

on the ability of lower courts to employ the so-called “effects” test to sustain jurisdiction over foreign defendants. Previously, relying on an earlier Supreme Court precedent, *Calder v. Jones*,⁴ courts had frequently exercised specific personal jurisdiction over a foreign defendant on the basis of the effect that the defendant’s conduct had on the plaintiff in the forum rather than the defendant’s connections with that forum. In *Walden*, the Supreme Court held that to sustain jurisdiction over a defendant, the court must find that the defendant purposefully directed his conduct at a forum itself, not simply that the defendant’s conduct had a foreseeable adverse effect on the plaintiff in the forum.

While *Walden*’s full reach is yet to be determined, the Supreme Court’s focus on the need for the defendant to have contacts with the forum, separate and apart from the effects the defendant’s conduct has on the plaintiff in the forum, calls into question the continued constitutional viability of CPLR §302(a)(3)—at least in so far as it extends to “economic,” as opposed to “physical,” torts. In the past, courts frequently exercised jurisdiction over foreign institutions alleged to have committed economic torts, such as conversion or breach of fiduciary duty, outside of New York but which allegedly injured a New York resident, pursuant to §302(a)(3) of the CPLR. The court’s decision in *Walden*, however, raises the prospect that such use of §302(a)(3), would no longer pass constitutional muster. By contrast, the ability of New York courts to exercise personal jurisdiction over a person standing on the New York border who throws a grenade into New York state and physically injures someone, is not in dispute. In sum, for foreign institutions seeking to avoid being dragged into U.S. courts, with U.S. discovery burdens, *Walden* offers not only new arguments to assert in support of their jurisdictional dismissal motions, but also suggests ways in which these institutions should organize themselves and plan their conduct to avoid being hauled into a U.S. courtroom.

The Legacy of ‘Calder v. Jones’

The effects test rejected by *Walden* had its roots in the Supreme Court’s decision in *Calder v. Jones*. *Calder* concerned a libel claim brought in California against the editor of the National Enquirer and one of the Enquirer’s writers, both residents of Florida. Defendants argued that the California court could not exercise personal jurisdiction over them because the challenged article was researched and written in Florida, and they were not responsible for circulating the article in

Lower courts applying ‘Walden’ have aggressively cut back on the application of “effects” jurisdiction, finding that knowledge that a defendant’s conduct will have an effect in a forum is **no longer sufficient** to warrant the exercise of jurisdiction over the defendant in the **absence of additional contacts** between the defendant and the forum.

California. The Supreme Court rejected this argument.

The court in *Calder* noted that defendants had (1) frequently traveled to California on business, (2) researched the article in question by calling individuals in California, (3) contacted the target of the article in California to solicit her comments, (4) been aware that the article would be circulated and distributed in California, and (5) been aware that the plaintiff, a resident of California, would suffer reputational harm in California. Aggregating these contacts together, the Supreme Court concluded that because “California is the focal point both of the story and of the harm suffered,” and the

defendants’ “actions were expressly aimed at California,” jurisdiction over the defendants was proper “based on the ‘effects’ of their Florida conduct in California.”

While *Calder* relied on both defendants’ alleged activities in California together with the “effect” of the challenged article in California to sustain the exercise of jurisdiction, lower courts interpreting *Calder* significantly expanded the “effects” test. For example, in *Washington Shoe Company v. A-Z Sporting Goods*,⁵ the Ninth Circuit held that jurisdiction was proper in a copyright infringement case where an Arkansas retailer sold knockoff boots in Arkansas, the design of which was copyrighted in Washington state. The Ninth Circuit reasoned that the willful infringement was expressly aimed at Washington because the Arkansas retailer knew that the copyright holder was situated there and would feel the effects there. Similarly, in *Silver v. Brown*,⁶ the Tenth Circuit upheld the exercise of jurisdiction in New Mexico over Florida residents who allegedly unjustly criticized a New Mexico resident in a blog post made in Florida. The court held that jurisdiction was proper because the defendants’ blog post aimed to cause the plaintiff to lose business in New Mexico, where the plaintiff was situated.

In short, following *Calder*, courts frequently applied the “effects” test to exercise jurisdiction over defendants on the basis that defendants could reasonably foresee that their conduct outside the forum would have adverse effects on the plaintiff within the forum—even if defendants lacked further contacts with that forum. In *Walden*, the Supreme Court was tasked with determining whether this expansive reading of *Calder* was consistent with the U.S. Constitution, and determined that it was not.

‘Walden v. Fiore’ and Its Progeny

Walden concerned a *Bivens* action brought by two residents of Nevada against an Atlanta-based law enforce-

ment officer. Gina Fiore and Keith Gipson were professional gamblers traveling from Puerto Rico to Nevada with a lay-over in Atlanta, and were carrying with them almost \$100,000 in cash. Defendant Anthony Walden, together with another DEA agent, intercepted the plaintiffs in Atlanta and seized the money, apparently on the basis that plaintiffs lacked a “legitimate source” for the funds. Walden later drafted an affidavit to be used in forfeiture proceedings against the plaintiffs, which the plaintiffs alleged to be “false and misleading.” Plaintiffs asserted that Walden was aware that his seizure of funds and preparation of a false affidavit would injure them in Nevada because they were traveling to Nevada; they had informed the DEA that Nevada was one of the places where they resided; and they had their Nevada lawyer contact the DEA to demand the return of the seized funds. The Ninth Circuit held that the District Court could exercise jurisdiction over Walden under the “effects” test because in submitting the allegedly false affidavit, he aimed his conduct at Nevada with the “knowledge that it would affect” persons with “significant connections” to Nevada.

The Supreme Court disagreed, holding that Walden’s “actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections.” The Supreme Court stressed that “[d]ue process limits on the state’s adjudicative authority protect the liberty of the nonresident defendant—not the convenience of [the] parties” and therefore the mere fact that a plaintiff suffered harm in a forum is, as a matter of law, not sufficient to justify the exercise of jurisdiction. Rather, what was required to justify the exercise of jurisdiction was the showing of the “defendant’s contacts with the Forum state itself, not the defendant’s contacts with persons who reside there.” Responding to plaintiffs’ invocation of *Calder v. Jones* and the “effects” test as a basis for exercising jurisdiction, the Supreme Court explained that the “crux” of *Calder* was

the connection between the defendants and California, including their decision to publish and distribute the article in California, rather than the effect that the article had on the plaintiff in California. In so doing, the Supreme Court refocused the jurisdictional inquiry from the forum in which the plaintiff felt the effect of the defendant’s conduct (whether or not the defendant knew or could foresee that the plaintiff would feel that effect in that forum) to the question of what contacts the defendant had with the forum.

Lower courts applying *Walden* have aggressively cut back on the application of “effects” jurisdiction, finding that knowledge that a defendant’s conduct will have an effect in a forum is no longer sufficient to warrant the exercise of jurisdiction over the defendant in the absence of additional contacts between the defendant and the forum. For example, in *Bixby v. KBR*,⁷ the Ninth Circuit overturned an \$81 million verdict against KBR, finding that the exercise of jurisdiction over KBR would not comport with the Due Process Clause. In *Bixby*, KBR was accused of misrepresenting the risks of hazardous chemicals in an Iraqi water facility to members of the Oregon National Guard, who filed suit in the District of Oregon. The District Court exercised jurisdiction on the basis that the minimum contact test was satisfied because KBR directed its alleged misrepresentations to Oregonians, knowing that the misrepresentation would have an effect on them in Oregon. Applying *Walden*, the Ninth Circuit reversed. The Ninth Circuit held that even if KBR could have, or reasonably should have, foreseen that its conduct would impact Oregonians, absent other relevant contacts between KBR and Oregon, the exercise of jurisdiction over KBR was not consistent with the Constitution.

Similarly, in *In re Methyl Tertiary butyl Ether (MTbE) Products Liability Litigation*,⁸ the Southern District of New York refused to exercise jurisdiction over a Texas company because the MTbE it sold ultimately ended up in Puerto Rico. As

the court explained, the company never “manufactured, marketed, traded, stored, sold, solicited, [or] advertised” in Puerto Rico, and even the knowledge that its product would ultimately make its way to Puerto Rico could not justify the exercise of jurisdiction.

Ultimate Impact of ‘Walden’

Whether the “effects” test for personal jurisdiction survives at all remains to be seen. For now, defendants seeking to defeat the exercise of “effects” jurisdiction, including under CPLR §302(a)(3) now have a powerful argument to rely on. And, of course, *Walden* offers helpful guidance of how foreign institutions can structure themselves and their conduct to avoid being sued in the United States.

Moreover, *Walden*, together with the Supreme Court’s previous decisions in *Goodyear* and *Daimler*, illustrates the Supreme Court’s continued concern that U.S. courts’ reach over foreign entities has gone too far. Combined with the Supreme Court’s guidance in limiting the extraterritorial reach of U.S. law, the message is clear: U.S. courts should exercise self-restraint in deciding to take jurisdiction over conduct that has occurred elsewhere, even if the impact of that conduct is felt in the United States. Mere injury to an American citizen, without other connections to the United States, can no longer suffice to warrant the exercise of personal jurisdiction over a foreign defendant.

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1. 131 S. Ct. 2846 (2011).
2. 134 S. Ct. 746 (2014).
3. 134 S. Ct. 1115 (2014).
4. 465 U.S. 783 (1984).
5. 704 F.3d 668, 678-79 (9th Cir. 2012).
6. 382 Fed. App’x 723, 730 (10th Cir. 2010).
7. 603 F. App’x 605 (9th Cir. 2015).
8. MDL No. 1358 (SAS), 2014 WL 1778984 (S.D.N.Y. May 5, 2014).