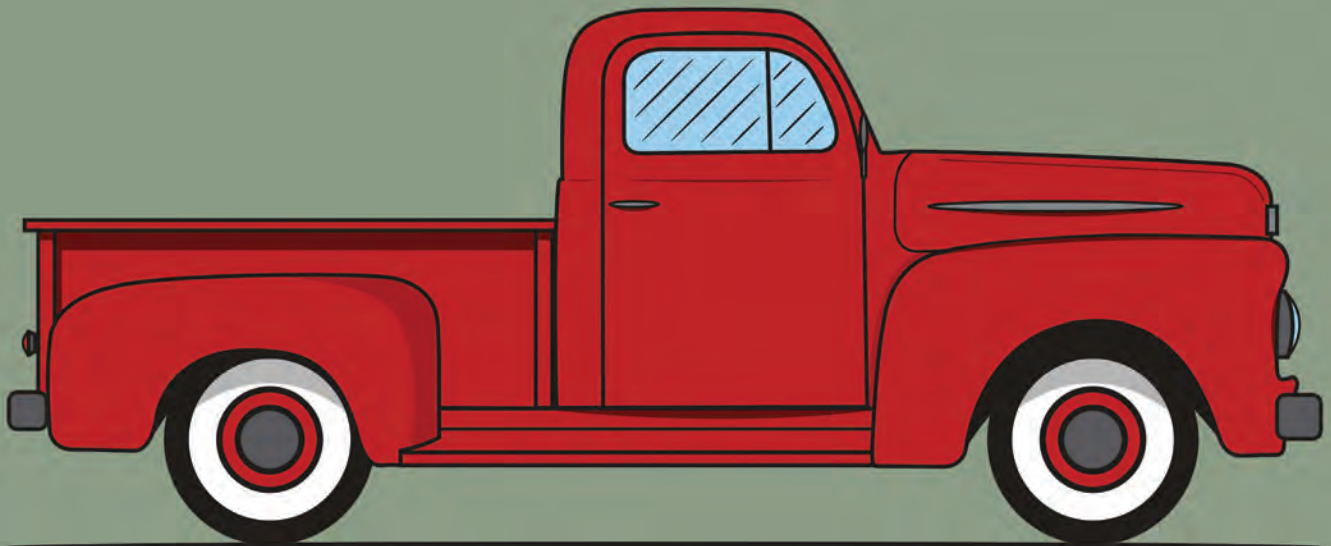


OPEN ROAD?



FORD REROUTES PERSONAL JURISDICTION

When can a plaintiff sue in their home state? The answer to that question was once answered fairly simply in a single first-year law class. But over the past decade, the answer has become infinitely more nuanced, as the Roberts Court has reshaped its jurisprudence, usually constricting its view of personal jurisdiction.

Last spring, the Court decided its first major case on the topic since 2017: *Ford Motor Company v. Montana Eighth Judicial District Court*. We asked four professors — those charged with the duty of teaching personal jurisdiction to the next generation — to parse the recent *Ford* case for some answers, and explain how their students — and judges — might guide their inquiries in the ever-evolving jurisdictional landscape. Professor **MARIN K. LEVY** (Duke University School of Law) moderated a lively discussion amongst Professor **KEVIN CLERMONT** (Cornell Law School), Professor **ZACHARY CLOPTON** (Northwestern Pritzker School of Law), and Professor **MILA SOHONI** (University of San Diego School of Law). Their conversation follows, lightly edited for length and clarity.

LEVY: If you were to ask somebody on the street: “Do you think you could sue the maker of the car in your home state when you get into an accident there?” my guess is they would say, “Yes.” And that is, in fact, what the Court decided. So why was there such anticipation of this case?

CLERMONT: I think the general expectation was that something big was going to happen. On the one hand, common sense, and really a long unbroken line of precedent across the nation, dictated that an injured person could sue a car manufacturer where the injury was suffered. On the other hand, there were very recent Supreme Court cases contracting personal jurisdiction, and those inexorably dictated that this jurisdiction over Ford no longer existed. In fact, apparently Ford had never raised a jurisdictional defense in these circumstances during the modern era — until 2015, after the Roberts Court, through its line of cases contracting jurisdiction, had effectively handed this defense to Ford.

There was this conflict between common sense on the one hand, and these recent Supreme Court cases on the other, and something had to ▶

FORD MOTOR CO. V. MONTANA EIGHTH JUDICIAL DISTRICT COURT

In *Ford*, the Court consolidated two cases — one from Minnesota and one from Montana. In both cases, Ford was sued in the respective state court for injuries sustained in Ford vehicles in a local accident. Ford moved to dismiss for lack of personal jurisdiction. While Ford conceded that it had “purposefully avail[ed] itself of the privilege of conducting activities” in the forum states,¹ it argued that those states had jurisdiction “only if the company’s conduct in the State had given rise to the plaintiff’s claims”² — a causal link that, Ford said, did not exist because the vehicles in question were not manufactured, designed, or first sold in the forum states.

Justice Kagan, writing for the Court, disagreed. The Court affirmed the familiar requirement that the suit “must arise out of or relate to the defendant’s contacts with the forum.”³ But it emphasized that the latter half of this phrase (the broader “relate to” language) meant that this “connection” did *not* require that the defendant’s conduct *caused* the plaintiff’s injuries.⁴ Ford “extensively promoted, sold, and serviced in Montana and Minnesota,” and that was sufficient.⁵ “[T]he connection between the plaintiffs’ claims and Ford’s activities in those States” was deemed “close enough to support specific jurisdiction.”⁶ Justice Alito issued a concurring opinion, noting his concern that the majority seemed to be creating a new category of cases in which personal jurisdiction may be found when claims “do not ‘arise out of’ (i.e., are not caused by) the defendant’s contacts but nevertheless sufficiently ‘relate to’ those contacts in some undefined way.”⁷ To Justice Alito, those phrases overlapped and were simply a way of restating *International Shoe’s* “minimum contacts” requirement. Justice Gorsuch, joined by Justice Thomas, also concurred in the judgment, wondering whether the Court’s “relate to” approach was at all clear, and whether corporations should “continue to receive special jurisdictional protections in the name of the Constitution.”⁸

give. I think most observers — the person on the street, or the law professor — predicted that the Court’s recent cases would have to give because the call for jurisdiction was just too strong. Hence the anticipation: How was the modern doctrine going to give way?

LEVY: How does this case fit — or not — with the Court’s precedent on personal jurisdiction?

CLOPTON: We should start with two key cases: *Goodyear* in 2011, and *Daimler* in 2014. Together these cases put some pretty clear boundaries on the concept of general jurisdiction. They say that a corporation is at home in its principal place of business and its place of incorporation (and maybe in an exceptional third case, which is extremely rare). These cases write out the old “doing business” version of general jurisdiction, which asked whether the defendant was “doing business” in the state. That change set up a lot of challenges, because a lot of the cases that could push on specific jurisdiction doctrine — such as the case of an individual injured by a car purchased out of state — would previously have been handled under the “doing business” standard. The *Daimler* and *Goodyear* cases are kind of the starting point for this modern turn in specific jurisdiction, because they start asking new questions that we didn’t have to ask before. That brings us *Bristol-Myers Squibb* in 2017 and *Ford* this year.

Part of this is about the relationship between general and specific jurisdiction. If one is constricted, that is necessarily going to put pressure on the other to expand. My view is that if we are constricting general jurisdiction, we need a broader and more flexible doctrine of specific jurisdiction. But this constricting also simply

puts these cases before the Court and allows the justices to author modern interpretations of specific jurisdiction law. And so I don’t think it necessarily meant that we were going to have that broad and flexible, specific jurisdiction that I was hoping for.

CLERMONT: And we also have to go back a little bit to 1945’s *International Shoe*, which started off the modern era. *Shoe* posed the question of the required relationship of the defendant’s in-state or state-directed activities and the cause of action. How related was the cause of action to those activities? And *Shoe* answered that question with a sliding scale: The more unrelated the cause of action, the more the defendant had to do locally in order to create jurisdiction that satisfied the Constitution.

What the Roberts Court has been doing is cutting back on personal jurisdiction, both with regard to general jurisdiction as in *Goodyear* and *Daimler*, but also with regard to specific jurisdiction as in *Bristol-Myers Squibb*, where the Court said that the cause of action had to be closely related to the local activity. Also, the *BMS* Court expressly jettisoned any sliding scale.

That’s the corner into which the Supreme Court had painted itself. There was no general jurisdiction over *Ford*. It hadn’t done enough in Minnesota or Montana to be “at home.” And the cause of action — for an injury in a car that wasn’t designed, manufactured, or originally sold in either state — seemed not closely enough related for specific jurisdiction. The Court had established that, if the cause of action was highly related, you didn’t need much activity for “purposeful availment.” If the activity was unrelated, you needed very significant activity. So there were these two levels: For specific jurisdiction, you needed very little, but highly

related, activity; for general jurisdiction, you needed tremendously high activity.

Ford presented the inevitable middle case — a fair amount of marketing, sales, and service activity in the state, but the cause of action didn’t arise out of the activity. There was not enough activity under *Daimler* for general jurisdiction; and the cause of action was fairly related, but not closely enough under *Bristol-Myers Squibb* for specific jurisdiction. So that was the fix the Court was in.

LEVY: If Justice Sotomayor’s theory had prevailed in *Daimler*, and the Court had embraced a much more expansive view of general jurisdiction, is it fair to say the Court in *Ford* wouldn’t have been in such a difficult position?

CLERMONT: That’s a very fair characterization. Or, alternatively, if we were still applying *International Shoe*, we wouldn’t be in this fix, either. *International Shoe* would have handled this case very easily, because a sliding scale is born to handle the middle case. And that’s why *Ford* never raised the defense between 1945 and 2015. During that time, the defense was unsupportable.

So, how did the Court get out of the corner that it painted itself into? Justice Kagan, writing for the majority, held that if a defendant does enough in the state to “affiliate” itself with the state, it can be sued not only on claims arising out of the in-state activities in a causal way, but also on those claims merely related to the in-state activities. In effect, the Court created a third kind of jurisdiction, in between specific jurisdiction and general jurisdiction — a weaker relationship to the state, but with lots of activity. By this step function, we have three pertinent levels of

local activity: purposeful availment, affiliation, and at home. Those three levels constitute a clumsy sliding scale that may ultimately get us back to *International Shoe* as courts struggle with the in-between cases.

What the Supreme Court had been doing recently was trying to convert the *International Shoe* standard into a set of rules for easy application. But rules aren't going to be able to handle all the cases that fall in the middle. *International Shoe's* essential message was that due process is a standard that cannot really be reduced to simple rules.

SOHONI: I completely agree with Professor Clermont that *Ford* has created an intermediate type of personal jurisdiction that resembles a sliding scale approach. I'll just come right out and say that I was surprised that all eight of the justices voted to uphold personal jurisdiction in *Ford*. I would have expected at least some division among the justices given *Bristol-Myers Squibb* — and also given another case that we haven't talked about yet, which is *BNSF v. Terrell*.

That said, though the surface vote-count was eight-zero, it was really five-three. It is worth looking at the two separate opinions concurring in the judgment — one by Justice Alito, and one by Justice Gorsuch, who was joined by Justice Thomas.

All three concurring justices criticize the Court for separating out the concept of "relating to" from the concept of "arising out of." All three concurring justices object to how the majority treats that phrase — "arise out of or relate to" — as if it were a statute. These three justices say that you can't treat a phrase that derives from the Court's opinions as if it were a snippet of statutory language that can be teased out and parsed apart in that

MY HOPE IS THAT ONE THING LOWER COURTS TAKE FROM FORD IS THAT, WHEN YOU'RE IN A SITUATION WHERE THE PERSON ON THE STREET OR THE LAWYER ON THE STREET WOULD SAY "SURE, THERE IS JURISDICTION," BUT THE TEXT OF SUPREME COURT OPINIONS SEEMS TO SUGGEST THAT THERE IS NO JURISDICTION, THAT THE PERSON ON THE STREET IS CORRECT — THE RIGHT APPROACH IS TO SAY THERE IS JURISDICTION.

—ZACHARY CLOPTON

way. Instead, Justice Alito says, "arise out of" and "relate to" are just ways of restating that the defendant has to have contacts in the forum that have a sufficiently sensible relationship to the suit. Justice Alito contends that there was a link between Ford's extensive contacts in the forum states and these injuries, a "common-sense relationship" that is "causal in a broad sense of the concept." He says he wouldn't require specific proof of that causality, but he says that we can reasonably infer that these suits have a broadly causal relationship to Ford's in-state activities, the whole point of which was to put more Ford vehicles on the state's roads.

So in my view, Justice Alito's opinion — though it rebukes the majority

for muddling the doctrine of specific personal jurisdiction — is not much clearer itself. He says that if a car manufacturer makes "substantial efforts" to sell cars in two states, A and B, then a purchaser in state A can sue the car maker in state B if injured by the car's defects in state B. Now, of course, the key ambiguity there is the question of what counts as making "substantial efforts" to sell in a state. Is any type of advertising enough? How many sales? How many billboards do you need to have there? We should talk more about Justice Gorsuch's opinion, but with respect to Justice Alito, I'll just say that his concurrence, like the Court's opinion, leaves lots of questions unanswered in an "I know it when I see it" style.

CLOPTON: I want to react to Professor Sohoni's suggestion that the majority opinion muddles the doctrine of specific jurisdiction. I actually see the muddling as a virtue in this opinion. I think Justice Kagan intentionally did not say there was a third category of jurisdiction (between specific and general) and did not attempt to "rulify" what that category would be. My hope is that one thing lower courts take from *Ford* is that, when you're in a situation where the person on the street or the lawyer on the street would say "Sure, there is jurisdiction," but the text of Supreme Court opinions seems to suggest that there is no jurisdiction, that the person on the street is correct — the right approach is to say there is jurisdiction.

You can arrive at that conclusion by marshaling lots and lots of facts. If you look at Justice Kagan's opinion, she goes on at length about the different types of contacts that existed, and then concludes that there is enough there. To be honest, most personal jurisdiction cases aren't hard. But when you ►

get the hard cases, I think some play in the joints is probably an improvement over where we were before *Ford* was decided.

So while I cannot imagine a single justice endorsing a sliding scale or using the words “sliding scale,” we get opinions like *Ford* that invite sliding scale-like activity.

LEVY: The Court has suggested, especially in *Goodyear*, that general and specific jurisdiction are binary categories, and never the two shall meet. But *Ford* seems to blur that distinction. What kinds of issues might that create?

SOHONI: I tend to have a personal preference for clarity in law and in life. So I am a bit sympathetic to the points raised by Justice Gorsuch in his concurrence. He asks: When do contacts in a forum stop being “isolated” and “sporadic”? When do they become “affiliations” that are continuous? How are you supposed to know what these words mean? How do you advise your clients about where they are liable to be sued? And the complexity does have a cost, even though the flexibility has its virtues.

LEVY: To Professor Clermont’s point, it seems that if we are talking about due process at the heart of jurisdiction, then we’re forced to be in a world of standards. So perhaps one response is that we are necessarily buying into some ambiguity — is that right?

CLERMONT: That would be certainly an intelligent response, though I don’t know if I would have made it. I’ve long maintained that the constitutional test should be unclear — that if you want clarity, we should be going by legislation or rule making. But I want to ask Professor Sohoni whether Justice

Gorsuch’s view doesn’t lead to a whole lot more jurisdiction — and I don’t get where he and Thomas are coming from, since you would think they would come out against expansive jurisdiction.

SOHONI: The Gorsuch and Thomas concurrence was quite surprising, though it did pick up some themes in the questions posed at oral argument. I encourage any reader of this *Judicature* piece to go back and listen to that argument. In his opinion, after Justice Gorsuch sets out his critique of the administrability of the majority’s test, he then embarks on this lengthy narration of how personal jurisdiction doctrine has evolved since *Pennoyer*. And he stresses how *International Shoe* transformed the pre-existing landscape by articulating “a new test” to uproot and replace “nearly everything that had come before.” The gist of his opinion is that the doctrine since *International Shoe* has meant that corporations today receive “special jurisdictional protections in the name of the Constitution,” but it is not clear why they should receive those special jurisdictional protections. For nationwide corporations, think of Walmart or Target, Justice Gorsuch — and I’m reading between the lines here — seemed to be imagining something like a pre-*International Shoe* regime in which such companies could be deemed present and thus subject to suit in every state in which they are doing business.

Interestingly, that viewpoint resonates with Justice Sotomayor’s dissent in *BNSF*. In that opinion, Justice Sotomayor contended that the Court’s contraction of general personal jurisdiction over corporations was unfair to plaintiffs because individual plaintiffs who were harmed by “actions of a far-flung foreign corporation” would have

to sue in distant jurisdictions. She complained that the Court had granted a “jurisdictional windfall to large multi-state or multinational corporations that operate across many jurisdictions.” So there’s a funny convergence across the poles of the ideological spectrum of the current Court. And that convergence is focused on the question of how to treat these nationwide or multinational corporations, and in particular on whether such entities are unfairly benefitting from modern personal jurisdiction doctrine.

CLOPTON: It is interesting to think about Justice Gorsuch’s concurring opinion as it would be applied to a case like *Bristol-Myers Squibb*. These broad notions of jurisdiction, on the one hand, do provide clarity. It’s easy to know where you can sue if you can sue everywhere. But those broad notions in the pre-*Goodyear* and *Daimler* era were criticized for allowing states to reach out beyond their borders. Some scholars have referred to *Bristol-Myers Squibb* as addressing the “busybody state,” or the state that would try to regulate extra-territorially — because choice of law rules often favor forum law, getting cases into a state’s court likely will lead to the application of that state’s law. Now that could open up a larger dialogue about choice of law, but that’s not one that I think this Court seems interested in taking up at the moment.

LEVY: What is the underlying rationale here — are these jurisdictional cases really about traditional notions of fairness or are they really about state sovereignty?

SOHONI: Justice Gorsuch’s opinion asks whether the terms of the debate should be shifted entirely back to the original meaning of the due process

clause. He closes his opinion by saying that he hopes future litigants and lower courts will help the Court figure out what the original meaning of the Constitution would require. Now, what the original meaning of the due process clause has to say about somebody in 2021 selling something over the internet is a tough question. And adherence to original meaning is not a pronounced feature of today's personal jurisdiction doctrine, or indeed of many other bread and butter aspects of civil procedure. But if we went down that route, maybe we would be focused entirely on state sovereignty and the law of the land rather than on contacts, or relatedness, or fair play.

CLERMONT: With Justice Barrett (who did not take part in *Ford*) coming on and presumably adding to the concurring wing here, what do you think is the long-run position that the conservative branch of the Supreme Court will take on these jurisdictional matters? Do you think that the conservatives will come to agree on originalism here, whatever that means?

SOHONI: It's a very intriguing question. It's hard to say. Most of the justices today are self-professed originalists. And in recent years they have increasingly expressed interest in originalism in cases involving equitable remedies such as nationwide injunctions, as well as in cases involving the use of severability as a remedy. Justice Thomas in particular has written a series of opinions calling for the Court to adhere to original meaning in these contexts. Perhaps what *Ford* reveals is that the originalist justices' growing interest in remedial originalism and equitable originalism is now seeping over to civil procedure, and will take root in that domain as well.

PERHAPS WHAT *FORD* REVEALS IS THAT THE ORIGINALIST JUSTICES' GROWING INTEREST IN REMEDIAL ORIGINALISM AND EQUITABLE ORIGINALISM IS NOW SEEPING OVER TO CIVIL PROCEDURE, AND WILL TAKE ROOT IN THAT DOMAIN AS WELL.

—MILA SOHONI

I think that the constitutional politics of originalism suggest that reconstructing civil procedure doctrine around original meaning will be an uphill battle. But it is notable that there's growing academic interest in the area of procedural originalism and also, as revealed in *Ford*, some appetite on the Court to see originalist argumentation develop in the area of civil procedure.

CLOPTON: One place where I think originalist, or at least historically minded, arguments may have purchase in personal jurisdiction cases is with respect to corporate registration statutes. An issue I think the Court is likely to face in the coming years is whether a state can require consent to specific or even general jurisdiction, when a corporation registers to do business. To me, those questions are really questions about consent. Questions about consent have a long tradition in the law of personal jurisdiction, and venue before that. And so, I suspect a lot of attention on original or historical understandings of consent with respect to these registration statutes.

I also think that if and when the Court takes up registration statutes, we may see a return to constitutional limits on personal jurisdiction outside of the due process clause. So we may see arguments about interstate commerce and about unconstitutional conditions that may play in the registration statute context that just don't come up in that mine-run personal jurisdiction case that we teach to our first-year students.

LEVY: Where do we go from here? Are we expecting lower courts to take the signal, and dismiss less frequently on jurisdictional grounds? Is the Court signaling to lower courts that it is changing its tune from where it has been in the last few years?

CLERMONT: One question that has been circulating among academics is: What about the plaintiffs in *Bristol-Myers Squibb*? What about the plaintiffs there who were from out of state, but swallowed the drug in the state? Would *Ford* dictate that jurisdiction existed for them? It is amazingly close to the facts of *Ford*.

CLOPTON: If my civil procedure students read *Judicature*, this will be a hint for them, because this is exactly the hypothetical I ask in class when we get to *Bristol-Myers Squibb*. I ask it because it's a hard question.

CLERMONT: I wonder: Is the Court signaling a general contraction of personal jurisdiction or instead liberalism with regard to future cases? I can hardly believe that it's a generally liberating decision. I think the Court was forced to this *Ford* outcome. And I think that in future cases, the split will reassert itself between the conservative and liberal wings. And the ►

liberal wing is quite outgunned at the moment.

SOHONI: I agree with Professor Clermont that *Ford* may not necessarily herald a future relaxation of specific jurisdiction. I wonder, and this is a very risky thing to wonder, whether *Ford* might lead to the development of a doctrinal line based on the size of the corporation — a doctrine that varies according to whether the defendant is a nationwide or global corporation, as opposed to a small seller. That was a recurring theme in the oral argument, and it even surfaced in the opinion: The Court seemed to want to treat differently the individual retiree craftsman of duck decoys than the behemoth nationwide corporation that does business in every state.

I wonder if that distinction might be something that we see developed further. The law right now, as far as I understand it, doesn't formally incorporate that distinction. But that might be a line that emerges organically now that *Ford* is on the books.

CLERMONT: The idea of affiliation may be a foot in the door for your approach — that it's the big corporations that are going to affiliate themselves with states, and perhaps less so the little guy. Now, the little guy who sells one thing that happens to explode in the forum state, maybe there ought to be specific jurisdiction for that. But *Ford's* in-between jurisdiction will not reach the little guy.

CLOPTON: I completely agree that the Court — although they don't explicitly say so in the doctrine of purposeful availment or relatedness — thinks that Ford Motor Company is different from the hypothetical small businesses the Court offers, like the Maine decoy carver or the Appalachian potter or the Kenyan coffee farmer.

I THINK THAT THE DISTRICT JUDGES WILL VIEW THE *FORD* CASE AS ALLOWING THEM TO APPLY A SLIDING SCALE ON THE POWER TEST THAT LOOKS AT LEVEL OF ACTIVITY AND DEGREE OF UNRELATEDNESS, BUT ALSO, IN EFFECT, A SLIDING SCALE ON WHETHER IT IS REASONABLE TO ASSERT JURISDICTION.

—KEVIN CLERMONT

I also want to offer another potential way to deal with this difference. I have a new piece coming out with a group of coauthors — Maggie Gardner, Pamela Bookman, Andrew Bradt, and Theodore Rave — and one thing that we suggest is that the Court has struggled in cases like *Ford* because it has tried to force this entire jurisdictional inquiry into the minimum contacts half of the equation, as opposed to talking about the reasonableness factors from *Burger King* and later cases.

To me, the reasonableness factors actually do inquire into the size of the defendant, in the sense that the burden on small defendants like the Maine decoy carver is much greater than the burden on Ford to litigate in another jurisdiction. One of the idiosyncrasies of both *Bristol-Myers Squibb* and *Ford* is that the defendants conceded reasonableness. So that focused the Court's attention on this other aspect of the inquiry. When the Court gets to the hypothetical Maine decoy carver,

what we suggest is that the Court should remember: It's not purposeful availment and relatedness that should protect the decoy carver. It's the reasonableness piece of the analysis.

CLERMONT: I think a good way to approach this question is less from the law professor viewpoint and more from the district judge viewpoint. And I think that the district judges will view the *Ford* case as allowing them to apply a sliding scale on the power test that looks at level of activity and degree of unrelatedness, but also, in effect, a sliding scale on whether it is reasonable to assert jurisdiction. And so you will get much more of a case-by-case approach that allows the judges to find jurisdiction when they get a case that tears at them to find it. I think there will be a liberalizing effect, whether or not it's intended. And very few cases get reviewed by the Supreme Court!

LEVY: What should judges in a post-*Ford* world be thinking about when they have a difficult personal jurisdiction case before them?

CLOPTON: I think I would advise them to remember that *Bristol-Myers Squibb* is an unusual case — the plaintiff and the claim were unrelated to California; these were non-residents who purchased the drug outside of the jurisdiction, ingested it outside of the jurisdiction, and were harmed outside of the jurisdiction. So although *Bristol-Myers Squibb*, in its articulation of the doctrine, did limit specific jurisdiction, the particular facts are particular. There are many cases that are in between *Bristol-Myers Squibb* and *Ford*. And I agree with my co-panelists that I think *Ford* gives district judges a little more flexibility in approaching those cases.

LEVY: So *Ford* helps to put into relief that *Bristol-Myers Squibb* is perhaps not an outlier, but should be conceived as one of a set of data points — others of which may be more helpful depending on the case in front of them. Is that fair?

CLOPTON: I could not have said it better myself.

CLERMONT: Yes. *Ford* makes *Bristol-Myers Squibb* less of a mega-case and more of a point on the diagram.

LEVY: What kinds of cases do we think the Court might take in the personal jurisdiction space in the years to come? Can we expect the ever-elusive internet case that applies these principles to an online seller? Or is *Ford* going to be the last word on this for a while?

SOHONI: The Court has been bracketing off the internet for a while now. *Ford* was no exception. If you look back at the long span of time between *International Shoe* and today, you'll see that these cases tend to come in waves. There will be a hiatus and then a sudden cluster of decisions and then a hiatus and then another cluster of decisions. But the clusters are not doz-

ens of decisions. And since we've had quite a few recently, I guess I wouldn't be surprised if they just take a break for a while.

CLERMONT: I think they'll take a break as well. I don't think this case gave the justices a great feeling of satisfaction. They had to decide it the way they decided it and weren't able to make major pronouncements. And I think when any future case comes along, they'll have exactly the same feeling about granting review.

CLOPTON: I agree with that on the internet cases. But one area where I think we may see more activity is the question of the application of *Bristol-Myers Squibb* to class actions. That is especially true in light of the *TransUnion* case, in which the Court answered a parallel question with respect to standing. The Court in *TransUnion* says that standing must be established as to every member of the class, not just as to named plaintiffs. So for personal jurisdiction, I think there may be an appetite to just resolve — in one direction or another — whether you apply *Bristol-Myers Squibb* to absent class members in addition to named plaintiffs. This question

was left open because *Bristol-Myers Squibb* was a mass action, more like a federal MDL (although in state court) than a class action.

CLERMONT: And interestingly, the Seventh Circuit subsequently rendered a decision saying that *Bristol-Myers Squibb* does not apply to a class action, and then-judge, now-Justice Barrett joined in that opinion. So it could be that the conservatives and liberals get together on that one and give a nice, clear answer — which would be helpful, because there are a lot of lower court cases on this question.

LEVY: Well, this was wonderful. I haven't yet taught *Ford* in the classroom. But now I will know what to say when I do. Thank you.

¹ *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, Nos. 19-386, 19-369, 592 U.S. ___, 141 S. Ct. 1017 (slip op. at 8) (Mar. 25, 2021).
² *Id.* at 3 (internal citations omitted).
³ *Id.* at 6 (internal citations omitted).
⁴ *Id.* at 8-9.
⁵ *Id.* at 18.
⁶ *Id.*
⁷ *Id.* at 3 (Alito, J., concurring).
⁸ *Id.* at 9 (Gorsuch, J., concurring).



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