

In the Boardroom with Resnick and Fuller Episode 6

PLUS Staff: [00:00:00] Welcome to this PLUS Podcast, “In the Boardroom With Resnick and Fuller,” Episode 6. We would like to remind everyone that the information and opinions expressed by our speakers today are their own, and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice.

In today’s episode, Stephanie and John discuss a recent Supreme Court decision that has the potential to upset well-settled law on the fundamental question of when a court may exercise jurisdiction over a corporate defendant. Ultimately, the decision enforced a Pennsylvania law requiring out-of-state companies that register to do business in Pennsylvania to agree to appear in Pennsylvania courts on “any cause of action” against them. The plaintiff in the case is a Norfolk Southern employee who lives in Virginia and never worked in Pennsylvania. Stephanie and John will explore the short-term and long-term effects of the *Mallory* decision, including whether it will lead to forum shopping and the possibility of similar cases in other states.

Finally, they’ll talk about what companies should do now to minimize exposure and the very real possibility that the Pennsylvania statute will be challenged on other grounds.

Stephanie Resnick is a partner at Fox Rothschild, a national law firm, and is co-chair of the firm’s Directors’ & Officers’ Liability & Corporate Governance Practice Group. For 14 years, Stephanie has been ranked by *Chambers USA* as a leading litigator in Pennsylvania. She is known for taking the lead in high-stakes, bet-the-company litigation and defending corporate boards and officers in complex and protracted litigation. Stephanie is a former managing partner of Fox’s Philadelphia office and a past chair of its nationwide Litigation Department.

John Cornell Fuller is also a partner at Fox Rothschild and is the other co-chair of the firm’s Directors’ & Officers’ Liability & Corporate Governance Practice Group. John has extensive experience defending directors and officers of public and private corporations in claims stemming from the discharge of their duties and management decisions.

Since 2015, Stephanie and John have been co-authoring articles on topics of interest to corporate boards and directors for a variety of publications, including *Corporate Compliance Insights*, *The Legal Intelligencer* and the *Wiley Board Leadership Journal*. And now, I'd like to turn it over to John to get us started.

John Fuller: Today, we're going to talk about the Supreme Court's recent holding and its impact on personal jurisdiction and the scope of that potentially across the country. When this decision was handed down in June of this year, there were a lot of headlines and a lot of alarm bells ringing about whether or not companies could be pulled in unexpectedly to jurisdictions all over the country.

Today, we're going to talk a little bit about the decision itself and the holding but then also talk about some of the short-term concerns we see and how to address them, and also what to watch in the longer term, because I think there's some thought that this might not have the ground-shaking impact that we all think it does, and there's definitely some things to watch in the medium and longer term.

So, the opinion itself was headed down on June 27 of 2023. And the Supreme Court held that Pennsylvania courts indeed do have jurisdiction over a defendant based on the fact that that defendant has registered to do business in Pennsylvania, and under Pennsylvania's business registration statute, companies are required and have consented to jurisdiction in Pennsylvania courts on all matters asserted against them.

Now, the facts of this case are fairly straightforward. The plaintiff was a Virginia man and a former employee of Norfolk Southern. And he brought his action in Philadelphia Court of Common Pleas, in Pennsylvania State Court against Norfolk Southern, which is a Virginia-based company.

He claimed damages relating to exposure to asbestos and other toxic chemicals and stated that he had contracted cancer as a result of that exposure. The issue here was that this employee had never worked for Norfolk Southern in Pennsylvania, yet chose Pennsylvania state courts as his forum. The hook here was that Norfolk Southern has registered to do business in Pennsylvania, and as I said, under the Pennsylvania Business Registration statute, therefore consented to jurisdiction. This is a plaintiff's argument. Now this opinion was handed down as a plurality. The majority opinion written by Justice Gorsuch, and they recognized this consent-based concept of jurisdiction. One of the interesting points that we'd like to lift up is that though the majority did acknowledge consent as opposed to what we generally talk about is the contact-based

jurisdiction, which developed from *International Shoe* and looks at things like whether a business company is at home in a jurisdiction or whether they have substantial contacts with a forum to give rise to jurisdiction.

This idea of consent-based jurisdiction is what they found does exist alongside that contact-based jurisdiction. The issue though, that again, we want to raise up is the majority opinion did spend a significant amount of time discussing other contacts that Norfolk Southern had with Pennsylvania, including hundreds of miles of track and three locomotive repair plants.

And though the court made this important distinction that it was looking at the consent basis, what we don't have is a case where the only contact is that registration, and we'll talk a little bit more about that later. Justice Jackson wrote a concurrence in which she spoke at length about this concept of a waiver of a consent-based jurisdiction.

Justice Alito, as we will also discuss in a moment, joined in the concurrence, but raised some concerns about the scope of Pennsylvania statute. Stephanie, I like to ask you first, in terms of short-term impacts, what do you see or have seen in these last few weeks and coming?

Stephanie Resnick: Undoubtedly. We are seeing forum shopping in Pennsylvania state courts. This will lead to a tremendous amount of cases being filed, likely in Philadelphia for injury cases and the like, as well as other cases filed against businesses in Pennsylvania. And what is going to ultimately happen is that Pennsylvania registered companies will be forced to be brought into court in state court in Philadelphia or in other parts of Pennsylvania.

And that is going to lead to an abundance of cases in plaintiff-friendly forums and will increase backlog, etc. But the focus is, what should companies do? And I think the first thing is that a company and its board should determine where the company is registered to do business.

Whether, in fact, the company is doing business there at that location where they're registered to do business. And really reflect on whether they need to be registered in Pennsylvania in order to conduct their business. And it's going to be a decision based upon what the pros and the cons are to being registered in Pennsylvania.

I think that at this point, companies need to assume that if they are registered in Pennsylvania, they will be brought into court, into state court in Pennsylvania,

and whether that will have a negative consequence to that company and that company's business.

John Fuller: I absolutely agree. I think the concept of registering with the Department of State in various jurisdictions was a no brainer. Very low risk.

And if you are planning to, or are doing some form of commerce in a jurisdiction, may have just done it, maybe a few hundred dollar filing fee and just put it to bed. But as you said, I think this analysis of when are you required to do so given this potential downside of unexpectedly being brought into court is something that I think a lot of boards have not necessarily focused on because it was just an easy box to check, but certainly something to look at.

And I certainly agree with you that the law of the land as we sit here today is that this registration statute in Pennsylvania is enough and it is consent. And it'll be construed there. So I certainly agree that Pennsylvania state courts will see an influx.

Stephanie Resnick: Yeah. And I think John, what we have to watch is whether it's a fundamental shift towards consent-based jurisdiction, or a narrow creation of the Pennsylvania registration statute. And even more centrally, whether the Pennsylvania registration statute will survive constitutional scrutiny. Now, there may be some facts that you would have that would be able to distinguish your company from this case and ruling by the Supreme Court, but it certainly is going to be harder to do so, in light of Justice Gorsuch's opinion. And the fact that you are going to need to expect that any lawsuits will be able to be filed in the state of Pennsylvania, and particularly in the urban areas.

John Fuller: Exactly. And I think, yeah, what you're sort of getting at. I certainly agree that the way Justice Gorsuch talked about the factors that said that you looked at the registration, did say it was consent and was separate, but also brought in some of these other, indicators of contact.

So we have that sort of analysis and I totally agree with you. This idea, if we really are moving to a world of purely consent-based jurisdiction. One of the things that Justice Alito brought up in his concurrence is concerns over the dormant commerce clause. And that is if, while we usually think of the commerce clause as helping interstate commerce if a state imposes regulations or statutes that create an excessive burden on interstate commerce, then they can be struck down as unconstitutional.

And what he suggested in the fact that these challenges may be there, is that what happened here is the way the Pennsylvania statute is written, if you want to do business in Pennsylvania, you have to register and in registering, you have to consent to jurisdiction.

And the question is whether that is too much and whether that is constitutionally too far to require businesses to do that. And I think we have to expect that there will be challenges on this. I think there will be companies who want clarity on this especially even beyond Pennsylvania. There are some other jurisdictions with similar language, and if the Pennsylvania statute is challenged and succeeds, then we would have to think that other jurisdictions may mirror that language.

Stephanie Resnick: Yeah. In the interim, what should companies do other than perform that analysis?

John Fuller: Yeah I totally agree with you there. In the short term, until we get some clarity on this, whether the Pennsylvania statute goes too far, I think the best you can do is to do this analysis, understand where not only in Pennsylvania, but other jurisdictions where you're registered, because at the very least, the very, very least, the idea that you are registered is being looked at as another contact with that jurisdiction, just like the miles of track, just like the locomotives, even if we don't go down the consent.

So it's an exposure point. It is something that even in other jurisdictions, even I would think where you don't have the same language as Pennsylvania, it's going to be thrown out as they're registered to do business here as part of the contact-based analysis, in addition to the consent base. So that's what we can, I think there will be challenges. There are vested interests who want clarity, some major corporations who are around the country who want clarity on this issue of whether they are subject to jurisdiction based on their registration in Pennsylvania. So I do think we will see challenges.

But as you said before, for now, you have to assume that you can be pulled into Pennsylvania and likely any other jurisdiction, which has similarly, a consent to jurisdiction in your business registration.

Stephanie Resnick: So do you think that this is a departure from the substantial contacts test set forth in our very famous *International Shoe* case?

Or do you think that it's really just more of a clarification based on how the court analyzed the case and the contacts that you need in order to be essentially hauled into court in that particular state.

John Fuller: The court spent a significant amount of time making sure to say this is not a change to the contacts-based. That is still alive and that is here and that is separate from what the court was discussing, which is this idea of consent.

I think we're highlighting this issue where the court said that very clearly and wanted to be clear that they're not changing *International Shoe*, that this is a separate type of analysis. What is interesting is that there was still this discussion of contact. So they say they're very much not doing a contact-based analysis, but then still discuss contact.

I think it operates in some ways, as you said, as clarification. And I think even if you don't have the full consent language in the registration statute that Pennsylvania has, I think if I was on whatever side seeking jurisdiction, I think you're going to see people using the fact that you are registered, even if it doesn't amount to consent as part of the contacts-based on this opinion as well.

Stephanie Resnick: To recap, I think the moral of the story is there must be discussion among senior management and the board to determine whether companies still want to register in a particular state, if, in fact, they're really not doing a lot of business there. And that, I think is the initial inquiry and what needs to be discussed and decided and then from there, if you decide that you do want to register as doing business in the state, that you have to be prepared to recognize that you are going to be subject to jurisdiction in the state court.

John Fuller: Yep, I think that's what we can do today, and we'll be watching this and sharing our thoughts as this continues to evolve.

Stephanie Resnick: Thanks, John.

John Fuller: Thank you.

PLUS Staff: Thank you to our speakers for sharing their insights with PLUS, and thank you to our listeners for listening to this PLUS podcast. If you have ideas for a future PLUS podcast, you can share those by completing the content idea form on the PLUS website.