

Big Auto's High Court Jurisdictional Workaround Rebuffed

By Linda Chiem

Law360 (March 25, 2021, 10:14 PM EDT) -- The U.S. Supreme Court largely maintained the status quo for big automakers facing product defect and negligence suits, but raised new questions on the scope of specific personal jurisdiction by rebuffing Ford Motor Co.'s bid to strictly limit where manufacturers can be sued when their products cause injuries.

The justices on Thursday delivered a win to injured consumers and accident victims in a consolidated case involving allegedly defective Ford vehicles, saying big manufacturers like Ford with a global reach can expect to be sued in states where they do a substantial amount of business. The justices agreed that Ford's "truckload of contacts" and business activities in Montana and Minnesota were enough for it to be sued in those states, rejecting the auto giant's proposed workaround for existing rules on specific personal jurisdiction.

The court's 8-0 ruling, which included a majority opinion from Justice Elena Kagan and separate concurring opinions from Justice Samuel Alito and Justice Neil Gorsuch, offered some extra clarity on the bounds of specific personal jurisdiction, but hardly broke new ground, experts told Law360. Justice Amy Coney Barrett, who joined the court shortly after oral arguments were completed, did not participate in the decision.

But the concurring opinions raised some concerns that the majority didn't explicitly define the threshold for determining what might count as substantial connections between a business and a given state. And by presenting other hypothetical scenarios, the majority needlessly created offshoots of the court's test for establishing specific personal jurisdiction that add new layers of confusion and open the door to additional litigation, according to the concurring opinions.

"This is not a needle-moving case, but a reaffirmance of prior precedent," said Andrew D. Kaplan, chair of Crowell & Moring LLP's mass tort, product, and consumer litigation group. "The court also did not take the invitation to endorse a pure stream-of-commerce theory, which would have changed the jurisdictional landscape."

But ultimately, the facts of the Ford case fit squarely within the court's 1980 precedent in *World-Wide Volkswagen Corp. v. Woodson*, which said that when a company places a defective product into the stream of commerce with the purpose of serving a particular forum, the company is subject to personal jurisdiction for the resulting injuries in that forum.

Ford's arguments banked on how the justices applied the court's 2017 precedent in *Bristol-Myers Squibb Co. v. Superior Court of California*, which said there needs to be a factual connection between the defendant's forum contacts and the claims being made in the litigation. A defendant must "have purposefully availed itself of the privilege of conducting activities within the forum state," and the plaintiff's claim must "arise out of or relate to" the defendant's forum conduct.

The justices in Ford did a deep-dive into the phrase "arise out of or relate to," since Ford argued that the specific vehicles involved in the accidents were designed, built and first sold in other states before they were bought secondhand in Montana and Minnesota. The accidents happened in and involved residents of Montana and Minnesota.

"In some way it's not unexpected, but the separate opinions by Justices Alito and Gorsuch point out [there's] more food for thought about what the court is doing, so I think there's layers to it," M.C. Sungaila, who heads Buchalter PC's appellate practice group, told Law360. "But untying that 'related to' language from a causal relationship, the question is what are the limits of that?"

Sungaila explained that, "on the one hand, this is a very traditional analysis and it does not involve new ways of commerce, but the implications for it are certainly there," given that the majority's reasoning might affect perhaps smaller or mid-sized companies.

While the outcome seemed straightforward enough based on existing precedent, experts say Justice Alito flagged an interesting issue in his concurring opinion. He said "my only quibble is with the new gloss that the court puts on our case law" when the majority broke up the phrase "arise out of or relate to" to analyze it as if they were two discrete grounds for jurisdiction. According to Justice Alito, "recognizing 'relate to' as an independent basis for specific jurisdiction risks needless complications."

Crowell & Moring's Kaplan explained that could be a potential issue if some courts were to focus on the "relate to" language as "a separate jurisdictional test that can be satisfied by myriad activities, when it needs to be understood in the context of the facts of this case, which involved clear purposeful availment of the forum states."

The Ford litigation raised due process questions of fairness and predictability for where corporate defendants might face suits, but Thursday's ruling neither upsets the balance nor does it enable the jurisdictional-free-for-all that Ford had feared. However, it raises new questions for other product manufacturers, including small businesses and those that sell items over the internet, which is a point the majority noted but refused to weigh in on, according to Tim Droske, co-chair of Dorsey & Whitney LLP's appellate practice group.

For example, it's unclear how the court would view specific personal jurisdiction in a situation involving a company that sells a small household item through department stores nationwide, but doesn't necessarily offer repair services or resale, only does minimal advertising, and whose product was bought in one state, but injured the buyer after they moved to another state, Droske said.

Things get even murkier when the internet comes into play, he said. The Supreme Court sidestepped that issue, with the majority stating in a footnote that "we do not here consider internet transactions, which may raise doctrinal questions of their own."

Droske said the court "recounted the puzzling hypothetical from oral argument: '[A] retired guy in a small town' in Maine 'carves decoys' and uses 'a site on the internet' to sell them. 'Can he be sued in any

state if some harm arises from the decoy?"

"The court's own unwillingness to resolve the hypothetical simply means that it is ripe ground for litigation in the lower courts," Droske said.

Some indicated that the decision is notable for not being that notable.

David Cheifetz, a partner with Stroock & Stroock & Lavan LLP, said Thursday's decision "reflects a bit of pumping the brakes on the court's increasingly restrictive view of personal jurisdiction over the last decade."

"However, the court was also wary of crafting any rule that would have broader implications for commerce in the modern internet age where businesses routinely have some form of contacts with all 50 states," Cheifetz said. "So instead of adopting any bright-line tests to determine whether a defendant's forum-related contacts sufficiently relate to a plaintiff's claims to establish specific jurisdiction, the court simply reaffirmed its prior precedents and held that the connection here between the claims and Ford's activities in the forum was 'close enough.'"

Even Justice Gorsuch pointed out Thursday that the court's holding makes additional litigation on this issue a sure bet, stating that "hopefully, future litigants and lower courts will help us face these tangles and sort out a responsible way to address the challenges posed by our changing economy in light of the Constitution's text and the lessons of history."

"A clearer, new test would have gone a long way towards quelling any confusion and creating predictable jurisdictional consequences of forum-related activity," Cheifetz said. "But the court really just ruled narrowly based on prior precedent and the facts presented. I would anticipate that lower courts will therefore continue to grapple with the many open questions left unresolved by today's decision."

Justice Gorsuch, who was joined in his concurring opinion by Justice Clarence Thomas, suggested that the court go back and reassess the high court's 1945 *International Shoe Co. v. Washington*, which established that "to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state."

He wrote that "some of the old guardrails have begun to look a little battered" and "a test once aimed at keeping corporations honest about their out-of-state operations now seemingly risks hauling individuals to jurisdictions where they have never set foot."

Steven M. Berezney, a plaintiffs attorney and partner with Korein Tillery, explained that Justices Gorsuch and Thomas "appear concerned that the court over the years has treated corporations differently than individuals for no apparent reason."

"While Justice Gorsuch does not say what specifically he has in mind and invites lower courts to help the Supreme Court determine the correct path given the changing economy, one might reasonably conclude that there are at least two votes — and perhaps three given the favorable statements contained in Justice Alito's concurrence — for modifying the jurisdictional analysis applicable to corporations in a manner that could help plaintiffs," Berezney said.

At the very least, the decision is a clear "common sense" win for plaintiffs who have hit some roadblocks

in previous challenges before the high court, according to Fordham University School of Law professor Howard Erichson.

"Some of the court's recent decisions on personal jurisdiction have lost sight of the practical questions about choosing a forum and about allocating judicial power," he said. "The court's majority has sometimes seemed sadly uninterested in protecting access to justice for plaintiffs in civil lawsuits. So today's decision came as a breath of fresh air, even if it addresses a rather technical question of civil procedure."

The cases are Ford Motor Company, Petitioner v. Montana Eighth Judicial District Court et al., case number 19-368, and Ford Motor Company, Petitioner v. Adam Bandemer, case number 19-369, in the U.S. Supreme Court.

--Editing by Kelly Duncan and Michael Watanabe.