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Civil Procedure
Personal Jurisdiction After Ford

Scott Dodson¹

The March 2021 decision of *Ford Motor Co. v. Montana Eighth Judicial District*² completes the triangulation of specific personal jurisdiction under the Constitution. Combined with the Court's recent narrowing of general jurisdiction and its longstanding adherence to tag jurisdiction and consent-based jurisdiction, personal jurisdiction in the United States is beginning to exhibit contours that are more defined and concrete. What does this state of personal jurisdiction mean for future developments? This chapter offers an answer.

Personal Jurisdiction Until Ford

Personal jurisdiction until 1945 was governed by notions of physical presence and territorial sovereignty.³ Under this regime, individual defendants could be sued in the states where they resided, where they were personally served, and where they consented to personal jurisdiction through voluntary appearance in the forum court.⁴ Those justifications for personal jurisdiction persist to this day. The consent basis for jurisdiction has even expanded beyond voluntary appearance in the forum court to include *ex ante* consent by contract.⁵

The 1945 case of *International Shoe Co. v. Washington*⁶ marked a dramatic expansion of the doctrine to allow personal jurisdiction over nonresidents—especially business entities—when they had sufficient “minimum contacts” with the forum state, such that personal jurisdiction in the forum would not offend “traditional notions of fair play and substantial justice.”⁷ The

¹ Excerpted and adapted from Scott Dodson, *Personal Jurisdiction, Comparativism, and Ford*, 51 STETSON L. REV. 187 (2021).

² 141 S. Ct. 1017, 1032 (2021).

³ *Pennoyer v. Neff*, 95 U.S. 714, 720, 722 (1878).

⁴ *Id.* at 729.

⁵ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991).

⁶ 326 U.S. 310 (1945).

⁷ *Id.* at 316 (internal quotation marks omitted).

Court thus loosened personal jurisdiction from moorings anchored solely on physical presence in the forum state, and it adopted an additional “minimum contacts” test for personal jurisdiction founded on activities, effects, and fairness.

Subsequent opinions distilled this standard into two species of personal jurisdiction: general (all-purpose) jurisdiction and specific (case-linked) jurisdiction.⁸ Until 2014, the development of specific jurisdiction was episodic and ad hoc. The Court required that the defendant’s forum contacts had to give rise to or be related to the plaintiff’s cause of action, but the Court did not establish how directly connected to the forum the defendant’s conduct had to be,⁹ nor did the Court define how related to the cause of action the defendant’s forum contacts had to be.¹⁰ The Court articulated catchphrases as guideposts: the defendant had to “purposefully avail[]”¹¹ itself of the forum state, such that it could “reasonably foresee[]” causing harm there.¹² The Court also noted, in specific-jurisdiction cases, that personal jurisdiction encompassed five “fairness factors,” which could raise or lower the minimum level of contacts needed to justify the exercise of personal jurisdiction.¹³

In 2014, the Court decided a series of cases that attempted to clarify the contours of specific jurisdiction’s minimum-contacts test. These cases have accentuated the Court’s pronouncement that specific jurisdiction depends upon the “relationship among the defendant, the forum, and the litigation.”¹⁴ Geometrically, the contours of this formulation are triangular, with the claim, the

⁸ Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 Nw. U. L. REV. 1, 7 (2018).

⁹ *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 112 (1987).

¹⁰ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984).

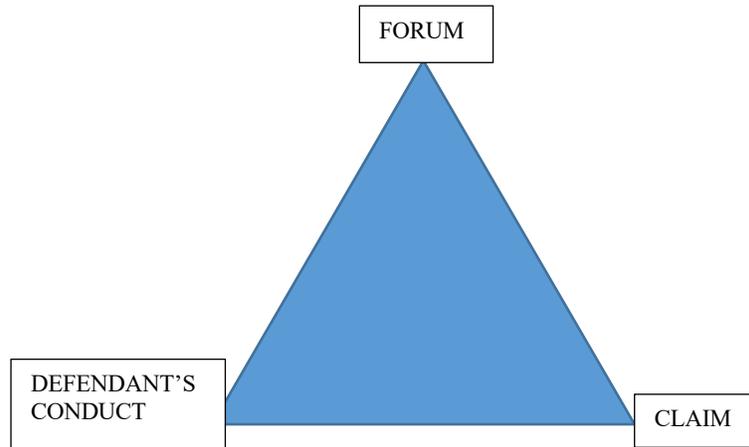
¹¹ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

¹² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

¹³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). The five fairness factors are the burden on the defendant, the plaintiff’s interest in obtaining effective relief, the interest of the forum state, the policies of other states or nations, and the judicial system’s interest in efficiency. *Asahi*, 480 U.S. at 113–15.

¹⁴ *Helicopteros*, 466 U.S. at 414.

forum, and the defendant's conduct at the apex of each triangle point, as shown below:



In *Walden v. Fiore*,¹⁵ the Court considered the left side of the triangle: the connection between the defendant's conduct and the forum. There, the defendant, a Georgia police officer, seized cash from Las Vegas poker players when the players arrived at the Atlanta airport on a layover stop during a flight from Puerto Rico to Nevada. The players sued the officer in Nevada for wrongfully seizing their cash. The Court held that even though the officer may have known that the poker players were from Nevada and that they would have suffered harm in Nevada from not having access to their cash, Nevada could not exercise personal jurisdiction over the officer because his conduct was not sufficiently connected to Nevada.¹⁶ The Court stated that the defendant's conduct must be connected to the forum state by more than just the plaintiffs' connections; rather, the connection between the defendant and the forum must be created by "contacts that the 'defendant *himself*' creates with the forum."¹⁷ *Walden* is thus a refinement of the more generalized "purposeful availment" test.¹⁸

¹⁵ 571 U.S. 277, 285 (2014).

¹⁶ *Id.* at 288–89.

¹⁷ *Id.* at 284.

¹⁸ Another key case on this side of the triangle is *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

In *Bristol-Myers Squibb Co. v. Superior Court of California*,¹⁹ the Court tackled the right side of the triangle: the relationship between the claim and the forum. Plaintiffs from around the country sued Bristol-Myers Squibb in California state court for injuries resulting from their ingestion of the drug Plavix, which Bristol-Myers Squibb sold nationwide through a California distributor. Plaintiffs claimed to have obtained, taken, and been injured by the drug in their home states. The non-California plaintiffs argued that California had personal jurisdiction over Bristol-Myers Squibb for their claims because Bristol-Myers Squibb had significant contacts involving Plavix in California.

The Supreme Court rejected that argument. Although the California court clearly had personal jurisdiction over Bristol-Myers Squibb for the California plaintiffs' claims, the non-California plaintiffs' claims were different: "The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims."²⁰ According to the Court, "[w]hat is needed—and what is missing here—is a connection between the forum and the specific claims at issue."²¹ After *Bristol-Myers Squibb*, "specific jurisdiction requires a direct link between not only between the forum and the defendant but also between the forum and the claim."²²

Walden and *Bristol-Myers Squibb* helped clarify the two sides of the triangle but did not address the base of the triangle. Previously, the Court had set out the legal test there: that the claim "must arise out of or relate to" the defendant's contacts.²³ "Arise out of" suggests causality, which many of the prior specific-jurisdiction cases easily satisfied. But the Court had never decided what other kinds of contacts might also satisfy the conduct-claim-connection requirements of this part of the triangle.

¹⁹ 137 S. Ct. 1773 (2017).

²⁰ *Id.* at 1781.

²¹ *Id.*

²² Dodson, *supra* note 8, at 17.

²³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

Ford and the Triangulation of Specific Jurisdiction

In March 2021, the Court completed the triangulation of specific jurisdiction. In *Ford Motor Co. v. Montana Eighth Judicial District*,²⁴ the Supreme Court considered what contacts were related enough to the cause of action to count for purposes of minimum contacts. *Ford* resolved two separate cases. In one case, a Montana resident died after an accident while driving her 1996 Ford Explorer in Montana. In the other, a Minnesota resident riding in a 1994 Ford Crown Victoria was seriously injured in an accident in Minnesota. Both plaintiffs sued Ford in their home states for state-law claims under specific jurisdiction. Because Ford is incorporated in Delaware and headquartered in Michigan, Ford moved to dismiss both complaints for lack of personal jurisdiction under the Fourteenth Amendment.

The evidence revealed that Ford directly targeted Montana with marketing efforts for Explorers through its advertising in the state, its 36 dealerships in the state, its sales of Explorers and their parts in the state, and its repair, replacement, and recall services for Explorers in the state. The evidence revealed that Ford directly targeted Minnesota with marketing efforts related to Crown Victorias through its marketing and advertising in Minnesota, its 84 dealerships in Minnesota, and its sale of thousands of 1994 Crown Victorias in Minnesota. With respect to both states, Ford both encouraged owners to keep their Fords for many years after purchase and encouraged a robust resale market for its vehicles in those states. Thus, there was no dispute that Ford did substantial business in both Montana and Minnesota related to the types of vehicles at issue.²⁵

Nevertheless, Ford argued that the courts hearing these cases lacked specific jurisdiction over Ford because Ford did not design, manufacture, or sell, in the forum states, the *particular* cars involved in the accidents.²⁶ Ford designed that Explorer in Michigan, manufactured it in Kentucky, and sold it in Washington. Ford designed that Crown Victoria in Michigan, manufactured it in Canada, and sold it in North Dakota. Ford had no direct involvement in bringing those cars into Montana and

²⁴ 141 S. Ct. 1017 (2021).

²⁵ *Id.* at 1026.

²⁶ *Id.* at 1019.

Minnesota.²⁷ According to Ford, therefore, those states' courts could not exercise specific jurisdiction over Ford in those lawsuits because Ford's conduct in those states was unrelated to the claim.

The Supreme Court rejected Ford's argument and held that the Montana and Minnesota courts could exercise specific jurisdiction over Ford in those cases.²⁸ Justice Kagan, writing for four other justices, reiterated the modern triumvirate: personal jurisdiction depends upon the connections between the claims, the defendant's conduct, and the forum state.²⁹ She quickly dispensed with the left and right sides of the triangle. The claims were connected to the forum states because, unlike the nonresident claims in *Bristol-Myers Squibb*, who were not injured in California, the *Ford* plaintiffs were residents of and were injured in the forum states.³⁰ Further, Ford's conduct had substantial connections with the forum states because, unlike in *Walden*, Ford purposefully (and systematically) availed itself of the privilege of conducting business activities in both states.³¹

The Court then turned to the base of the specific-jurisdiction triangle. Was Ford's forum conduct sufficiently related to the claims at issue? The Court answered yes: "Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States."³² Accordingly, Ford's substantial conduct in the forum states pertaining to the types of cars at issue in the accidents were related to the claims.³³

Ford thus completes the triangle. Each modern case—*Walden*, *Bristol-Myers Squibb*, and *Ford*—supplies clearer standards for each of the triangle's sides, as depicted below.

²⁷ *Id.* at 1023.

²⁸ *Id.* at 1032.

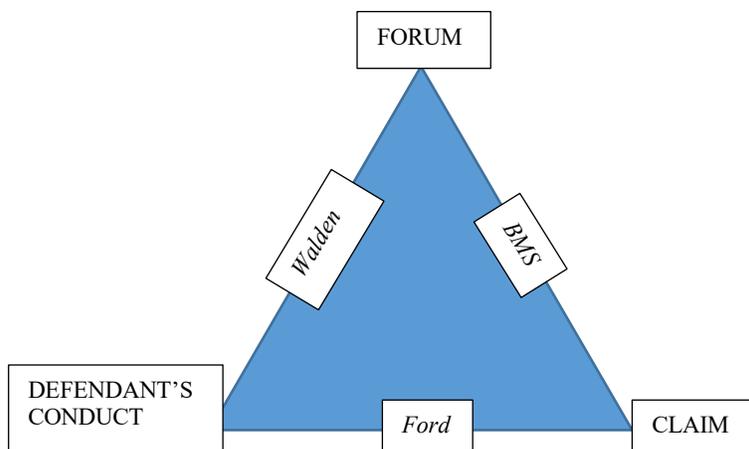
²⁹ *Id.* at 1024.

³⁰ *Id.* at 1031.

³¹ *Id.* at 1026, 1031.

³² *Id.* at 1028.

³³ *Id.* at 1032.



Six Observations After Ford

I offer six observations about *Ford* and the future of specific jurisdiction. First, *Ford* does little to clarify whether the five fairness factors are still good law and, if so, how they operate within the specific-jurisdiction framework. In *Burger King* and *Asahi*, the Court treated the fairness factors as a bifurcated analysis that could raise or lower the minimum-contacts bar. *Bristol-Myers Squibb* took a different track; although the Court referred to “a variety of interests,” including the plaintiff’s choice of forum and the forum’s interests, it focused on the “burden on the defendant,” which it phrased in terms of “the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.”³⁴ *Bristol-Myers Squibb* then focused on that latter point, which it equated with the side of the triangle connecting the forum to the claim.³⁵

Ford is even vaguer about the fairness factors. It neither mentions them by name nor analyzes them as a separate group.³⁶

³⁴ *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017) (internal quotations omitted).

³⁵ *Id.* at 1781.

³⁶ *Ford*, 141 S. Ct. at 1024–25.

Ford does, during its discussion, obliquely refer to three of them in ways scattered throughout the opinion. First, as for the burden on the defendant, “allowing jurisdiction in these cases treats *Ford* fairly.”³⁷ Second, as for the interest of the plaintiff, “the plaintiffs brought suit in the most natural State.”³⁸ Finally, as for the forum states’ interests, “[t]hose States have significant interests at stake.”³⁹ After *Ford*, it is unclear whether the fairness factors retain their status as a discrete inquiry, what work they do in the test, and whether all of them are still good law.

Second, because *Ford* did not implicate nettlesome issues of virtual contacts and complications of technology, the majority did not consider whether current doctrine was up to the challenges of the technology age. The elephant in the room continues to be the Internet, and the doctrine will not truly be settled until the Court considers how specific jurisdiction applies to virtual contacts.

Third, the Court backed away from the debate aired in *J. McIntyre Machinery v. Nicastro* between a consent-based theory of personal jurisdiction and a fairness-based theory of personal jurisdiction.⁴⁰ *Ford* sidestepped both theories and instead framed personal jurisdiction in terms of reciprocity (purposeful availment) and notice (reasonable foreseeability):

Our decision in *International Shoe* founded specific jurisdiction on an idea of reciprocity between a defendant and a State: When (but only when) a company “exercises the privilege of conducting activities within a state”—thus “enjoying the benefits and protection of its laws”—the State may hold the company to account for related misconduct. Later decisions have added that our doctrine similarly provides defendants with “fair warning”—knowledge that a “particular activity may

³⁷ *Id.* at 1029.

³⁸ *Id.* at 1031.

³⁹ *Id.* at 1030.

⁴⁰ Compare *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (Kennedy, J., plurality) (dispensing with “[f]reeform notions of fundamental fairness” in favor of acts that manifest an intention to “submit to a State’s authority”), with *id.* at 901–02 (Ginsburg, J., dissenting) (stating that “the plurality’s notion that consent is the animating concept draws no support from controlling decisions of this Court” and instead interpreting precedent to “g[i]ve prime place to reason and fairness”).

subject it to the jurisdiction of a foreign sovereign.” A defendant can thus structure its primary conduct to lessen or avoid exposure to a given State’s courts.⁴¹

Fourth, the Court reaffirmed personal jurisdiction’s connection to interstate federalism, a principle that had seemingly been put to rest in 1982⁴² before being awakened by *Bristol-Myers Squibb*.⁴³ As the Court in *Ford* put it:

And this Court has considered alongside defendants’ interests those of the States in relation to each other. One State’s “sovereign power to try” a suit, we have recognized, may prevent “sister States” from exercising their like authority. The law of specific jurisdiction thus seeks to ensure that States with “little legitimate interest” in a suit do not encroach on States more affected by the controversy.⁴⁴

Fifth, Justice Gorsuch penned a concurring opinion, decrying the current test as divorced from an originalist view of personal jurisdiction, as prone to vagaries in application, and as providing special treatment to artificial entities.⁴⁵ Justice Gorsuch even seems willing to consider reviving the old “doing business” heuristic as a proxy for corporate “presence.”⁴⁶ The Court rejected that proposition as inconsistent with the limits of specific jurisdiction,⁴⁷ but Justice Gorsuch’s point was to invite a rethinking of the entire doctrine in line with originalism rather than precedent. It remains to be seen just how many justices are willing to embark on a course that would jettison more than seventy-five years of precedent.

⁴¹ *Ford*, 141 S. Ct. at 1025 (internal citations omitted).

⁴² *See* *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982) (“The restriction on state sovereign power described in *World-Wide Volkswagen* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.”).

⁴³ *Bristol-Myers Squibb*, 137 S. Ct. at 1780–81.

⁴⁴ *Ford*, 141 S. Ct. at 1025 (internal citations omitted).

⁴⁵ *Id.* at 1035, 1038 (Gorsuch, J., concurring).

⁴⁶ *Id.* at 1036 (Gorsuch, J., concurring).

⁴⁷ *Id.* at 1027 n.3.

Sixth, an important takeaway is what the Court *didn't* do. *Ford* was an easy case. Ford's contacts in the forum state were significant; no unfairness in terms of burdens or expectations could possibly be argued. And the cause of action arose there. As Alito suggested, Ford's contacts may even have proximately caused the injuries to occur there because of Ford's efforts to make sure people, like the plaintiffs, drove their Ford vehicles in those states.⁴⁸ So the Court's rejection of Ford's argument against personal jurisdiction was, if not surprising, of profound importance. Had Ford's argument been successful, specific jurisdiction would have been dramatically narrowed. Few cases would meet all three sides of the triangle. Companies could game the market by selling into only one state while advertising and promoting in all of them, thereby reaping the benefits of those many states' markets without being subject to suit there. Ultimately, the biggest effect of *Ford* may end up being its rejection of Ford's restrictive theory of specific jurisdiction.

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⁴⁸ *Id.* at 1032 (Alito, J., concurring).