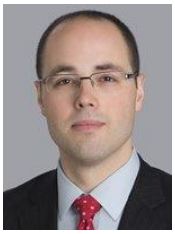
Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Neb. Ruling May Squash Consent By Registration Theory

By **Andrew Tulumello, Jacob Spencer and Joshua Wesneski**
(August 7, 2020, 4:41 PM EDT)

Andrew Tulumello



Jacob Spencer

Joshua Wesneski

Since the U.S. Supreme Court decided Daimler AG v. Bauman,[1] plaintiffs have been finding increasingly creative ways to hale foreign, or out-of-state, corporations into court in forums unrelated to the underlying allegations.

But one of the most popular arguments plaintiffs have put forth is also one of the oldest — that a foreign corporation that registers to do business in a state and appoints an agent for service of process has consented to the all-purpose general personal jurisdiction of the courts of that state.

Although plaintiffs root this argument in a series of Supreme Court cases that have never been formally overruled, well-armed defense counsel have so far been successful in persuading state and federal courts to narrowly interpret registration statutes to reject this obvious attempt to sidestep the rigorous test for general jurisdiction set forth in Daimler and BNSF Railway Co. v. Tyrrell.[2]

A recent case from the Nebraska Supreme Court, however, broke new ground in this ongoing conflict. In Lanham v. BNSF,[3] the Nebraska Supreme Court became the first appellate court — state or federal — to firmly hold that the theory of consent by registration is unconstitutional per se, regardless of how a particular state's registration statute is written or interpreted.

That ruling has important implications going forward, as it opens up a new line of precedent that defense counsel may use to permanently shut the door on this theory.

The Origin of Consent

The consent by jurisdiction argument has its origins in a 1917 Supreme Court case, Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.,[4] where the Supreme Court affirmed the Missouri Supreme Court's holding that an Arizona corporation consented to the jurisdiction of Missouri courts by obtaining a license to do business in Missouri and appointing the superintendent of Missouri's insurance department as an agent for service of process.

The U.S. Supreme Court held that "[t]he construction of the Missouri statute thus adopted hardly leaves

a constitutional question open," and that if the corporation "had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt."

The Supreme Court revisited and reaffirmed this ruling two decades later, in Neirbo Co. v. Bethlehem Shipbuilding Corp.[5] Although the case involved the question of venue, as opposed to personal jurisdiction, the court relied on the proposition that "service upon [a registered] agent, in conformity with a valid state statute, constitute[s] consent to be sued in the federal court."

Because the corporation had, pursuant to New York law, designated an agent for service of process in New York, that was sufficient to satisfy the federal venue statute.

These cases, however, were premised on the necessity of the times, owing their pedigree to the then-prevailing conception of personal jurisdiction that required a defendant's physical presence in a forum in order to obtain personal jurisdiction over the defendant.[6] Because corporations were not physically present in any state except their state of incorporation, they could not be sued in any other state, even if they did business or committed torts there.[7]

Consent jurisdiction provided a solution to that problem, permitting suits against corporations outside of their state of incorporation, and therefore harmonized the rigid structure of personal jurisdiction at the time, the theory of corporate presence, and the need to allow suits against corporations outside of their home states.[8]

But this form of consent, as the Supreme Court later recognized, was entirely fictional. And in the paradigm-shifting case of International Shoe Co. v. Washington,[9] the Supreme Court abandoned the strict requirement of physical presence in favor of the flexible, contacts-based approach to personal jurisdiction that now dominates.

As a plurality of the Supreme Court later recognized, International Shoe cast aside the "fiction" of consent by registration, replacing it with the tests for specific and general jurisdiction.

Notwithstanding that International Shoe had eroded the rationale for Pennsylvania Fire and Neirbo, some plaintiffs seeking to file suit in a favorable forum clung to the old line of cases — particularly as the Supreme Court continued to define and narrow personal jurisdiction — and succeeded in persuading both the U.S. Court of Appeals for the Third Circuit and U.S. Court of Appeals for the Eighth Circuit to endorse consent by registration theories of jurisdiction.[10]

Other federal courts of appeals, however, were not persuaded that consent by registration was so solid a basis for personal jurisdiction.[11]

The Post-Daimler Renaissance

New developments in the Supreme Court limiting the jurisdictional reach of courts, however, have pushed plaintiffs to resort more frequently to the consent by registration theory of jurisdiction.

In Daimler, the Supreme Court narrowed the instances in which a corporation could be subject to general, all-purpose jurisdiction in a court — only when a "corporation's 'affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State.'"

This conception of the due-process limitations on personal jurisdiction followed closely on the heels

of Goodyear Dunlop Tires Operations SA v. Brown,[12] in which the court expressed similar disapproval of unconstitutionally liberal impositions of general jurisdiction.

Following Daimler's tightening of the jurisdictional limitations, many plaintiffs began turning to the theory of consent jurisdiction to do precisely what Daimler said they could not — sue corporations on any claim in any state in which they do business. But those plaintiffs have been met with stiff opposition, particularly from state supreme courts.[13]

In each of those cases, the state supreme courts either refused to construe their states' respective corporate registration statutes to extract consent to all-purpose jurisdiction or, in some cases, actually reversed a prior interpretation giving the statute that effect. Each of these courts noted the serious constitutional questions implicated by extracting consent through registration, and opted to interpret the statutes narrowly.

The U.S. Court of Appeals for the Second Circuit also has weighed in on the matter in Brown v. Lockheed Martin Corp.,[14] narrowly construing Connecticut's registration statute and observing:

> If mere registration and the accompanying appointment of an in-state agent ... nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and Daimler's ruling would be robbed of meaning by a back-door thief.

Since Daimler, no state supreme court or federal court of appeals has sanctioned the consent by registration theory.

None of these appellate cases, however, went so far as to say that consent by registration is per se unconstitutional under Daimler. Prior to 2020, the closest any court had come was in DeLeon v. BNSF Railway Co.[15]

There, the Montana Supreme Court — like the other courts before it — construed its registration statute narrowly and rejected the argument that the defendant's registration to do business in Montana constitutes consent to all-purpose jurisdiction.

But the court went on to analyze the due-process implications of such a ruling, saying that Pennsylvania Fire and Neirbo were decided "before International Shoe, and they therefore do not hold significant precedential weight," and observing also that "extending general personal jurisdiction over all foreign corporations that registered to do business in Montana and subsequently conducted in-state business activities would extend our exercise of general personal jurisdiction beyond the narrow limits recently articulated by the Supreme Court."

Turning Point

In Lanham, however, the Nebraska Supreme Court took the next step, and ruled exclusively on constitutional grounds. BNSF Railway argued both for a narrow interpretation of the Nebraska registration statute and that inferring consent from mere registration was unconstitutional.

The Nebraska Supreme Court noted that Nebraska's registration statute "does not explicitly state that compliance with the statute constitutes a waiver of the foreign corporation's right to require personal jurisdiction," and acknowledged that the plaintiff's jurisdictional argument was thus based on implied

consent.

But the court did not reach the question whether Nebraska's statute could be so construed as a matter of statutory interpretation, instead holding that "even assuming BNSF's registration to do business in Nebraska constitutes implied consent, the exercise of personal jurisdiction must comport with due process."

And, because "treating BNSF's registration to do business in Nebraska as implied consent to personal jurisdiction would exceed the due process limits prescribed in [Goodyear] and [Daimler]," the court held that "a corporation's registration ... does not provide an independent basis for the exercise of general jurisdiction." In doing so, the court overruled its own precedent from 1982.

The Lanham case represents a significant turn in the battle over consent jurisdiction, because it marks the first time a state supreme court or federal court of appeals has squarely rejected consent by registration solely on constitutional grounds.

Instead of simply narrowly interpreting registration statutes, courts may be more inclined to rule on constitutional grounds, removing any possibility that the legislature could revise the statute to more explicitly require consent to jurisdiction for foreign corporations registering to do business.

But Lanham is unlikely to be the last word on the matter. Pennsylvania's registration statute is explicit in requiring foreign corporations registering to do business to consent to all-purpose jurisdiction in Pennsylvania.[16] The Third Circuit held that the statute could constitutionally subject foreign corporations to all-purpose jurisdiction in Pennsylvania in the pre-Daimler case Bane v. Netlink Inc.

The Third Circuit has not yet had an occasion to reconsider that ruling post-Daimler, but one district court judge has held that decision inconsistent with Daimler.[17] If and when the issue reaches the Third Circuit, or the Pennsylvania Supreme Court, it is likely to be a litmus test for whether any courts are willing to infer consent through registration in the post-Daimler world.

Beyond Pennsylvania, the issue is likely to find its way up to the U.S. Supreme Court only if a federal court of appeals or state supreme court breaks from the uniform post-Daimler precedent and rules consent by registration constitutional. In addition to the Third Circuit, the Eighth Circuit also has not had an opportunity to revisit its pre-Daimler precedent, although the issue may never arise in those courts if the states within those courts' geographical jurisdiction narrow their interpretation of their respective registration statutes.

As defense counsel continue to face this argument in Pennsylvania and elsewhere, Lanham provides helpful precedent for attacking this theory on constitutional grounds. While courts are more likely to continue to approach this issue from a statutory interpretation standpoint, the specter of inviting Supreme Court review on a constitutional issue will help dissuade courts in the future from endorsing the theory of consent by registration.

Andrew S. Tulumello is partner, and Jacob T. Spencer and Joshua M. Wesneski are associates, at Gibson Dunn & Crutcher LLP.

Disclosure: Gibson Dunn was among the counsel to BNSF Railway Co. in the Lanham case.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 571 U.S. 117 (2014).

[2] 137 S. Ct. 1549 (2017).

[3] 939 N.W.2d 363 (Neb. 2020).

[4] 243 U.S. 93 (1917).

[5] 308 U.S. 165 (1939).

[6] Pennoyer v. Neff, 95 U.S. 714 (1877).

[7] See St. Clair v. Cox, 106 U.S. 350 (1882).

[8] See Ex parte Schollenberger, 96 U.S. 369 (1877).

[9] 326 U.S. 310 (1945).

[10] See Bane v. Netlink, Inc., 925 F.2d 637 (3d Cir. 1991); Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196 (8th Cir. 1990).

[11] See Consol. Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286 (11th Cir. 2000); Siemer v. Learjet Acquisition Corp., 966 F.2d 179 (5th Cir. 1992).

[12] 564 U.S. 915 (2011).

[13] See Wal-Mart Stores Inc. v. LeMaire, 395 P.3d 1116 (Ariz. 2017); State ex rel. Norfolk S. Ry. Co. v. Dolan, 512 S.W.3d 41 (Mo. 2017); Genuine Parts Co. v. Cepec, 137 A.3d 123 (Del. 2016).

[14] 815 F.3d 619 (2d Cir. 2016).

[15] 426 P.3d 1 (Mont. 2018).

[16] See 42 Pa. Const. Stat. §5301(a)(2)(i).

[17] See In re: Asbestos Prods. Liab. Litig. (No. VI), 384 F. Supp. 3d 532 (E.D. Pa. 2019).