

## TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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### IN THIS ISSUE

*This article is the first of a two part series analyzing the current jurisdictional jurisprudence affecting foreign corporations registered to do business in the Commonwealth of Pennsylvania. Part I will focus on the current state of the law in Pennsylvania relating to consent by registration and the arguments made to the Pennsylvania Superior Court. Part II will analyze the court's ruling upon publication and the impact of the ruling on future lawsuits filed in Pennsylvania.*

## Will Pennsylvania Join the *Daimler* Era?

### ABOUT THE AUTHORS



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**DAIMLER.** For over a century, the word was synonymous with German manufacturing; one of the world's most successful automotive companies. Since January 2014, however, "Daimler" has assumed a new meaning; a legal defense invoked by corporate defendants in lawsuits pending in both federal and states courts throughout this country. In its now seminal *Daimler AG v. Bauman*<sup>1</sup> decision, the United States Supreme Court revisited the issue of personal jurisdiction in a way not seen since *International Shoe*<sup>2</sup> and *Pennoyer*<sup>3</sup> confirming, unequivocally, that a court cannot assert general jurisdiction over a corporation, unless that corporation 1) is either incorporated or principally based in that forum; or 2) has affiliations with the forum that are "so continuous and systematic as to render it essentially at home" there.<sup>4</sup> If nothing else, *Daimler* was an attempt to maintain restrictions on the exercise of general jurisdiction, not to expand it, and provide corporations some predictability on where they may be sued.

In the five years since the Supreme Court's ruling in *Daimler*, both federal and state courts across this country have ruled upon numerous motions to dismiss based upon a lack of personal jurisdiction, although, without consistency. Some state courts

have vigorously supported the application of *Daimler*, while others have found factual differences to deny such personal jurisdiction challenges. In some cases Plaintiffs have successfully circumvented application of *Daimler* through theories of "consent by registration" and expansive "specific jurisdiction". This inconsistent application of *Daimler* has clouded its long term application; however, Pennsylvania courts may be one step closer to an appellate ruling on the breadth of *Daimler* under Pennsylvania's far-reaching business registration statute.

### **Current Pennsylvania Jurisdictional Landscape**

Pennsylvania is the only state which expressly confers general personal jurisdiction upon a foreign corporation solely based on its business registration pursuant to statute.<sup>5</sup> In its June 2018 *Webb-Benjamin* decision<sup>6</sup>, the Superior Court found foreign corporations consent to general jurisdiction under the Pennsylvania Long Arm Statute by registering to do business in the Commonwealth. Yet weeks earlier a federal judge ruled<sup>7</sup> that the statutory scheme violates due process in the wake of the *Daimler*. In September 2018, a 2-1 majority

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<sup>1</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>2</sup> *International Shoe Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>3</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1878).

<sup>4</sup> 134 S. Ct. at 762, quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

<sup>5</sup> 42 Pa.C.S.A. §5301(a)(2)(i).

<sup>6</sup> *Webb-Benjamin, LLC v. Int'l Rug Grp.* 2018 Pa. Super. LEXIS 742.

<sup>7</sup> *In re Asbesto Prod. Liab. Litig. (No. VI) Sullivan v. A.W. Chesterton, Inc., et al.*, 384 F. Supp.3d. 532 (E.D. Pa. June 6, 2019), (holding that consent jurisdiction is inconsistent with the requirements of the Due Process Clause).

ruled in *Murray v. Am. LaFrance, LLC*<sup>8</sup>, that registering as a foreign corporation in Pennsylvania equals consent to the state court's general personal jurisdiction. However, on December 7, the Superior Court granted *en banc* re-argument, which was held on October 31, 2019. The implications of the court's decision could be widespread. The court could uphold *Webb-Benjamin*, thus delaying, yet again, Pennsylvania's acceptance of *Daimler*, or the *en banc* panel could come to a different conclusion on the issue of personal jurisdiction; thus paving the way for additional challenges by out of state corporations within the Commonwealth.

***Kenneth Murray, et al.***  
***Plaintiffs/Appellants, v. American***  
***LaFrance, LLC, Defendant and Federal***  
***Signal Corp., Defendant/Appellee***<sup>9</sup>

*Murray* is a product liability case filed in the Philadelphia, Pennsylvania trial court by New York residents as a result of alleged hearing loss from excessive noise from fire engines. All exposures occurred in the State of New York. American LaFrance, now Federal Signal, is a foreign corporation which registered in 1969 to do business in the Commonwealth of Pennsylvania. American

LaFrance, and later, Federal Signal, reaffirmed its registration pursuant to statute in 2008 and 2011. In the underlying trial court action, Federal Signal filed preliminary objections seeking dismissal for lack of general personal jurisdiction which were subsequently granted. Plaintiffs appealed.

The Pennsylvania Superior Court, sitting *en banc* on October 31, 2019, examined whether Pennsylvania general personal jurisdiction should extend to all entities that register to do business in the Commonwealth, an argument that has been closely watched because it could impact litigation ranging from single business contract disputes to mass tort litigation. Judge Mary Jane Bowes served as Presiding Judge and was joined on the panel by Judges Jacqueline Shogan, Anne Lazarus, Judith Olson, Victor Stabile, Alice Dubow, Deborah Kunselman, Carolyn Nichols, and Mary Murray.<sup>10</sup>

**The Standard of Review**

Plaintiffs/Appellants<sup>11</sup> argued that in the face of a constitutional challenge, the standard of review requires a 2-part analysis: 1) that there is a presumption that the

joined, was not on the *en banc* panel for this argument.

<sup>11</sup> Thomas J. Joyce III of Mark J. Bern & Partners, LLC, New York, NY and Charles "Chip" Becker of Kline & Specter, Philadelphia, PA who appeared on behalf of the Pennsylvania Association for Justice, presented argument on behalf of Plaintiffs/Appellants. David Duffy of Thompson Coburn, Chicago, IL argued on behalf of Defendant/Appellee, Federal Signal.

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<sup>8</sup> No. 2105 EDA 2016, 2018 Pa. Super. LEXIS 1064.

<sup>9</sup> Nos. 2105 EDA 2016, 2106 EDA 2016, 2107 EDA 2016, 2108 EDA 2016, 2109 EDA 2016, 2110 EDA 2016, 2111 EDA 2016 (consolidated). On appeal from the final order entered May 25, 2016, in the Philadelphia County Court of Common Pleas, November Term 2015, No. 2536.

<sup>10</sup> Of note, Judge William Platt, who wrote the three-judge panel opinion in September 2018 finding jurisdiction over Federal Signal, which Judge Lazarus

statute is constitutional and 2) the statute will not be declared unconstitutional unless it clearly, plainly and palpably violates the U.S. Constitution. Plaintiffs argued that “all doubts must be resolved in the favor of finding constitutionality”.

### Constitutional Fairness vs. Consent

Much of the questioning from the judges focused on issues of fairness, and how the Supreme Court’s decision in *Daimler* changed the considerations for determining jurisdiction. In *Daimler*, the high court ruled that jurisdiction could not be exercised over a foreign corporation in a state where that corporation was not “at home”, which the justices defined as having “continuous and systematic” “affiliations” with the state where the litigation was filed.

Judge Stabile asked Plaintiffs how to reconcile consent by registration with the constitutional burden put on commerce; does this not force general personal jurisdiction for registration? Plaintiffs implored the panel to recognize that *Daimler* is not about registration, referring to a number of U.S. Supreme Court cases which hold that a state may condition “or burden” a foreign corporation by conditioning its right to do business in the state.

Plaintiffs reminded the court that there is no real punishment for foreign corporations that do not register. They can still conduct business in Pennsylvania, and the only major

distinction is that they cannot bring certain types of lawsuits. There is fundamental fairness – “it lies in the registration. There is a quid pro quo,” Plaintiffs said.

Federal Signal conceded that it had notice of the registration statute and its jurisdictional aspects when reaffirming in 2008 and 2011 American LaFrance’s 1969 registration.<sup>12</sup> However, Federal Signal argued that consent to jurisdiction under the registration statute is a legal “fiction” that would allow any state to create jurisdiction simply by adding “magic words” to standard documents. “As a practical matter, *Daimler* is completely [gone] if you’re going to engage in this legal fiction that registration is consent.”

Federal Signal also argued that is not seeking the court’s determination that the registration statute is unconstitutional; rather it is asking the court to apply a two part analysis. Does the language of the statute permit the conduct that provides the basis for the jurisdiction? Is the exercise of jurisdiction constitutional? Federal Signal argued that the law was fundamentally unfair, and that Federal Signal had no way to foresee that, simply by registering to do business in Pennsylvania, it would be sued by a group of firefighters from New York for injuries they allegedly sustained in the State of New York.

Judge Anne Lazarus, told Federal Signal that the argument used “circular logic”, since it was saying that the law was unconstitutional

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<sup>12</sup> Of note, the underlying registration at issue was enacted in 1978.

because there was no consent, yet the law specifically mentions consent. Federal Signal argued that the U.S. Constitution requires a case-specific analysis to determine fundamental fairness.

Judge Bowes, who dissented in the three-judge panel's prior decision in the case, stated that *Daimler* was a "real shift" that "constrained" and "reined in" states' assertion of general jurisdiction; such power could only be applied where companies are at home. She asked "how is this not an unconstitutional taking?" "You're requiring [defendants] to give up their due process rights as defined by the U.S. Supreme Court in *Daimler*."

Both Judge Bowes and Judge Judith Olson also questioned whether, if, once Pennsylvania upheld consent by registration, all 50 states would adopt similar laws, and how that scenario could impact the constitutional considerations. "If they passed that, it undercuts everything the U.S. Supreme Court has said," Olson declared.

### **Was there Waiver Below?**

There exists a threshold legal issue of whether the Plaintiffs waived their right to argue on appeal that registration equals consent to jurisdiction. Federal Signal pointed out that in the underlying trial court action, the Plaintiffs never sought to amend any pleading to meet the statutory provisions for pleading the basis for jurisdiction. Plaintiffs argued that "waiver" is a question of law and that the appellate

panel has the authority to address it at this juncture. It is unlikely that the waiver argument will have any bearing on the court's final ruling. Both sides presented minimal argument on this issue and the judges did not engage in significant questioning of counsel.

### **Failure to Provide Notice to the Attorney General**

Plaintiffs challenged the standing of Federal Signal to pursue its jurisdictional defense. Plaintiffs argued that Pennsylvania law requires that any party seeking to have a statute held unconstitutional must provide notice to the Attorney General of the Commonwealth of Pennsylvania. Federal Signal acknowledged that this was the first time that it heard of this "notice requirement" but further stated that Federal Signal is not advocating that Pennsylvania's registration statute is "unconstitutional on its face" but rather the application of the registration by consent and exercise of general personal jurisdiction over Federal Signal in these particular circumstances is unconstitutional.

### **Where Does this Leave Pennsylvania?**

Does this leave open the issue of consent by registration regardless of the court's ruling on this argument? Clearly, the general personal jurisdiction question under Pennsylvania's registration statute remains ripe for final resolution by Pennsylvania's highest court, either on this appeal or in any other personal jurisdiction cases winding



their way through the Pennsylvania appellate system. No matter the vehicle, we hope that the justices will finally resolve whether registration to do business in Pennsylvania is enough of a voluntary act to constitute consent to the general personal jurisdiction of Pennsylvania courts.

We expect the Pennsylvania Superior Court's ruling within the next few months and will provide a further analysis of the ruling and its application to foreign corporations registered to do business in Pennsylvania in Part II of this article.

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