

## TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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## IN THIS ISSUE

*This article concludes a two part series analyzing the current jurisdictional jurisprudence affecting foreign corporations registered to do business in the Commonwealth of Pennsylvania. Part I, issued in December 2019, focused on the state of the law in Pennsylvania relating to consent by registration and the arguments made to the Pennsylvania Superior Court regarding the propriety of applying general jurisdiction based on consent post- Daimler. Part II provides an analysis of the Pennsylvania Superior Court's recent ruling in Murray v. Am. LaFrance, LLC and the impact of the ruling on future lawsuits filed in Pennsylvania.*

Will Pennsylvania Join the *Daimler* Era? – Part II

## ABOUT THE AUTHORS



**Stephanie A. Fox** is a director of Maron Marvel Bradley Anderson & Tardy, LLC in Wilmington, Delaware and Philadelphia, Pennsylvania and chair of the firm's Business and Commercial Litigation Practice Group. As a trial and appellate counsel, she focuses her practice on general business and commercial disputes and the defense of toxic tort matters. She can be reached at [saf@maronmarvel.com](mailto:saf@maronmarvel.com).



**Antoinette D. Hubbard** is a director of Maron Marvel Bradley Anderson & Tardy, LLC in Wilmington, Delaware. She is co-chair of the firm's Asbestos Practice Group and serves as the firm's Diversity & Inclusion Director. She has represented clients at the trial and appellate level. Her litigation practice focuses primarily on the defense of complex product liability and toxic tort matters. She can be reached at [ADH@maronmarvel.com](mailto:ADH@maronmarvel.com).

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**Craig T. Liljestrand**  
Vice Chair of Newsletters  
Hinshaw & Culbertson LLP  
[cliljestrand@hinshawlaw.com](mailto:cliljestrand@hinshawlaw.com)

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Pennsylvania remains the only state which expressly confers general personal jurisdiction upon a foreign corporation solely based on its business registration pursuant to statute.<sup>1</sup> In September 2018, a 2-1 majority ruled in *Murray v. Am. LaFrance, LLC*,<sup>2</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, to address whether Pennsylvania had general jurisdiction over the defendant due exclusively to its registration with the Pennsylvania Department of State as a foreign corporation. On June 25, 2020,<sup>3</sup> a full complement of the court, reviewing that panel's ruling, declined to address the merits of Plaintiffs' claim because of a procedural technicality – thus effectively affirming the trial court's decision that had dismissed the case due to *Daimler*.

While this ruling leaves those waiting to find out if Pennsylvania will enter the *Daimler* era unsatisfied, the issue is already on its way back up to the Superior Court in another case.

### **Did Plaintiffs Waive their Consent to Jurisdiction Argument?**

As one of its many arguments, Federal Signal raised the 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 asserted consent by registration as the statutory provisions for pleading the basis for jurisdiction. Rather, Plaintiffs asserted that Federal Signal maintained systematic and continuous contacts as the basis for jurisdiction. At no time during the pendency of the trial court's consideration of Federal Signal's challenge to jurisdiction did Plaintiffs seek to amend their pleadings to include the statutory basis for jurisdiction. Plaintiffs argued that "waiver" is a question of law and that the appellate panel inherently had the authority to address it.

### **The Superior Court's Ruling**

Both sides presented minimal argument on the waiver issue and the judges did not engage in significant questioning of counsel. However, the Superior Court chose to examine whether the consent to jurisdiction argument was indeed waived prior to addressing the merits of the jurisdictional challenge. In an opinion authored by Judge Mary Jane Bowes and joined by Judges Jacqueline Shogan, Anne Lazarus, Judith Olson, Victor Stabile, Alice Dubow, Deborah Kunselman, and Mary Murray,<sup>4</sup> the Court determined that Plaintiffs failed to include the argument that registration equates to

<sup>1</sup> 42 Pa.C.S.A. §5301(a)(2)(i).

<sup>2</sup> No. 2105 EDA 2016, 2018 Pa. Super. LEXIS 1064.

<sup>3</sup> *Murray v. Am. Lafrance, LLC*, 2020 PA Super 149 (June 25, 2020).

<sup>4</sup> Judge Carolyn Nichols noted dissent.

consent to jurisdiction in the trial court filings, relying instead on the assertion of Federal Signal's continuous and systematic contacts with the Commonwealth. The Superior Court's ruling relied upon guidance from the Pennsylvania Supreme Court, "where the parties fail to preserve an issue for appeal, the Superior Court may not address the issue, even if the disposition of the trial court was fundamentally wrong."<sup>5</sup>

jurisdictional statute, and specifically whether mandatory business registration constitutes consent to jurisdiction that satisfies due process, the issue is set to be argued in another case which has made its way up to the appellate court – *Mallory v. Norfolk Southern Railway Company*, No. 802 EDA 2018. In the *Mallory* appeal, briefing is nearly completed so that it may be listed for argument. Stay tuned.

### Where Does this Leave Pennsylvania?

Judge Bowes instructed that the Court did not take the decision lightly, stating that the argument raised by Plaintiffs on appeal implicates an issue that has generated abundant scholarly commentary. Pennsylvania's unique jurisdictional framework sets it apart from other jurisdictions that have confronted the related issue regarding whether corporate registration is tantamount to implied consent.<sup>6</sup> The *en banc* Court further noted that there is debate surrounding this jurisdictional issue and that "recent district court decisions have taken divergent views" on this jurisdictional issue.<sup>7</sup>

Although *Murray* did not reach the issue of the constitutionality of Pennsylvania's

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<sup>5</sup> *Danville Area Sch. Distr. v. Danville Area Educ. Ass'n, PSEA/NEA*, 754 A.2d 1255, 1259 (Pa. 2000); see also *Kimmel v. Somerset County Comm'rs*, 333 A.2d 777, 779 (Pa. 1975) ("It is a fundamental principle of appellate review that [appellate courts] will not reverse a judgment or decree on a theory that was not presented to the trial court.")

<sup>6</sup> *Murray* at \*4, n.6.

<sup>7</sup> *Id.* (Compare *In re Asbestos Products Liability Litigation (No. VI)*, 394 F. Supp.3d 532, 540-41 (E.D.

Pa. 2019)(mandatory statutory regime purporting to confer consent to general jurisdiction in exchange for the ability to legally do business in a state is contrary to the rule in *Daimler* and, therefore, can no longer stand."), with *Kraus v. Alcatel-Lucent*, 2020 WL 951082, at \*1 (E.D. Pa. Feb. 27, 2020) (Pennsylvania's consent-by-registration statute is constitutional.).

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