Strictly Speaking

The newsletter of the Product Liability Committee

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Gretchen Miller

Where did you grow up and what did you like about it?

I grew up in Park Ridge, Illinois, a suburb of Chicago. We lived at the end of a dead end street, which meant that the neighborhood kids were able to transform the block into a regular hockey rink, soccer field and hide and go seek arena. My favorite memories are of our weekly Friday night game of kick the can!

In the movie of your life, who would you cast to play you?

After her role as Eleanor in *The Good Place*, I'd have to pick Kristen Bell to deliver the appropriate amount of snark and sarcasm for the job!

If you were creating a signature cocktail what would you put in it and what would you call it?

Tequila, Jalepeño-infused simple syrup, Pellegrino Sparkling Grapefruit, and splash of lime juice. I'd call it a Spicy Picasso.

If you weren't a lawyer what would you be?

Mia Hamm (as long as we are being fanciful!).

Of all the cases you have worked on, which stands out for you?

So many stand out for different reasons, but the most comical was a case I was handling for a testing laboratory who was defending claims regarding the alleged disclosure of the results of an STD test by an employee who was involved in a love triangle. After entering my appearance in the case, the local newspaper ran a headline that ran: "Chicago Lawyer Gretchen Miller Enters STD Case." Great.

What was the last film you saw and would you recommend it?

I have three boys and I recently agreed to participate in a household coronavirus challenge of watching all of the Marvel movies in chronological order. (Except for *Hulk*, which all three of my boys refused to watch—apparently it's terrible.) We watched one movie a night and it took us over three weeks! My favorite of the series was definitely *Captain America*, and I can now keep up with all discussions about the infinity stones to anyone looking to geek out with me.

What was the first concert you went to?

Wham, 1985. Yep.

What was the first album you bought?

The Cure, *Head on the Door*. Also 1985 and totally incongruous of my last answer, I know.

Gretchen N. Miller is a shareholder in the litigation practice of Greenberg Traurig's Chicago office. She concentrates her practice in product liability and toxic tort litigation in state and federal courts. As trial counsel, Gretchen has tried cases on behalf of manufacturers of consumer, industrial and automotive products. As national counsel, Gretchen oversees litigation nationwide and counsels clients on risk management strategies and compliance with regulatory authorities, including the CPSC, NHTSA and EPA. Gretchen is the Product Liability Committee Vice Chair, is a member of IADC and is recognized as an Illinois Super Lawyer

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Not Just Section 15: Other Statutes Enforced by the CPSC

By Mike Gentine

In just April of this year, the U.S. Consumer Product Safety Commission (CPSC) announced recalls of seven products—ranging from drain cleaners to essential oils—for alleged non-compliances with the child-resistant closure requirements of the Poison Prevention Packaging Act (PPPA) or the hazard-labeling provisions of the Federal Hazardous Substances Act (FHSA). This flurry of activity serves as a useful reminder that the CPSC's reach and companies' responsibilities to the agency are broader than might be obvious, and that even companies whose core businesses are regulated by other agencies may have CPSC duties.

The most familiar CPSC-enforced statute is the Consumer Product Safety Act (CPSA), which is also the agency's organic statute, and the most commonly enforced CPSA provision is Section 15, which requires companies to report potentially hazardous defects or non-compliances to the agency. But the agency also enforces a host of other statutes. We'll take a look at some of these, but first a quick note about one common feature among most of them: Reporting.

If a product is subject to a standard or rule under any statute the CPSC administers, any manufacturer, importer, distributor, or retailer of that product must inform the CPSC of any non-compliance. Failure to do so could lead to civil (up to $16.025 million) or criminal (up to five years) penalties. Notably, however, even in the case of a non-compliance, reporting does not necessarily mean a recall, as the CPSC can order a recall only after an administrative hearing process determines that the non-compliance creates a "substantial product hazard."

Typically, the CPSC simply requests that the company correct its future production to bring it into compliance, sometimes with a request that the company also stop its sale of non-compliant product. Occasionally, the agency also asks for a retail-level recall (*i.e.* pulling back products still on shelves) or, even less frequently, a consumer-level recall. You can keep an eye on the agency's enforcement trends on its website.

Poison Prevention Packaging Act (PPPA), 15 U.S.C. §S 1471–76

As its name suggests, the PPPA's focus is on keeping potentially poisonous substances locked up so that accidental ingestions and resulting injuries are less likely, specifically among children. The act allows the CPSC to designate any "household substance" as sufficiently hazardous to require "special packaging." The agency's running list of designated substances is at 16 C.F.R. §1700.14.

The definition of household substance includes products the CPSC designates as hazardous substances under the FHSA (below) and household fuels in portable containers, but it also expressly includes food, drugs, and cosmetics, products that are regulated by the Food and Drug Administration (FDA) and thus outside of the CPSC's jurisdiction. Prescription and over-the-counter drug makers who can face years seeking approval for a new drug from FDA may also have to remember to put the drug in special packaging.

"Special packaging" means packaging that is "significantly difficult for children under five years of age to open," and is colloquially known as child-resistant. And how can you find out if packaging is "significantly difficult" for kids to open? Ask some kids. The CPSC's regulations include very specific required test protocols that involve getting 50-200 children together and asking them to try to open the package. Some liquid products must also have packaging that restricts the flow of the liquid, making it more difficult and time-consuming to be exposed to a harmful amount of the product.

The CPSC has enforced the PPPA. Not only has the act produced a number of recalls, but, in 2018, the agency, through the Department of Justice, obtained a $5 million civil penalty judgment for an alleged violation of the PPPA.

Federal Hazardous Substances Act (FHSA), 15 U.S.C. §§1261–78a

Originally called the Federal Hazardous Substances Labeling Act, the FHSA is still largely a labeling statute. For products that contain substances that are toxic, corrosive, irritants, strong sensitizers, flammable, combustible, or pressure-generating (through heat, decomposition, or other means), the FHSA requires packaging that bears specified "signal words" and additional labeling describing the potential hazard, steps users should take to avoid it, and, as appropriate, first-aid treatment for exposures. For example, a product containing a corrosive substance must bear the signal word "DANGER" and label information noting the flammability of the product and how it should be used to minimize that potential hazard.

In its implementing rules, the CPSC is very specific about its expectations, requiring that signal words and principal hazard statements appear on packages' "principal display panels," that the additional cautionary text appear in a single block, and that all FHSA labeling meet precise font, size, color, and other conspicuity requirements.

However, the renamed FHSA also includes authority for the CPSC to declared "banned hazardous substances," those whose potential risks are so great that labeling is insufficient and that must be kept out of consumer commerce. The act also gives the CPSC the power to ban toys or other children's products that present electrical, mechanical or thermal hazards. For example, the banned toys authority is the basis for the CPSC's bans on toys with small parts and on lawn darts. The banned hazardous substances list is at 16 C.F.R. §1500.17, and the banned toys/articles for use by children list is at 16 C.F.R. §1500.18.

Flammable Fabrics Act (FFA), 15 U.S.C. §§1191–1204

The oldest of the statutes enforced by the CPSC, the FFA of 1953 prohibits the sale of wearing apparel or interior furnishing that does not meet flammability rules set by the CPSC. The CPSC sets rules product-by-product, resulting in eight separate flammability standards covering products ranging from clothing to carpets to mattresses. These can be found at 16 C.F.R. parts 1610-1633.

In general, the FFA standards establish detailed test procedures by which fabrics are exposed to a heat source and their propensity for burning or ignition is measured. For example, in the clothing flammability test, a fabric without a raised surface is acceptable for commerce if it takes 3.5 seconds or more for the fabric to burn to a pre-defined point, while a fabric that burns to that point in less than 3.5 seconds is unlawful. Relying on decades of testing experience, the CPSC has exempted clothing fabrics weighing 2.6 ounces per square yard or more and fabrics made entirely from acrylic, modacrylic, nylon, olefin, polyester, or wool from the testing requirements, and, in 2016, the agency also exercised its enforcement discretion to relieve companies making and selling those exempted products of the requirement to certify their compliance.

There are some incongruities in the FFA and its rules that may cause confusion. Most notably, the original 1953 FFA definition of "wearing apparel" had an express exception for "hats, gloves, and footwear." Reasoning that, if these items caught fire, they could be removed quickly enough to prevent injury, Congress did not require them to meet flammability standards. The implementing rules adopted by the Federal Trade Commission (FTC), which administered the 20 years of the FFA's existence before the CPSC's creation, naturally mirrored the statutory exception and provided that the "standard shall not apply" to hats, gloves, or footwear.

In 1967, Congress amended the FFA and changed the definition of "wearing apparel" to "any costume or article of clothing worn or intended to be worn by individuals." The hat, glove, and footwear exception was gone, and these items were now governed by the FFA. However, the FTC did not amend its rules accordingly, and, when the CPSC took jurisdiction over the FFA, it adopted the FTC's rules without changing the exception. As a result, the CPSC's rules create a flammability exception for hats, gloves, and footwear that is no longer supported by statute. It is unclear how this history would affect any CPSC effort to enforce the FFA against the maker or seller of hats, gloves, or footwear.

Refrigerator Safety Act (RSA), 15 U.S.C. §§1211–1214

Enacted in 1956, the RSA requires that refrigerators be equipped with a means to open the door from the inside. At the time of the RSA's enactment, refrigerators were generally closed with external latching mechanisms. If a person—generally a child—climbed into the refrigerator and the door were latched, the person would be unable to escape, and several deaths occurred. Congress responded with the RSA's internal-mechanism requirement, but the refrigerator industry responded by putting magnets inside the gaskets surrounding refrigerator doors, eliminating the need for a latch entirely.

Magnetized gaskets were cheaper and easier to use, and they inherently complied with the RSA. Nonetheless, the RSA is still on the books, and fridges still must comply with the act. However, in 2019, the CPSC exercised its enforcement discretion to relieve appliance companies of the requirement to certify their refrigerators' compliance.

Child Nicotine Poisoning Prevention Act (CNPPA), 15 U.S.C. §1472a

The CNPPA amended the PPPA to create special-packaging requirements for liquid nicotine containers. Initially, the CPSC interpreted the CNPPA as imposing only the child-resistant closure requirements of the PPPA on liquid nicotine. Last year, with the vocal support of newly minted Commissioner Peter Feldman, the agency shifted its interpretation, applying the flow-restrictor requirements to nicotine packaging, as well.

Children's Gasoline Burn Prevention Act (CGBPA), 15 U.S.C. §2056 note

Enacted in 2008 and buried in a note to the CPSC's general standard-setting authority (Section 9 of the CPSA, 15 U.S.C. §2056), the relatively obscure CGBPA requires child-resistant closures on consumer-grade portable gasoline containers. The CGBPA does not apply the PPA's definitions of or test methods for child-resistance, but instead it adopts the child resistance provisions of the relevant consensus standard, ASTM 2517-17. Since enacting the implementing regulation in 2017, the CPSC has not issued a Notice of Violation or a civil penalty for a CGBPA violation.

Virginia Graeme Baker Pool and Spa Safety Act (VGBA), 15 U.S.C. §8001–08

The VGBA requires that pools and spas be equipped with anti-entrapment devices and secondary systems to disable or reverse drain flow in the event of an entrapment. Those requirements do not apply to "unblockable drains," those of a size and shape such "that a human body cannot sufficiently block [the drain] to create a suction entrapment hazard." In 2010, the CPSC interpreted the term "unblockable drain" to include a drain equipped with an unblockable cover. In 2011, the Commission abruptly reversed course and revoked that interpretation; as a consequence, an unblockable cover is not sufficient, and pools whose drains are equipped with such covers must still also have one of the secondary systems specified in the act.

It also created the CPSC's "Pool Safely" grant program that awards funds for enforcement and education programs to states and municipalities that have enacted laws requiring anti-entrapment features.

Drywall Safety Act (DSA), 15 U.S.C. §2056c

A response to reports of imported drywall containing potentially hazardous levels of sulfurous compounds, the DSA directed the CPSC to adopt a consensus standard from ASTM or, if none existed, to issue rules limiting the sulfur content of drywall. ASTM subsequently published—and the CPSC subsequently adopted—ASTM C1396-14a, which limits drywall to no more than 10 parts-per-million of elemental sulfur.

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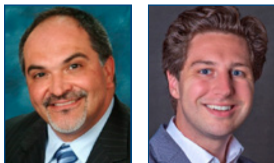
Are Open Skies on the Horizon in Specific Jurisdiction Cases?

By Manual Saldaña and Brent Buyse



Earlier this year, the United States Supreme Court granted certiorari in *Ford Motor Co. v. Bandemer* and *Ford Motor Co. v. Montana Eighth Judicial District Court*. Both cases are products liability actions against Ford Motor Company arising from automobile accidents in Minnesota and Montana. At issue is whether personal jurisdiction is proper based on the sufficiency of the defendant's contacts with the state giving rise to the cause of action, with the focus on the 'arise out of or relate to' aspect of specific jurisdiction. The cases, consolidated as Supreme Court docket No. 19-368, were originally set to be argued on April 27, 2020, but have been pushed back to the October 2020 term. The outcome of these cases could mark a paradigm shift of the conditions for a court to exercise specific jurisdiction in the absence of a finding of general jurisdiction. For the aviation industry, where recent jurisdictional battles have centered on specific jurisdiction, this could open amenability to suit as wide as the sky.

The Minnesota case alleged a failure of the passenger air bag to deploy in a vehicle that was not designed, manufactured, or originally sold in Minnesota, but was sold in neighboring South Dakota and never registered in Minnesota until its fourth owner. The Montana case alleged the vehicle tires experienced a "tread/belt separation" in a vehicle assembled in Kentucky and originally sold in Washington.

The Supreme Court will consider "whether the 'arise out of or relate to' requirement is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts."

Ford's automobiles are ubiquitous nationwide. However, that presence does not universally mean designing, manufacturing, and distributing automobiles in every jurisdiction. Thus at first glance, this question seems quite settled as a matter of law by the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, in which the Court clarified that a corporation's continuous activity of some sort within a state is not enough to support the demand that the corporation be amenable to suit unrelated to that activity. 137 S. Ct. 1773, 1781 (2017). In doing so, the Court looked to its own jurisprudence in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and reiterated its requirement for 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 regulations. 137 S. Ct. at 1780. This begs the question: why would the Supreme Court consider an analogue to *Bristol-Myers* in such a short term?

The answer is likely found in how the plaintiffs frame the question before the Court. The plaintiff in the Minnesota case presented the question in his brief as being:

> [W]hether petitioner Ford Motor Company is subject to specific personal jurisdiction in Minnesota when one of its cars injures a Minnesota resident in Minnesota, where Ford has deliberately targeted the Minnesota market and sold hundreds of thousands of cars in Minnesota, but where the particular car causing the injury was originally sold in a neighboring state.

The plaintiffs in the Montana case phrased the apex question in similar terms:

> Should the due-process standard for establishing personal jurisdiction incorporate a but-for or proximate causation requirement derived from tort law, such that Ford Motor Company cannot be held to answer in a forum for injuries caused by a product that it advertises and sells in that forum unless the *particular individual product* that caused the injury can be traced to Ford's direct contacts with the forum state?

From this standpoint, the balance moves toward the seminal case *Burger King v. Rudzewicz*, where the Court held that parties who reach-out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities. 471 U.S. 462, 473 (1985). The Court further made clear that where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, personal jurisdiction is satisfied if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities. *Id*. at 472. This reasoning formed the basis of the "reasonable or fair" analysis. A couple of years later, this "reasonable or fair" analysis premised upon a continuing relationship evolved into the "Five Factor Test" in *Asahi v. Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

Juxtaposed to the analysis in *Bristol-Myers*, the likely result remains uncertain still. It appears the question considered falls squarely somewhere between each precedent. The Supreme Court in *Bristol-Myers* denounced a loose and spurious form of general jurisdiction and required an *actual* connection between the claims and the forum. *Bristol-Myers*, 137 S. Ct. at 1781. The plaintiffs in the Ford Motor Company cases rely on the *World-Wide Volkswagen Corp. v. Woodson*, standard for personal jurisdiction over "a corporation that delivers its products into the stream of commerce" as long as the sales arise from the corporation's efforts "to serve, directly or indirectly, the market for its product in other states." 444 U.S. 286, 298 (1980). In that case, however, the Supreme Court struck down Oklahoma's attempt to exercise jurisdiction over an out-of-state dealer. Absent a change of rationale, the Court could easily do the same here and agree with its prior holding that "the consumer's 'unilateral' act of bringing the defendant's product into the forum–even when combined with the location of the evidence and witnesses–was not a sufficient basis for exercising personal jurisdiction." *Id*. at 297–98.

The importance of these cases, even after a term that saw many high profile decisions, cannot be understated. Several amicus curiae briefs have been filed in support of both sides, including a high profile and authoritative brief filed by DRI arguing that "if courts exercise specific jurisdiction only on a showing of substantively relevant forum contacts . . . [then] courts can more readily perceive what contacts are relevant, thus promoting consistency in adjudication in an area where our law should demand it." It is a compelling and imperative argument worthy of serious consideration.

The Supreme Court's resolution of the specific jurisdiction issues now before it will be dramatically defining for the next few decades of litigation– especially in the aviation industry. Jurisdictional considerations invariably play a role in operations, manufacturing, design, and the myriad of complexities inherent to aviation. Permitting an expansive application of personal jurisdiction will only compound those complexities. Unfortunately, disputes over personal jurisdiction impede litigation, as pointed out by DRI's amicus brief, devolving into a costly discovery-intensive endeavor. The highly competitive nature of aviation manufacturing reinforces the increasing importance of combatting the often broadly directed discovery requests targeting sales, marketing, manufacturing, distribution, testing, and business strategies. Ultimately, this underscores the importance of DRI's signal to the Supreme Court for consistency. The practicalities and efficiencies to be maintained are critical for corporations, defense counsel, and plaintiffs alike. Bright jurisdictional lines streamline justice and shed the burdensome discovery expense.

The evaluation of this nuance question of specific jurisdiction will have a lasting effect for aviation products liability litigation. Ford advocates to pull the Court's decision to be in line with the most recent jurisprudence and underscores the importance of an actual connection between the activities of a company and the resulting claim whereas the Minnesota and Montana plaintiffs argue the analysis should turn on the inherent sufficiency of the contacts themselves. Interestingly, each side argues a different half of the 'arise out of or relate to' aspect of specific jurisdiction which the Supreme Court is tasked to evaluate. Perhaps the Supreme Court is taking up this question so soon after *Bristol-Myers* for further clarity similar to how the Supreme Court expanded on *Burger King* by its decision two years later in *Asashi*. In any event, the outcome of this case will be determinative for the future direction of aviation products liability claims. In keeping with public health guidance in response to COVID-19, the Supreme Court is expected to take this up during the next term and will be carefully watched by aircraft operators and aircraft manufacturers, as well as those who represent them.

Manuel Saldaña*, a partner in the Los Angeles office of Gordon & Rees, is a nationally recognized trial attorney and litigator. Mr. Saldaña's clients include Fortune 500 companies and other large institutions and corporations. He has tried to verdict and successfully handled several complex matters, including those related to aviation, utilities, automobile, playground equipment, elevators, industrial equipment, consumer goods and food products. He has handled claims for general negligence, premises liability, products liability, wrongful death, commercial litigation, contractual indemnity, elder abuse, employee benefit plans and insurance, in individual and class action suits.*

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