



Ep. 12: Personal Jurisdiction Part 3 – Oral Arguments in the *Ford* Cases

November 3, 2020

The U. S. Supreme Court recently heard oral arguments on two potentially groundbreaking personal jurisdiction cases known as “the Ford cases.” In this third episode from our series on Personal Jurisdiction, we’ll discuss our take on what we heard from the litigants and from the bench.

For previous installments in the series on personal jurisdiction, see Eps. 04 and 08.

Rasch Brown:

Hi, I'm **Rasch Brown**. I'm once again joined by my colleagues **Gary Hebert** and **Brian LeCompte** to take a closer look at two cases pending before the Supreme Court. *Ford v. Montana* and *Ford v. Bandemer* both seek clarification as to the appropriate test for specific jurisdiction. To recap, these consolidated cases both involve product liability claims against Ford. Neither vehicle was designed, manufactured, assembled, or sold in the forum states. The lower courts, nevertheless, found specific jurisdiction. Gary and Brian, tell me about how these cases have progressed.

Brian LeCompte:

We've gotten through oral argument, which gives us a lot more to think about. Of course, you can't really tell how judges will rule based on their questions and comments. Still, I think we both came away with a much clearer picture of the issues.

For example, we had talked about the proximate cause standard advanced by Ford a little bit in our last episode. This uses a causal test for the “arise out of or relate to” requirement, which is easily understood as a tort standard of proximate causation. The standard advanced by the plaintiffs, on the other hand, became much clearer during oral argument when Justice Kagan gave it a name. She called it the “same product rule.”

It's exactly what it sounds like. Focusing on the Due Process fairness principles, plaintiffs argued that when Ford sells the same product or same model vehicle in the forum, that's enough – even if the accident vehicle itself was sold outside the forum and brought there by third parties through no direction of Ford. I think this “test” is

attractive, at least from a fairness perspective when you look at a company like Ford, which sold a lot of vehicles in both of these forums.

Rasch Brown: So does that attractiveness or receptiveness give us any indication as to a ruling – one way or another?

Brian LeCompte: I'm not sure about that. Everyone likes fairness in the abstract. But the present struggle is about fairness to *whom*? In the personal jurisdiction context, Due Process focuses on fairness to the defendant. I think the Court is struggling with finding a balance between (1) a defendant's Due Process rights, and (2) federalism principles, which typically weigh in favor of the forum plaintiffs.

I don't see plaintiffs' "same product" test as a way to strike that balance at all. It would effectively subject Ford to jurisdiction in all 50 states, with very, very few exceptions. Members of the Court – I think correctly – questioned whether this test would even be useful outside of product liability cases. As we talked about last episode, this type of test seems to confuse general jurisdiction considerations with specific jurisdiction requirements. *Bristol Myers* closed the door on that type of sliding scale analysis.

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Rasch Brown: How about the causation test? Did we get any read on how Ford's argument for a proximate cause standard fared?

Gary Hebert: To my ear, the Justices were not at all receptive to Ford's proposed proximate cause standard as an additional element in the specific jurisdiction context. Justice Thomas at one point commented that, to get from Due Process to proximate cause "seems to be a long journey." I suspect that Ford was hoping the conservative members of the Court would be most receptive to their proximate cause test, making Justice Thomas's comments especially noteworthy for me.

In follow up, Justice Breyer asked: "What's unfair about finding general jurisdiction as to *Ford*?" The general jurisdiction question seemed to catch everyone off guard. Having gone back to re-read the transcript, I'm now rather wondering if some members of the Court aren't wishing they could find some other tool in the box; for now, they have only general and specific jurisdiction to choose from.

I don't see Ford's "proximate cause" test as garnering support from the majority.

The question in my mind is how the Court might find for the plaintiffs, which I think is likely, without upending the settled concepts of general and specific jurisdiction.

- Rasch Brown:** When Justice Breyer brought up general jurisdiction, do you think he may have been suggesting that as a potential avenue to find personal jurisdiction over Ford?
- Gary Hebert:** The case law, most notably *Daimler*, tells us that general jurisdiction has no application here, simply because Ford cannot reasonably be deemed “at home” in either forum state. And the plaintiffs surely had abandoned general jurisdiction by the time of oral argument. I don’t see general jurisdiction as viable here, and neither do the parties.
- Rasch Brown:** So let’s bring this back to specific jurisdiction. It doesn’t sound to me that either the “proximate cause” test advanced by Ford or the “same product” test argued by plaintiffs will prevail?
- Brian LeCompte:** I think that’s right. I expect the Court to look back at its existing jurisprudence rather than make broad new pronouncements that refashion traditional jurisdictional rules. As Gary noted, the Justices seemed most concerned with fairness principles on both sides of the equation. They asked a lot of questions like: “what’s unfair about subjecting Ford to jurisdiction in these forums where they sell thousands of products and where their products allegedly injured people?”
- To these types of questions, Ford’s counsel emphasized that the Due Process rights we’re talking about belong to the defendant. He also pointed out that any decision in these cases will apply not only to Ford, but also all manufacturers, big and small – and likely sellers, distributors, and others, too.
- Justice Roberts posed a hypothetical that I think illustrates the point. He said: What if you have a retiree in Maine who carves and paints decoys and puts a few on the internet for sale? Someone in a far-away forum alleges injury due to lead paint. That hypothetical underscores the inadequacy of our present framework to deal with e-commerce. It also and suggests that what’s fair for a company like Ford might not be fair for smaller players.
- Rasch Brown:** Gary and Brian, do you care to take a guess on how the Court might rule?
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- Brian LeCompte:** Again, I don’t think either the “same product” test argued by plaintiffs or Ford’s “proximate cause” test will carry the day. I think that Ford’s counsel may have even anticipated this, as he backtracked a little bit in his argument. He eventually argued that the Court doesn’t even need to articulate a “proximate cause” standard to rule in his client’s favor. He said the plaintiffs’ claims’ complete lack of connection to Ford’s forum contacts means that jurisdiction couldn’t be met under any causal standard.

- Gary Hebert:** I agree that the Court is unlikely to adopt either of those tests. But we may see a test that opens the window to address e-commerce, which was plainly on the minds of the Court. As I said a minute ago, the Court is a bit frustrated, at least in my view, with the limited tools at its disposal – general and specific jurisdiction.
- Rasch Brown:** So do you think the Court will find personal jurisdiction in these cases?
- Gary Hebert:** Yes, based on what we heard from the bench in oral argument, I do believe that. I heard too much skepticism from the Court for allowing Ford to walk away from these forums.
- And keep in mind, too, that the plaintiffs’ position is supported by amicus briefs of 40 state Attorneys General and by numerous trade groups, all of which urge that federalism principles – which are part of a Due Process analysis – should compel an outcome for the plaintiffs. I find it especially intriguing that the traditionally conservative mantra of Federalism seems to be at odds, to some degree, with the corporate defendants’ position here. It may be tricky for the Court to find for Ford without being seen as trampling on federalism principles.
- Brian LeCompte:** I disagree on the prediction. Under the current jurisprudence, the plaintiffs can’t establish specific jurisdiction given that none of their claims arise out of or relate to Ford’s forum contacts. You just can’t get there without confusing general jurisdiction considerations with specific jurisdiction requirements. And *Bristol-Myers* says you can’t do that.
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- Gary Hebert:** I don’t know that Brian and I are really that far apart on this. What we have learned since the last episode comes from the oral argument. And based on what I heard, the Court is inclined to find personal jurisdiction as to *Ford*. I certainly agree that a finding of jurisdiction would require a clarification – if not an entirely new framework – for jurisdictional analyses to fit the world of 2020 and beyond.
- Rasch Brown:** What kind of clarification of the existing jurisprudence might allow for personal jurisdiction to be reached on the facts of these cases?
- Brian LeCompte:** Well, during oral argument, both Justices Breyer and Kagan suggested that *Bristol-Myers* can be distinguished because the plaintiffs’ injuries in those cases occurred outside of the forum. Here, both the plaintiffs and injury occurrences were in their respective forums. Of course, the *Walden* decision and others say that the location of the plaintiff and injury occurrence cannot, by themselves, establish jurisdiction.

There may be a way to distinguish *Bristol-Myers* on federalism principles. Maybe Minnesota's and Montana's interests in protecting their citizens will be enough to draw that distinction. During oral argument, Justice Kagan did say that federalism has become at least as important as Due Process fairness concerns. But still, the jurisprudence is solid that a plaintiff herself cannot supply the link between the defendant and the forum. And I don't think federalism has trumped Due Process – at least not yet.

Gary Hebert: I think it's a fair assumption that however the Justices decide, it won't be unanimous or an 8-1 decision like in *Bristol-Myers*. I would not be at all surprised to see a plurality opinion – or even series of opinions.

Rasch Brown: Was there any discussion of the old concept of stream of commerce?

Gary Hebert: You know, going in, I thought it would have been discussed in greater detail. But by the time of oral argument, Ford apparently had conceded "purposeful availment." Stream of commerce, of course, falls under the umbrella of "purposeful availment," so we did not hear much about stream of commerce at all during the arguments. It just wasn't on the table.

Brian LeCompte: With purposeful availment conceded, plaintiffs argued that Due Process doesn't require a *direct* connection between Ford's activity and plaintiffs' claims. Instead, they argued specific jurisdiction can be met as long as plaintiffs' claims are "related to" Ford's forum activity, and Ford could have reasonably foreseen its product being used in the forum. Plaintiffs' counsel repeatedly said that Ford "deliberately cultivated the market" for its product in each of these two states such that not exercising jurisdiction would be unconscionable. But again, as Ford's counsel pointed out, if *Bristol-Myers* stands for anything, it's that there is no sliding scale between general jurisdiction and specific jurisdiction considerations. And plaintiffs can establish jurisdiction here without using one.

Rasch Brown: As the Justices retired to chambers to deliberate, what issues do you think are troubling the Justices?

Justice Gorsuch noted that we are using outdated tests for modern commerce. International Shoe, after all, dates back to the 1940's.

Gary Hebert: Justice Gorsuch noted that we are using outdated tests for modern commerce. *International Shoe*, after all, dates back to the 1940's. It's remarkable to even ponder how much the world has changed since the Court first articulated the concepts of general and specific jurisdiction 8 decades ago. The Justices seemed to acknowledge the need for new metrics in the modern age.

Ford's counsel described the internet implications as "vexing," but then he stated that those issues are in no way implicated on this record. And I suspect that he's right. To my

ear, he never really addressed the issue at all, perhaps knowing that doing so would send him down a rabbit hole with no apparent relevance to these cases.

Whatever is to come, I think we both see the Court as laser focused on the confusion that exists within the lower courts that are struggling with what may be very outdated tools – general and specific jurisdiction as currently framed, at least as applied to today’s world.

Brian LeCompte: Agreed. If the Court sticks to its schedule here, we should see a decision in mid-January. And when that happens, we will be back to discuss the ruling.

Rasch Brown: On that note, we're out of time. I'll say again, 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. That's it for now. I'm Rasch Brown.

Gary Hebert: I'm Gary Hebert.

Brian LeCompte: And I'm Brian LeCompte.

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Francis "Rasch" Brown
Member, New Orleans
(504) 596-2735
fbrown@mcglinchey.com



Gary Hebert
Member, New Orleans
(504) 596-2715
ghebert@mcglinchey.com



Bran LeCompte
Member, New Orleans
(504) 596-2832
blecompte@mcglinchey.com

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