



Court of Appeals Clarifies Need for Certificate of Authority to Maintain Lawsuits in North Carolina

Recently, the Court of Appeals of North Carolina confirmed that limited liability companies (LLCs) formed in other states must obtain a certificate of authority to transact business in North Carolina to prosecute lawsuits in the state's Superior Court. *JDG Environmental, LLC v. BJ & Associates, Inc., et al.*, Appeal No. COA21-692 (N.C. App. Oct. 17, 2023) ([click here](#) for the opinion). As addressed in an *Alert* released earlier this year, the issue raised in *JDG Environmental* involves yet another gloss on the question of how state business registration may be mandated and the implications for foreign LLCs and other foreign entities of registering to conduct business in other states. (See "Where Can a Corporation Be Sued for, Well, Anything? (An Evolving Test)," August 2023 *Litigation Alert*, [click here](#).)

The Court of Appeals decision addressed a civil action filed in North Carolina Superior Court by JDG Environmental, LLC (JDG), an Oklahoma LLC, against BJ & Associates, Inc. (BJ), a general contractor that engaged JDG to perform cleanup work in a residential community in Newport, North Carolina, damaged by Hurricane Florence. During oral arguments on JDG's motion for summary judgment, counsel for BJ made a cross-motion for summary judgment against JDG on the grounds that it had failed to comply with N.C. Gen. Stat. § 57D-7-02. That statute provides that "no foreign LLC transacting business in this State without permission obtained through a certificate of authority may maintain any proceeding in any court of this State unless the foreign LLC has obtained a certificate of authority prior to trial." (A similar statute (N.C. Gen. Stat. § 57D-15-02(a)) applies to foreign corporations.) Since JDG had not obtained a certificate of authority from the North Carolina Secretary of State, the Superior Court orally granted BJ's motion and later entered judgment against JDG.

The Court of Appeals reversed the Superior Court's ruling on two grounds.

First, the statute at issue requires only that a foreign LLC obtain a certificate of authority "prior to trial." Applying the plain meaning of this phrase that is not otherwise defined in the law, the Court held that JDG could have obtained a certificate and complied with this requirement any time prior to the empanelment of a jury in the case (i.e., prior to the time a jury trial is generally considered to have "commenced"). *JDG Environmental*, at 5-6. By granting judgment against JDG at the summary judgment stage, the Superior Court improperly cut short its opportunity to comply with the statute.

Second, the Court addressed the last sentence in N.C. Gen. Stat. § 57D-7-02, which states that "[A]n issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial." Observing that motions for summary judgment in North Carolina courts are commonly heard by a judge who will *not* be the judge presiding over the trial of the case, the Court of Appeals also held that BJ had raised its motion with the wrong judge. Again, taking the statutory language at face value, such a motion must be heard and determined by the "trial judge," not the judge hearing pre-trial motions.

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As a result of the Court of Appeals' decision, JDG will have its day in court (it had obtained its certificate of authority even before the Superior Court issued its written opinion in the case). But the time and expense associated with litigating this issue could have been avoided had JDG complied with the certificate requirement before filing suit. That decision, though, is not always without its own consequences. In the August 2023 *Litigation Alert* referenced above, we discussed how the United States Supreme Court upheld a Pennsylvania statute that requires foreign corporations registering in the Commonwealth to consent to the jurisdiction of its courts over *any* dispute, not just those involving in-state activities.¹ The North Carolina statute at issue in this case does not attach such onerous conditions, but registration can trigger other obligations—ranging in significance from annual reporting and fees to other regulatory burdens. It may therefore be prudent to seek legal counsel before registering to do business in a new jurisdiction, even if it is just to prosecute a single lawsuit.

For questions about the North Carolina law related to this decision, please contact Christopher B. (Kip) Power (licensed to practice in North Carolina, West Virginia and Kentucky) at (681) 265-1362 or cpower@babstcalland.com. For questions concerning the federal and state constitutional and procedural aspects of corporate registration and jurisdiction to sue or be sued, please contact Joseph V. Schaeffer (licensed to practice in Pennsylvania, District of Columbia, Virginia and West Virginia) at (412) 394-5499 or jschaeffer@babstcalland.com.

¹The Supreme Court limited its consideration to a constitutional due process challenge and remanded the case to the Supreme Court of Pennsylvania to consider challenges under the dormant commerce clause. Meanwhile, other challenges to the Commonwealth's business registration statute are working their way through Pennsylvania courts.

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