

The Legal Intelligencer

Superior Court Jurisdictional Rulings Clear Way for Phila.'s First Trial Linking Talc to Ovarian Cancer

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By Zack Needles | October 08, 2018



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On Oct. 1, Philadelphia Court of Common Pleas Judge Idee Fox [overruled preliminary objections](#) by defendant Imerys Talc America in *Kleiner v. Rite Aid*, finding that the Superior Court's decisions in [Webb-Benjamin v. International Rug Group](#) from June and [Murray v. American LaFrance](#) from September dictate that an out-of-state company's registration to do business in Pennsylvania constitutes consent to general personal jurisdiction in Pennsylvania.

Over the past four years, state trial judges across Pennsylvania—including [in Philadelphia](#)—have split on the issue of whether consent by registration under 42 Pa.C.S.A. Section 5301(a)(2) is still valid after the U.S. Supreme Court's 2014 ruling in [Daimler v. Bauman](#). In *Daimler*, the high court ruled that jurisdiction could not be exercised over a 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.

But in *Webb-Benjamin* and *Murray*, two different three-judge panels of the Superior Court ruled that *Daimler* had no impact on the consent provision in Pennsylvania's long-arm statute and that registering to do business in the state still means agreeing to the possibility of being sued in the state. Both Superior Court rulings took guidance from the U.S. District Court for the Eastern District of Pennsylvania case [Bors v. Johnson & Johnson](#).

Litigators on both sides of the courtroom aisle [have predicted](#) that the one-two punch of *Webb-Benjamin* and *Murray* has now made it much more difficult to argue against consent by registration.

The complaint in *Kleiner* was originally filed in the Philadelphia trial court in January 2017 against defendants Imerys, Johnson & Johnson and Rite Aid. Johnson & Johnson removed the case to the U.S. District Court for the Eastern District of Pennsylvania in September of that year, but a district judge [remanded it back to state court that October](#).

The suit alleges Imerys mined and sold talc to Johnson & Johnson, which used the mineral in its baby powder and “Shower to Shower” products that were sold to consumers by Rite Aid.

After the case was sent back to state court, Imerys filed preliminary objections arguing that the court lacked jurisdiction because the company was not “at home” in Pennsylvania as defined by *Daimler*.

But Fox rejected that argument, relying on *Webb-Benjamin* and *Murray*.

“Imerys argues that this court cannot exercise general personal jurisdiction because Imerys is not ‘at home’ in Pennsylvania,” Fox said. “However, the Superior Court has held specifically ... that registration as a foreign association constitutes consent to personal jurisdiction notwithstanding the United States Supreme Court's ruling in *Daimler*.”

Fox also noted that Imerys had been a defendant in the *Bors* case, which both Superior Court panels relied upon for their holdings in *Webb-Benjamin* and *Murray*, and that the company had unsuccessfully argued that, post-*Daimler*, consent by registration was an unconstitutional violation of the due process guaranteed under the 14th Amendment.

“The district court rejected this argument, noting that ‘[i]n 2007, long after Pennsylvania enacted its specific notice statute and after our Court of Appeals confirmed personal jurisdiction based on registration, Imerys elected to register to do business in Pennsylvania as a foreign corporation. Imerys’ compliance with Pennsylvania registration statute amounted to consent to personal jurisdiction,’” Fox said, quoting from the *Bors* ruling.

“The district court’s reasoning is as applicable here as it was in *Bors*,” Fox added.

The judge also said Imerys’ consent to jurisdiction went beyond just the registration itself, noting that the plaintiffs have shown that Imerys makes about \$2 million per year in revenue from talc sales in Pennsylvania.

“Although these earnings are not enough to find that Imerys is ‘at home’ in Pennsylvania, they are evidence that Imerys’ registration to do business in Pennsylvania is more than a mere formality,” Fox said.

The plaintiffs in *Kleiner* are represented by Nancy Winkler, Todd Schoenhaus and Daniel Sherry Jr. of Eisenberg, Rothweiler, Winkler, Eisenberg & Jeck in Philadelphia, along with Ted Meadows of Beasley Allen in Alabama.

“Both J&J and Imerys have tried to do everything they could to keep this case from being tried here, where it rightfully belongs,” Winkler said in an email. “Now that those efforts have proved futile, our clients look forward to having their case move forward to be heard by a Philadelphia jury.”

Imerys is represented by Thomas Hanson Jr. of Barnes & Thornburg in Wilmington, Delaware; Rite Aid is represented by James Robinson of Gordon Rees Scully Mansukhani in Philadelphia; and Johnson & Johnson is represented by David Abernethy of Drinker Biddle & Reath in Philadelphia.

The defense attorneys could not immediately be reached for comment on Fox’s ruling.