

EN BANC PANEL OF THE PENNSYLVANIA SUPERIOR COURT GETS SET FOR REARGUMENT REGARDING BUSINESS REGISTRATION AS CONSENT TO GENERAL PERSONAL JURISDICTION

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On October 31, 2019, an *en banc* panel of the Pennsylvania Superior Court will hear reargument [1] in the case of *Murray v. American LaFrance LLC* to decide whether, following the United States Supreme Court's landmark decision in *Daimler AG v. Bauman*, registration to do business in Pennsylvania can constitute consent to general personal jurisdiction. [2] The issue was previously addressed by separate three-judge panels of the Superior Court last year—first in *Webb-Benjamin, LLC v. International Rug Group, LLC* [3] and then in *Murray*—and both held that the language of Pennsylvania's business registration [4] and long-arm statutes [5] provided sufficiently explicit notice of the jurisdictional impact of registering to do business, such that the act of registration conferred constitutionally valid "consent" to personal jurisdiction. Since that time, however, federal courts in Pennsylvania have split in deciding whether to follow existing precedent accepting consent by registration or to reject such an interpretation on constitutional grounds. This alert provides an overview of the current landscape in Pennsylvania, including recent federal decisions, on the eve of rehearing in *Murray*. [6]

I. CONSENTING TO PERSONAL JURISDICTION BY REGISTERING TO DO BUSINESS

In the wake of the United States Supreme Court's landmark decisions in *Goodyear v. Brown*, *Daimler AG v. Bauman*, *BNSF Railway Co. v. Tyrell*, and *Bristol-Myers Squibb Co. v. Superior Court (Anderson)*, [7] companies across the country (and particularly those companies facing potential exposure to mass tort, product liability, and other repetitive litigation claims) have been closely following ongoing developments related to personal jurisdiction. As litigants have continued to wrestle with the contours of the constitutional limitations defined by *Daimler* and its progeny, one question that has consistently risen to the forefront is when, if ever, registration to do business in a particular state can constitute valid *consent* to general personal jurisdiction in that state. This question became important following *Daimler* because the Supreme Court did away with the concept of general jurisdiction based solely on the business contacts of an out of state defendant. [8] Nationally, most courts addressing the issue have concluded that, even if an out of state company is reached by the forum's long arm statute, simply registering to do business fails to satisfy constitutional due process requirements for personal jurisdiction; accordingly, these courts have rejected the argument that mere registration is sufficient to establish consent to jurisdiction. [9]

On the other hand, some recent Pennsylvania federal and state court decisions have found registration sufficient to establish general jurisdiction based on their interpretation of Pennsylvania's particular statutory scheme. [10] The consequences of these decisions were immediate; *all* companies registered in Pennsylvania (irrespective of their presence in the state) were potentially subjected to lawsuits brought by plaintiffs (including plaintiffs from outside of Pennsylvania) seeking to recover for injuries suffered entirely in other states. [11]

II. RECENT FEDERAL DECISIONS HAVE REACHED DIVERGENT CONCLUSIONS ABOUT THE VALIDITY OF "JURISDICTION BY REGISTRATION"

While *Murray* awaits its *en banc* rehearing, federal district courts have continued to address questions regarding general personal jurisdiction and Pennsylvania's statutory scheme. For example, on January 16, 2019, in *Youse v. Johnson & Johnson*, a mass-tort lawsuit alleging exposure to asbestos from the use of cosmetic talcum powder products, Judge Michael Baylson of the Eastern District of Pennsylvania sided with other recent Pennsylvania federal district court decisions holding that business registration constitutes consent to jurisdiction. [12] Judge Baylson explained that in *Bane v. Netlink, Inc.*—decided prior to *Daimler*—the Third Circuit had interpreted registration under the statute to confer consent to jurisdiction. [13] Accordingly, Judge Baylson held that "[w]ithout the Third Circuit overruling *Bane* or distinguishing *Daimler*," the court was bound to "follow these decisions [i.e. *Bane* and its progeny]." [14]

On June 6, 2019, however, in another asbestos case, Judge Eduardo Robreno of the Eastern District of Pennsylvania reached a contrary conclusion on constitutional grounds in *Sullivan v. A.W. Chesterton, Inc.* [15] In *Sullivan*, defendant Huntington Ingalls Incorporated ("HIC") moved to dismiss because HIC had no forum contacts sufficient to establish specific jurisdiction and HIC was not "at home" in Pennsylvania for general jurisdiction under *Daimler*—in fact, HIC was incorporated and maintained its headquarters in Virginia. [16] Of course, however, HIC had registered to do business in Pennsylvania. [17]

To determine whether it had personal jurisdiction, the court first discussed *Daimler* within the evolution of the Supreme Court's general personal jurisdiction precedents. The court explained that the Supreme Court had gradually rejected the contacts-based analysis of general jurisdiction it announced in *International Shoe* and ultimately concluded, in *Goodyear*, that "a foreign corporation is subject to general personal jurisdiction only where it 'is fairly regarded as at home.'" [18] *Daimler*, in turn, "completed the turn away from *International Shoe*'s factual analysis in favor of a fairly straightforward bright line test" such that "a corporation is typically 'at home' in only two places: its state of incorporation and that state in which it has its principal place of business." [19] The court further explained, however, that although *Daimler* did not prevent a party from consenting to jurisdiction under certain circumstances, it is axiomatic that consent is only valid if it is given both knowingly and voluntarily. [20] Accordingly, the court framed the question in *Sullivan* as whether "a foreign corporation *knowingly* and *voluntarily* consent[s] to general jurisdiction in a state by registering to do business under a statutory regime that conditions the right to do business on the waiver of general jurisdiction?" [21]

In addressing the question of knowing and voluntary consent, the court found that the "knowingly" prong was arguably satisfied because Pennsylvania's statutory scheme explicitly ties registration to jurisdictional consent. [22] The problem, however, was whether that consent was voluntary. [23] Noting that use of Pennsylvania's statutory scheme to establish consent would allow states to circumvent *Daimler* without giving corporations any real alternative to registration, [24] the court explained that the Pennsylvania statute failed the "voluntary" prong

because it "allows Pennsylvania to impermissibly extract consent at a cost of a constitutional right." This, the court found, violates the unconstitutional conditions doctrine, which prohibits a state from "condition[ing] a benefit generally available to others in the state [*i.e.* engaging in commerce in the state] on the surrender of a constitutional right [*i.e.* the due process protections afforded by *Daimler*]." [25] Therefore, the statute "violates the Due Process Clause and is unconstitutional." [26]

As it relates to *Bane*, *Youse*, and other decisions holding that the statutory scheme was sufficient to confer general personal jurisdiction, the court explained that "[w]hen a constitutional standard is replaced by newer Supreme Court law contrary to the law of the circuit, 'the old standard [is] not binding' on lower courts." [27] Consequently, the court held that, because "the rule that emerges from *Daimler* changed the standard for determining when a state may exercise general personal jurisdiction over a foreign corporation . . . the result obtained under *Bane* . . . cannot stand under the new constitutional standard adopted in *Daimler*." [28]

III. THE SUPERIOR COURT PREPARES FOR *EN BANC* REHEARING OF *MURRAY V. AMERICAN LAFRANCE LLC*

It is against this backdrop that the Pennsylvania Superior Court will rehear argument in *Murray*, in which the court will reconsider its earlier 2-1 panel decision holding that registration to do business in Pennsylvania provides constitutionally valid "consent" to general personal jurisdiction, even in the absence of other "contacts" between the defendant and Pennsylvania. [29] Indeed, the forthcoming *en banc* decision is poised to provide the most definitive resolution to date of this important statutory and constitutional question with significant jurisdictional implications for every company registered to do business in the state.

It is also worth emphasizing that the Superior Court *en banc* panel will not be bound by that court's earlier panel decisions or by the federal district court decisions addressing the issue. As such, the *en banc* panel will have a number of options before it and, although the panel is expected to revisit the central issue of registration by consent, it is possible the court could sidestep the issue and reach a decision on case-specific grounds. For example, the court could conclude the defendant in *Murray* did not "consent" to jurisdiction because it registered to do business in Pennsylvania nine years before the "explicit general-jurisdiction language in Section 5301" was actually adopted in 1978. The court could also elect to decide the case on the grounds of waiver, although that appears unlikely given the posture of the case. Both of these case-specific concerns were flagged in Judge Mary Jane Bowes 27-page dissent in *Murray*, and a narrow decision on either ground by the *en banc* panel [30] could leave *Webb-Benjamin* undisturbed as the prevailing law in Pennsylvania.

IV. CONCLUSION

For now, then, the situation remains very much in flux. A company that registers to do business in Pennsylvania today may find itself subject to general personal jurisdiction in Pennsylvania's courts. That analysis may change in the near future, however, with the Pennsylvania Superior Court set in *Murray* to provide what will become the most definitive interpretation of the relevant statutory scheme by a Pennsylvania appellate court to date. Moreover, further consideration by the Pennsylvania Supreme Court or the Third Circuit could set the issue up to be heard by the United States Supreme Court, since neither is bound by decisions of the other on issues of federal law. Whatever the Superior Court ultimately decides, one thing is clear: all companies registered (or considering registering) to do business in Pennsylvania should be closely monitoring the *en banc* proceedings in

Murray over the coming months and preparing to evaluate the impact of the decision on their exposure to potential liability in Pennsylvania.

NOTES

[1] Reargument of a case before an *en banc* panel of the Superior Court is not reargument before the full court. According to Pa. R.A.P. 3103(a), the Superior Court *en banc* "shall consist of no more than nine active members of the court." Nonetheless, "an opinion of the court *en banc* is binding on any subsequent panel of the appellate court in which the decision was rendered." Pa. R.A.P. 3103(b).

[2] *Murray v. American LaFrance LLC*, 2018 PA Super 267 (Sep. 25, 2018), *withdrawn*, 2018 Pa. Super. LEXIS 1320 (Pa. Super. Ct. Dec. 7, 2018) (ordering rehearing by *en banc* panel); *Daimler AG v. Bauman*, 571 U.S. 117, 134 S.Ct. 746 (2014).

[3] *Webb-Benjamin, LLC*, 2018 PA Super 187, 192 A.3d 1133 (Pa. Super. Ct. 2018).

[4] 15 PA. CONS. STAT. § 411.

[5] 42 PA. CONS. STAT. § 5301(a)(2)-(3).

[6] We discussed *Murray*, and previewed the issues the *en banc* panel will confront at rehearing, in an [alert published earlier this year](#). We also discussed *Webb-Benjamin* in further detail in an [alert published in August 2018](#).

[7] See *Goodyear Dunlop Tires Operations, S.A., et al. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846 (2011); *Daimler*, 571 U.S. 117 (2014); *BNSF Railway Co. v. Tyrell*, 581 U.S. ___, 137 S. Ct. 1549 (2017); *Bristol Myers Squibb Co. v. Superior Court of California*, 582 U.S. ___, 137 S. Ct. 1773 (2017).

Goodyear held that general jurisdiction over a defendant foreign corporation is proper only where the corporation's contacts with the jurisdiction are so extensive that the corporation is "essentially at home" in the jurisdiction. *Daimler* clarified and extended the rule announced in *Goodyear*, explaining that a corporation is typically "at home" only in the state of its place of incorporation and its principal place of business. Subsequently, in *Tyrell* and *Bristol Myers Squibb Co.*, the U.S. Supreme Court rejected attempts to circumvent *Daimler* by asserting specific jurisdiction over defendants based on limited and/or unrelated contacts to the forum state, describing such arguments as resembling an impermissibly "loose and spurious form of general jurisdiction."

[8] Of course, the holding in *Daimler* did not affect specific personal jurisdiction based on litigation-related forum contacts; as such, in cases where the defendant's forum contacts are related to the claims at issue, plaintiffs need not resort to arguing for general jurisdiction over an out-of-state defendant.

[9] See, e.g. *Waite v. All Acquisition Corp.*, 901 F.3d 1307 (11th Cir. 2018), *cert. denied sub nom. Waite v. Union Carbide Corp.*, 139 S. Ct. 1384, 203 L. Ed. 2d 611 (2019) (rejecting argument that "a foreign corporation's registration to do business and appointment of an agent for service of process in Florida amounts to its consent to general jurisdiction in the Florida courts."); *Brown v. Lockheed-Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016) (holding that "mere registration" to do business in the forum state is not sufficient to establish consent to jurisdiction); *but see id.* at 640 (citing Pennsylvania's Section 5301 as an example of "[j]urisdictions other than Connecticut" that "have enacted registration statutes that more plainly advise the registrant" of the jurisdic

[10] **State:** See, e.g. *Webb-Benjamin, LLC v. Int'l Rug Grp., LLC*, 2018 PA Super 187, 192 A.3d 1133 (June 28, 2018); *Murray v. American LaFrance LLC*, 2018 PA Super 267 (Sep. 25, 2018), *withdrawn*, 2018 Pa. Super. LEXIS 1320 (Pa. Super. Ct. Dec. 7, 2018) (ordering rehearing by *en banc* panel); *but see Robert Mallory v. Norfolk Southern Railway Co.*, No. 1961, (Philadelphia Court of Common Pleas, May 30, 2018) (rejecting "consent by registration" argument under Section 5301 prior to the Superior Court's decision in *Webb-Benjamin*).

Federal: See, e.g. *Sciortino v. Jarden, Inc.*, No. 17-0605, 2019 U.S. Dist. LEXIS 122623 (E.D. Pa. July 23, 2019); *Williams v. Takeda Pharmaceuticals America, Inc.*, No. 18-4774, 2019 WL 2615947 (E.D. Pa. June 6, 2019); *Aetna v. Kurtzman Carson Consultants, LLC*, No. 18-470, 2019 U.S. Dist. LEXIS 55608 (E.D. Pa. Mar. 29, 2019); *Youse v. Johnson & Johnson*, No. 18-3578, 2019 WL 233884 (E.D. Pa. Jan. 16, 2019); *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278 (M.D. Pa. 2018); *Pager v. Metro. Edison*, No. 3:17-CV-00934, 2018 WL 491014 (M.D. Pa. Jan. 19, 2018); *Plumbers' Local Union No. 690 Health Plan v. Actavis, Inc.*, No. CV 16-665, 2017 WL 3129147 (E.D. Pa. July 24, 2017); *Lindsay Morgan Hegna v. Smitty's Supply Co.*, No. CV 16-3613, 2017 WL 2563231 (E.D. Pa. June 13, 2017); *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648 (E.D. Pa. 2016).

[11] In *Murray*, for example, the Superior Court held that a Delaware defendant's Pennsylvania business registration was sufficient to confer jurisdiction over a lawsuit filed by plaintiffs from Massachusetts, New York, and Florida, based on injuries allegedly suffered in New York. *Murray*, 2018 PA Super 267.

[12] *Youse v. Johnson & Johnson*, No. 18-3578, 2019 WL 233884 (E.D. Pa. Jan. 16, 2019). See also *Sciortino v. Jarden, Inc.*, No. 17-0605, 2019 U.S. Dist. LEXIS 122623 at *17-*18 (E.D. Pa. July 23, 2019) ("[b]ecause Pennsylvania's registration statute explicitly advises foreign corporations of the jurisdictional effect of registering to do business in the Commonwealth, and due to the fact that [defendant] has undisputedly registered to do business here, it has consented to the jurisdiction of Pennsylvania courts for that reason alone."); *Williams v. Takeda Pharmaceuticals America, Inc.*, No. 18-4774, 2019 WL 2615947 at *3 (E.D. Pa. June 6, 2019) ("[w]ithout any further analysis from the Supreme Court or the Third Circuit, a foreign corporation's registration to do business in Pennsylvania establishes consent to personal jurisdiction."); *Aetna v. Kurtzman Carson Consultants, LLC*, No. 18-470, 2019 U.S. Dist. LEXIS 55608 at *18 (E.D. Pa. Mar. 29, 2019) ("[defendant] is subject to general jurisdiction in Pennsylvania by consent" because it registered under the business registration statute.).

[13] See *id.* at *3 (citing *Bane v. Netlink*, 925 F.2d 637 (3d Cir. 1991)).

[14] *Youse*, 2019 WL 233884 at *4.

[15] *Sullivan v. A.W. Chesterton*, 384 F.Supp. 3d 532 (E.D. Pa. 2019).

[16] *Sullivan*, 384 F.Supp. 3d at 534-35.

[17] *Id.*

[18] *Id.* at 537-38.

[19] *Id.* at 538.

[20] *Id.*

[21] *Id.* (emphasis added).

[22] *Id.* at 539; *but see Gorton v. Air & Liquid Systems Corp.*, 303 F. Supp. 3d 278, 296-97 (M.D. Pa. 2018) ("if a defendant's alleged act or omission that exposed Mr. Gorton to asbestos occurred prior to the enactment of

section 5301, *i.e.*, prior to 1978, this court would not have general jurisdiction over that defendant based solely upon the defendant's qualification as a foreign corporation in Pennsylvania.").

[23] *Id.*

[24] *Id.* at 540.

[25] "[T]he logical foundation of the unconstitutional conditions doctrine applies with equal force in any case in which the enjoyment of a government-sponsored benefit is conditioned upon a person's nonassertion of any constitutional right." *Id.* at 542 (quoting *Wojtczak v. Cuyler*, 480 F. Supp. 1288, 1306 (E.D. Pa. 1979)).

[26] *Id.* at 543.

[27] *Id.* at 544 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 697-98 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833, 112 S.Ct. 2791 (1992)).

[28] *Id.* at 545.

[29] *Murray v. American LaFrance LLC*, 2018 PA Super 267 (Pa. Super. Dec. 7, 2018).

[30] The *en banc* panel in *Murray* includes Judges Bowes, Shogan, Lazarus, Olson, Stabile, Dubow, Kunselman, Nichols, and Murray. Judge Lazarus was on the panel in *Murray* along with Judge Bowes. Judge Stabile was on the 3-0 panel that decided *Webb-Benjamin*.

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