



## Ep. 08: Personal Jurisdiction Part 2 – The Ford Cases

September 2, 2020

*In the second installment of our series on personal jurisdiction, we discuss the potentially groundbreaking Ford cases pending before the U.S. Supreme Court. Given recent Court precedent, is personal jurisdiction forever changed? How far will the Court go on this? This episode presents the Ford cases in some detail, discusses potential outcomes and closes with commentary as to the impact of various outcomes.*

*For the first installment in the series on personal jurisdiction, see Ep. 04.*

**Rasch Brown:**

Hi, I'm **Rasch Brown**. I'm once again joined by my colleagues, **Gary Hebert** and **Brian LeCompte**, to delve a bit deeper into the evolving topic of personal jurisdiction. During our first episode, we discussed a trio of cases, *Goodyear*, *Daimler* and *Bristol Myers*, that have changed the landscape of general personal jurisdiction. Today, we're going to dive into two consolidated cases currently pending before the Supreme Court. Those cases are *Ford v. Montana* and *Ford v. Bandemer*, and they place the concept of specific jurisdiction directly in the Court's sights. Because specific jurisdiction is inherently fact-specific, let's take a look at the facts of these cases. Gary and Brian, tell me about the facts of the two *Ford* cases.

**Brian LeCompte:**

Sure, Rasch. In *Ford v. Montana*, we have a tread separation on a Ford Explorer that resulted in a fatal rollover. *Ford v. Bandemer*, out of Minnesota, is an airbag non-deployment case where a Crown Victoria rear-ended a snowplow. Plaintiffs in both cases brought product liability and negligence claims against Ford in the forums where those accidents occurred. As we talked about last episode, personal jurisdiction requires us to look at the defendant's suit-related conduct to see if there's enough minimum contacts to meet due process requirements. In product liability cases like these, that suit related conduct is typically going to be in those forums where the vehicles were designed, manufactured, assembled, and sometimes, sold. But in both of these *Ford* cases, the vehicles were not designed, manufactured, assembled, or sold in either of the forum states. The lower courts, nevertheless, found specific jurisdiction. But it looks like they may have used general jurisdiction considerations to get there.

**Gary Hebert:**

As we talked about in the first episode, general jurisdiction is now limited to a defendant's state of incorporation and its principal place of business. For Ford, those states are Delaware and Michigan. If we take the U.S. Supreme Court at its word from *Daimler*, *Goodyear*, and then *Bristol Myers*, general jurisdiction is basically off the table in these cases, so that these claims against Ford filed in Minnesota and Montana can proceed only if the courts find specific jurisdiction as to Ford. To Brian's point, neither of the accident vehicles was designed, manufactured, or assembled in Montana or Minnesota. What's more, it doesn't seem that either accident vehicle found its way into these states through Ford's efforts directed at the forums. The fact that these vehicles ended up in Minnesota or Montana seems pretty random. Nothing that Ford did in or directed to these forums states explains the accident vehicles' presence in the forum states, let alone these crashes.

**Rasch Brown:**

Given that there's little or no link in either case between Ford's suit-related actions and these crashes, how do the lower courts justify their findings of specific jurisdiction?

**Brian LeCompte:**

The lower courts found specific jurisdiction under two very different analyses. The Minnesota court used a 5-factor test, the third prong of which requires that the cause of action be connected to a defendant's contacts in a forum. And this seems to be a key question on appeal: the need for, and extent of, a causal connection. Ultimately, the Minnesota court held that Ford's general business in the state provided a sufficient connection between Ford's conduct and the lawsuit. But to Gary's point, I think that post *Bristol Myers*, using general jurisdiction considerations to find specific jurisdiction is off the table.

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**Gary Hebert:**

The Montana court used a very different analysis, but it reached the same result. That court applied a "Stream of Commerce plus" theory. We've not yet talked about the Stream of Commerce theories, but the Cliff's Notes version is this: if a defendant places a product into the stream of commerce, then the forum state is free to exercise jurisdiction for incidents arising within its borders, so long as there are other acts that establish a connection between the defendant and the forum. To me, this also harkens back to a general jurisdiction analysis, when the criteria for a specific jurisdiction really ought to be the focus. The Montana court found the connection to have been satisfied because Ford had advertised and sold vehicles, although not this particular vehicle, in Montana. The court reasoned that by selling a vehicle, which after all is a product designed and intended to travel, Ford could have reasonably foreseen that it would end up getting sued in Montana, even for accidents involving vehicles not sold in Montana.

**Rasch Brown:**

Well, does it matter that Ford did not sell the car in Montana? Is Ford's argument really that it might be subject to personal jurisdiction in one state involving a given Mustang,

but might not be in another case involving a different Mustang, simply because of the vehicle's title history?

**Brian LeCompte:**

That's what Ford is arguing here. *Bristol Myers Squibb* requires that the cause of action arise out of or relate to the defendant's contact with the forum. If Ford's conduct outside of these forum states is what caused the injury, then there really isn't any justification for exercising jurisdiction in those states. If Ford's general marketing and distribution activities across all 50 states are the sole links to this cause of action, then we're on thin jurisdictional ice. It would essentially mean that Ford is subject to personal jurisdiction in every state of the union, which would seem to erase recent U.S. Supreme Court precedent.

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**Gary Hebert:**

Let's take a quick look at the Third Circuit case of *U.S. v. Coates* to see how this has played out in lower courts. *Coates* stems from a car crash that occurred in the U.S. Virgin Islands involving a Ford. The car had been purchased in another state from a third-party seller. Even after conducting jurisdictional discovery, the appropriateness of which we can take up in a later episode, the court held that Plaintiff failed to establish a sufficient connection between Ford's contacts with the forum, the Virgin Islands, and the specific vehicle involved. Ford's only contact that could potentially have given rise to the exercise of jurisdiction in the Virgin Islands was advertising that allegedly persuaded the plaintiff to buy the car. But the court rejected that as a basis for imposing jurisdiction and found that it lacked jurisdiction over Ford. If the Supreme Court follows that analysis in these consolidated cases, then I see a big victory for Ford and for many manufacturers throughout the country.

**Brian LeCompte:**

And the crux of Ford's argument presently before the Supreme Court is just what was discussed in the *Coates* case. Ford's briefing does a good job of laying out the current split among the lower courts as to what degree of a connection is required between the defendant's conduct with the forum and the cause of action. A Due Process analysis under current precedent does require some causal connection. The question to the Court is how much?

**Rasch Brown:**

How do you see the Court resolving it?

**Gary Hebert:**

Everyone needs guidance in this area, precisely because this area of the law has changed so much in the last decade. But it's very hard to predict what the Court will do, in part because many of these cases start and finish by emphasizing that personal jurisdiction, by its very nature, is a fact-sensitive inquiry that has to be assessed on a case-by-case basis. So while the Supreme Court certainly will rule on these cases, it's really tough to predict what sort of guidance the Court might provide to assist lower courts and litigants in other cases involving disparate facts.

**Brian LeCompte:** The circuit split itself is largely due to the fact-sensitive nature of the analysis. Every case has different facts to consider, and earlier jurisprudence was vague enough to allow differing interpretations and tests with very different outcomes. And that's really the problem. Some jurisdictions seem to require little or no real causal connection, relying on a broad application of the "Stream of Commerce" theory. Other courts use a but-for standard, and before the U.S. Supreme Court right now is a test that the Plaintiffs argue is essentially a tort standard of proximate causation. Whether or not the Court goes that far, I hope we get some guidance on exactly what kind of causal connection is needed.

**Rasch Brown:** Playing devil's advocate, if the Court were to go that far, would the result be fair to the plaintiffs here? Would this result be fair to a plaintiff injured by a product where they live?

**Brian LeCompte:** That's really one of the Plaintiffs' best arguments in the *Ford* case: fairness. The Plaintiffs argue that Ford purposefully availed itself of the laws of these forums, so that depriving the forum residents of access to courts in their own backyards would be just plain wrong. If the causal connection standard were strictly applied, the Plaintiffs would have to sue Ford in a venue upwards of 3,000 miles away from their home states.

**Gary Hebert:** I have to tell you that these arguments, once again, are starting to sound an awful lot like general jurisdiction arguments, and we have to assume that the concept of general jurisdiction is all but dead in these cases. It's rarely coming into play anymore. I really think that these arguments, and any argument that would result in Ford being subject to personal jurisdiction wherever an accident involving one of its vehicles occurs is just conflating the concepts of general and specific jurisdiction. There's no doubt that the criteria formerly reserved for a general jurisdiction analysis keep popping up in cases on specific jurisdiction. The Supreme Court has consistently admonished courts for confusing these two very different concepts. And it seems to me, that's exactly what the lower courts did in these consolidated cases. I frankly would be surprised to see the Court retreat from its earlier admonitions on this.

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**Rasch Brown:** A key argument the Plaintiffs make is the distinction between a legal argument and a common-sense argument. How would you explain this holding to a non-lawyer?

**Gary Hebert:** You know, Rasch, a judge in Boston put a very similar question to me a few years ago when she asked me whether, if she granted my client's motion, the Plaintiffs would be left without a recourse in any court. As I told her then, whether the Plaintiff has recourse is simply not among the factors that a Due Process analysis calls out as relevant in this context. And the reason is, the focus in a personal jurisdiction context is solely on fairness to the defendant, which brings us back to the federal question at issue, of

course: does the Due Process Clause permit the Court to exercise jurisdiction over the defendant in this specific forum?

**Brian LeCompte:** From a common-sense perspective, trial courts don't do Plaintiffs any favors by finding personal jurisdiction when there is none. Product liability litigation in particular is expert-driven and very expensive. It's not fair for either party to have to spend years and small fortunes only to have an appellate court determine there was no jurisdiction in the first place. Personal jurisdiction is a fundamental threshold issue. It should be easily determined at the outset of every case. Hopefully these Ford cases can help make that happen.

**Rasch Brown:** On that note, we're out of time. It's safe to say that we're expecting this decision to have a major effect on litigation nationwide, and we look forward to seeing what the Supreme Court decides. We'll discuss more nuances in this area, including some of the topics we only hinted at this week in a later episode. After delays related to COVID, oral arguments for the consolidated Ford cases are currently set for October 7, 2020 at 11:00 AM. That's it for today. I'm Rasch Brown.

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

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

*Thanks for tuning into this episode of "More with McGlinchey." If you have a question or would like to propose a topic, we'd love to hear from you at [podcast@mcglinchey.com](mailto:podcast@mcglinchey.com). For additional resources on this topic, please visit [mcglinchey.com](http://mcglinchey.com). On behalf of the law firm that brings you more, we hope you'll join us next time.*



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