Personal Jurisdiction: Not Built Ford Tough

A Practical Guidance® Article by Jim Wagstaffe and the Wagstaffe Group

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This article addresses the impact of the March 2021 U.S. Supreme Court decision in *Ford Motor Co. v. Montana Eighth Judicial District*, and covers topics such as how the Court's holding will alter the personal jurisdiction landscape, the rejection of the strict proximate cause connection test advocated by Ford, and personal jurisdiction in a 21st century economy.

The Supreme Court's hot-off-the-presses decision in Ford Motor Co. v. Montana Eighth Judicial District, 2021 U.S. LEXIS 1610 (U.S. S. Ct. March 25, 2021), reminds us that the subject of personal jurisdiction has practical implications far beyond confounding first year law students studying Civil Procedure. For the bottom line of Justice Kagan's majority opinion for the Court is that when companies like Ford advertise and sell car models out of state, they must defend lawsuits brought by forum residents who are injured there even if the vehicle in question was designed, manufactured, and sold elsewhere.

There is a real estate truism of "location, location, location" that applies with great tactical significance to plaintiffs and their local counsel suing for personal injuries: no matter who is the defendant, bring the suit in your home court where you have the maximum convenience and jury appeal. Of course, a personal jurisdiction problem often can thwart this strategy if the desired defendants are located out of state. Of course, if defendants are frank they would concede that they are often less interested in constitutional limits, principles of federalism, or even their own convenience or lack thereof. Rather, the banal hope is that the case will be relocated elsewhere such that the litigation burdens will be so substantial that many plaintiffs will simply give up their claims.

Nevertheless, and as I have been teaching Civ Pro law students and writing for decades, even if the defendant is not from the forum, a court will have personal jurisdiction and you win the location game if your opponent's forum-related "contact rocks" pile high enough to make the assertion of judicial power reasonable. See Wagstaffe Prac Guide: Fed Civil Proc Before Trial § 7-II[A]. Well, the Supreme Court's decision in the consolidated *Ford Motor Company* case now addresses for the first time how related or "affiliated" those "contact rocks" must be to the actual cause of action at issue to justify the assertion of personal jurisdiction over an out-of-state manufacturer.

For practice notes on personal jurisdiction, see Personal Jurisdiction (Federal) and Motion to Dismiss for Lack of Personal Jurisdiction: Making the Motion (Federal).

The Underlying Litigation and Ford Motor Company's Forum Contacts

In the two consolidated Ford Motor Company products liability cases before the high court, the allegedly defective cars involved in the forum-related accidents were designed and manufactured by Ford (of Michigan) outside the forum, and the vehicles were also sold and even resold by others elsewhere (in the Pacific Northwest and North Dakota respectively).

But as is often the case with cars, the vehicles in the accidents in question eventually were sold to and driven by persons from other states (respectively Montana and Minnesota) where the injured plaintiffs lived and brought their lawsuits. However, and not surprisingly, Ford, which is headquartered in Michigan, did advertise, sell, and service many, many other cars of the exact same make and model in the forum states at issue—just not the ones involved in the accidents in question.

In both cases, Michigan-based Ford argued the state courts lacked personal jurisdiction over the company because it did not do anything there as to the specific cars involved in the accidents. Those vehicles were designed, assembled, sold, and resold elsewhere. In particular, Ford asserted that the only minimum contacts to be counted are those satisfying a causal connection to the case in suit itself—which it argued were completely absent.

In challenging the decisions of the Montana and Minnesota courts respectively upholding personal jurisdiction, Ford argued that its liability did not arise out of the admittedly significant marketing and sales activities it performed in those states as to other vehicles—albeit of the same make and model. Thereby, Ford was asking the high court to impose a strict "proximate cause" standard for which contact rocks to count in exercising personal jurisdiction.

In opposition, counsel for the plaintiffs raised a "you've got to be kidding" point (i.e., Ford deliberately through sales and shipments cultivated both Montana and Minnesota as markets for cars of the exact same make and model). Furthermore, the car company aggressively advertised these cars in each state, had 36 dealerships in Montana, and 84 in Minnesota, and regularly maintained and repaired vehicles there on a regular basis (what Justice Kagan would call a "veritable truckload of contacts"). And unlike prior personal jurisdiction cases, the injured plaintiffs were from and injured in the forum states themselves.

Understanding the Defense of Personal Jurisdiction

The genesis of the "modern" test for personal jurisdiction can be traced to 1945 and the International Shoe case. *International Shoe* Co. v. Washington, 326 U.S. 310 (1945); see Wagstaffe Prac Guide: Fed Civil Proc Before Trial § 10-II[A][1]. There, the Court issued the refrain quoted in every law student's first year outline: To be subject to jurisdiction in a state consistent with due process, a defendant must have "certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice"

What has emerged in the following decades is a two-tiered analysis as to general and specific jurisdiction. The high court has held that when the contacts relating to the claim take place outside the forum, the defendant nevertheless is subject to general jurisdiction in the forum if they are "at home" in the forum—meaning domiciled there as individuals or incorporated or with their principal place of business if entity defendants. Daimler AG v. Bauman, 134 S. Ct. 746 (2014); see Wagstaffe Prac Guide: Fed Civil Proc Before Trial § 10-V.

By distinction, a defendant is subject to specific jurisdiction if the defendant's conduct "arises out of or relates to" the defendant's contacts with the forum. Thus, one simply does not count those forum-related contacts that are not tied in some described manner with the cause of action in the lawsuit. In other words, if the defendant attended an unrelated trade show or vacationed in the forum and such connections were unrelated to the claims at issue, they are jurisdictionally irrelevant. See Wagstaffe Prac Guide: Fed Civil Proc Before Trial § 10-VI.

And this distinction between general and specific jurisdiction was the rub facing the Ford Court in addressing personal jurisdiction. By definition, and as the Court acknowledged, there was no general jurisdiction as Ford concededly is only "at home" in Michigan and Delaware. Further, Ford argued there is no specific jurisdiction since the company's activities in Montana and Minnesota respectively, while substantial, were causally unrelated to the claims in question.

In contrast, the plaintiffs argued that Ford's substantial marketing and sales activities should count because they related to the same vehicle models, they showed that the company was serving the market for products in the states, and demonstrated an *affiliation* between Ford and the forum states. Moreover, Ford could hardly claim that the forum states had no interest in regulating its conduct particularly when it resulted in injuries in the state to forum state residents.

Thus, the dispute in the case turned on the question as to when do a defendant's contacts give rise or relate to the claim. And this is an issue on which lower courts have struggled for decades, debating what test—proximate cause, relating to, or but-for—should be utilized in assessing the jurisdictional connections. See O'Connor v. Shady Lane Hotel Co., Ltd., 496 F.3d 312 (3d Cir. 2007); see also Wagstaffe Prac Guide: Fed Civil Proc Before Trial § 10-VIII. And while, in upholding jurisdiction, the high court's decision does indeed take an "I know it when I see it" approach to Ford's contacts, by using the undefined term "affiliation" as the touchstone, it gives very little guidance

outside the context of major, interstate manufacturers as to what the test in the future will be.

The Supreme Court's Decision

Since the *Ford* case no doubt will enter the law school casebooks, here's the stated issue for future case briefings: Whether individuals injured in automobile accidents involving Ford cars can sue Ford in the states in which the accidents took place (Montana and Minnesota) if Ford regularly sells, ships, and markets cars in those states but manufactured and sold the specific cars involved in the accidents in other states. The answer, we now know, is a resounding yes.

In simple terms, the Kagan opinion holds as follows: "When a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit." Moreover, Justice Kagan's opinion for the Court emphasizes that Ford, in seeking to apply a strict proximate cause test, misreads the "arise out of or relate to" language by ignoring the disjunctive. In other words, contacts may be considered either when they "arise out of" or "relate to" the forum state, the latter obviously being a broader and more inclusive concept. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); see Wagstaffe Prac Guide: Fed Civil Proc Before Trial § 10-VIII[A].

The Court's opinion distinguishes two important and recent decisions finding no personal jurisdiction over defendants. In the 2017 decision in Bristol-Myers Squibb v. Superior Court of California, 137 S. Ct. 1773 (2017), the Court held that selling a similar product in a state to others could not provide a basis for jurisdiction there as to out-of-state drug purchasers. Similarly, in a 2014 decision in Walden v. Fiore, 134 S. Ct. 1115 (2014), the Court held that there was no jurisdiction in Nevada (plaintiffs' home state) over a DEA agent who had committed allegedly illegal acts in seizing their money at the Atlanta airport. The test examined the relationship between the forum, the cause of action, and the defendant—not the plaintiff.

Rather easily, Justice Kagan distinguished these cases as involving liabilities that arose out of state involving the activities of plaintiffs that also occurred elsewhere. Justice Kagan conceded that if the plaintiffs here were from Ohio and were injured there, neither Montana nor Minnesota would have personal jurisdiction over Ford simply because it committed unrelated activities in the forum.

No, according to Justice Kagan, this case was more analogous to the major car companies (Audi and Volkswagen) in the 1980 *World-Wide Volkswagen* Supreme Court ruling where, albeit in dictum, the Court concluded that the substantial state-based marketing and sales activities in Oklahoma of those companies would have subjected them to personal jurisdiction for a products liability suit arising from an accident in that state—even as to a car sold elsewhere. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). The Court in *Ford* reasoned that you subject yourself to the coercive power of a state for injuries occurring there to forum residents "related to" other similar and substantial product sales there. And certainly, that defendant is "on notice" that such activities can subject it to the coercive litigation authority of that sovereignty which has an interest in regulating conduct and accidents within its borders.

Other Applications Raising More Vexing Questions

To hold that a major interstate corporation is subject to jurisdiction in a state in which it sells products identical to the one sold elsewhere that now causes injury here is one thing. However, what if the sales are more isolated or sporadic? What if, as in the differentiated hypothetical raised by Justice Kagan in *Ford*, a retiree in Maine carves and sells wooden duck decoys, sold online to a single purchaser in another state who is then injured? What then?

The high court in setting forth its "contacts affiliated with the forum are enough" rule, expressly stated that these circumstances (isolated sales or internet contacts) are questions for another day, unaffected by the rule and reasoning of this decision. As Justice Gorsuch bemoaned in his concurring opinion, the main opinion simply "supplies no meaningful guidance about what kind or how much of an 'affiliation' will suffice."

What we do know, however, is that the Court overwhelmingly and unanimously rejected the strict proximate cause connection test espoused by Ford. And certainly, the Court will consider forum-related contacts if they are substantial and continuous and sufficiently "affiliated" with the cause of action by way of similar product lines, locus of injury, and related product support such as warranty work and the like. And this is by no means nothing given the doctrinal quagmire existing before this decision on this point.

What of the "Where the Plaintiff Resides Is Jurisdictionally Irrelevant" Case Law

In advance of *Ford*, and as a follow up to *Walden v. Fiore*, litigators and scholars were opining that the location of the plaintiff was jurisdictionally irrelevant. It was the defendant's contacts (not those of the plaintiff) that counted. See Wagstaffe Prac Guide: Fed Civil Proc Before Trial § 10-VII[B][3].

This analytic approach has a major impact both in products liability and a whole host of cases in other substantive areas. For example, what of a copyright or trademark infringement suit in which the plaintiff as the holder has its intellectual property infringed and thereby suffers economic injury in the forum. Since *Walden*, most courts were finding the location of the plaintiff, without more (e.g., a defendant's visit to the forum) to be insufficient to serve as a basis for the assertion of personal jurisdiction. See, e.g., Ariel Investments v. Ariel Capital Advisors, 881 F.3d 520, 523 (7th Cir. 2018) (no personal jurisdiction in trademark suit simply because plaintiff in forum state).

It is clearer now, after *Ford*, that the location of the plaintiff to the extent that it involves a defendant "may be relevant in assessing the link between the defendant's forum contacts and the plaintiff's suit—including its assertions of who was injured where." And particularly in cases involving intentional torts in which the defendant expressly aims its conduct at forum residents, personal jurisdiction likely can be upheld on a showing of lesser contacts. Wagstaffe Prac Guide: Fed Civil Proc Before Trial § 10-VII[C][4].

Personal Jurisdiction in a 21st Century Economy

The high court opinions in *Ford* address and do not resolve how modern changes to now-ancient concepts of physical presence, direct forum activities, and corporate locus will affect the jurisdictional calculus. The concurring opinions of Justices Alito and Gorsuch certainly indicate that this decision in Ford simply does not address such things as corporations with "virtual headquarters" and business performed remotely. Undoubtedly, in light of these open questions, more would-be litigants will attempt to control the jurisdictional situation through the use of consent to jurisdiction clauses authorized and fully supported by the case law. See Wagstaffe Prac Guide: Fed Civil Proc Before Trial § 10-Iv[D].

And certainly, internet-based contacts and particularly those of small businesses and individuals remain the third rail of jurisdictional analysis. The hypothetical questions posed both at oral argument and in the various opinions in *Ford* cause one to believe rather strongly that we await a future jurisprudence providing broader jurisdictional immunities. Therefore, it may not be, as I have taught for years, that internet jurisdiction is "simply old wine in a new bottle." Concepts of unfairness and economic litigation extortion might well carry the jurisdictional day.

At bottom, the *Ford* decision tells us that large corporations cannot avoid litigation on a "first-sale only" basis, but rather must answer to lawsuits brought in states where their conduct allegedly injures forum-based residents. This will be true even if the defendants sold their products initially elsewhere, as long as they are indeed serving such markets in any substance directly or indirectly. In being required to defend lawsuits outside of Michigan, the car company in this new case truly has to be Ford tough as it advertises.

And, as a Civ Pro professor and practice guide author, I am still in business. Thank goodness for that.

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The Civil Litigation offering features content by renowned author, litigator, educator and lecturer James M. Wagstaffe, the premier industry expert and authority on pretrial federal civil procedure.

Jim is partner and co-founder of Wagstaffe, von Loewenfeldt, Busch & Radwick. He maintains a diverse litigation practice, including complex litigation, professional and governmental representation, will and trust disputes, legal ethics, First Amendment cases and appeals in state and federal courts. Clients frequently retain Jim for high-stakes legal matters, and he has particular expertise on virtual world issues, including electronic discovery and Wi-Fi technology. In 2017, California Lawyer named him Attorney of the Year for his successful representation of The State Bar of California in a high-profile privacy trial.

Jim has authored and co-authored a number of publications, including *The Wagstaffe Group® Practice Guide: Federal Civil Procedure Before Trial*. As one of the nation's top authorities on federal civil procedure, Jim has helped shape the direction and development of federal law. For more than 30 years, he has developed and delivered various annual forums, seminars, webinars, and workshop sessions intended to educate federal judges and their clerk staffs on federal law. In 2016, Jim presented a one-hour "live" web broadcast seminar on the topic of *New Rules in Gatekeeping: Jurisdiction and Venue* to more than 1,200 federal judges participating in an online broadcast.

Jim currently serves as the chair of the Federal Judicial Center Foundation Board, a position to which he was appointed by the Chief Justice of the United States Supreme Court. Jim is an adjunct professor of constitutional law and civil procedure at UC Hastings College of the Law, as well as of media law at San Francisco State University.

Jim launched The Wagstaffe Group in 2016 to provide practicing litigators with groundbreaking tools and resources to tackle the complexities of civil procedure. The Wagstaffe Group's authors include a highly experienced and talented array of federal judges and law clerks, law firm managing partners, honored trial and appellate attorneys and longtime writers of litigation practice guides.