdictional consequences of the "tag" rule or entering into a forum selection clause, among others.

The dissenting justices maintained that based on its precedent in *Daimler AG* and *BNSF Railway Co.* ("a case with remarkably similar facts"), simply doing business in the forum is not enough to compel general jurisdiction. In the absence of exceptional circumstances, a corporation is "at home" where it is incorporated or where it has its principal place of business. "Adding the antecedent step of registration does not change that conclusion. If it did, 'every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler's* ruling would be null."

Proposed Changes to New York BCL §1301 and 'Mallory' Impact

Recently, a law passed by both houses, but not yet signed into law, proposed legislation amending BCL §1301 to add a subsection (e) providing that:

> (e) A foreign corporation's application for authority to do business in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation. A surrender of such application shall constitute a withdrawal of consent to jurisdiction.

Similar amendments were proposed to the general association's law, limited liability company law, not-for-profit corporation law, and partnership law.

If this new proposed amendment is signed into law, the *Mallory* Court would likely sustain such a statute, leaving corporations subject to general jurisdiction. It cannot be overlooked that the *Mallory* Court's decision stressed that the defendant had substantial ties to Pennsylvania.

Notwithstanding the decision, it would appear that it leaves room for further adjudication should a corporation with less substantial contacts challenge such a statute.

Nonetheless, the principle that registration to do business is consent to jurisdiction seems valid.

Practically, such a statute may deter corporations from registering to do business in New York in fear of submitting themselves to general jurisdiction. It would certainly open defendants to additional suits in New York that have little or no connection to New York, although this was true for nearly 100 years until the recent *Aybar* decision.

Adam C. Calvert is a shareholder and Brian Ramkissoon is an associate in Marshall Dennehey's New York City office, where they practice in the firm's casualty department. Calvert represents clients in construction injury litigation, retail liability, automobile litigation, trucking and transportation litigation, product liability actions and more. Ramkissoon focuses his practice in premises and retail litigation, New York Labor Law litigation, construction litigation, product liability, maritime litigation and general liability litigation.