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FORD MOTOR COMPANY RULING ON AVIATION PRODUCT
LIABILITY AND MONTREAL CONVENTION CASES

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The Potential Impact of the Supreme Court's *Ford Motor Company* Ruling on Aviation Product Liability and Montreal Convention Cases

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This paper is dedicated to the memory of Law Professor Margaret Stewart, an outstanding civil procedure scholar and teacher. May She Rest in Peace.

Introduction

On March 25, 2021, the United States Supreme Court issued its much anticipated decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*,¹ revisiting the Constitutional limitations on state power to assert personal jurisdiction over parties sued in states where they are not citizens. The eight Justices deciding the case² all rejected Ford's proposed "causation-only" standard for invoking "specific" personal jurisdiction, providing much-needed legal clarification.

The *Ford* case involved two consolidated vehicular collision cases. The fact pattern was the same in each: "The accident happened in the State where suit was brought. The victim was one of the State's residents. And Ford did substantial business in the State – among other things, advertising, selling, and servicing the model of vehicle the suit claims is defective."³ Nevertheless, Ford argued "that jurisdiction is improper because the particular car involved in the crash was not first sold in the forum State, nor was it designed or manufactured there."⁴

In rejecting Ford's argument, the majority broadly held, "[w]hen 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."⁵

This article discusses the majority's rejection of the "causation-only" test for specific personal jurisdiction proposed by Ford, describes concerns raised in the two concurring opinions,⁶ then zeroes in on the potential impact of the *Ford* decision on aviation product liability and Montreal Convention cases.

Constitutional Limitations on Personal Jurisdiction

In rendering its decision, the *Ford* majority first summarized the modern history of "*in personam*" or personal jurisdiction, not-

¹ 141 S. Ct. 1017 (2021).

² Justice Barrett did not participate in the case.

³ 141 S. Ct. at 1022.

⁴ *Id.*

⁵ *Id.*

⁶ Justice Kagan delivered the majority opinion, joined by Chief Justice Roberts, Justice Breyer, Justice Sotomayor, and Justice Kavanaugh. Justices Alito and Gorsuch each filed a separate opinion concurring in the judgment only. Justice Thomas joined Justice Gorsuch's opinion.

ing, *inter alia*, a state court’s power to exercise personal jurisdiction over a defendant is derived from the Fourteenth Amendment’s *Due Process Clause*,⁷ and recognizing that “[t]he canonical decision in this area remains *International Shoe v. Washington*, 326 U.S. 310 (1945).”⁸ “Opinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction.”⁹

A state court has general or all-purpose personal jurisdiction over a defendant only when that defendant is “essentially at home” in the state. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Sticking to and elaborating on this concept, the *Ford* majority explained:

General jurisdiction, as its name implies, extends to “any and all claims” brought against a defendant. [Citation omitted]. Those claims need not relate to the forum State or the defendant’s activity there; they may concern events and conduct anywhere in the world. But that breadth imposes a correlative limit: Only a select “set of affiliations with a forum” will expose a defendant to such sweeping jurisdiction. [Citation omitted]. In what we have called the “paradigm” case, an individual is subject to general jurisdiction in her place of domicile. [Citation omitted]. And the “equivalent” forums for a corporation are its place of incorporation and principal place of business. [Citation omitted] (leaving open “the possibility that in an exceptional case” a corporation might also be “at home” elsewhere).¹⁰

Elaborating on the concept of specific or case-linked jurisdiction, the *Ford* majority first summarized what is and what isn’t specific jurisdiction:

Specific jurisdiction is different: It covers defendants less intimately connected with a State, but

⁷ 141 S. Ct. at 1024.

⁸ Quoting Justice Ginsburg’s opinion for a unanimous Court in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011).

⁹ *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 919 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, nn.8–9 (1984)).

¹⁰ 141 S. Ct. at 1024.

only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name “purposeful availment.” [Citation omitted]. The defendant, we have said, must take “some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.” [Citation omitted]. The contacts must be the defendant’s own choice and not “random, isolated, or fortuitous.” [Citation omitted]. They must show that the defendant deliberately “reached out beyond” its home – by, for example, “exploit[ing] a market” in the forum State or entering a contractual relationship centered there. [Citation omitted] (internal quotation marks and alterations omitted). Yet even then – because the defendant is not “at home” – the forum State may exercise jurisdiction in only certain cases. The plaintiff’s claims, we have often stated, “must arise out of or relate to the defendant’s contacts” with the forum. [Citations omitted]. Or put just a bit differently, “there must be ‘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 regulation.’” [Citations omitted].¹¹

The majority then discussed the balancing required between competing constitutional principles of fairness and federalism:

These rules derive from and reflect two sets of values – treating defendants fairly and protecting “interstate federalism.” [Citations omitted]. 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 “enjoy[ing] the benefits and protection of [its] laws” – the State may hold the company to account for related misconduct. [Citations omitted]. Later decisions have added that our doctrine similarly provides defendants

¹¹ *Id.* at 1024–25.

with “fair warning” – knowledge that “a particular activity may subject [it] to the jurisdiction of a foreign sovereign.” [Citations omitted]. A defendant can thus “structure [its] primary conduct” to lessen or avoid exposure to a given State’s courts. [Citation omitted]. 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. [Citation omitted]. 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. [Citation omitted].¹²

For personal jurisdiction over corporations, there are two clearly defined goalposts; the gray area lies in between. The first is when the corporate defendant is sued in its state of incorporation, principal place of business, or other home. In this scenario, which presents no Constitutional problem, the state is free to assert personal jurisdiction over the defendant on matters related or unrelated to the defendant’s contact with the forum state. At the opposite end of the spectrum is a single isolated act by the defendant in the forum state, with the claims sued on that are unrelated to that contact. In that scenario, it would violate Due Process for the state to assert personal jurisdiction over that defendant over objection. It is between these two goalposts that contested personal jurisdiction disputes are litigated. The *Ford* case, as expected, played out between these yardsticks, but as will be seen, it was much closer to one than the other.

The Ford Case

The *Ford* case involved two separate personal injury lawsuits stemming from vehicular collisions involving Ford vehicles – one happened in Montana, and the other in Minnesota. Each lawsuit was filed in the state where both the accident occurred and the plaintiff was domiciled. The Ford vehicles at issue in the case were sold new to other owners in other states. Later, each of the two Fords was sold into the forum state as a used car from a

¹² *Id.*

private transaction that Ford was not a part of. Moreover, Ford had no contact with either vehicle in the forum state.

Ford is a Delaware corporation with its principal place of business in Michigan. In arguing personal jurisdiction was improper in Montana and Minnesota, Ford emphasized it had not manufactured, sold, or maintained either of the vehicles in the state where the accident occurred.¹³ According to Ford, these facts meant there was no “causal link” between its conduct in the forum states specific to the particular vehicles at issue and because it had not designed, manufactured, or first sold the specific vehicles in the forum states, exercise of personal jurisdiction was improper.

The Montana and Minnesota Supreme Courts disagreed, ruling each state had personal jurisdiction over Ford, and rejecting Ford’s claim that a causal link was necessary to satisfy Due Process requirements. After Ford’s Petition for a Writ of Certiorari was granted, more than twenty *amicus curiae* briefs were filed, including one submitted by 39 states and the District of Columbia.¹⁴

The Majority’s Holding

Speaking for the majority, Justice Kagan forcefully rejected Ford’s “causation-only” standard for the exercise of specific personal jurisdiction, explaining that none of the Court’s precedent suggested, let alone stood for, the proposition that a strict causal relationship was necessary for there to be a “connection” between a plaintiff’s suit and a defendant’s activities:

[O]ur most common formulation of [specific jurisdiction] demands that the suit “arise out of *or relate to* the defendant’s contacts with the forum.” *Id.*, at ___ (slip op., at 5)¹⁵ (quoting *Daimler*, 571 U.S., at 127; emphasis added; alterations omitted); see *supra*, at 6.¹⁶ The first half of that standard asks about causation; but the back half, after the “or,”

¹³ *Id.* at 1017.

¹⁴ See Supreme Court online docket, <https://www.supremecourt.gov/docket/docketfiles/html/public/19-368.html> (last visited Aug. 11, 2021). Nearly every state and most other *amici* opposed Ford’s position in the case.

¹⁵ *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cty.*, 582 U.S. ___, 137 S. Ct. 1773, 198 L. Ed. 2d 395, 403 (2017).

¹⁶ 141 S. Ct. at 1025.

contemplates that some relationships will support jurisdiction without a causal showing.¹⁷

The majority cautioned, though, that the absence of a causative relationship “does not mean anything goes. In the sphere of specific jurisdiction, the phrase ‘relate to’ incorporates real limits, as it must to adequately protect defendants foreign to a forum.”

In rejecting the causal requirement proposed by Ford, the majority disarmed *Bristol-Meyers* while reaffirming that non-causal activity of a defendant was still relevant to the specific jurisdiction analysis:

But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation – *i.e.*, proof that the plaintiff’s claim came about because of the defendant’s in-state conduct. See also *Bristol-Myers*, 582 U.S., at ___, ___ (slip op., at 5, 7)¹⁸ (quoting *Goodyear*, 564 U.S., at 919) (asking whether there is “an affiliation between the forum and the underlying controversy,” without demanding that the inquiry focus on cause). So the case is not over even if, as Ford argues, a causal test would put jurisdiction in only the States of first sale, manufacture, and design. A different State’s courts may yet have jurisdiction, because of another “activity [or] occurrence” involving the defendant that takes place in the State. *Bristol Myers*, 582 U.S., at ___, ___ (slip op., at 6, 7)¹⁹ (quoting *Goodyear*, 564 U.S., at 919).²⁰

With the approach set up, the majority applied it to the facts of *Ford*, reasoning:

By every means imaginable – among them, billboards, TV and radio spots, print ads, and direct mail – Ford urges Montanans and Minnesotans to buy its vehicles, including (at all relevant times) Explorers and Crown Victorias. Ford cars – again including those two models – are available for sale, whether new or used, throughout the States, at 36

¹⁷ *Id.* at 1026.

¹⁸ 198 L. Ed. 2d at 410, 412.

¹⁹ *Id.* at 404.

²⁰ 141 S. Ct. at 1026–27.

dealerships in Montana and 84 in Minnesota. And apart from sales, Ford works hard to foster ongoing connections to its cars' owners. The company's dealers in Montana and Minnesota (as elsewhere) regularly maintain and repair Ford cars, including those whose warranties have long since expired. And the company distributes replacement parts both to its own dealers and to independent auto shops in the two States. Those activities, too, make Ford money. And by making it easier to own a Ford, they encourage Montanans and Minnesotans to become lifelong Ford drivers.²¹

The majority went on to explain how any of these facts relate to the litigated claims:

Now turn to how all this Montana- and Minnesota-based conduct relates to the claims in these cases, brought by state residents in Montana's and Minnesota's courts. Each plaintiff's suit, of course, arises from a car accident in one of those States. In each complaint, the resident-plaintiff alleges that a defective Ford vehicle – an Explorer in one, a Crown Victoria in the other – caused the crash and resulting harm. And as just described, Ford had advertised, sold, and serviced those two car models in both States for many years. (Contrast a case, which we do not address, in which Ford marketed the models in only a different State or region.) In other words, 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. So there is a strong “relationship among the defendant, the forum, and the litigation” – the “essential foundation” of specific jurisdiction. *Helicopteros*, 466 U.S., at 414, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (internal quotation marks omitted). That is why this Court has used this exact fact pattern (a resident-plaintiff sues a global car company, extensively serving the state market in a vehicle, for an in-state accident) as an

²¹ *Id.* at 1028.

illustration – even a paradigm example – of how specific jurisdiction works. See *Daimler*, 571 U.S., at 127, n. 5²²

After distinguishing the cases upon which Ford relied, the majority wrapped up the case in two sentences:

Here, resident-plaintiffs allege that they suffered in-state injury because of defective products that Ford extensively promoted, sold, and serviced in Montana and Minnesota. For all the reasons we have given, the connection between the plaintiffs’ claims and Ford’s activities in those States – or otherwise said, the “relationship among the defendant, the forum[s], and the litigation” – is close enough to support specific jurisdiction.²³

Concurrences

In his concurrence, Justice Alito raised concerns about the majority’s parsing of the phrase “arising out of or relate to,” derived from case law, as if it were a matter of statutory construction, with a focus on the phrase being worded in the disjunctive. He felt this focus risked “needless complications,” as lower courts will now have to test the outer bounds of what “relates to.”²⁴ Justice Alito lamented that “[w]ithout any indication of what those limits [of ‘relate to’] might be, I doubt that the lower courts will find that observation [by the majority of ‘real limits’] terribly helpful.”²⁵ The reason, according to Justice Alito, that this phrase parsing was unnecessary is this is an easy case for specific personal jurisdiction based on existing precedent.

Justice Gorsuch, joined by Justice Thomas, went further, raising concerns about the current state of personal jurisdiction in a 21st century world. Their concurrence questioned both the propriety of general jurisdiction’s “one or two homes” premise and what it called the majority’s assembly of specific causation entirely around the disjunctive conjunction “or” found in the middle of “arise out of *or* relate to.”²⁶ Justice Gorsuch’s concurrence also

²² *Id.*

²³ *Id.* at 1032.

²⁴ *Id.*

²⁵ *Id.* at 1034.

²⁶ *Id.*

took aim at the majority's "duck decoy" hypothetical used to contrast Ford's behemoth omnipresence, noting:

[I]f this comparison highlights anything, it is only the litigation sure to follow. For between the poles of "continuous" and "isolated" contacts lie a virtually infinite number of "affiliations" waiting to be explored. And when it comes to that vast terrain, the majority supplies no meaningful guidance about what kind or how much an "affiliation" will suffice.²⁷

Justice Gorsuch delved into the history of personal jurisdiction law as it evolved over time, recognizing the shift in Constitutional jurisprudence near the end of the 19th century that began to favor corporations at the expense of injured parties.²⁸ Summarizing this thought, Justice Gorsuch concluded:

Nearly 80 years removed from *International Shoe*, it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why.

Maybe, too, *International Shoe*, just doesn't work quite as well as it once did. . . . 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.²⁹

Notably, Justice Gorsuch, joined by Justice Thomas, seemed to question the ongoing wisdom of the *International Shoe* regime in contemporary circumstances. For his part, Justice Alito openly acknowledged there "are grounds for questioning the standard that the Court adopted in *International Shoe*"³⁰

²⁷ *Id.* at 1035.

²⁸ *Id.* at 1037.

²⁹ *Id.* at 1038.

³⁰ *Id.* at 1032. Justice Alito explained why the issue was not evaluated further in *Ford*: there is "nothing distinctively 21st century about the question in the cases now before us." *Id.* Of course, what may or may not happen to the overall *International Shoe* "canonical" legal framework in the future is well beyond the scope of this paper.

Potential Impact of the Ford Ruling on Aviation Product Liability Cases

Post-*Ford*, in jurisdictions where such a showing was previously required, parties trying to show there is specific personal jurisdiction over a party will no longer necessarily have to establish a causal connection between that party's contacts with the state and the claims for relief in the lawsuit. This is likely to trigger considerable re-evaluation of the approaches taken by lower courts throughout the land. For example, the decision in *Ford* implicitly overrules cases requiring a "but-for" causal connection between in-state activities of a sued party and the claims for relief asserted in the lawsuit. Such is the rule in the Fourth Circuit,³¹ Ninth Circuit,³² and Eleventh Circuit,³³ as well as the highest courts of Arizona,³⁴ Massachusetts,³⁵ and Washington.³⁶ Other jurisdictions, which required an even stronger causal connection, are similarly called into question, including the First Circuit³⁷ and the Sixth Circuit,³⁸ which heretofore have used what can be described as a "proximate cause" standard to establish specific jurisdiction. Other jurisdictions that required some level of causation, but refrained from using the term "proximate cause," including the Third Circuit,³⁹ Seventh Circuit,⁴⁰ and the high courts of Nevada,⁴¹ New Hampshire,⁴² Oklahoma,⁴³ and Oregon⁴⁴ will need to reevaluate. Finally, jurisdictions where a causal but unspecified connection was required, such as the

³¹ *Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 278–79 (4th Cir. 2009).

³² *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007).

³³ *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1314 (11th Cir. 2018).

³⁴ *Williams v. Lakeview Co.*, 13 P.3d 280, 284–85 (Ariz. 2000).

³⁵ *Tatro v. Manor Care, Inc.*, 625 N.E. 2d 549, 553 (Mass. 1994).

³⁶ *Shute v. Carnival Cruise Lines*, 783 P.2d 78, 81–82 (Wash. 1989).

³⁷ *Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005).

³⁸ *Beydoun v. Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 507–08 (6th Cir. 2014).

³⁹ *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 323 (3d Cir. 2007).

⁴⁰ *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 430 (7th Cir. 2010).

⁴¹ *Tricarichi v. Cooperative Rabobank, U.A.*, 440 P.3d 645, 652 (Nev. 2019).

⁴² *Petition of Reddam*, 180 A.3d 683, 691 (N.H. 2018).

⁴³ *Montgomery v. Airbus Helicopters, Inc.*, 414 P.3d 824, 834 (Okla. 2018).

⁴⁴ *Robinson v. Harley-Davidson Motor Co.*, 316 P.3d 287, 300 (Or. 2013).

Second Circuit,⁴⁵ Eighth Circuit,⁴⁶ Tenth Circuit,⁴⁷ and Supreme Court of Alabama,⁴⁸ may also need to refine their approach in light of *Ford*.

In product liability cases, a substantial substantive issue is already percolating in the lower courts in the wake of the *Ford* decision, involving the legal status of the “stream of commerce” test first articulated by the U.S. Supreme Court in the *World-Wide Volkswagen* case.⁴⁹ There, a majority of the Court wrote: “The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”⁵⁰

At issue is whether, as so many previously thought, this theory has been replaced by the more restrictive “stream of commerce-plus” test that was first described in 1987 by Justice Sandra Day O’Connor in her plurality opinion in the *Asahi* case.⁵¹ There, she said:

In *World-Wide Volkswagen* itself, the state court sought to base jurisdiction not on any act of the defendant, but on the foreseeable unilateral actions of the consumer. Since *World-Wide Volkswagen*, lower courts have been confronted with cases in which the defendant acted by placing a product in the stream of commerce, and the stream eventually swept defendant’s product into the forum State, but the defendant did nothing else to purposefully avail itself of the market in the forum State. Some courts have understood the Due Process Clause, as interpreted in *World-Wide Volkswagen*, to allow an exercise of personal jurisdiction to be based on no

⁴⁵ *SPV Osus Ltd., v. UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018).

⁴⁶ *Myers v. Casino Queen, Inc.*, 689 F.3d 904, 912–13 (8th Cir. 2012).

⁴⁷ *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1079 (10th Cir. 2018).

⁴⁸ *Hinrichs v. General Motors of Canada, Ltd.*, 222 So. 3d 1114, 1114 (Ala 2016).

⁴⁹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

⁵⁰ *Id.* at 297–98.

⁵¹ *Asahi Metal Indus. Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987).

more than the defendant's act of placing the product in the stream of commerce.

. . . .

Other courts, however, have understood the Due Process Clause to require something more than that the defendant was aware of its product's entry into the forum State through the stream of commerce in order for the State to exert jurisdiction over the defendant. In the present case, for example, the State Court of Appeal did not read the Due Process Clause, as interpreted by *World-Wide Volkswagen*, to allow

“mere foreseeability that the product will enter the forum state [to] be enough by itself to establish jurisdiction over the distributor and retailer.”

[Citation omitted]. In *Humble v. Toyota Motor Co.*, 727 F.2d 709 (CA8 1984), an injured car passenger brought suit against Arakawa Auto Body Company, a Japanese corporation that manufactured car seats for Toyota. Arakawa did no business in the United States; it had no office, affiliate, subsidiary, or agent in the United States; it manufactured its component parts outside the United States and delivered them to Toyota Motor Company in Japan. The Court of Appeals, adopting the reasoning of the District Court in that case, noted that although it “does not doubt that Arakawa could have foreseen that its product would find its way into the United States,” it would be “manifestly unjust” to require Arakawa to defend itself in the United States. . . .

We now find this latter position to be consonant with the requirements of due process. The “substantial connection,” [citations omitted] between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. [Citations omitted]. The placement of a product into the stream of commerce, without more, is not an act of the defendant

purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.⁵²

In *Griffin v. Ste. Michelle Wine Estates Ltd.*, before the *Ford* decision came down, the trial court concluded, based on a “federal evolution towards [sic] a stricter personal jurisdiction standard” since the *Asahi* case, that Idaho courts lacked personal jurisdiction over a product liability defendant under the “stream of commerce-plus” test.⁵³ This ruling was reversed on appeal to the state supreme court. After *Ford* was decided, the Supreme Court of Idaho ruled that the correct test for determining personal jurisdictional issues remains the stream of commerce test adopted by the United States Supreme Court in *World-Wide Volkswagen* and not the stream of commerce-plus test described by Justice O'Connor in her plurality decision in *Asahi*.⁵⁴

The *Griffin* court explained:

[I]n a case such as this, the proper determination for a trial court is not to predict where it believes the law is headed in the future, but to follow the law as it exists today. Based on the forgoing analysis, we conclude that we are bound by *World-Wide Volkswagen*, the reasoning in Justice Brennan's concurring opinion in *Asahi*, and Justice Breyer's concurring opinion in *J. McIntyre*. Accordingly,

⁵² *Id.* at 110–12.

⁵³ *Griffin v. Ste. Michelle Wine Estates Ltd.*, 2021 Ida. LEXIS 127, *10 (Idaho July 19, 2021).

⁵⁴ *Id.*, *passim*.

the district court erred by applying the stricter “stream of commerce *plus*” test⁵⁵

In a footnote, the *Griffin* court summarized its reasoning and explained the impact of the *Ford* decision on the stream of commerce issue:

While the district court’s view of where the United States Supreme Court’s personal jurisdiction jurisprudence is heading may ultimately prove correct, it is by no means a certainty. A closer analysis suggests that the perceived inertia towards the “stream of commerce-plus” test may have stalled, or even reversed course. The test was first suggested by Justice O’Connor in 1987 in *Asahi*. It is reasonable to conclude that many scholars believed that was where the law was heading after *Asahi*. However, almost twenty-five years later in *J. McIntyre*, there was still no majority support for the “stream of commerce-plus” test. Also of note, the plurality who favored the “stream of commerce-plus” test in *J. McIntyre* lost two of its votes (J. Kennedy and J. Scalia) while the concurrence that followed *World-Wide Volkswagen* is still intact (J. Breyer and J. Alito). Moreover, the dissent in *J. McIntyre* lost one vote (J. Ginsburg). If the *J. McIntyre* case were heard today, there would presumably be two votes for the plurality, two for the concurrence, and two for the dissent (not considering the three new justices – Justice Gorsuch, Justice Kavanaugh, and Justice Barrett – who did not participate in the original *J. McIntyre* decision). Only Justice Barrett has issued a reported opinion (during her tenure on the Second Circuit Court of Appeals) that addressed the “stream of commerce” issue. See *J.S.T. Corp. v. Foxconn Interconnect Tech. Ltd.*, 965 F.3d 571 (2020). There, Justice Barrett applied the “stream of commerce” test from *World-Wide Volkswagen*, noting that it has yet to be overruled by the United States Supreme Court.

⁵⁵ *Id.* at *43.

Furthermore, the United States Supreme Court cited *World-Wide Volkswagen* multiple times in its recent decision in *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 209 L. Ed. 2d 225 (2021). The Court, with eight justices concurring in the judgment (Justice Barrett did not participate), held that Montana had specific jurisdiction to hear a product liability claim. The Court noted: “[T]his Court has stated that specific jurisdiction attaches in cases identical to this one – when a company cultivates a market for a product in the forum State and the product malfunctions there.” *Id.* at 1019 (citing *World-Wide Volkswagen*, 444 U.S. at 300). In short, rumors of *World-Wide Volkswagen*’s imminent demise may be greatly exaggerated.⁵⁶

In the five months since the *Ford* decision, other courts have also weighed in on the continuing tension between the “stream of commerce” test and the “stream of commerce-plus” test. *E.g.*, *Bayne v. Taishan Gypsum Co.*, 2021 U.S. Dist. LEXIS 152824, *14 (N.D. Ala. Aug. 23, 2021) (“This court finds that, under both Supreme Court and Eleventh Circuit precedent, it should apply the broader “stream of commerce” test to the facts of this case. Thus, the court will consider whether Taishan delivered its dry-wall into the stream of commerce with the expectation that consumers in Alabama would purchase it.”); *Commonwealth v. Exxon Mobil Corp.*, 2021 Mass. Super. LEXIS 371, *19–20 (Mass. Super. Ct. June 22, 2021) (“The Commonwealth has a strong interest in enforcing its consumer protection law, including against allegedly false and misleading statements, in Massachusetts. Meanwhile, Exxon delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in all states, including Massachusetts . . .”). *Compare with Luciano v. SprayFoamPolymers.com, LLC*, 2021 Tex. LEXIS 626 (Tex. June 25, 2021) (“Following Justice O’Connor’s plurality opinion in *Asahi*, Texas courts require ‘additional conduct’ evincing ‘an intent or purpose to serve the market in the forum State,’ whether directly or indirectly.”); *and Avicelli v. BJ’s Wholesale Club, Inc.*, 2021 U.S. Dist. LEXIS 112546 (E.D. Pa. June 16, 2021) (after noting the “vitality of the ‘stream-of-com-

⁵⁶ *Id.* n.10.

merce' theory . . . has "been in flux for decades," declining to exercise personal jurisdiction based on it).

The early returns suggest the *Ford* decision may have breathed new life into the *Worldwide Volkswagen* stream of commerce test and de-powered the trend toward an *Asahi* stream of commerce-plus test. After all, the *Ford* majority expressed no concern that the involved vehicles had gone through numerous private transactions, far removed from Ford's original sales, in states far away from where they were originally sold. Moreover, Ford itself did not seriously contest that it had purposely availed itself of the privilege of conducting business in the forum states.⁵⁷

Assuming purposeful availment is either conceded (as it was in *Ford*) or proven under the *Worldwide Volkswagen/Ford* legal standard, it may now be enough to establish specific jurisdiction if "a company like Ford serves a market for a product in the forum State and the product malfunctions there."⁵⁸ Although the *Ford* majority qualified the preceding quote for a "company like *Ford*," it did not say what precisely made Ford, "*Ford*."

Arguably, massive publicly traded companies like Boeing, Airbus, General Electric, Honeywell, and Raytheon should fit easily into the "company like *Ford*" paradigm, but as the breadth and corresponding purposeful availment of a company decreases, likely relative to its size, how far from "like *Ford*" will be too far? Again, this will be the kind of question lower courts will have to wrestle with in the wake of *Ford*. But one thing is clear: the probable impact of *Ford* in aviation product liability cases is that courts are going to deny motions to dismiss based on lack of personal jurisdiction more often, and also be less likely to apply a stream of commerce-plus test that has failed to garner a United States Supreme Court majority after more than 30 years of debate.

An example of a case that may have turned out differently would be *Hinkle v. Cirrus Design Corp.*, arising out of the Eleventh Circuit Court of Appeals, wherein a plaintiff sought to exercise personal jurisdiction over non-resident airplane manufacturer Cirrus in Florida.⁵⁹ In that case, a nearly new Cirrus aircraft malfunctioned shortly after takeoff from a Florida

⁵⁷ 141 S. Ct. at 1026.

⁵⁸ *Id.* at 1027.

⁵⁹ 775 Fed. Appx. 545 (11th Cir. 2019).

airport, resulting in a crash landing in South Carolina.⁶⁰ Although the plaintiff was a resident of Florida, the aircraft took off from Florida, and Cirrus “has a sizeable presence in the state,” the Eleventh Circuit affirmed the trial court’s dismissal for lack of specific personal jurisdiction.⁶¹ Interpreting the Florida long-arm statute in the context of *Bristol-Meyers*, the *Hinkle* Court held that “no matter how involved Cirrus may be in the state of Florida, because the [plaintiffs] did not demonstrate a ‘direct affiliation, nexus, or substantial connection’ between that involvement and their causes of action, specific jurisdiction is not proper.”⁶² Although jurisdictional discovery was limited, had it shown that Cirrus advertised the model aircraft in Florida, sold the same model aircraft in Florida, provided flight training, maintenance services, and distributed replacement parts in Florida, the case would have been similar to *Ford* and the outcome perhaps different.

Potential Impact of the Ford Ruling on Montreal Convention Cases

Finally, the *Ford* decision may impact resolution of personal jurisdiction disputes in cases governed by the Montreal Convention,⁶³ which provides the exclusive remedy against air carriers for passenger injuries due to accidents occurring during most international air travel.⁶⁴

The analysis begins with Article 33 of the Convention, which describes jurisdiction under the treaty:

Article 33 – Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through

⁶⁰ *Id.* at 547.

⁶¹ *Id.*

⁶² *Id.* at 550.

⁶³ Convention for the Unification of Certain Rules for International Carriage by Air, *opened for signature* May 28, 1999, T.I.A.S. No. 13,038, 2242 U.N.T.S. 309 (entered into force Nov. 4, 2003) [hereinafter Montreal Convention].

⁶⁴ *E.g.*, *Doe v. Etihad Airways*, P.J.S.C., 870 F.3d 406, 412 (6th Cir. 2017).

which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. For the purposes of paragraph 2,

(a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;

(b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

4. Questions of procedure shall be governed by the law of the court seized of the case.⁶⁵

The four jurisdictions listed in paragraph 1 of Article 33 were carried over from the predecessor treaty to the Montreal Convention, the Warsaw Convention. The same four jurisdictional triggers were found in Article 28(1) of the Warsaw Convention. Under Warsaw, a settled legal regime was established for the interplay between treaty jurisdiction on the one hand, and *in personam* jurisdiction on the other:

Once the courts of the United States are determined to have subject matter jurisdiction over a matter under Article 28(1), issues of personal juris-

⁶⁵ Montreal Convention, *supra* note 63, art. 33.

diction and venue are determined by domestic laws. *See Campbell v. Air Jamaica, Ltd.*, 863 F.2d 1, 1 (2d Cir. 1988) (“Compliance with Article 28(1) gives a nation treaty jurisdiction over the claim, so that the nation is an appropriate site for litigation, although domestic jurisdiction and venue questions still may require further analysis.”); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 855 (2d Cir.) (“Plaintiff’s choice of forum within [the] country is governed by internal law, with all its intricacies and complexities, not by the Warsaw Convention.”), *cert. denied*, 382 U.S. 816, 15 L. Ed. 2d 64, 86 S. Ct. 38 (1965); *In re Air Crash Disaster at Gander, Newfoundland*, 660 F. Supp. 1202, 1217 (W.D. Ky. 1987) (“Which court within a High Contracting Party should hear a case arising under the [Warsaw] Convention is purely a matter of the High Contracting Party’s internal law of venue and jurisdiction.”); *Butz v. British Airways*, 421 F. Supp. 127, 129 (E.D. Pa. 1976) (“Jurisdiction in an international sense must be established in accordance with Article 28(1) of the Warsaw Convention, and then jurisdiction of a particular court must be established pursuant to applicable domestic law.”), *aff’d*, 566 F.2d 1168 (3d Cir. 1977). Accordingly, a court’s personal jurisdiction in cases under the Warsaw Convention is determined by the Federal personal jurisdiction rule, Fed.R.Civ.P. 4(e).⁶⁶

The Montreal Convention added a fifth treaty jurisdictional option for certain injury and death cases, the passenger’s “principal and permanent residence.” This provision has been in force in the United States since November 4, 2003.⁶⁷ Nevertheless, the interplay between treaty jurisdiction and the rules of *in personam* jurisdiction have not changed.⁶⁸

⁶⁶ *Romero v. Aerolineas Argentinas*, 834 F. Supp. 673, 678 (D.N.J. 1993).

⁶⁷ Int’l Civil Aviation Org., *Montreal Convention: List of Parties*, https://www.icao.int/secretariat/legal/list%20of%20parties/mtl99_en.pdf (last visited Aug. 25, 2021).

⁶⁸ *E.g.*, *Fisher v. Qantas Airways Ltd.*, 2021 U.S. Dist. LEXIS 36946, *8–14 (D. Ariz. Feb. 24, 2021); *Kim v. Korean Air Lines Co.*, 2021 U.S. Dist. LEXIS 7713, *8–9 (D.N.J. Jan. 14, 2021); *Burton v. Air France-KLM*, 2020 U.S. Dist. LEXIS 229223, *17–20 (D. Or. Dec. 7, 2020); *Davydov v.*

What this means is state personal jurisdiction statutes and federal Constitutional limits on the power of a state to assert personal jurisdiction over a party both come into play in Montreal Convention cases, with one exception: When there is proper treaty jurisdiction under Article 33 of the Montreal Convention in the United States, then it is settled in the lower courts that the relevance of the rules and principles governing personal jurisdiction control which courts within the United States are free to assert personal jurisdiction, *not whether any court in the United States can*.⁶⁹

A typical fact pattern courts have confronted⁷⁰ involves a United States domiciliary purchasing plane tickets either online or from a travel agent, but in either event in their home state, from an air carrier based in a foreign country that flies into few airports in the United States, but not in the passenger's home state. Internet marketing of these flights is commonly present and the U.S. citizen suffers an accident far from home during international travel that is covered by the Montreal Convention. The prototypical legal scenario is a decision by the injured passenger to sue in their home state instead of a state in which the air carrier defendant is more active. In such cases, all of which so far have been decided before the *Ford* ruling was handed down, courts have been quick to rule that the plaintiff's home state lacks personal jurisdiction, while states the air carrier flies into (or out of) do not.⁷¹

Scandinavian Airlines Sys., 2020 U.S. Dist. LEXIS 220818, *4–5 (D.N.J. Oct. 5, 2020).

⁶⁹ This is the clear impact of Article 33(4), requiring questions of procedure to “be governed by the law of the court seized of the case.” Accordingly, when Montreal Convention cases are filed in the wrong federal court, judges have routinely entered orders either dismissing them without prejudice if the statute of limitations has not yet run, or transferring them to a court with personal jurisdiction. *E.g.*, *Fisher*, 2021 U.S. Dist. LEXIS 36946 (motion to dismiss held in abeyance as parties brief whether and to which court the case should be transferred); *Kim*, 2021 U.S. Dist. LEXIS 7713 (pursuant to 28 U.S.C. § 1631 transferring case to the U.S. District Court for the Eastern District of New York); *Burton*, 2020 U.S. Dist. LEXIS 229223 (dismissing case without prejudice less than two years after the accident); *Davydov*, 2020 U.S. Dist. LEXIS 220818 (same).

⁷⁰ See cases cited in the two preceding footnotes.

⁷¹ *Kim*, 2021 U.S. Dist. LEXIS 7713, is a good example. The New Jersey-domiciled plaintiff purchased her international ticket from Delta's website while she was in New Jersey. She later flew from New York to South Korea on Korean Airlines. During the flight, a flight attendant spilled hot soup on the plaintiff, injuring her. She sued in New Jersey, the air carrier

In a post-*Ford* world, where courts will be free to consider “non-causal” conduct of foreign airlines in the forum states, and where they will doubtless be called upon to do specific personal jurisdictional analysis in Montreal Convention cases, rulings may change and more plaintiffs may be allowed to sue in their home states. After all, some air carriers are literally doing business everywhere (i.e. “*like Ford*”), most are marketing their services broadly, some have travel agent and ticketing agent agreements, and some have specialized amenities such as lounges that they advertise to draw customers to their airline and not others.

Will targeting a state with advertising, participating in code share agreements, utilizing agents to sell tickets, deriving profits, and leasing and operating lounges to lure customers in a state be enough in the post-*Ford* world to sustain personal jurisdiction over foreign air carriers in states they do not fly into? The lower courts will have to sort this out in the wake of *Ford*, where it may be reasonable to argue such contacts are beyond “minimum” and might be enough.

Moving Forward

In his concurring opinion, Justice Gorsuch aptly stated:

I readily admit that I finish these cases with even more questions than I had at the start. 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.⁷²

The *Ford* majority clearly rejected a “causation-only” standard for specific personal jurisdiction, and likewise provided strong guidance on what the result should be when companies “like Ford” seek to avoid accountability in states where they purposefully availed themselves of the privilege of conducting activities. What is less clear are the answers to the many questions the *Ford* majority leaves behind for lower courts to sort out, like how much activity in a state will be enough to satisfy the real limits of “relate to,” especially in the context of companies that are *unlike*

moved to dismiss, the court denied the motion and transferred the case to the district in New York where the flight to South Korea originated.

⁷² 141 S. Ct. at 1039.

Ford, whatever that turns out to mean. Answers will no doubt become clearer as time passes and post-*Ford* cases weave their way through the courts.