Conn. Court Split May Lead To Vertical Forum Shopping

By **Matthew Gibbons** (October 4, 2024)

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In Mallory v. Norfolk Southern Railway Co.,[1] the U.S. Supreme Court clarified last year that states can require foreign entities to consent to personal jurisdiction as a condition for doing business within their borders.

The type of personal jurisdiction at issue in Mallory, general jurisdiction, allows a court to hear any claim against a defendant.

Connecticut state courts are bound by precedent, holding that foreign corporations registered to do business in Connecticut are subject to general jurisdiction. They are beginning to apply this precedent for nearly the first time, as shown in the Hartford Judicial District's July 23 decision in State v. Exxon Mobil Corp.[2]

But Connecticut's federal courts are bound by a contrary precedent. There is currently a vertical split on personal jurisdiction in Connecticut that the Connecticut Supreme Court will likely need to resolve.

State court authority recognizes that Connecticut is a consent-by-registration jurisdiction.

Like many states, to lawfully conduct business within its borders, Connecticut statutorily requires most foreign entities doing business within its borders to register and appoint an agent for service.[3] It is also a consent to general jurisdiction — but only in state courts.

Connecticut's status as a consent-by-registration jurisdiction is rooted in the Connecticut Appellate Court's 1987 decision in Wallenta v. Avis Rent a Car System Inc., which arose from a car accident.[4] The accident occurred in Alabama, in a car rented from an Alabama location through an agreement executed in Alabama. The injured plaintiff was a Connecticut resident.

Though Avis is a Delaware corporation, it complied with Connecticut's registration statutes by maintaining an agent for service of process and registering to do business in Connecticut.

The Fairfield Judicial District of the Connecticut Superior Court, the trial-level court, dismissed the case because the long-arm statute did not provide personal jurisdiction.

The Appellate Court of Connecticut disagreed. It framed the issue as one of consent, describing the question before it as whether the

> maintenance of an office in this state and compliance with the statutory requirement of appointing an agent for service of process is, in effect, a consent to the jurisdiction of this state's courts for the determination of a cause of action arising out of a contract entered into by it and a citizen of this state but executed in another state.[5]

The court concluded that registered foreign corporations consented to personal jurisdiction in Connecticut. Thus, an "allegation that the defendant was licensed to do business in this

state was sufficient to show that this state had authorized the assertion of jurisdiction over the defendant and that the defendant had consented to that assertion of jurisdiction" as a statutory matter separate from due process concerns.[6]

As a result, since 1987, compliance with Connecticut's foreign corporation registration and agent appointment statutes constituted consent to general personal jurisdiction based on Connecticut long-arm statutes, and only if such an exercise was consistent with due process.

Then, in 2009, the Connecticut Appellate Court issued Talenti v. Morgan & Brother Manhattan Storage Co.[7] Unlike Wallenta, the Talenti suit arose in Connecticut. It related to a plaintiff's termination from employment, which occurred in Connecticut, and to emails sent to and from Connecticut. Also unlike Wallenta, the plaintiffs were not Connecticut residents.

Because the defendant was a New York corporation, Morgan & Brother, it sought dismissal for lack of personal jurisdiction based on a long-arm statute,[8] which conferred personal jurisdiction over foreign corporations for causes of action arising out of actions in Connecticut in suits brought by a plaintiff who is "a resident of this state or by a person having a usual place of business in this state."[9]

The Stamford-Norwalk Judicial District dismissed the suit for lack of personal jurisdiction.

However, the defendant had complied with the Connecticut registration and agent appointment statutes.[10] Relying heavily upon Wallenta, the Talenti appeals court reiterated that by performing the acts necessary to comply with Connecticut's registration and agent appointment statutes, a foreign corporation "consented to the exercise of jurisdiction over it by the courts of this state."[11]

It reversed the dismissal, even though the long-arm statute did not confer jurisdiction. Indeed, in a footnote, the court stated that no analysis of due process issues was necessary because holding that "the defendant has consented to jurisdiction" meant that such an exercise did "not violate due process."[12]

Thus, the Talenti court held that "when a foreign corporation complies with [statutory] requisites of ... obtaining a certificate of authority and ... authorizing a public official to accept service of process" in Connecticut, "it has consented to the exercise of jurisdiction over it by the courts of this state."[13]

Importantly, it explained that "consent is effective even though no other basis exists for the exercise of jurisdiction."[14]

Federal courts lead the way away from Talenti.

Less than two years after Talenti was decided, the U.S. District Court for the District of Connecticut in its 2011 WorldCare Limited Corp. v. World Insurance Co. decision declined to apply it based on due process concerns.[15]

The district court was free to do this because, although Connecticut Appellate Court precedents are binding on lower state courts, they are merely persuasive indicia of what the state Supreme Court would hold. Therefore, federal courts are not "strictly bound by state intermediate appellate courts," as articulated by the U.S. Court of Appeals for the Second Circuit in its 2005 DiBella v. Hopkins decision.[16]

A few months after the WorldCare decision, the Hartford Judicial District faithfully applied Talenti in Lake Road Trust Ltd. v. ABB Inc.[17]

However, the U.S. Supreme Court began to change the legal landscape of personal jurisdiction writ large within months.

First, in Goodyear Dunlop Tires Operations SA v. Brown,[18] the Supreme Court in June 2011 held that general jurisdiction exists only where an entity "is fairly regarded as at home."[19] However, Goodyear did not analyze or involve issues of consent.[20]

Three years later, the Supreme Court elaborated on general jurisdiction in Daimler AG v. Bauman, explaining that the proper "inquiry ... is whether that corporation's 'affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State.'"[21] But Daimler also did not analyze or involve issues of consent.

Even so, courts generally disregarded Talenti following those nonconsent cases. First, the District of Connecticut reevaluated consent-by-registration in Connecticut.[22] Acknowledging Talenti but taking its cues from Daimler, the district court in 2014 found it lacked personal jurisdiction in Brown v. CBS Corp.,[23] even though the defendant registered to do business in Connecticut and maintained an agent in Connecticut.[24]

The Second Circuit agreed in its 2016 decision in Brown v. Lockheed Martin Corp.[25] The court rejected Talenti based on statutory construction grounds.[26]

It did not reach the question of whether "a corporation's purported 'consent' may be limited by the Due Process clause."[27] It did predict issues that potentially "implicate[d] Due Process and other constitutional concerns."[28]

The first concern was that corporate "'consent' through registration ... [was] a fiction" and did not make the corporation essentially at home in the jurisdiction.[29]

The second concern was the nearly 100-year-old Supreme Court precedent, Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.[30] The ostensibly controlling decision in Penn Fire held that state laws requiring foreign entities to consent to general jurisdiction as a condition of doing business in a state did not violate the due process clause.[31]

The Second Circuit explained that Penn Fire had "yielded to the doctrinal refinement reflected in Goodyear and Daimler."[32]

Although Brown was grounded in statutory interpretation, Connecticut trial courts recognized the doubts cast upon Talenti based on the evolution of due process.[33] Many state trial courts agreed with the Second Circuit's post-Daimler due process analysis, relying upon Brown in cases where a foreign corporation registered to do business in Connecticut and a registered agent in Connecticut sought dismissal of an action for lack of personal jurisdiction.[34]

As a result, the Talenti holding was largely ignored for over a decade.

Mallory revives Talenti.

Then, on June 27, 2023, the Supreme Court issued Mallory, which held that state laws may require consent to general jurisdiction without violating due process and reaffirmed the

validity and precedential import of Penn Fire.

Like Daimler and Goodyear, Mallory is a case about general jurisdiction. Unlike those predecessors, it is also about consent. The five-justice majority reaffirmed the validity of Penn Fire and held that states may require consent to general jurisdiction as a condition of doing business within their borders without violating due process.[35]

Mallory addressed both due process concerns identified in Brown and disagreed with the Second Circuit. This means the Connecticut state courts that declined to apply Talenti based on the Second Circuit's concerns were wrong. And it began a sea change in Connecticut's law of personal jurisdiction.

The immediate consequence of Mallory was that registered foreign corporations became subject to personal jurisdiction in state courts for all claims.

In late July of this year, Hartford Superior Court Judge John Farley reviewed Talenti's decision in light of the Supreme Court's ruling in Mallory. In State v. Exxon, the court expressly held that Connecticut remains a consent-by-registration forum.[36] The court wrote, "[B]y registering to conduct business in Connecticut, [a] defendant consented to personal jurisdiction in the state and, pursuant to the United States Supreme Court authority, no due process analysis is required for the exercise of jurisdiction by the consent given by the defendant."[37]

After Exxon, Connecticut state courts must apply Talenti until the Supreme Court of Connecticut or the en banc appellate court says otherwise.

However, federal courts are not bound to do so — indeed, they are bound not to. Mallory did not invalidate Brown's core holding, which was a "construction of the Connecticut long-arm statute" that is binding on the U.S. District Court for the District of Connecticut.[38]

In addition to anticipating the due process issues that Mallory dispatched, Brown simply disagreed with Talenti's reading of Connecticut statutes. Accordingly, motions to dismiss for lack of personal jurisdiction based on Brown will continue to be successful — and defendants will, therefore, fare better — in federal courts.

This split between Connecticut's state and federal systems will result in vertical forum shopping.[39] As a result, trial courts in a single jurisdiction will reach divergent conclusions over whether they have personal jurisdiction in similar situations. Thus, parties may be incentivized to manipulate which court they are in by any means necessary.

Defendants will seek to implicate federal subject matter jurisdiction and, where that is impossible, Connecticut's civil venue statutes, both of which may be a shield to unexpected suits.

Notably, because Talenti answers the question of whether Connecticut is a consent-by-registration state, courts may not certify the question directly to the state Supreme Court.[40] Since federal courts are bound to apply Connecticut state law as articulated by the Connecticut Supreme Court, the split will not be resolved until an en banc appellate court or a Supreme Court resolves the issue.

The litigation resolving this split will examine the history above, examine the clarity and role of the statutory registration requirements, and examine the acts mandated by the statute that constitute consent.

Another important question will be the impact of consent-by-registration on interstate commerce. In his Mallory concurrence, Justice Samuel Alito alluded to the specter of a dormant commerce clause challenge to some personal jurisdiction exercises based on consent.[41]

Because Mallory was a 5-4 split decision, a preserved dormant commerce clause challenge to a consent-by-jurisdiction statute can undo Mallory's effects in a particular case.

Conclusion

Connecticut's personal jurisdiction law underwent a sea change. State courts must now recognize that Connecticut is a consent-by-registration jurisdiction, but federal courts may not. Thus, personal jurisdiction — which is determined according to state law — will vary based on the court where a defendant lands.

This vertical split will cause foreign entities to endure costly distant litigation, forum shopping and uncertain liability. Defendants in state court will need to rely upon the venue statute or removal from state court to ward off costly unexpected litigation.

Until this split is resolved, litigants would be wise to assert a dormant commerce clause defense where appropriate.

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[1] Mallory v. Norfolk Southern Railway Co., 600 U.S. 122 (2023).

[2] State v. Exxon Mobil Corp., 2024 WL 3580377, (Conn. Super. Ct. July 23, 2024).

[3] Conn. Gen. Stat. §§33-920 (foreign corporation certificate of authority requirement), 34-38g (foreign limited partnership registration requirement), 34-531 (foreign statutory trust registration requirement), 34-275a(a) (foreign limited liability company registration requirement); 33-926 (foreign corporation registered office and agent requirement), 34-38p (foreign limited partnership registered agent requirement), 34-532 (foreign statutory trust registered agent requirement), 34-275b, 34-243n (foreign limited liability company registered agent requirement).

[4] Wallenta v. Avis Rent a Car System Inc., 10 Conn. App. 201 (1987).

[5] Id. at 203-04.

[6] Id. at 208.

[7] Talenti v. Morgan & Bros., 113 Conn. App. 845 (2009).

[8] Conn. Gen. Stat. §33-929(f).

[9] Id. at 847-48.

[10] Id. at 856.

[11] Id. at 855.

[12] Id. at 856 n.14.

[13] Id. at 854-55.

[14] Id. at 855.

[15] WorldCare Ltd. Corp. v. World Ins. Co., 767 F. Supp. 2d 341, 355-56 (D. Conn. 2011).

[16] DiBella v. Hopkins, 403 F.3d 102, 112 (2d Cir. 2005).

[17] Lake Rd. Tr. LTD. v. ABB Inc., 2011 WL 1734458 (Conn. Super. Ct. Apr. 11, 2011).

[18] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

[19] Id. at 924.

[20] See id. at 928 (quoting Donahue v. Far Eastern Air Transport Corp., 652 F.2d 1032, 1037 (D.C. Cir. 1981)).

[21] Daimler AG v. Bauman, 571 U.S. 117, 138-39 (2014) (internal quotation marks and alterations omitted) (quoting Goodyear, 564 U.S. at 919).

[22] Brown v. CBS Corp., 19 F. Supp. 3d 390 (D. Conn. 2014), aff'd sub nom. Brown v. Lockheed Martin Corp., 814 F.3d 619 (2d Cir. 2016).

[23] Id. at 398.

[24] Id. at 391-92.

[25] Brown v. Lockheed Martin Corp., 814 F.3d 619 (2d Cir. 2016).

[26] Id. at 641 ("We need not reach that [constitutional] question here, however, because we conclude that the Connecticut business registration statute did not require Lockheed to consent to general jurisdiction in exchange for the right to do business in the state."); id. ("in the absence of a clear legislative statement and a definitive interpretation by the Connecticut Supreme Court and in light of constitutional concerns, we construe Connecticut's registration statute and appointment of agent provisions not to require registrant corporations that have appointed agents for service of process to submit to the general jurisdiction of Connecticut courts."); see also, id. at 640 ("Were the Connecticut statute drafted such that it could be fairly construed as requiring foreign corporations to consent to general jurisdiction, we would be confronted with a more difficult constitutional question about the validity of such consent after Daimler.").

[27] Id. at 641.

[28] Id. at 626; see id. at 636 ("We hazard that the Appellate Court erred in reading the

registration and agent appointment statutes as constituting corporate consent to the exercise of general jurisdiction by the Connecticut state courts, and — more within this Court's ordinary domain — that it also erred in casually dismissing related federal due process concerns in a brief footnote.").

[29] Id. at 632.

[30] Id. at 638; Penn. Fire Ins. Co. v. Gold Issue Mining & Milling Co. ("Penn Fire"), 243 U.S. 93 (1917).

[31] See Mallory, 600 U.S. at 128.

[32] Brown, 814 F.3d at 639.

[33] Clark v. State Farm Mut. Auto. Ins. Co., No. FST CV21-6050604-S, 2022 WL 1049243, at *3 n.3 (Conn. Super. Ct. Feb. 16, 2022).

[34] See Mossack Fonseca & Co., S.A. v. Netflix Inc., No. 3:19CV1618 (JBA), 2019 WL 5298171, at *4 n.2 (D. Conn. Oct. 17, 2019) ("The Court notes that none have adopted Talenti's interpretation of Connecticut's long-arm statute since Brown's issuance."); see also, e.g., Dunnigan v. Disney Vacation Club Hawaii Mgmt. Co. LLC, No. CV-22-6033648-S, 2023 WL 3024870, at *7 (Conn. Super. Ct. Apr. 11, 2023) (citing Brown to support conclusion "that a corporation's registration with the Secretary of the State, alone, does not confer jurisdiction upon an out of state corporation."); Perdomo v. W. Express Inc., No. WWMCV206020503S, 2021 WL 3141972, at *2-3 (Conn. Super. Ct. June 17, 2021) (rejecting reliance upon Talenti, finding no general jurisdiction based in part upon Brown, and granting the defendant's motion to dismiss); Peeples v. State Farm Mut. Auto. Insur. Co., No. FSTCV186036595S, 2019 WL 4201550, at *7 (Conn. Super. Ct. Aug. 8, 2019) ("despite this court's reading of the statutes as distinguishing between a statutorily-required agent for service and jurisdiction, this court believes it is bound by the determination in Talenti that designation of the Insurance Commissioner as a statutory agent for service constitutes a form of consent to jurisdiction. The court agrees with WorldCare and Brown, however, that the decision's treatment of constitutional due process issues was dictum and therefore not binding on this court, and that this court cannot disregard those constitutional considerations."); cf., Patti v. All. Laundry Serv., No. FBT-CV20-6100584-S, 2022 WL 1051597, at *4 (Conn. Super. Ct. Feb. 18, 2022) (finding the Connecticut long arm statute reached the defendant foreign entity under Talenti based on registration and appointment of an agent, but ultimately finding such an exercise of jurisdiction would violate due process under Daimler and Brown and dismissing for lack of personal jurisdiction).

[35] Mallory, 600 U.S. at 137.

[36] State v. Exxon Mobil Corp., No. HHDCV206132568S, 2024 WL 3580377, at *1 (Conn. Super. Ct. July 23, 2024).

[37] Id. at *19.

[38] Mossack Fonseca & Co., S.A., 2019 WL 5298171, at *4.

[39] Belfiore v. Procter & Gamble Co., 311 F.R.D. 29, 59 (E.D.N.Y. 2015).

[40] Conn. Gen. Stat. § 51-199b(d).

[41] Mallory, 600 U.S. at 160 (Alito, J. concurring).