U.S. Supreme Court Renders Personal Jurisdiction Decision

This post is by Maggie Gardner, a professor of law at Cornell Law School. It is cross-posted at Transnational Litigation Blog.

The U.S. Supreme Court yesterday upheld the constitutionality of Pennsylvania's corporate registration statute, even though it requires out-of-state corporations registering to do business within the state to consent to all-purpose (general) personal jurisdiction. The result in *Mallory v. Norfolk Southern Railway Co.* re-opens the door to suing foreign companies in U.S. courts over disputes that arise in other countries. It may also have significant repercussions for personal jurisdiction doctrine more broadly.

The Case

Robert Mallory worked for Norfolk Southern for nearly twenty years in Ohio and Virginia. He has since been diagnosed with cancer, which he alleges was caused by the hazardous materials to which he was exposed while in Norfolk Southern's employ. Although he currently lives in Virginia, he sued Norfolk Southern (a company then incorporated and based in Virginia) in state court in Pennsylvania, asserting claims under the Federal Employers' Liability Act (FELA).

Norfolk Southern contested personal jurisdiction. But Mallory argued that by registering to do business in Pennsylvania, it had agreed to appear in Pennsylvania courts on any cause of action. While the Pennsylvania Supreme Court agreed with that interpretation of Pennsylvania's corporate registration statute, it held that the statute violated the Due Process Clause of the Fourteenth Amendment in light of the Supreme Court's caselaw since *International Shoe Co. v. Washington* (1945).

The Holding

A majority of the Supreme Court disagreed. Justice Alito joined Justice Gorsuch's plurality (with Justices Thomas, Sotomayor, and Jackson) to hold that the question was controlled by a pre-*International Shoe* decision, *Pennsylvania Fire Ins. Co. v.*

Gold Issue Mining & Milling Co. (1917). *Pennsylvania Fire* approved a Missouri statute that required out-of-state insurance companies to appoint a state official as an agent for service of process for any suit. In *Pennsylvania Fire*, that Missouri statute was invoked to establish jurisdiction over a Pennsylvania insurance company regarding a contract formed in Colorado to insure a Colorado facility owned by an Arizona company. The five Justices agreed that the Supreme Court has never overruled *Pennsylvania Fire* and that it thus controls this case.

There is another, broader point on which the five Justices also seem to agree: *Pennsylvania Fire* does not conflict with *International Shoe* because *International Shoe* only addressed jurisdiction over *non-consenting* defendants. As Alito put it, "Consent is a separate basis for personal jurisdiction"—or as Gorsuch put it, "*International Shoe* simply provided a 'novel' way to secure personal jurisdiction that did nothing to displace other 'traditional ones.'" An entirely separate avenue for establishing personal jurisdiction exists outside of *International Shoe*'s framework, which includes (according to the plurality) "[f]ailing to comply with certain pre-trial court orders, signing a contract with a forum selection clause, accepting an in-state benefit with jurisdictional strings attached," or making a general appearance. And in this consent-based track, the five Justices also seem to agree that federalism concerns are no longer applicable.

Points of Disagreement

Alito wrote separately, however, to argue that Pennsylvania's statute runs afoul of the dormant Commerce Clause. Even if the statute didn't discriminate against out-of-state businesses, Alito explained, it significantly burdens interstate commerce, and it does so without any legitimate local interest. While a state "certainly has a legitimate interest in regulating activities conducted within its borders," and while it "also may have an interest 'in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors,'" a state "generally does *not* have a legitimate local interest in vindicating the rights of non-residents harmed by out-of-state actors through conduct outside the State."

It is not particularly surprising that Alito was alone in elaborating this dormant Commerce Clause concern, given the split opinions earlier this Term in *National Pork Producers Council v. Ross*. As I discussed in a preview of the *Mallory* decision, Gorsuch and Thomas in that case found the balancing approach required

by the dormant Commerce Clause jurisprudence to simply be infeasible. (Perhaps Alito hoped he might win them over if he could establish a *complete* lack of legitimate local interest, which would obviate the need for balancing). And if Sotomayor was unconvinced by the plaintiffs' showing of a substantial burden on interstate commerce in *National Pork Producers*, she was unlikely to sign onto Alito's rather vague paragraph about how statutes like Pennsylvania's could burden small companies.

But why did Alito not join more of the plurality opinion? The plurality embraced a framing of the case that emphasized Norfolk Southern's significant and permanent presence in Pennsylvania, including its 5,000 employees, 2,400 miles of track, and three locomotive shops (including the largest in North America). That framing is reminiscent of Sotomayor's emphasis on fairness in her prior personal jurisdiction writings, as well as her questions at oral argument last fall. The plurality opinion also begins by contrasting this case with Mallory's ability to "tag" an individual employee of Norfolk Southern in Pennsylvania, asking why Mallory shouldn't be able to assert personal jurisdiction as easily over Norfolk Southern itself. That framing recapitulates a key point in Gorsuch's concurrence in *Ford Motor Co. v. Montana Eighth Judicial District Court* (2021).

But neither of those framings resonates with Alito's prior writings, to say the least. He tends to be more skeptical of litigation and court access policies, and he notably did not join Gorsuch's concurrence in *Ford*. Further, both framings would have undermined Alito's argument that Pennsylvania lacked any legitimate local interest in this case.

Jackson also wrote a brief concurrence that emphasized that personal jurisdiction is a waivable right, focusing on the Court's opinion in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* (1982). Her invocation of "waiver" rather than "consent" was clearly purposeful (and a distinction that Robin Effron and John Coyle have recently explored).

The Dissent

Justice Barrett's dissent (joined by Chief Justice Roberts and Justices Kagan and Kavanaugh) staunchly defended the *International Shoe* paradigm. "For 75 years," it begins, "we have held that the Due Process Clause does not allow state courts

to assert general jurisdiction over [out-of-state] defendants merely because they do business in the State." The Court's decision in *Mallory*, Barrett explains, invites states to evade *International Shoe*'s limits on personal jurisdiction by simply rewording their long-arm statutes to include implied consent. Indeed (she notes), this case is remarkably like *BNSF Railway Co. v. Tyrrell* (2017), another FELA suit involving out-of-state parties and a cause of action that arose out of state as well. In *Tyrell*, the Court rejected the state's assertion of personal jurisdiction in light of the Court's recent decisions in *Daimler AG v. Bauman* (2014) and *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011). Approving Pennsylvania's statute effectively robs all three of those precedents of meaning.

Foreign Defendants in U.S. Courts

The dissent is at least right about the practical implications of the Court's holding: states that are inclined to do so now have a roadmap for evading the limits on general personal jurisdiction that the Court staked out in *Goodyear*, *Daimler*, and *BNSF*. While the mere fact of doing business is still not enough to subject a "non-consenting" business to jurisdiction in a forum, the mere fact of doing business plus a broadly worded statute might be. Indeed, it's possible that Sotomayor joined the majority precisely because of her consistent concern that the Roberts Court has gone too far in paring back both general and specific jurisdiction under *International Shoe*. As the lone justice who refused to join the Court's opinion in *Daimler*, she has now helped reclaim some of that state power.

Daimler, itself a case involving a foreign defendant, made it much harder for plaintiffs to hale non-U.S. companies into U.S. courts. After *Daimler*, plaintiffs have had to establish specific jurisdiction over foreign defendants, which can be hard to do even when the plaintiff resides in the U.S. forum and was injured there, as in *J. McIntyre Machinery, Ltd. v. Nicastro* (2011). *Mallory* gives states a different avenue for protecting their citizens' ability to sue foreign defendants. As the plurality asserts, "all *International Shoe* did was stake out an *additional* road to jurisdiction over out-of-state corporations," separate from the consent-based road upon which states can now rely.

It will be interesting to see how many states take up this invitation. My prediction is that we will see few open-ended statutes like Pennsylvania's, but that we will see some more tailored statutes, for example asserting all-purpose jurisdiction

over any claims brought by in-state residents against companies doing business in the state.

Broader Implications for Personal Jurisdiction Doctrine

It will also be interesting to see how much of a sea change *Mallory* makes in personal jurisdiction doctrine more broadly. While the holding may appear narrow, five Justices have agreed to limit the ambit of *International Shoe*'s paradigm to *non-consenting* defendants—a rather significant restriction. And given how broadly the Court construes "consent" in the age of forum selection clauses and compelled arbitration (and now corporate registration statutes), that could render *International Shoe* largely obsolete.

The approach of the plurality may also signal that there is more to come. Gorsuch's opinion focuses on history and tradition and encourages reliance on pre-*International Shoe* cases. He has found a way to wind back the clock without having to directly overrule *International Shoe*—but would a future case encourage these Justices to wind back the clock even further?

I do worry that Gorsuch and his like-minded colleagues are too sanguine about the challenges that a return to broad general jurisdiction would entail. As I have written with others, there are real systemic costs to a paradigm of general jurisdiction—precisely the costs that *International Shoe* was written to address. A fundamental flaw in the plurality's approach is its syllogism that because the Court approved tag jurisdiction over individuals in *Burnham v. Superior Court* (1990), it should also continue to recognize broad general jurisdiction over corporations. First, *Burnham* was a splintered decision, and a majority of the Justices did *not* agree that tag jurisdiction was completely unmoored from *International Shoe*'s framework. But second, why isn't *Burnham* itself the mistake? Why not level up the protections for individual defendants, requiring some connection between the forum, the dispute, and the defendant greater than the defendant's fleeting physical presence?

Conclusion

I have started wondering if the binary distinction between general and specific jurisdiction might have outlived its usefulness as a legal construct. Perhaps registration statutes and tag jurisdiction (and some modified forum of doing business jurisdiction?) belong in an intermediate category—but one that must still satisfy *International Shoe*'s overarching command that the defendant have minimum contacts with the forum such that notions of fair play and substantial justice will not be offended.