Are Open Skies on the Horizon in Specific Jurisdiction Cases?

By Manual Saldaña and Brent Buyse


Earlier this year, the United States Supreme Court granted certiorari in *Ford Motor Co. v. Bandemer* and *Ford Motor Co. v. Montana Eighth Judicial District Court*. Both cases are products liability actions against Ford Motor Company arising from automobile accidents in Minnesota and Montana. At issue is whether personal jurisdiction is proper based on the sufficiency of the defendant's contacts with the state giving rise to the cause of action, with the focus on the 'arise out of or relate to' aspect of specific jurisdiction. The cases, consolidated as Supreme Court docket No. 19-368, were originally set to be argued on April 27, 2020, but have been pushed back to the October 2020 term. The outcome of these cases could mark a paradigm shift of the conditions for a court to exercise specific jurisdiction in the absence of a finding of general jurisdiction. For the aviation industry, where recent jurisdictional battles have centered on specific jurisdiction, this could open amenability to suit as wide as the sky.

The Minnesota case alleged a failure of the passenger air bag to deploy in a vehicle that was not designed, manufactured, or originally sold in Minnesota, but was sold in neighboring South Dakota and never registered in Minnesota until its fourth owner. The Montana case alleged the vehicle tires experienced a "tread/belt separation" in a vehicle assembled in Kentucky and originally sold in Washington.

The Supreme Court will consider "whether the 'arise out of or relate to' requirement is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts."

Ford's automobiles are ubiquitous nationwide. However, that presence does not universally mean designing, manufacturing, and distributing automobiles in every jurisdiction. Thus at first glance, this question seems quite settled as a matter of law by the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, in which the Court clarified that a corporation's continuous activity of some sort within a state is not enough to support the demand that the corporation be amenable to suit unrelated to that activity. 137 S. Ct. 1773, 1781 (2017). In doing so, the Court looked to its own jurisprudence in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and reiterated its requirement for an affiliation between the forum and the underlying controversy—principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulations. 137 S. Ct. at 1780. This begs the question: why would the Supreme Court consider an analogue to *Bristol-Myers* in such a short term?

The answer is likely found in how the plaintiffs frame the question before the Court. The plaintiff in the Minnesota case presented the question in his brief as being:

> [W]hether petitioner Ford Motor Company is subject to specific personal jurisdiction in Minnesota when one of its cars injures a Minnesota resident in Minnesota, where Ford has deliberately targeted the Minnesota market and sold hundreds of thousands of cars in Minnesota, but where the particular car causing the injury was originally sold in a neighboring state.

The plaintiffs in the Montana case phrased the apex question in similar terms:

> Should the due-process standard for establishing personal jurisdiction incorporate a but-for or proximate causation requirement derived from tort law, such that Ford Motor Company cannot be held to answer in a forum for injuries caused by a product that it advertises and sells in that forum unless the *particular individual product* that caused the injury can be traced to Ford's direct contacts with the forum state?

From this standpoint, the balance moves toward the seminal case *Burger King v. Rudzewicz*, where the Court held that parties who reach-out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities. 471 U.S. 462, 473 (1985). The Court further made clear that where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, personal jurisdiction is satisfied if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities. *Id.* at 472. This reasoning formed the basis of the "reasonable or fair" analysis. A couple of years later, this "reasonable or fair" analysis premised upon a continuing relationship evolved into the "Five Factor Test" in *Asahi v. Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

Juxtaposed to the analysis in *Bristol-Myers*, the likely result remains uncertain still. It appears the question considered falls squarely somewhere between each precedent. The Supreme Court in *Bristol-Myers* denounced a loose and spurious form of general jurisdiction and required an *actual* connection between the claims and the forum. *Bristol-Myers*, 137 S. Ct. at 1781. The plaintiffs in the Ford Motor Company cases rely on the *World-Wide Volkswagen Corp. v. Woodson*, standard for personal jurisdiction over "a corporation that delivers its products into the stream of commerce" as long as the sales arise from the corporation's efforts "to serve, directly or indirectly, the market for its product in other states." 444 U.S. 286, 298 (1980). In that case, however, the Supreme Court struck down Oklahoma's attempt to exercise jurisdiction over an out-of-state dealer. Absent a change of rationale, the Court could easily do the same here and agree with its prior holding that "the consumer's 'unilateral' act of bringing the defendant's product into the forum–even when combined with the location of the evidence and witnesses–was not a sufficient basis for exercising personal jurisdiction." *Id.* at 297–98.

The importance of these cases, even after a term that saw many high profile decisions, cannot be understated. Several amicus curiae briefs have been filed in support of both sides, including a high profile and authoritative brief filed by DRI arguing that "if courts exercise specific jurisdiction only on a showing of substantively relevant forum contacts . . . [then] courts can more readily perceive what contacts are relevant, thus promoting consistency in adjudication in an area where our law should demand it." It is a compelling and imperative argument worthy of serious consideration.

The Supreme Court's resolution of the specific jurisdiction issues now before it will be dramatically defining for the next few decades of litigation– especially in the aviation industry. Jurisdictional considerations invariably play a role in operations, manufacturing, design, and the myriad of complexities inherent to aviation. Permitting an expansive application of personal jurisdiction will only compound those complexities. Unfortunately, disputes over personal jurisdiction impede litigation, as pointed out by DRI's amicus brief, devolving into a costly discovery-intensive endeavor. The highly competitive nature of aviation manufacturing reinforces the increasing importance of combatting the often broadly directed discovery requests targeting sales, marketing, manufacturing, distribution, testing, and business strategies. Ultimately, this underscores the importance of DRI's signal to the Supreme Court for consistency. The practicalities and efficiencies to be maintained are critical for corporations, defense counsel, and plaintiffs alike. Bright jurisdictional lines streamline justice and shed the burdensome discovery expense.

The evaluation of this nuance question of specific jurisdiction will have a lasting effect for aviation products liability litigation. Ford advocates to pull the Court's decision to be in line with the most recent jurisprudence and underscores the importance of an actual connection between the activities of a company and the resulting claim whereas the Minnesota and Montana plaintiffs argue the analysis should turn on the inherent sufficiency of the contacts themselves. Interestingly, each side argues a different half of the 'arise out of or relate to' aspect of specific jurisdiction which the Supreme Court is tasked to evaluate. Perhaps the Supreme Court is taking up this question so soon after *Bristol-Myers* for further clarity similar to how the Supreme Court expanded on *Burger King* by its decision two years later in *Asashi*. In any event, the outcome of this case will be determinative for the future direction of aviation products liability claims. In keeping with public health guidance in response to COVID-19, the Supreme Court is expected to take this up during the next term and will be carefully watched by aircraft operators and aircraft manufacturers, as well as those who represent them.

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