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Court's Personal Jurisdiction Due Process Opinion and Petitioners' Reply Brief in New York Opioid Stewardship Act Tax Injunction Act Case

***41** As many of our readers know, whether a state can assert jurisdiction over a taxpayer for a tax depends on whether the taxpayer has sufficient contacts with the jurisdiction to satisfy the Fourteenth Amendment's Due Process Clause of the U.S. Constitution.Accordingly, the U.S. Supreme Court's decisions in personal jurisdiction cases, which focus on whether a state court can exercise jurisdiction over a defendant under the Due Process Clause, are relevant to taxpayers and state and local tax practitioners. Recently,Justice Kagan delivered the opinion of the Court in *Ford Motor Company v. Montana Eighth Judicial District Court* (Docket No. 19-368) and *Ford Motor Company v. Adam Bandemer*, (Docket No. 19-369), which we discuss in this issue of theJournal. These cases involved two motor vehicle products liability cases brought against Ford Motor Company (‘Ford‘) in Montana and Minnesota.

In each case, serious car accidents occurred in the state in which the suit was brought and the victim was a resident of the state. Affirming decisions by the Supreme Courts of Montana and Minnesota, the Court found that ‘when a company like Ford servesa 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,‘ and satisfy the Due Process Clause of the U.S. Constitution. The Court rejected Ford's argumentthat ‘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.‘

We also detail the Reply Brief filed by the Petitioners in *Healthcare Distribution Alliance v. James* (Docket No. 20 – 1611). The issue in that case is whether the New York Opioid Stewardship Act's payment is a ‘tax‘ within themeaning of the Tax Injunction Act.[1]

As we go to press, we note the filing of a Petition for Writ of Certiorari by Clear Channel against Baltimore's Billboard tax. We will cover this Petition in the next issue of the Journal. Finally, we continue to track the MoneyGram cases: *Delawarev. Pennsylvania,* 220145 and *Arkansas et al. v. Delaware,* 220146. The dispute is over which state is entitled to escheat, or take custody of, the proceedings of certain unclaimed monetary instruments issued by MoneyGram Payment Systems, Inc.

Supreme Court Finds Specific Jurisdiction in States Where Company Systematically Served a Market and Product Malfunctioned and Injured Petitioners

****2** On March 25, 2021, Justice Kagan delivered the opinion of the Court in *Ford Motor Company v. Montana Eighth Judicial District Court* (Docket No. 19-368) and *Ford Motor Company v. Adam Bandemer*, (Docket No. 19-369). Affirming decisionsby the Supreme Courts of Montana and Minnesota, the Court found that '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.'

The Due Process Clause and general and specific jurisdiction.

The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant. As explained by the Court, '[t]he canonical decision in this area remains *International Shoe Co. v. Washington.*[2] There, the Court held that a tribunal's authority depends on the defendant's having such •contacts' with the forum State that •the maintenance of the suit' is •reasonable' and •does not offend traditional notions of fair play and substantialjustice.'' In applying that formulation, the Court has long focused on the nature and extent of the defendant's relationship to the forum state.

As such, according to the Court, '[t]hat focus led to our recognizing two kinds of personal jurisdiction: general (sometimes called all-purpose) and specific (sometimes called case-linked) jurisdiction.' A ***42** state court may exercise generaljurisdiction only when a defendant is 'essentially at home' in the State.[3] (For example, for a corporation, the forum would be in the state of the corporation's place of incorporation or commercial domicile). Specific jurisdiction covers defendants 'less intimately connected with a State, but only as to a narrower classof claims.' To be subject to that kind of jurisdiction, the defendant must take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State. '[4] Also, the plaintiff's claims 'must arise out of or relate to the defendant's contacts' with the forum.[5] As explained by the Court, '[o]ur 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 conductingactivities within a state,' - thus •enjoy[ing] the benefits and protection of [its] laws,'- the State may hold the company to account for related misconduct.'

Factual background and lower court cases.

These cases involve two Ford vehicles – a 1996 Ford Explorer and a 1994 Crown Victoria. One case comes from Montana, where Ms. Gullett was driving her Ford Explorer near her home in the state when the tread separated from a rear tire and the vehiclespun out of control, rolled into a ditch and came to rest upside down. Ms. Gullett died at the scene. The second case comes from Minnesota, where Mr. Bandemer was a passenger in a friend's Ford Crown Victoria. When Mr. Bandemer's friend rear-ended a snowplow,the car landed in a ditch and Mr. Bandemer suffered serious brain damage. Ford designed the Explorer and Crown Victoria vehicles in Michigan, and manufactured the cars in Kentucky and Canada, respectively. Resales and later relocations by consumers broughtthe vehicles at issue to Montana and Minnesota.

****3** As explained by the Court in its Opinion, Ford is a global auto company, incorporated in Delaware and headquartered in Michigan. However, as noted by the Court, 'its business is everywhere. Ford markets, sells, and services its products across the UnitedStates and overseas.' In addition, the Court points out that 'Ford also encourages a resale market for its products: Almost all dealerships buy and sell used Fords, as well as selling new ones.' The Court also notes that '[t]o enhanceits brand and increase its sales, Ford engages in wide-ranging promotional activities, including television, print, online, and direct- mail advertisements.'

Ford moved to dismiss both suits for lack of personal jurisdiction, arguing that each state court had jurisdiction only if the company's conduct in the State had given rise to the plaintiff's claims. Ford agrees that it 'purposefully avail[ed]

itself of the privilege of conducting activities‘ in both Montana and Minnesota.[6] Ford claims instead that those activities do not sufficiently connect to the suits, even though the resident-plaintiffs allege that Ford cars malfunctioned in the forum States. In Ford's view, due process requires a causal link, and that jurisdictionattaches ‘only if the defendant's forum conduct gave rise to the plaintiff's claims.‘ Ford argues that jurisdiction attaches only in the State where Ford sold the car in question, or the States where Ford designed and manufactured the vehicle. Thus,per Ford, because none of these things occurred in Montana or Minnesota, those States' courts have no power over these cases.

As explained by the Court, both the Montana and the Minnesota Supreme Courts rejected Ford's argument: ‘The Montana Court began by detailing the varied ways Ford •purposefully’ seeks to •serve the market in Montana.' The company advertises inthe State, •has thirty-six dealerships' there; •sells automobiles, specifically Ford Explorer[s] [the car at issue in the case] and parts' to Montana residents; and provides them with •certified repair, replacement, and recallservices.'‘ Thus, the Court, explaining the lower court's findings states, ‘Ford's conduct, said the court, encourages •Montana residents to drive Ford vehicles.’ When that driving causes in-state injury, the ensuing claims have enough of a tieto Ford's Montana activities to support jurisdiction.‘ The Court went on to describe the Minnesota Supreme Court's decision. Per the Court, ‘Minnesota's Supreme Court agreed [with the Montana Supreme Court'sholding]. It highlighted how Ford's •marketing and advertisements' influenced state residents to •purchase and drive more Ford vehicles. Indeed, Ford had sold in Minnesota •more than 2,000 Crown Victoria[s]’ – the •verytype of car' involved in [the Petitioner's] suit. That the •*particular vehicle*' injuring him was •designed, manufactured, [and first] sold elsewhere' made no difference.‘

Court rejects causation-only approach.

As noted above, in Ford's view, due process requires a causal link, and that jurisdiction attaches ‘only if the defendant's forum conduct gave rise to the plaintiff's claims.‘ Writing for the majority, Justice Kagan asserts that Ford's causation-onlyapproach finds no support in the Court's requirement of a connection between a plaintiff's suit and a defendant's activities‘.[7] She further provides that ‘[n]one of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and litigation will do. . . .

****4 *43** [O]ur most common formulation of the rule demandsthat the suit • arise out of *or relate to* the defendant's contacts with the forum state.' ‘ Justice Kagan, then expressly states ‘[a]nd indeed, this Court has stated that specific jurisdiction attaches in cases identical tothe ones here—when a company like Ford cultivates a market for a product in the forum State and the product malfunctions there.‘

Justin Kagan considers the business the company regularly conducts in Montana and Minnesota when looking ‘[t]o see why Ford is subject to jurisdiction in these cases.‘ She finds that ‘it is a [s]mall wonder that Ford hashere conceded •purposeful availment’ of the two States' markets. In this regard, she describes how ‘[b]y every means imaginable – among them, billboards, TV and radio spots, print ads, and direct mail – Ford urges Montanans andMinnesotans to buy its vehicles, including (at all relevant times) Explorers and Crown Victorias. . . And, apart from sales, Ford works hard to foster ongoing connections to its cars' owners.‘

Justice Kagan then turns to how all this Montana- and Minnesota-based conduct relates to the claims in these cases, brought by state residents in the States' courts, and states the following:

> ‘Each plaintiff's suit, of course, arises from acar accident in one of those states. In each complaint, the resident-plaintiffs alleges that a defective Ford vehicle – an Explorer in one, a Crown Victoria in the other – caused the crash and resulting harm. And just as 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 andMinnesota 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.'[8]

The Court addresses the 'complicating' fact raised by Ford, which is that the company sold the specific cars involved in these crashes outside the forum States, with consumers later selling them to the States' residents. The Court dismisses thisargument as another causal test of connection which the Court argues is inconsistent with case law.[9] Justice Kagan explains Ford systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States.

The majority opinion also finds that 'allowing jurisdiction in these cases treats Ford fairly, as this Court's precedents explain. In conducting so much business in Montana and Minnesota, Ford •enjoys the benefits and protection of [their]

laws' – the enforcement of contracts, the defense of property, the resulting formation of effective markets. *International Shoe,* 326 U.S. at 319. All that assistance to Ford's ***44** in-state business creates reciprocal obligations - mostrelevant here, that the car models Ford so extensively markets in Montana and Minnesota be safe for their citizens to use there.'

****5** Accordingly, the Court holds that '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 tosupport specific jurisdiction.'

Petitioners' Reply Brief in Challenge to Ruling that New York Opioid Stewardship Payment is a 'Tax' Under the 'Tax Injunction' Act

A petition in *Healthcare Distribution Alliance v. James* (Docket No. 20 – 1611) asks whether the New York Opioid Stewardship Act's payment (the 'Payment') is a 'tax' within the meaning of the Tax Injunction Act (the 'TIA').The TIA forbids federal district courts from 'enjoin[ing], suspend[ing], or restrain [ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts ofsuch State.' The Second Circuit Court of Appeals determined that the annual Payment required of opioid manufacturers and distributers under New York's Opioid Stewardship Act ('OSA') is a 'tax' within the meaning of the TIA, and therefore,the United States District Court for the Southern District of New York lacked jurisdiction to invalidate or enjoin enforcement of the Payment.

As discussed in the last issue, the Attorney General of the State of New York ('Attorney General'), Solicitor General, and Deputy Solicitor General of the State of New York ('the Respondents') filed a Brief in Opposition. In this issue,we cover the Reply Brief filed by the Association for Accessible Medicines and SpecGx LLC and Healthcare Distribution Alliance. First, the reply brief asserts that the Respondents are incorrect in their assertion that there is no circuit court split overwhether certain charges are taxes or fees. Specifically, the Petitioners argue that the First, Fourth and Ninth Circuits would not have held the Payment a 'tax' within the meaning of the TIA. Second, the brief asserts that the Second Circuit's dismissalof the pass-through prohibition weighs further in favor of certiorari. Third, the reply brief explains why the appeal is worthy of review. Finally, the brief argues the Second Circuit's opinion is wrong.

First argument: First, Fourth and Ninth Circuits would have held OSA payment a punitive fee, not a 'tax' within the TIA.

First, the brief argues that the First, Fourth and Ninth Circuits would not have held the Payment is a 'tax' within the TIA. The brief explains that while circuit courts across the country use the same *San Juan Cellular Telephone* three-factortest to determine whether a surcharge is a tax within the TIA, the courts apply and interpret those factors in disparate ways.[10] 'Although [the

circuit courts] superficially recite the same so-called *San Juan Cellular* factors, the courts of appeals in fact apply radically different frameworks to the tax/fee distinction under the TIA.‘

The brief asserts that ‘[t]he question here is not whether the courts of appeals involve the same, extremely general analytical framework; it is whether they are construing and applying that framework in fundamentally inconsistent ways.‘The Second Circuit reasoning ‘conflicts squarely‘ with decisions of the First, Fourth, and Ninth Circuits, who would have likely not treated the OSA surcharge as a tax. The brief explains that the ‘most significant‘ consideration factoringinto the Second Circuit's holding was that the “opioid-addiction treatment and prevention services' for which the OSA's ***46** proceeds are earmarked •undoubtedly provide a general benefit to New York residents.’‘ The brief explains that the ‘Stateitself describes *Trailer Marine Transportation Corp. v. Rivera Vazques,* 977 F.2d 1 (1st Cir. 1992), as holding that the assessment there was not a •tax’ within the meaning of the TIA because it was •collectedonly from those seeking the privilege' of engaging in a state-licensed activity and set aside in a special fund •to compensate victims for specified damage resulting from that activity.'‘ Those are precisely the facts here: The OSA's surcharge is collectedby state regulators from state-licensed opioid manufacturers and distributors and set aside in a special fund to remedy the damage that the legislature believes results from that activity.

****6** Thus, under the First Circuit's opinion, the OSA Payment would be considered a punitive fee, not a ‘tax‘ within the TIA. The brief also cites to another First Circuit decision which it describes as ‘squarely reject[ing] the SecondCircuit's reasoning in this case – i.e., that what matters most is whether the exaction raises revenue to •serve the public benefit’‘ and finds that the proper focus of the tax/fee analysis is ‘whether an injunction would pose a •threatto the central stream of tax revenue relied on by’ the State to fund ordinary operations.‘[11] According to the petitioners, ‘[i]t can be said of virtually all activity by a state that the activity serves the public benefit‘ and ‘to focus on the public benefit proves too much.‘

The brief then examines the Ninth's Circuit reasoning in *Bidart Brothers v. California Apple Commission,* and concludes that the Circuit ‘[C]ourt rejected the State's assertion that, even though •[t]he funds are segregatedfrom California's general funds', •the assessments [at issue] should be considered taxes because they benefit the entire community.’‘[12] Similarly, the brief cites to the Fourth Circuit's decision in *GenOn Mid-Atlantic v. Montgomery County*, that ‘an exaction intended to ensure that large greenhouse gas emitters contributed to paying for the programs necessary to offsetthe externalized social costs of burning coal was a punitive and regulatory fee because it was very narrowly targeted and its proceeds were earmarked for a restitutionary purpose.‘[13]

The brief also asserts that numerous Supreme Court cases support the proposition that anomalous methods of assessing a charge are indicative of a nontax levy and ‘assessments lacking all the ordinary characteristics of a tax are not taxes.‘[14] Here, the brief points out that the OSA surcharge is assessed in an annually-recurring lump sum of $100 million, apportioned among market participants a year or more after the underlying sales have taken place. The brief highlights that the only supportthat this method of assessment is ‘hardly unheard of‘ are three federal taxes each enacted more than 200 years ago prior to the adoption of the Sixteenth Amendment. The brief asserts that ‘the bottom line is that •taxes' are not assessed inapportioned lump sums, but fines and penalties are.‘ As such, the brief argues that ‘[e]very other court of appeal would have considered that plainly relevant observation.‘

Second argument: Second Circuit's dismissal of the OSA pass-through prohibition weighs in favor of certiorari.

The brief also asserts that the Second Circuit erroneously ‘dismissed the inherently punitive implications of the OSA's pass-through prohibition on the unusual ground that the district court had invalidated it as unconstitutional and the State did notappeal that holding.‘ The brief maintains that ‘[t]hat reasoning . . . is illogical – whether an exaction is a penalty turns on legislative purpose, which cannot be altered retroactively by judicial decree or the State's litigationconduct.‘ The brief criticizes the State for ‘simply parrot[ing] back the Second Circuit's rationale, without explaining how or why it is defensible.‘

****7** The reply brief explains how the pass-through prohibition was an essential element of the OSA, amounting to what the district court described as one of two indispensable 'pillars' of the acts, along with the surcharge itself. The district courtheld the prohibition was not severable, '[w]ithout [the pass-through prohibition] the OSA cannot achieve its goal of ensuring that a very narrow class of ***48** state-licensed manufacturers and distributors, and they alone, bear the surcharge'sburden.' The brief argues that dismissing the pass-through prohibition as though it had never existed 'turns on the bizarre idea that the district court's order and State's decision not to appeal somehow altered the OSA's history and purpose, transformingits exaction from a punishment-inflicting •fee' into a revenue-raising •tax.'' There is a consistent line between classic taxes and penalties, determined by when 'the penalizing feature of a so-calledtax loses its character as such and becomes a mere penalty.' The brief asserts that, '[t]he surcharge here singles out opioid manufacturers and distributors to extract punitive restitution.'

Third argument: The appeal is worthy of review.

The Petitioners counter the specific arguments raised by the Respondents that the case is a 'poor vehicle' and that the decision below turns on 'case-specific features' that will not recur. First, the brief argues that the Respondents'contention that it would prevail on an alternative ground is not truly a vehicle argument. It also maintains that the Respondents' alternative argument bears on the merits, which no federal court may reach unless and until the Court reviews the Second Circuit'sTIA holding. It also points out that the district court rejected the Respondent's alternative argument.

Also, the reply brief makes clear that the fact that the OSA is no longer in effect, is a 'red herring.' In this regard, the brief argues that although the OSA was superseded in 2019 by a traditional excise tax, the Plaintiffs still continue to face$200M in assessments under the original OSA.

Finally, the reply brief argues that the State is wrong that the issues presented for review are unimportant. The Petitioners argue that '[t]his is a recurring question of federal law, often involving hundreds of millions of dollars in penaltieswhen it arises.' Per the Petitioners 'a federal forum is essential for politically unpopular out-of-states attempting to vindicate their federal constitutional rights in cases like this.'

Fourth argument: the Second Circuit's opinion is wrong.

The reply brief argues that 'when the 75th Congress used the word •tax' in the TIA, it intended to have the same meaning that courts had given the word in years prior, under the AIA.' It also points out that in its Petition,the Petitioners explained further that 'this Court's pre-TIA cases construing federal exactions under both the AIA and the Tax Clause consistently drew a line between classic taxes and penalties. E.g., Bailey v. Drexel Furniture Co., 259 U.S. 20, 38 (1922)'('[T]here comes a time in the extension of the penalizing features of [a] so-called tax when it loses its character as such and becomes a mere penalty.'). The Petitioners main argument is that they have shown that the OSA Paymenthas all the characteristics of a penalty.

****8** The Petitioners reject the Respondents arguments that 'an assessment can never be a penalty unless it is link[ed] to the commission of an unlawful activity,' and counter stating that the Court has recognized in *NFIB* that anexaction imposed for a violation of the law is necessarily a penalty. However, no member of the Court has suggested the inverse, that an exaction imposed for disfavored but lawful conduct can*not* be a penalty. Finally, the Petitioners reject theRespondents likening of the OSA Payment to 'so-called sin taxes, like •cigarette taxes.'' They argue that they have shown that 'the surcharge here is not regulatory in that sense. It singles out opioid manufacturers and distributors to extractpunitive restitution for their purportedly •reprehensible conduct,' not to influence or incentivize aspects of their business conduct.'

Footnotes

1 28 U.S.C. § 1341 .

2 *International Shoe Co. v. Washington*, ECASE:326 U.S. 310.

3 *Goodyear Dunlop Tires Operations, S. A v. Brown*, 564 U. S 915.

4 *Hanson v. Denckla*, 357 U. S. 235.

5 *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco City*, .

6 *Hanson v. Denckla*, 357 U. S. 235.

7 *Bristol –Myers,* .

8 *Helicopteros,* 466 U.S., at 414.

9 *See e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286. In this case, the Court made clear that systematic contacts in Oklahoma rendered Audi accountable there for an in-state accident, even though it involved a car sold in New York. *See also Helicopteros Nacionales deColumbia, S.A. v. Hall*, 466 U.S. 408.

10 *San Juan Cellular Telephone v. Public Services Commission of Puerto Rico*, 967 F.2d 683 (1992).

11 *American Trucking Associations v. Alvitti*, 944 F.3d 45 (2019). *See also Trailer Marine Transportation Corp. v. Rivera Vazquez*, 977 F.2d 1 (1992).

12 *Bidart Brothers v. California Apple Commission*, 73 F.3d 925 (1996).

13 *GenOn Mid-Atlantic v. Montgomery County*, 650 F.3d 1021 (2011).

14 *See e.g., Dep't of Revenue of Mont. V. Kurth Ranch*, 511 U.S. 767 (1994); *Lipke v. Lederer*, 259 U.S. 557 (1922).

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