VOL. 100 • MONDAY, APRIL 26, 2021

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In this article, Fruchtman reviews recent personal jurisdiction developments relevant to e-commerce businesses. He observes that in a unanimous Supreme Court decision issued March 25 involving an automobile manufacturer, the justices went out of their way to indicate their reluctance to apply World War II-era personal jurisdiction principles to 21st-century commerce. Fruchtman describes steps that e-commerce businesses can take to provide further support for their position so that they are not subject to the authority of a court in a remote jurisdiction.

Imposition of state taxes or tax collection responsibilities requires the satisfaction of three distinct jurisdictional tests:

1. the tax tribunal or court must have personal jurisdiction over the alleged taxpayer (that is, the taxpayer must have "purposefully availed" itself of contacts with the jurisdiction);
2. the alleged taxpayer's contacts must satisfy tests of due process tax presence with the jurisdiction; and
3. the alleged taxpayer must satisfy tests of commerce clause tax presence with the tax jurisdiction.

As such, one should not presume that facts satisfying one test or even two tests will satisfy all three jurisdictional tests. Rather, the taxpayer's circumstances must be examined under each test — and appropriate challenges raised.

In 2018 the U.S. Supreme Court held in *Wayfair* that three large e-commerce vendors had commerce clause tax presence with South Dakota even though each vendor lacked physical presence in the state.[1] Leveraging *Wayfair*'s economic nexus ruling, California has aggressively assessed tax liabilities against small e-commerce vendors, including some run from a kitchen table or garage more than half a continent removed from the state. Further, California is asserting income tax liabilities against these businesses.

Notably, *Wayfair* did not disturb the requirement that a court must have personal jurisdiction over a defendant because of the defendant's having "purposefully availed" itself of contacts with the jurisdiction. Now, in *Ford*, a March 25 decision,[2] the Supreme Court dropped several hints that it may be prepared to review

[1] *South Dakota v. Wayfair Inc.*, 585 U.S. ___ (2018). Personal jurisdiction and due process nexus apparently were beyond dispute, as *Wayfair* focused entirely on tax presence under the commerce clause.

[2] *Ford Motor Co. v. Montana Eighth Judicial District Court*, No. 19-368 (U.S. Mar. 25, 2021).

whether e-commerce vendors have sufficient connections to be subject to the jurisdiction of distant courts.[3]

Ford

The issues in *Ford* arose out of car accidents in Montana and Minnesota in which occupants were killed or seriously injured. Ford Motor Co. argued that because the specific vehicles that were involved in the collisions were not sold in the states in which suit was filed, the courts in those states lacked personal jurisdiction over Ford. The U.S. Supreme Court unanimously rejected that argument.

However, tucked into that unanimous decision are multiple indications that the justices believe that personal jurisdiction principles announced 75 years ago cannot be applied to e-commerce. Thus, in the majority opinion, Justice Elena Kagan, writing for herself and four other justices, stated:

> We do not here consider internet transactions, which may raise doctrinal questions of their own. *See Walden v. Fiore*[4] ("[T]his case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State"). So consider, for example, a hypothetical offered at oral argument. "[A] retired guy in a small town" in Maine "carves decoys" and uses "a site on the Internet" to sell them. Tr. of Oral Arg. 39. "Can he be sued in any state if some harm arises from the decoy?" Ibid. The differences between that case and the ones before us virtually list themselves. (Just consider all our descriptions of Ford's activities outside its home bases.) So we agree with the plaintiffs' counsel that resolving these cases does not also resolve the hypothetical. *See id.*, at 39-40.[5]

In a concurring opinion, Justice Samuel A. Alito Jr. wrote that:

> there are also reasons to wonder whether the case law we have developed since [1945] is well suited for the way in which business is now conducted. But there is nothing distinctively 21st century about the question in the cases now before us.

And in another concurring opinion, Justice Neil M. Gorsuch, joined by two other justices, wrote that:

> Today, even an individual retiree carving wooden decoys in Maine can "purposefully avail" himself of the chance to do business across the continent after drawing online orders to his e-Bay "store" thanks to Internet advertising with global reach. . . . 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. Perhaps this is the real reason why the majority introduces us to the hypothetical decoy salesman. Yes, he arguably availed himself of a new market. Yes, the plaintiff's injuries arguably arose from (or were caused by) the product he sold there. Yes, *International Shoe*'s [1945] causation test would seemingly allow for personal jurisdiction.

[3] Tax practitioners are familiar with the practice of Supreme Court justices using their opinions to, in effect, request a desired type of case. A prominent example is Justice Anthony M. Kennedy's concurrence in *Direct Marketing Association v. Brohl*, 575 U.S. 1 (2015). In *Direct Marketing*, the question before the Court was "whether the Tax Injunction Act [TIA], which provides that federal district courts 'shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law,' 28 U.S.C. section 1341, bars a suit to enjoin the enforcement of this law." The Court unanimously held that it does not, meaning that the association's lawsuit could proceed. Moreover, the Court demonstrated judicial restraint by addressing only the reach of the TIA: "we express no view on the merits of [the association's] claims." It also rejected a footnote in the lower court's opinion, stating: "We take no position on whether a suit such as this one might nevertheless be barred under the 'comity doctrine.'"

Nevertheless, in a concurrence taking a much less restrained tone, Kennedy wrote that he was prepared to eliminate the physical presence requirement central to *National Bellas Hess Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Kennedy wrote that *Quill* was "questionable even when decided," and closed by stating: "The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." Direct Marketing, 575 U.S. at 19. Three years later, in *Wayfair*, Kennedy wrote the Court's 5-4 decision striking the physical presence requirement.

More recently, Justices Clarence Thomas and Samuel Alito used a denial of certiorari in *Taylor v. Yee*, 577 U.S. ___ (2016), to state their desire to hear an unclaimed property case with a cleaner procedural history than that presented by the party seeking relief. The Court (via a special master) is now considering two consolidated cases that could serve as a vehicle for that review: *Delaware v. Pennsylvania and Arkansas v. Delaware*, Dkt. Nos. 220145 and 220146 (consolidated Oct. 3, 2016).

[4] 571 U.S. 277, 290, n.9 (2014).

[5] *Ford*, No. 19-368 at 12-13, n.4.

> But maybe the majority resists that conclusion because the old test no longer seems as reliable a proxy for determining corporate presence as it once did.

Kagan and her majority colleagues acknowledged the challenge put forth in the concurrences:

> One of the concurrences here expresses a worry that our *International Shoe*-based body of law is not "well suited for the way in which business is now conducted," and tentatively suggests a 21st-century rethinking. . . . Fair enough perhaps [citing the duck decoy scenario], but the concurrence then acknowledges that [Ford's] cases have no distinctively modern features.[6]

Now What for E-Commerce?

There is no reason to expect state tax collectors to restrain themselves from applying World War II-era personal jurisdiction principles to e-commerce in 2021 and beyond. This leaves businesses with a choice: Pay the state (and the next state, and the next state . . .) or fight. On this, we turn again to Gorsuch: "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."

So there will be litigation. And while any measures taken to prepare for the possibility of such litigation must be business specific, all e-commerce vendors should know where they have a physical presence. That presence can be direct (that is, through an employee or the ownership or rental of real or tangible personal property) or indirect (typically through an agent or representative). These vendors also should identify for themselves the jurisdictions that they target as potential markets or in which they use their trademarks, trade names, or other income-generating intangible property.

In *Jeopardy Productions*, a recent example of tax-related personal jurisdiction litigation that is likely to reoccur throughout the country, the Louisiana Court of Appeals held that a non-Louisiana corporation headquartered out of state and having no direct or indirect Louisiana contacts was not subject to personal jurisdiction in Louisiana.[7] The only connection between the company and Louisiana was the use of the company's trademarks in Louisiana by third-party licensees, with that use resulting in the payment of royalties to the company.

Obviously, the license agreements did not prohibit the licensees from using the trademarks in Louisiana. But lack of prohibition is not purposeful availment. Therefore, the appellate court concluded that the company lacked even a minimal connection to Louisiana.

A Noteworthy Amicus Brief

Since 2011 the Supreme Court has issued no fewer than six important decisions directly involving personal jurisdiction.[8] Invariably, these cases involve personal jurisdiction catchphrases such as:

- Did the defendant have a minimal connection with the state?
- Did the defendant purposefully avail itself of the privilege of conducting activities within the state?
- Should the defendant reasonably have anticipated being haled into court in the jurisdiction?
- Does a finding of personal jurisdiction offend traditional notions of fair play and substantial justice?

Regrettably, these phrases — when unmoored from the lessons of case law going back generations — convey no meaning. Moreover, unless one has an active litigation practice, it is easy to be confused by the federal and state courts' attempts to apply these phrases as tests of personal jurisdiction.

[6] *Ford*, No. 19-368 at 7, n.2.

[7] *Robinson v. Jeopardy Productions Inc.*, 2019 CA 1095 (La. Ct. App. 1st Cir. 2020) (*writ denied*, 308 So. 3d 1166 (2021)).

[8] *See, e.g.*, *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873 (2011); *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 915 (2011); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Walden*; *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017); and *Ford*.

Therefore, an amicus brief filed by the states' attorneys general is noteworthy for providing a concise summary of general principles of personal jurisdiction.[9] While the entire brief merits reading, e-commerce executives' attention is directed to the attorneys general's following statements providing both guidelines and acknowledgments of the present state of personal jurisdiction law:

- "This Court's precedents on specific (as opposed to general) personal jurisdiction principally focus on two questions. The first is whether the nonresident defendant 'purposefully avail[ed] itself of the privilege of conducting activities within the forum State.' *Hanson v. Denckla*.[10] The second is whether the plaintiff's claims 'arise out of or relate to' the defendant's forum conduct. *Helicopteros Nacionales de Colombia S.A. v. Hall*.[11] A negative answer to either question pretermits analysis of the other." (Amicus brief at 6.)
- "[P]urposeful availment focuses on ensuring a defendant-initiated link to the forum or that relatedness properly accounts for the relationships among a State, its citizens, and the nature of the claim." (Amicus brief at 8.)
- "*Bristol-Myers Squibb* confirms that the relationship between the forum and the nature of a plaintiff's claim is a crucial component of the relatedness inquiry — and that relatedness serves a function different from purposeful availment. Again, the purposeful availment requirement ensures that a defendant has a sufficiently strong relationship with the forum; the inquiry therefore turns on the defendant's own conduct, not the conduct of the plaintiff or third parties. *See Hanson*.[12]" (Amicus brief at 10.)
- "The United States [in its amicus brief filed in *Ford*] rightly opposes the adoption of Ford's proximate cause test. [U.S. amicus brief at 29-32.] It proposes a different test based on 'where the defendant makes or sells a product,' allowing businesses to 'take more precautions or reduce the volume of sales' in States with less desirable litigation environments. *Id.* at 18. But a defendant's ability to avoid certain forums already exists. The independent requirement of purposeful availment ensures that only the voluntary conduct of the defendant itself can demonstrate an adequate relationship with the forum. *See Walden*;[13] *Hanson*.[14]" (Amicus brief at 18-19.)
- "Predictability and fairness to the defendant are important factors in any analysis of specific personal jurisdiction. *See Bristol-Myers Squibb*, 137 S. Ct. at 1780; *Burger King*, 471 U.S. at 472; *World-Wide Volkswagen*, 444 U.S. at 297." (Amicus brief at 21.)
- "Ford's test[15] would not mesh with the realities of today's economy, where it is increasingly old fashioned to assume that something is designed in a single State, or even to assume that determining where something is sold is a simple question. Today's companies use cross-office design teams, and consumers in one State often purchase gifts online from companies in different States for shipment to residents of yet more States, to give just two examples." (Amicus brief at 24.)

The acknowledgment by 39 states' attorneys general that, for personal jurisdiction purposes, "purposeful availment focuses on ensuring a defendant-initiated link to the forum" and that "the inquiry therefore turns on the defendant's own conduct, not the conduct of the plaintiff or third parties" is a breath of fresh air for those familiar with the reasoning of *Geoffrey*[16] and many of the business activities tax cases across the United States decided after it. As a reminder, in *Geoffrey*, the South Carolina Department of Revenue argued and the South Carolina Supreme Court held that a trademark licensor

[9] Brief for Minnesota, Texas, 37 Other States and the District of Columbia as Amici Curiae in Support of Respondents, *Ford*, No. 19-368.

[10] 357 U.S. 235, 253 (1958).

[11] 466 U.S. 408, 414 (1984).

[12] 357 U.S. at 253-254.

[13] 571 U.S. at 286.

[14] 357 U.S. at 253.

[15] As stated above, Ford argued that because the specific vehicles involved in the collisions were not sold in the states in which suit was filed, the courts in those states lacked personal jurisdiction over Ford.

[16] *Geoffrey Inc. v. South Carolina Tax Commission*, 313 S.C. 15 (1993).

lacking any presence in South Carolina nevertheless had income tax nexus with the state because its license agreement did not prohibit the licensee's use of the trademarks in South Carolina:

> The nexus requirement of the Due Process Clause can be satisfied even where the corporation has no physical presence in the taxing state if the corporation has purposefully directed its activity at the state's economic forum. *Quill.* Geoffrey asserts that it has not purposefully directed its activities toward South Carolina. To support its position, Geoffrey points out that Toys R Us had no South Carolina stores when it entered into the Agreement and urges, therefore, that Toys R Us's subsequent expansion into South Carolina was unilateral activity that cannot create the minimum connection between Geoffrey and South Carolina required by due process.
>
> In our view, Geoffrey has not been unwillingly brought into contact with South Carolina through the unilateral activity of an independent party. Geoffrey's business is the ownership, licensing, and management of trademarks, trade names, and franchises. By electing to license its trademarks and trade names for use by Toys R Us in many states, Geoffrey contemplated and purposefully sought the benefit of economic contact with those states. Geoffrey has been aware of, consented to, and benefited from Toys R Us's use of Geoffrey's intangibles in South Carolina. Moreover, Geoffrey had the ability to control its contact with South Carolina by prohibiting the use of its intangibles here as it did with other states. We reject Geoffrey's claim that it has not purposefully directed its activities toward South Carolina's economic forum and hold that by licensing intangibles for use in South Carolina and receiving income in exchange for their use, Geoffrey has the "minimum connection" with this State that is required by due process.[17]

Likewise, e-commerce businesses should take note of the acknowledgments by the attorneys general (1) regarding the changed "realities of today's economy" and (2) that "it is increasingly old fashioned to assume that . . . determining where something is sold is a simple question." The import of those acknowledgments is that purposeful availment cannot be demonstrated merely by showing that a business's goods, digital products/services, or intangibles were delivered to or used in a state. ■

[17] *Geoffrey*, 313 S.C. at 16.