

When Courts Grapple with Unsettled Precedent, Early Mediation May Be Worthwhile

Laurie Salita, Esquire



The U.S. Supreme Court's Decision in *Ford Motor Co. v. Bandemer* left litigants – particularly product manufacturers – and courts across the country with more questions than answers. See 141 S.Ct. 1017 (2021). Private mediation may be worthwhile when fundamental questions of jurisdiction are unsettled.

Consider the Ninth Circuit Court of Appeals' recent decision in *LNS Enterprises LLC, et al., v. Continental Motors, Inc., et al.*, 2022 U.S. App. LEXIS 901 (9th Cir. 2022). In that case, the Court affirmed the United States District Court for the District of Arizona's dismissal of plaintiffs' claims against Continental Motors, Inc. *n.k.a.* Continental Aerospace Technologies, Inc. and its denial of plaintiffs' request for jurisdictional discovery. The learned Court rendered this decision in the wake of *Ford Motor Co. v. Bandemer* ("*Ford*") after extensive briefing and oral argument last Fall.

The case arose from an Arizona aircraft accident resulting in property damage to the subject aircraft. Plaintiffs (Arizona residents) asserted multiple claims against multiple defendants, but their claim against Continental alleged that the engine it sold in 2006 to an unaffiliated customer in Oregon contained defects. The parties agreed that the Arizona courts lacked general personal jurisdiction over Continental. Therefore, like *Ford*, the Court's inquiry focused on the issue of specific personal jurisdiction.

Continental established that it had no contact whatsoever with the engine after its initial sale nor any knowledge of its whereabouts prior to being informed about the subject litigation. Indeed, the Oregon customer installed the engine into the accident aircraft, and 10 years later, plaintiffs purchased the aircraft from a Texas-based seller. Ultimately, one of the plaintiffs piloted the aircraft in Arizona where it crash landed.

Continental argued that the engine's eventual matriculation into the forum through the stream of commerce could not justify the exercise of personal jurisdiction over it. Plaintiffs argued that Continental's nationwide marketing and advertising activities and the existence

of Arizona-based repair facilities that serviced Continental engines were contacts sufficient to establish specific personal jurisdiction over Continental. Plaintiffs also argued that the forum-based location of the accident and their Arizona-resident status should be considered in the Court's jurisdictional analysis.

The Ninth Circuit Court of Appeals affirmed. It held that the trial court correctly considered the evidence offered by Continental because it conflicted with the facts alleged in the plaintiffs' complaint, and plaintiffs provided no contradictory evidence. The Court then compared and contrasted *World Wide Volkswagen* (where defendants carried on "no activity whatsoever" in the forum) and *Ford* (where the defendants had a "verifiable truckload" of contacts in the forum) but ultimately recognized that not all manufacturers will be "like Ford" insofar as Ford pervasively exploited the forum marketplace.

Even though a manufacturer does not need to have "Ford's staggering number of contacts to have satisfied the requirement that it purposefully availed itself of the privilege of conducting activities in the forum," a manufacturer's connection with the forum must be "something more" than placing the product into the stream of commerce. That "something more" was lacking in the case of Continental's connection to Arizona, the Court said. Plaintiffs' allegations of nationwide marketing activities are insufficient "to render Continental subject to jurisdiction in Arizona, because they do not demonstrate that Continental purposefully availed itself of the privilege of conducting business in Arizona." Likewise, Continental's alleged relationships with unaffiliated, third-party maintenance facilities – particularly when those maintenance facilities performed no work on the aircraft or engine in question – cannot create a connection with Arizona sufficient to justify the exercise of jurisdiction. Where Continental had no contacts intentionally directed to Arizona that "related to" the plaintiffs' claims, it could not be subject to personal jurisdiction in Arizona. The plaintiffs' claims against Continental were dismissed, and as the statute of limitations had expired, plaintiffs were left without a forum to pursue their claims against Continental.

The plaintiffs in *LNS Enterprises LLC* wanted to pursue their claims against Continental in Arizona. The *Ford* decision probably gave them confidence in their pursuit of that goal. *Ford* disrupted previously established jurisdictional jurisprudence and opened the door to new arguments – especially against manufacturers. It left open the question: what level of market exploitation renders a defendant "like Ford?" And, it paved the way for plaintiffs to argue that a manufacturer is subject to personal jurisdiction wherever a forum contact relates to the plaintiff's claim, no matter how tangential that relationship. Surely the LNS Enterprises plaintiffs thought their investment in an appeal to the Ninth Circuit would be worthwhile. On the other hand, Continental did not want to litigate in Arizona and may have seen this case as an opportunity to have the Ninth Circuit Court of Appeals clarify or focus the *Ford* decision in situations where manufacturers do not have a "verifiable truckload" of forum contacts. Irrespective of the parties' beliefs and desires, however, courts can be unpredictable. Once parties submit an issue to the courts for

resolution – even an issue as fundamental and pivotal as personal jurisdiction – they lose control of the outcome.

Having some control over the outcome of any litigation is appealing. Private mediation gives each party the power to discuss imminent issues and those likely to arise if the litigation proceeds through discovery, trial or appeal. It allows parties to take time to consider what they really want to achieve and what is most important to them. Communication fostered by a neutral and/or a neutral’s insight may elicit thoughts and perspectives not previously evident. Information gleaned through these discussions may be quite surprising and may even promote resolution through creative, non-traditional means. Early mediation may alleviate concerns of expensive, protracted litigation and publicity.

Sometimes the threat of establishing precedent through continued litigation is incentive enough seek alternate dispute resolution, and this is especially true when a decision like *Ford* puts a “new gloss on our case law” and adds “new layers of confusion to our personal jurisdiction analysis.” See *Ford*, 141 S. Ct. at 1032 *et seq.* (Alito and Gorsuch concurring respectively). Indeed, unsettled jurisprudence makes it very difficult for litigants to predict outcomes. Although the eventual outcome of any mediation is unknown, the litigants, not the courts have control over that outcome.

