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WHITE PAPER

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Personal Jurisdiction After the Supreme Court's Decision in *Ford*: What Has Changed?

The Supreme Court's recent decision in *Ford* is sure to be framed by some as expanding—perhaps quite significantly—the availability of specific personal jurisdiction under the Due Process Clause. But the decision should not be read as having sweeping consequences or any truly expansive impact on jurisdiction. The Court simply applied its precedents to resolve a relatively straightforward personal jurisdiction question in a set of relatively straightforward product liability suits. Nonetheless, the Court's discussion of when a corporation's in-state contacts are "related enough" to the lawsuit to support specific jurisdiction is likely to be the focus of follow-on litigation for which defendants should be prepared.

This *White Paper* analyzes *Ford*, discusses implications of the decision in the product liability and other contexts, and identifies limiting principles to personal jurisdiction after *Ford*.

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SUMMARY

On March 25, 2021, the Supreme Court issued its newest ruling on personal jurisdiction, in the consolidated cases of *Ford Motor Company v. Montana Eighth Judicial District Court* and *Ford Motor Company v. Bandemer*. The Court held that Ford could be sued in Montana and Minnesota (respectively) after its cars were involved in accidents in those states. The Court rejected Ford's argument that personal jurisdiction was lacking because the specific cars in question were neither designed, nor manufactured, nor sold within the forum state—meaning there was no direct causal link between Ford's in-state activities and the plaintiffs' claims. It was enough, the Court explained, that Ford cultivated and served a market in both states for the car models involved in the accidents, and that the plaintiffs' claims were closely "related to" those in-state activities.

Plaintiffs will surely attempt to spin *Ford* as a relaxation of the Due Process Clause's limits on personal jurisdiction. The opinion is best read, however, as an application of the Supreme Court's longstanding precedents—not as new authorization for suits in states with scant connection to the dispute. For starters, the decision addresses only "specific jurisdiction," which concerns claims connected to the forum state. The Due Process Clause's strict limits on all-purpose "general jurisdiction" remain fully intact—a corporation can be sued for any and all claims only where it is "essentially at home," usually just the state(s) where it is incorporated or has its headquarters. And the Court did not sketch new standards that departed from its existing precedent; it emphasized that it was simply resolving the cases at hand, not other questions like the extent to which internet commerce might give rise to personal jurisdiction. Moreover, several aspects of the Court's analysis underscore that *Ford* should not be read to meaningfully expand the number of states in which corporate defendants can be sued. These issues nonetheless are likely to be the subject of much discussion and litigation in the months and years ahead.

BACKGROUND

The modern understanding of the Due Process Clause's limits on personal jurisdiction begins with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). There, the Supreme Court held that a corporation based in one state could be sued in another as long as the corporation had "certain minimum contacts with [the other State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." The Court said the corporation must have "such contacts" with the state "as make it reasonable" for the corporation to defend a suit there. And it explained that it usually would be reasonable when the "obligations" at issue "arise out of or are connected with the [corporation's] activities within the [S]tate."

The Supreme Court clarified *International Shoe* in later decisions. The Court emphasized that a defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum State" before it may be sued there. *Hanson v. Denckla*, 357 U.S. 235 (1958). A plaintiff's "unilateral activity" does not suffice. Nor is it enough, without more, that a corporation's product might injure someone in the state, or that it might be convenient to litigate there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The corporation itself must establish meaningful contacts with the state, and—as the Court has repeatedly put it—the suit must "arise[] out of or relate[] to" those contacts. *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

The Court applied these precedents most recently in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). There, the Court held specific jurisdiction lacking where plaintiffs sued concerning a product that the corporate defendant actively marketed and sold in the forum state, but the plaintiffs themselves neither used the product in that state nor resided there.

THE DECISION IN *FORD*

In many respects, *Ford* presents a straightforward application of the Court's precedents. Every Justice—except Justice Barrett, who joined the Court too late to participate—agreed on the outcome.

In each of the consolidated cases, a Ford car was in an accident in the forum state, the victim resided and was injured in the state, and Ford did substantial business in the state, including by marketing the car models in question and creating a service network to maintain those models. Using the language of past decisions, Justice Kagan, writing for the Court, held that Ford had "purposefully availed itself of the privilege of conducting activities" within each state, and the suits "ar[o]se out of or relate[d] to" the contacts Ford had cultivated in each state. The "connection" between Ford's in-state activities

and the plaintiffs' claims was enough to allow the forum state's courts to adjudicate the claims.

Ford itself agreed with the first part of the Court's analysis. It acknowledged it had "purposefully availed itself of the privilege" of conducting business in Montana and Minnesota through extensive advertising and its dealer and service networks. But Ford argued that these in-state activities were not adequately connected to the plaintiffs' claims. In Ford's view, a state could assert jurisdiction over an out-of-state corporation like itself only when the corporation's activities "*gave rise* to the plaintiff's claim." Ford thus contended that it could not be sued in Montana and Minnesota because the cars at issue were designed, manufactured, and sold elsewhere. Ford's activity in Montana and Minnesota, however extensive, did not cause the plaintiffs' injuries.

The Court rejected Ford's argument, explaining that its precedents had never required such a "strict causal relationship between the defendant's in-state activities and the litigation." The Court reiterated that specific personal jurisdiction can be established in two ways: The suit can "arise out of *or relate to*" the defendant's purposeful contacts with the forum. As the Court explained, the "or relate to" language in its well-worn test "contemplates that some relationships will support jurisdiction without a causal showing." But the Court was quick to reject the idea that "anything goes," and held that "the phrase 'relate to' incorporates real limits." Indeed, the Court insisted on a "strong relationship among the defendant, the forum, and the litigation"—what it called "the essential foundation of specific jurisdiction." But the Court held the cases satisfied that standard because Ford "systematically served a market in Montana and Minnesota for the very vehicles" the plaintiffs alleged "malfunctioned and injured them in those States." Its in-state activities were "related enough" to the plaintiffs' claims.

WHAT DOES "RELATED ENOUGH" MEAN?

The key question after *Ford* will be whether a corporate defendant's contacts with the forum state are "related enough" to the suit. As far back as *International Shoe*, the Court said that specific jurisdiction typically is appropriate when a plaintiff's claims "arise out of or are connected with" an out-of-state corporation's purposeful activities in the state. But not until *Ford* has the Court so clearly underscored that the "connected to" or "related to" standard can stand by itself.

Further, while the Court found that there was a "close enough" affiliation between Ford, the states, and the litigation for jurisdictional purposes, the Court's opinion may encourage some to test the boundaries of the "related enough" standard. Justice Gorsuch made this point in his concurrence in the judgment (joined by Justice Thomas). Justice Alito concurred in the judgment with his own opinion, expressing similar concerns.

LIMITING PRINCIPLES

No doubt Justice Gorsuch is right—litigation will follow. Plaintiffs likely will argue that their forum state of choice will do, because it is somehow "related to" the defendant's activities and the asserted claims. But several facets of the Court's opinion should give corporations comfort that they should not be exposed to suits in distant, inconvenient, or unfavorable forums, and that the Court's "related enough" standard has limits. Three possible lines of argument are highlighted below.

Ford Was a Straightforward Application of Past Precedents; It Changed Little

It is helpful that *Ford* involved what the Court considered to be relatively open-and-shut cases, and that the Court did not even purport to tweak the legal standard. Indeed, the Court simply applied the test first established in *International Shoe* itself—which said that a corporation may be sued in a state for claims that "arise out of or are connected with" its activities in that state. The Court rejected Ford's position only insofar as, in the Court's view, it gave insufficient weight to the "connected with" or "related to" language persistently present in the Court's decisions. Under Ford's causation-focused approach, the Montana and Minnesota plaintiffs—who sued in their home states, for injuries suffered in those states, because of alleged defects that manifested in those states—likely would have had to sue in Washington or North Dakota, simply because their vehicles were first sold to others in those states, and that first sale causally linked Ford to the claims.

As the Court pointed out, that approach not only pushed against the language of *International Shoe*, but was effectively foreclosed by hypotheticals discussed in two of its

previous car-related personal-jurisdiction decisions—*World-Wide Volkswagen* and *Daimler*—in which the Court suggested it would be relatively noncontroversial for a carmaker to be sued in a state where it actively marketed its vehicles, when one of those vehicles injured a resident there. In relying on those decisions and others, the Court "proceed[ed] as the Court has done for the last 75 years—applying the standards set out in *International Shoe* and its progeny." Corporate defendants can ask lower courts to take the Court at its word, and recognize that *Ford* changed nothing.

Ford Noted the Problem of Forum-Shopping; It Wanted the Cases in the Right State

Various passages in the Court's opinion reveal the Court's concern that litigation should take place not just in any state but in an appropriate state. The Court noted that the constitutional limits on state court jurisdiction exist in part to "ensure that States with little legitimate interest in a suit do not encroach on States more affected by the controversy." Later, the Court suggested that it rejected Ford's argument because Ford's proposed forum states—Washington and North Dakota—had a "less significant" connection to the litigation than Montana and Minnesota. The Court also explained that the plaintiffs' decisions to sue in their home states had no whiff of "forum-shopping." Indeed, the Court concluded that those states were the "most natural" place for the litigation.

Corporate defendants can use these passages to resist inappropriate assertions of jurisdiction. That a state might have some passing connection to the corporation's activities and the plaintiff's claim should not be enough to permit a suit there—especially when another state's connections are substantially more significant, or the plaintiff's choice smacks of forum-shopping. To be sure, in some cases there may be multiple states in which a corporation is subject to suit for a particular claim. But the Court's "less significant" and "most natural" analyses (further) open the door to a more comparative assessment of forum choices, which could cut in a defendant's favor.

Ford Considered Federalism and Fairness; Burdens on the Defendant Matter

Many of the Court's past decisions have emphasized federalism and fairness when determining jurisdiction. A state should not assert jurisdiction over an out-of-state corporation when it would be inconsistent with the country's federal system, or would impose undue burdens on the corporation. For example, in *Bristol-Myers*, the Court relied on these principles to hold that California could not adjudicate claims by non-California plaintiffs against a non-California corporate defendant. The Court in *Ford* gave these considerations full and fair treatment. Importantly, too, it did so near the end of its analysis—after it held that Ford had targeted the forum states, and that the plaintiffs' suits related to that targeting. Corporate defendants thus may continue to rely on federalism and fairness considerations to curb spurious jurisdictional claims—those that are "surprising" or "undue" from the defendant's perspective.

THE ROAD AHEAD

What does *Ford* mean as a practical matter? What arguments might plaintiffs make in different contexts, and how might defendants respond?

Product Liability

Ford involved product liability cases—so the decision of course will resonate most directly in that context. The plaintiffs claimed Ford's cars were defective. The Court acknowledged that Ford's activities in Montana and Minnesota did not lead, at least not directly, to the plaintiffs' claims. The cars were designed and built elsewhere, first sold in other states to other people, and brought to Montana and Minnesota without Ford's involvement. Yet the plaintiffs could sue Ford in Montana and Minnesota.

Product liability plaintiffs may attempt to push the implications of that holding. They might argue that a corporation can be sued in any state in which a plaintiff used the corporation's product or in which its product becomes defective, as long as the corporation also cultivated a market for that product in the state. Alternatively, they might argue that a corporation can be sued in any state in which the plaintiff allegedly was injured by the supposed defect, no matter where the defect materialized. Moreover, plaintiffs may attempt to expand jurisdiction around latent injuries—those that take a long time to develop or manifest.

Defendants, however, have grounds to rebut such arguments. First, they can point out that the plaintiffs in *Ford* sued in the states where they lived, where they used the product, where the defect materialized, and where they were injured. *Ford* explained that this combination of factors contributed to the "strong relationship among the defendant, the forum, and the

litigation," forming "the essential foundation of specific jurisdiction." So all of those factors arguably were essential to the Court's ruling. Take away one or more of them, and the case begins to look more like *Bristol-Myers*—where the Court held that non-California plaintiffs could not sue in California because they neither used the allegedly defective product nor suffered injury in California. In addition, as noted above, product liability defendants can argue that a plaintiff's chosen forum state is not the "most natural" choice, even if it has a tenuous connection to the litigation. So, too, can they explain that federalism or fairness concerns cut against the plaintiff's choice.

Even more, the Court's rejection of an exclusively causal framework for jurisdiction might aid product liability defendants in some cases. Imagine that a corporation does significant business in New York, Pennsylvania, and Ohio. It sells a product in New York. The product is later resold in Pennsylvania, and resold again in Ohio. Still later, the product becomes defective and injures a consumer in Ohio. (These facts track *Ford*.) If the plaintiff sues in New York (or Pennsylvania) because he believes it to be a friendly forum, the corporation could argue that New York lacks jurisdiction. Ohio might be more closely affiliated with the defendant's activities and the plaintiff's claim—even if the plaintiff's chosen forum of New York might satisfy an exclusively causal test.

Finally, the Court's opinion never endorses the view that jurisdiction flows wherever the stream of commerce brings a defendant's product as long as the defendant is aware that the product might flow there—a view the Court has considered but never accepted (but also never definitively rejected). *See, e.g., J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (opinion of Kennedy, J.) (discussing concept). To the contrary, the Court explained that the Montana and Minnesota courts had jurisdiction not merely because it was foreseeable that Ford's cars might travel to those states through the stream of commerce, but because Ford had developed a deep network of dealers and servicers in both states, and had marketed the models in question by "every means imaginable—among them billboards, TV and radio spots, print ads, and direct mail." The Court expressly stated that it would be a different case if Ford had never marketed the specific car models in Montana or Minnesota. And it went out of its way to note that "isolated and sporadic" transactions involving the forum state differ from the "continuous" connections Ford had developed. *Ford* therefore reaffirms that a defendant must take active steps to serve a market for a particular product before it may be subject to personal jurisdiction because the stream of commerce swept that product there.

Although *Ford* is first and foremost a product liability case, the decision is likely to be invoked by litigants in other areas, including financial services, privacy litigation, climate litigation, and internet commerce.

Financial Services

Plaintiffs may argue that *Ford* makes it easier for courts to assert jurisdiction over out-of-state financial institutions. Following the Court's 2014 decision in *Daimler*, plaintiffs could no longer argue that an out-of-state bank was subject to general, all-purpose jurisdiction by dint of its in-state operations, such as branch banking. The bank must be "at home" in the forum state to be subject to general jurisdiction there. Typically that means the bank needs to be incorporated or headquartered there. Plaintiffs quickly pivoted after *Daimler* closed the door to general jurisdiction, focusing instead on specific jurisdiction to support their claims, and they likely will contend *Ford*'s "related to" holding makes those claims easier to bring in more places.

However, the in-state connections of out-of-state banks often are fleeting, taking the form of electronic fund transfers blipping through intermediary banks, to and from parties outside of the state. Such out-of-state banks, with such tenuous contacts, could argue that they did not purposefully avail themselves of the privilege of doing business in the plaintiff's chosen forum.

Further, under *Ford*, a bank could respond to any spurious jurisdictional claim by explaining why another state—perhaps the plaintiff's home state, or the state where the alleged harm occurred—has a closer connection to the litigation. So, too, could a bank argue that federalism principles or fundamental fairness mean that a state with only a thin connection to the suit cannot assert jurisdiction over the bank in respect of the plaintiff's claim.

Privacy Litigation

Lawsuits challenging a corporation's collection, use, and disclosure of personal information are proliferating. Because the law of privacy is relatively undeveloped, plaintiffs often assert novel and untested theories. In this context, plaintiffs may view

Ford as an opportunity to bring additional suits in states perceived as more amenable to their arguments. For example, plaintiffs might argue they can sue in a friendly forum state simply because the corporation's privacy policy applies to consumers in all states, and the plaintiff exchanged information with the corporation in the forum state.

As noted above, however, a corporate defendant in this situation can argue that its activities in the forum state bear insufficient relation to the plaintiff's claim, or that federalism or fairness principles direct the suit elsewhere. Even more important, *Ford*'s express carve-out of internet commerce (see below) suggests that the decision might not reach many privacy-related jurisdictional questions at all.

Climate Litigation

Climate litigation plaintiffs have a history of bringing claims that ignore well-established limits of personal jurisdiction and Due Process, viewing climate change as related to every state. But *Ford* did not purport to expand the existing standards governing jurisdiction. The Court focused on whether there was a clear and specific affiliation among the forum, the defendant's activities, and the plaintiffs' claims, including the specific injuries alleged. Absent this direct and specific connection, climate-based claims should quickly unravel. Moreover, the Court's reference to the "most natural" state, and its invocation of federalism principles, could aid climate litigation defendants in some cases depending on the location and nature of the activities at issue.

Internet Commerce

The *Ford* decision may be cited by some to support jurisdiction over corporations that rely on the internet to market their products or services. A plaintiff might argue that any number of states can assert jurisdiction over the corporate defendant as long as the corporation targeted the state in some way, and the suit bears some connection to the state and that targeting. In *Ford*, however, the Court expressly stated that it was not "consider[ing] internet transactions, which raise doctrinal questions of their own." At the same time, the Court suggested that a state might not have jurisdiction over a small-time internet proprietor who did nothing other than sell his wares to a consumer in the forum state on eBay or a comparable site. That seems correct under the Court's precedents. But, suffice it to say, the Court did not understand its decision to bear on, let alone resolve, the question of how personal jurisdiction interacts with internet commerce.

KEY TAKEAWAYS

1. The Court held that an out-of-state corporation could potentially be sued in another state as long as the corporation's purposeful actions in or aimed at that state are sufficiently related to the plaintiff's claim.

2. The corporation must have targeted the forum state with its business, and its activities in the state must have a "real" connection to the plaintiff's claim.

3. Plaintiffs may argue that *Ford* adopts a looser approach to personal jurisdiction, but the Court emphasized throughout that it was merely applying its precedents, within the context of relatively straightforward product liability cases, and that it was simply rejecting an exclusively causal gloss on those precedents.

4. Looking ahead, the Court's three opinions suggest it may have occasion to consider personal jurisdiction again in coming years. Justice Kagan's opinion for the Court expressly excluded internet transactions—but they raise questions the Court will have to address at some point. Further, the concurrences in judgment of Justices Alito and Gorsuch (the latter of which was joined by Justice Thomas) signaled a willingness to reconsider the Court's current regime. Finally, Justice Barrett took no part in *Ford*, and her views remain an open question.

Jones Day submitted an amicus brief on behalf of the Washington Legal Foundation in Ford.

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