# Podcast: Redefining Personal Jurisdiction – SCOTUS rules on the Ford Cases

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What does the U.S. Supreme Court's March 25 decision regarding personal jurisdiction in the Ford cases mean for litigants and litigation across the country?

Join McGlinchey attorneys **Rasch Brown**, **Gary Hebert**, and **Brian LeCompte** for the fourth installment in their series on the changing landscape of general personal jurisdiction.

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**Rasch Brown:** Hi, I'm Rasch Brown. Once again, joined by my colleagues Gary Hebert and Brian LeCompte to talk about the United States Supreme Court's most recent pronouncement on personal jurisdiction. We launched this series with a discussion of a trio of cases – all handed down since 2011 – that really changed the landscape **general** personal jurisdiction. We then discussed the two consolidated cases that were pending before the Supreme Court, *Ford v. Montana* and *Ford v. Bandemer*, which placed the concept of **specific** jurisdiction directly in the Court's sights. Last episode, we took a deeper dive by breaking down the oral arguments and offered some predictions on how the Supreme Court might come down. At long last, we have a decision.

Before we get to that, let's remind our listeners of what precisely was before the Supreme Court. Gary and Brian, remind our listeners about the facts and issues before the Court.

Before oral argument, Ford conceded "purposeful availment" in both forums, so that the stream of commerce theories were off the table. The only issue concerned whether Ford's contacts with the forum states were sufficiently connected to the plaintiffs' claims.

**Gary Hebert:** Thanks, Rasch. *Ford v. Montana* arises from a tread separation on a Ford Explorer that resulted in a fatal rollover. *Bandemer* is a non-deployment case in which a Crown Victoria rear-ended a snowplow in Minnesota. Plaintiffs in both cases brought product liability and negligence claims as to Ford. In both cases, the vehicles had been designed, manufactured, and assembled outside the forum states, and neither of the vehicles had been originally sold in the forum states. Plaintiffs conceded that Ford could not be subject to general

jurisdiction, so that these were purely cases involving specific jurisdiction. The respective state Supreme Courts in both cases affirmed the lower courts' findings of specific jurisdiction as to Ford.

Which brings us to the U.S. Supreme Court: sometime before oral argument, Ford conceded "purposeful availment" in both forums, so that the stream of commerce theories that are so often discussed in these cases were off the table. The only issue before the Court concerned whether Ford's contacts with the forum states were sufficiently connected to the plaintiffs' claims. Or to use the technical legal phrasing, did the plaintiffs' claims "arise out of or relate to" Ford's contacts with the forum states? Although that language dates back to the *Burger King* case from 1985, the precise meaning of that phrase had never really been addressed by the Supreme Court before now. Ford argued in both cases for the application of a proximate cause standard, essentially a tort standard, which would require that plaintiffs specifically plead that their claims had been caused by Ford's forum contacts. Ford seems to have viewed the argument as a logical extension of recent cases, including the U.S. Supreme Court case of *Bristol-Myers Squibb*, which instructed that for specific jurisdiction to attach, plaintiffs' claims must arise out of the defendant's "suit-related" conduct. What's more, the Court's prior cases had specifically admonished courts against using general jurisdiction considerations to justify a finding of specific jurisdiction.

**Rasch Brown:** I recall from our last podcast that you both felt that Ford's proximate cause standard might be a bridge too far for the Court. Is that how it played out?

The Court concluded that the connection between the plaintiffs' claims and Ford's activities within the forum states was "close enough" to support specific jurisdiction. If "close enough" sounds imprecise and confusing to our listeners, it's the same for us.

**Brian LeCompte:** That's right. And here the Court unanimously rejected Ford's proposal out of hand, which wasn't surprising at all. What is surprising is how the Court got there. In an opinion authored by Justice Kagan, and joined by four other Justices, the Court concluded that the connection between the plaintiffs' claims and Ford's activities within the forum states was "close enough" to support specific jurisdiction. If "close enough" sounds imprecise and confusing to our listeners, it's the same for us. Now, the Court did recognize that because Ford was not "at home" in either forum, specific jurisdiction required a showing that the plaintiffs' claims arise out of or relate to the defendant's contacts within the forum. But the Court then used a method typically reserved for statutory interpretation to break down this requirement. It focused on the disjunctive "or" in the phrase "arise out of or relate to." The majority opinion then concluded that this "relate to" language was sufficiently broad to encompass the kind of general contacts that might not be easily understood as "suit-related." As the court put it, "there must be an **affiliation** between the forum and the underlying controversy, principally an activity or occurrence that takes place in the forum state and is therefore subject to the state's regulation."

So to establish this connection or "affiliation," the Ford Court looked to forum contacts, such as Ford's general marketing efforts in the forum states, sales volume for Ford vehicles in the forum states, and Ford's network of dealers in those forum States. Although the Court did not overrule or even criticize the prior case law on the issue, this decision arguably invites the use of general jurisdiction considerations to satisfy specific jurisdiction

requirements. To me, this seems like a pretty big departure from the Court's recent directives, most notably in the *Bristol-Myers* decision, where the Court warned against such a sliding scale approach.

**Rasch Brown:** So how did the Court reconcile this decision with *Bristol-Myers*?

**Brian LeCompte:** Well, the Court did distinguish *Bristol-Myers* on its facts, emphasizing that the plaintiffs in *Bristol-Myers* did not reside in the forum, did not use the product in the forum, and did not sustain injury in the forum. But still, the *Bristol-Myers* admonition against using a sliding scale analysis, or confusing general jurisdiction considerations with specific jurisdiction requirements, seems to have been completely glossed over.

**Gary Hebert:** I couldn't agree more, but it's really not surprising given what we heard from the bench during oral argument. As we said in our last podcast, several members of the Court voiced concern during oral argument with federalism principles, which weigh in favor of the forum state's authority to adjudicate matters brought by forum citizens involved in accidents in those forums. Remember, 40 states' Attorneys General and numerous trade groups had filed or joined in amicus briefs to support a finding of personal jurisdiction in these cases. This decision might best be understood, not in the context of specific versus general jurisdiction, but rather overriding federalism concerns on the facts of these cases. Unfortunately, for those of us who'd been hoping for clear guidance from the Court on the matter of specific jurisdiction, and especially the "arise out of or relate to" language, we really got nothing.

**Rasch Brown:** So what does this mean for litigants going forward. Can companies like Ford be sued in all 50 states?

The decision is relatively short, and precisely what it means to the Court to be a company "like Ford" seems to have been taken for granted, although the record is replete with evidence of Ford's uniquely pervasive presence in the forums and all over the country.

**Gary Hebert:** It's an interesting question, and especially interesting that you use the phrase "like Ford." Justice Kagan used that phrase quite a few times in the majority opinion. The decision is relatively short, and precisely what it means to the Court to be a company "like Ford" seems to have been taken for granted, although the record is replete with evidence of Ford's uniquely pervasive presence in the forums and all over the country. For now, we're left somewhere in between companies "like Ford" and, as the Court referenced, an individual in Maine who makes a few decoys to sell over the internet.

**Brian LeCompte:** You know, I think that because the *Ford* decision did not overrule any of its prior jurisprudence, it's noteworthy that much of that jurisprudence contains some real limitations on the reach of specific personal jurisdiction. Many of those limitations were expressly acknowledged in the Ford decision itself.

**Rasch Brown:** What kind of limitations?

**Brian LeCompte:** Well, purposeful availment, for one. Even with Ford's stipulation, the Court cited *Worldwide Volkswagen, Walden, Keeton*, and others for the proposition that Ford had "cultivated a market" for its products in each of the forum states. "Purposeful availment" requires some intentional action on the part of a defendant. Within the Ford decision is guidance on exactly what this means. It means a defendant deliberately reaching out beyond its home and exploiting a market in the forum state. *The Ford* decision re-emphasized that these

contacts must arise from a defendant's own deliberate choice and not some random isolated or fortuitous contact.

The jurisprudence traced all the way back to International Shoe shows that specific jurisdiction is based on the idea of reciprocity between a defendant and the forum state. The defendant must have exercised the privilege of conducting activities in that state, enjoying the protection of that state's laws, and being subject to that state's regulations.

And just as a defendant must deliberately choose to cultivate or exploit a market for jurisdiction to attach, it can also avoid jurisdiction by purposefully avoiding that market. The *Ford* decision cites to its own precedent to acknowledge this concept of, let's call it, purposeful avoidance, as opposed to purposeful availment. It said, "a defendant can thus 'structure its primary conduct' to lessen or avoid exposure to a given state's courts." We see this all the time with companies uprooting from jurisdictions for a variety of reasons. I just don't think that the *Ford* decision goes so far as to say that federalism principles will necessarily trump a defendant's Due Process rights. Instead, the jurisprudence traced all the way back to *International Shoe* shows that specific jurisdiction is based on the idea of reciprocity between a defendant and the forum state. It's a balancing of interests, and it's never been enough that, in isolation, a defendant's product finds its way into a particular state. The defendant must have exercised the privilege of conducting activities in that state, enjoying the protection of that state's laws, and being subject to that state's regulations. Look, all of the limitations discussed in past jurisprudence are still on the table. How those limitations might be applied to a company that is not exactly "like Ford," whatever that may mean, remains to be seen.

**Rasch Brown:** So what is the big picture here, or is there one?

**Gary Hebert:** Well, those of us who were hoping for concrete guidance from the Court are frankly disappointed. And what's so unusual about the ruling, at least to my read, is that eight Justices agreed with imposing jurisdiction on Ford, so that everything following that finding could arguably be understood as *dicta*. It's not at all clear why the Court even continued with its discussion after finding jurisdiction, given that it provided no guidance at all to lower courts and/or litigants going forward. And remember, too, that a huge part of the limiting jurisprudence and perhaps a meaningful analysis of the "stream of commerce" test, was taken off the table with Ford's concession on "purposeful availment." So this decision really doesn't give us any guidance on how to interpret the case law or to analyze the concept of specific jurisdiction going forward, other than perhaps instructing that some courts had been reading *Bristol-Myers* and *Walden* too narrowly.

We are left with many more questions than answers I'm afraid. And I was really hoping that Justice Kagan, a civil procedure professor herself, would have given more instruction. I could go on and on, but I see that our time for today has come to an end. Maybe we can wrap up by quoting Justice Gorsuch's concurrence in these cases. As he said, "the real struggle here isn't with settling on the right outcome in these cases, but with making sense of [the Court's] personal jurisdiction jurisprudence and *International Shoe*'s increasingly doubtful dichotomy."

**Rasch Brown:** Interesting. Might *International Shoe* be getting a little long in the tooth? I look forward to exploring that question in detail in our next several podcasts. That's it for today. I'm Rasch Brown.

**Gary Hebert:** I'm Gary Hebert.

**Brian LeCompte:** And I'm Brian LeCompte.

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