

Recent Decisions on Specific Personal Jurisdiction in the United States Civil Procedure

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I. Introduction

Personal jurisdiction in the United States civil litigations is regarded as a court's power over defendants. Especially, for plaintiffs to launch an action against non-resident defendants, personal jurisdiction is a rather difficult threshold to cross over if the forum is not located in the state of the defendants. There are two types of personal jurisdiction, general and

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specific. The U.S. Supreme Court has developed a series of court-created principles on personal jurisdiction through its decisions. However, the Court has a tendency to strictly interpret such principles and not to recognize personal jurisdiction of the forum state. This strong stance of the Court is similar in dealing with jurisdictional arguments to assert general or specific jurisdiction.

Here, this paper focuses on specific jurisdiction. To find out how rules of specific jurisdiction have been developed in the U.S. Supreme Court since 2010, the paper looks over three major cases of the Court, *J. McIntyre Machinery, Ltd. v. Nicastro* (“McIntyre”),¹⁾ *Walden v. Fiore* (“Walden”),²⁾ and *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County* (“Bristol-Myers”).³⁾ Interestingly, the Court denied specific jurisdiction in all three cases as the Court denied general jurisdiction in other recent cases,⁴⁾ *Goodyear*⁵⁾, *Daimler*⁶⁾, and *BNSF Railway*.⁷⁾ The review of the U.S. Supreme Court’s recent cases on specific jurisdiction may be helpful to plan litigation tactics in the United States and to understand how the U.S. Supreme Court interprets and applies its jurisdictional principles.

1) *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011).

2) *Walden v. Fiore*, 134 S.Ct. 1115 (2014).

3) *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.Ct. 1773 (2017).

4) See Young-Ran Choi, “General Jurisdiction over Foreign Corporations in the United States Civil Procedure,” 34 *Wonkwang Law Review* 225 (2018).

5) *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846 (2011).

6) *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

7) *BNSF Railway, Co. v. Tyrrell*, 137 S.Ct. 1549 (2017).

II. Specific Personal Jurisdiction

1. Personal Jurisdiction

When a court hears and decides a particular case, the court must have jurisdiction over the persons or property in the lawsuit, which is referred as personal or territorial jurisdiction.⁸⁾ Traditionally, personal jurisdiction is based on the presence of the person or thing within the forum's territorial boundaries or the consent of the person.⁹⁾ Later, the rules on personal jurisdiction have developed by the courts based on the relations between the forum and the parties of the litigation.¹⁰⁾

A state cannot exercise jurisdiction over a party or property in the litigation unless it has statutory authority under the state's long arm statute and the Federal Constitution.¹¹⁾ Thus, once the state's statutory requirement on personal jurisdiction is satisfied under its long arm statute, the next step is to review whether the exercise of jurisdiction meets due process limits under the Federal Constitution.

The Court in *International Shoe Co. v. Washington*¹²⁾ set up the general principles of personal jurisdiction on the basis of due process requirement of the Federal Constitution.¹³⁾ The Court initiated the minimum contacts

8) Jack H. Friedenthal, Mary Kay Kane and Arthur R. Miller, *Civil Procedure*, St. Paul: Thomson West, 2005, 99. Personal jurisdiction in the United States can also be categorized into three, jurisdiction over persons (*in personam* jurisdiction), and jurisdiction over property (*in rem* jurisdiction and *quasi in rem* jurisdiction). General and specific personal jurisdiction are addressed under the *in personam* jurisdiction.

9) *Id.*, at 99-100.

10) *Id.*

11) *Id.* The general two-part inquiry for personal jurisdiction will be: (i) whether the activities of the party come under the state's long arm statute and therefore does that state's statute permit service of process; and (ii) whether the exercise of jurisdiction comports with due process under the Federal Constitution. Robert A. Matthews, 5 Annotated Patent Digest § 36:74. States with long-arm statutes coextensive with due process (March 2019 update).

12) *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

theory based on the defendant's contacts or relations with the forum State.¹⁴⁾ The analysis on personal jurisdiction to meet the minimum contact requirement has been focused on the level of frequency of the non-resident defendant's activities in the forum, whether they are "continuous and systematic" or "sporadic and casual."¹⁵⁾

2. Specific Jurisdiction

Nowadays, personal jurisdiction in the U.S. Supreme Court is addressed in two categories, general jurisdiction and specific jurisdiction. However, at the beginning when the Court in *International Shoe*¹⁶⁾ recognized personal jurisdiction over non-resident defendants, no clear distinction between general and specific jurisdiction was raised.

Later the Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*¹⁷⁾ classified personal jurisdiction into two types.¹⁸⁾ The Court in *Helicopteros* stated that "when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising "specific jurisdiction" over the defendant."¹⁹⁾ And it further indicated that "when a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising "general jurisdiction" over the defendant."²⁰⁾

13) Jack H. Friedenthal, Mary Kay Kane and Arthur R. Miller, *Civil Procedure*, St. Paul: Thomson West, 2005, 127. *International Shoe* presents a two-step due-process analysis: (1) whether the non-resident defendant has minimum contacts with the forum, and (2) if so, whether the assertion of jurisdiction over the defendant comports with "traditional notions of fair play and substantial justice." *Id.*

14) *Id.*

15) *Id.*

16) *International Shoe*, 326 U.S. 310 (1945).

17) *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868 (1984).

18) 4 Fed. Prac. & Proc. Civ. § 1067.5 (4th ed.).

19) *Helicopteros*, at 414, n.8.

Thus, specific jurisdiction or case-specific jurisdiction may be asserted when the cause of action arises out of or relates to the contacts with the forum state even if the defendant's contacts with the state are isolated or sporadic.²¹⁾ However, specific jurisdiction needs to meet the constitutional due process requirements under the Fourteenth Amendment.²²⁾ Accordingly, certain minimum contacts of defendants need to comply with traditional notions of fair play and substantial justice. And the maintenance of a suit in the forum is fair and reasonable to require non-resident defendants to defend the particular suit.²³⁾ Even though specific jurisdiction may be asserted on the basis of a single act related to the underlying controversy, the plaintiff must show that foreign defendants have sufficient minimum contacts with the forum state consonant with due process.²⁴⁾

III. The U.S. Supreme Court's Recent Decisions on Specific Jurisdiction

Since 2011, the U.S. Supreme Court rendered three decisions with respect to specific jurisdiction, *J. McIntyre Machinery, Ltd. v. Nicastro*²⁵⁾

20) *Id.*, at 414, n.9.

21) General jurisdiction or all-purpose jurisdiction may be referred when the cause of action does not arise from or relate to the defendant's contacts with the forum state. To assert general jurisdiction over the non-resident defendant, the defendant's contacts with the forum need to be "continuous and systematic" and substantial to justify the lawsuit within the forum against the defendant.

22) See Young-Ran Choi, "The Strictly-Tailored Personal Jurisdiction over Foreign Corporations in the United States Supreme Court's Decisions," 28 *Wonkwang Law Review* 209, 220-221 (2012).

23) 16D C.J.S. Constitutional Law §1752.

24) *Id.*

25) *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011).

in 2011, *Walden v. Fiore*²⁶⁾ in 2014, and *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County* ("BMS")²⁷⁾ in 2017. Specific jurisdiction in all three cases was denied on different grounds. Here, in order to grasp how the U.S. Supreme Court has interpreted and applied the long-established principles of specific jurisdiction, three cases will be reviewed.

1. *J. McIntyre Machinery v. Nicastro*

A New Jersey resident plaintiff, Nicastro, brought a products liability suit against a U.K. corporation, J. McIntyre Machinery, Ltd. ("McIntyre") in a New Jersey state court, after he was injured in New Jersey while using the company's three-ton metal-shearing machine.²⁸⁾ The New Jersey Supreme Court recognized specific jurisdiction based on the stream of commerce doctrine. The court reasoned that the foreign company "knew or reasonably should have known that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states," but failed to take some reasonable step to prevent the distribution of its products in New Jersey.²⁹⁾

However, the U.S. Supreme Court did not apply the stream of commerce theory. Instead, the majority relied on the purposeful availment test in this product liability case. The majority argued that New Jersey courts may exercise jurisdiction over McIntyre if the foreign manufacturer has purposeful contacts with New Jersey while any purposeful contacts with the U.S. would be irrelevant to the assertion of jurisdiction of New Jersey

26) *Walden v. Fiore*, 134 S.Ct. 1115 (2014).

27) *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.Ct. 1773 (2017).

28) *McIntyre*, 131 S.Ct. 2780, 2785, 2795 (2011).

29) *Nicastro v. McIntyre Machinery America, Ltd.*, 987 A.2d 575, 591, 592 (2010).

courts.³⁰⁾ Subsequently, the Court held that New Jersey courts lacked jurisdiction over McIntyre since it did not engage in conduct purposefully directed at the forum state. The Court found that McIntyre's link with the forum state is not sufficient, by comparing the company's sales activities in the U.S. with those in New Jersey. The Court focused on the fact that the company did not market or advertise its machines in New Jersey. Only four machines out of the total number of machines sold in the U.S. were ended up in New Jersey. Even the sales in the U.S. were not done by McIntyre, but by an independent U.S. distributor in Oklahoma.³¹⁾

Unlike the majority, the dissent emphasized that if the foreign company would make substantial revenue from sales to the United States purchasers, where in the U.S. those buyers reside does not matter to the company.³²⁾ The dissent raised the issue of fairness to the parties.³³⁾ It weighed which might be reasonable, the U.S. buyer going to United Kingdom to sue the foreign company in a U.K court or the foreign company defending itself in New Jersey courts?³⁴⁾ The dissent thought that the burden of the buyer who purchased a defective product might be heavier than the inconvenience of the foreign company which might be engaging business internationally with a reasonable cost.³⁵⁾ The dissent concluded that the jurisdictional issue in McIntyre can be better resolved by the stream-of-commerce test since the foreign defendant attended at trade shows and used its U.S. distributor to sell its product in the U.S. markets.³⁶⁾

30) Young-Ran Choi, "The Strictly-Tailored Personal Jurisdiction over Foreign Corporations in the United States Supreme Court's Decisions," 28 *Wonkwang Law Review* 209, 225-227 (2012).

31) McIntyre, 131 S.Ct. at 2785, 2796 (2011).

32) *Id.*, at 2794.

33) See Young-Ran Choi, "The Strictly-Tailored Personal Jurisdiction over Foreign Corporations in the United States Supreme Court's Decisions," 28 *Wonkwang Law Review* 209, 229. (2012).

34) McIntyre, at 2800 - 2801.

35) *Id.*

2. *Walden v. Fiore*

In *Walden v. Fiore*,³⁷⁾ Nevada-resident plaintiffs brought a lawsuit against Walden, a police officer, who is not a resident of Nevada.³⁸⁾ Walden seized plaintiffs' cash at an airport in Georgia during the plaintiffs' return trip to Nevada via Georgia, thinking that the cash was involved in overseas gambling and drug activity.³⁹⁾ Plaintiffs sought money damages against Walden in a federal court in Nevada, claiming violations of their Fourth Amendment rights by seizing the cash without probable cause and keeping it even after it was proved that the money was not related to drug.⁴⁰⁾

Walden moved to dismiss the suit for lack of personal jurisdiction in Nevada.⁴¹⁾ The district court granted Walden's motion, concluding that the search and seizure of plaintiffs' money in Georgia did "not establish a basis to exercise personal jurisdiction in Nevada."⁴²⁾ However, the Ninth Circuit reversed the district court's decision, based on other activities of Walden, such as plaintiffs' submission of a false affidavit at Nevada and Walden's delayed returning the seized cash to plaintiffs. The Circuit Court contended that the exercise of personal jurisdiction of Nevada court would be reasonable since the submission of a false affidavit would affect persons with a "significant connection" to Nevada, and the delay in returning the cash caused the plaintiffs "foreseeable harm" in Nevada.⁴³⁾

36) McIntyre, at 2802 - 2803.

37) *Walden v. Fiore*, 134 S.Ct. 1115 (2014). For the detailed review on Walden, see Young-Ran Choi, "Due Process Requirements for Non-resident Defendants in the United States Personal Jurisdiction", 10 Gachon Law Review, 85 (2017).

38) *Walden*, 134 S.Ct., at 1119.

39) *Id.*

40) *Id.*, at 1120.

41) *Id.*

42) *Id.*

43) *Id.*

The United State Supreme Court unanimously denied the Nevada court's personal jurisdiction over the non-resident defendant based on the due process requirement under the U.S. Constitution to apply the minimum contact standards that require sufficient connection among the non-resident defendant, the forum state and the litigation, and that may assert specific jurisdiction.⁴⁴⁾ The Court added that "for a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." Then, the Court posited two key aspects relevant to the relationship necessary to establish the "substantial connection."⁴⁵⁾ The first is that "the relationship must arise out of contacts that the 'defendant himself' creates with the forum State,⁴⁶⁾ and the second is that "our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."⁴⁷⁾

The Court was straightforward not to recognize specific jurisdiction of Nevada court because the only link of non-resident defendant with Nevada in this case is plaintiffs themselves.⁴⁸⁾ Relying on the Court's precedent, *Calder*,⁴⁹⁾ the plaintiffs raised the "effect" argument that they suffered the "injury" caused by Walden's tortious conduct such as "the delayed return of plaintiffs' gambling funds" while they were in Nevada.⁵⁰⁾ However, the Court clarified that *Calder* "made clear that mere injury to a forum resident is not a sufficient connection to the forum, and that "the proper question is not where the plaintiff experienced a particular injury or effect

44) *Walden*, at 1121.

45) *Id.*, at 1121-1122.

46) *Id.*, at 1122.

47) *Id.*

48) *Id.*

49) *Calder v. Jones*, 465 U.S. 783 (a libel suit in California state court filed by an actress residing in California against a reporter and an editor working for the *National Enquirer* in Florida).

50) *Walden*, at 1125.

but whether the defendant's conduct connects him to the forum in a meaningful way."⁵¹⁾ The Court concluded that even *Calder*, "the reputation-based effects of the alleged libel" connected the defendants to the forum State, California, not just to the plaintiff."⁵²⁾

In conclusion, the Court addressed that "the proper focus of the 'minimum contacts' inquiry in intentional-tort cases is 'the relationship among the defendant, the forum, and the litigation,' and that "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." Consequently, the Court did not approve specific jurisdiction of a Nevada court, stating that the non-resident defendant's "relevant conduct occurred entirely in Georgia, and that the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction."⁵³⁾

3. *Bristol-Myers Squibb Co. v. Superior Court of California*

The Court of *Bristol-Myers*⁵⁴⁾ is composed of the majority opinion joined by 8 Justices and one dissenting opinion drafted by Justice Sotomayor. The parties of this case are U.S. consumers and a U.S. company. This is a rather interesting case since the Court rejected specific jurisdiction over the U.S. company incorporated in out-of-the forum state although the company appears to have some significant contacts with the forum. Here, the Court proved that specific jurisdiction does concern the claim-linked relations of the defendant to the forum. The Court reaffirmed that if the defendant's relations or connection are not claim-linked, a court cannot exercise specific jurisdiction even if such relations or connections are

51) *Id.*

52) *Id.*, at 1123-1124.

53) *Id.*, at 1126.

54) *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773 (2017).

substantial. Thus, the different conclusions of the majority and the dissenting opinions resulted from which facts were determinants to their rationale. The majority emphasized the connection of the company's alleged product with the forum while the dissent relied on the general business activity of the company itself with the forum.

Since Bristol-Myers is the most recent case to deny specific jurisdiction over the U.S. corporate defendant which has some business activities in the forum state, this paper reviews in detail its factual and procedural backgrounds, and the rationale of the majority and the dissent. Bristol-Myers clearly shows the U.S. Supreme Court's current restricted position on specific jurisdiction, which requires the cause of action to arise out of the contacts with the forum state.

(1) Factual and Procedural Backgrounds

A group of consumers residing in California and other States in the United States brought a class action in a California state court against a pharmaceutical company, Bristol-Myers Squibb Co. ("BMS"), incorporated in Delaware and headquartered in New York.⁵⁵⁾ Plavix, a BMS-manufactured prescription drug, was in the middle of the product liability and other claims. The buyers alleged that the drug "damaged their health."⁵⁶⁾ The drug was sold across the United States including California.⁵⁷⁾

BMS has five research and laboratory facilities with around 160 employees and a small advocacy office in California, and employs about 250 sales representatives in California.⁵⁸⁾ The revenue earned from the sale of Plavix in California amounts to over one percent of the company's total

55) Bristol-Myers, 137 S.Ct., at 1777-1778. The plaintiffs are 86 California residents and 592 residents of 33 other States. *Id.*, at 1778.

56) *Id.*

57) *Id.*

58) *Id.*

sales revenue in the U.S.⁵⁹⁾

Since this case was argued on specific jurisdiction, whether there are any relations or contacts of the alleged claims with California is the main issue. Noticeably, the majority and the dissent of the U.S. Supreme Court appeared to identify material facts in a somewhat different manner. The majority focused on whether the drug itself had contacts with California while the dissent emphasized the contacts of the drug company, BMS, with California.

The majority of the California Supreme Court recognized specific jurisdiction over BMS since the company has extensive contacts with California even though there are “less direct connection between BMS’s forum activities and plaintiff’s claims.”⁶⁰⁾ The rationale behind its holding is a “sliding scale approach,” stating that “the more wide ranging the defendant’s forum contacts, the more readily is shown a connection between the forum contacts and the claim.”⁶¹⁾ The U.S. Supreme Court reversed.

(2) Discussion on Specific Jurisdiction in BMS

The U.S. Supreme Court took the case to decide whether the California courts’ exercise of jurisdiction violates the Due Process Clause of the Fourteenth Amendment. The Court started to proclaim the constitutional rights of non-resident defendants, stating that “the Fourteenth Amendment limits the personal jurisdiction of state courts.”⁶²⁾ It reasoned that a state court’s assertion of jurisdiction exposed defendants to the state’s coercive power.⁶³⁾ Accordingly, it reaffirmed that the inquiry on personal

59) *Id.*

60) *Id.*, at 1778-1779.

61) *Id.*

62) *Id.*, at 1779.

63) *Id.*

jurisdiction should be focused on the defendant's relationship to the forum state.⁶⁴⁾

The Court reviewed the rules on specific jurisdiction or case-linked jurisdiction. To exercise specific jurisdiction, "the suit must arise out of or relate to the defendant's contacts with the forum,"⁶⁵⁾ which means "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 regulation."⁶⁶⁾ The Court again emphasized that "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction."⁶⁷⁾

The Court implied that "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State"⁶⁸⁾ if there is no affiliation or connection between the forum and the dispute. Thus, the U.S. Supreme Court disapproved the California Supreme Court's "sliding scale approach," which may consider the unrelated forum activities of the defendant as long as such activities have extensive forum contacts.⁶⁹⁾ The Court considered that the defendant's "general" connections with the forum are not enough to obtain specific jurisdiction.⁷⁰⁾ The Court looked up the non-resident plaintiff's claims against BMS, and found that there was no adequate link between California and the plaintiffs. The non-residents were not prescribed or purchased Plavix in California, and

64) *Id.*

65) *Id.*, 1780.

66) *Id.*

67) *Id.*

68) *Id.*, at 1781.

69) *Id.* The Court state: "Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction." *Id.*

70) *Id.*

not injured in California.

Thus, the Court thought that California courts should not assert specific jurisdiction over BMS⁷¹⁾ because “a defendant’s relationship with a third party, standing alone, is an insufficient basis for jurisdiction.”⁷²⁾ The Court refused to identify the fact that BMS conducted research in California since the connection between the forum and the specific claims at issue is a relevant fact for specific jurisdiction.⁷³⁾ Consequently, the Court concluded that the relevant plaintiffs were not California residents and did not claim to have suffered harm in California,⁷⁴⁾ and “all the conduct giving rise to the nonresidents’ claims occurred elsewhere.”⁷⁵⁾

The Court also noted that, in order to exercise personal jurisdiction, a court should consider the interests of the forum State and of the plaintiff, and together with the burden on the defendant which is the primary concern.⁷⁶⁾ The Court indicated that “the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant.”⁷⁷⁾ It can be interpreted that the primary inquiry to exercise jurisdiction over non-resident defendants should be the due process rights of the defendants.

In conclusion, the Court did not approve specific jurisdiction over BMS in the case of non-resident plaintiffs while it recognized specific

71) *Id.*

72) *Id.* Likewise, the Court refused to take the non-resident plaintiffs’ argument that “BMS’s decision to contract with a California company, McKesson, to distribute Plavix nationally provides a sufficient basis for personal jurisdiction.” *Bristol-Myers*, at 1783. The Court explained that “the requirements of *International Shoe* ... must be met as to each defendant over whom a state court exercises jurisdiction.” *Id.*

73) *Id.*, at 1781.

74) *Id.*, at 1782.

75) *Id.*

76) *Id.*, at 1780–1781.

77) *Id.* at 1783.

jurisdiction over California residents. It advised that California residents and non-residents may join in a consolidated action against BMS in its principal place of business or place of incorporation, such as New York or Delaware where general jurisdiction over BMS can be asserted.⁷⁸⁾

(3) Dissenting Opinion

Justice Sotomayor disagreed with the majority opinion by referring the majority's holding as "a contraction of specific jurisdiction."⁷⁹⁾ She criticized the majority because they hold that "a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State."⁸⁰⁾ She concerned that the ruling would "make it impossible to bring a nationwide mass action in state court against defendants who are 'at home' in different States."⁸¹⁾

The dissent argued that the main concern on personal jurisdiction should be 'fairness,' and that it is "not unfair" to sue a company in a state "for a nationwide course of conduct that injures both forum residents and nonresidents alike."⁸²⁾ She pinpointed the fact that BMS advertised and distributed the alleged drug, Plavix, nation-wide.

The dissent explained that the question of this case is not whether BMS is subject to suit in California on claims that arise out of the design, development, manufacture, marketing, and distribution of Plavix, but whether BMS is subject to suit in California only on the California residents' claims or on the nonresidents' claims, too.

The dissent went through the rules on personal jurisdiction. It stated

78) *Id.*, at 1783-1784.

79) *Id.*, at 1784.

80) *Id.*

81) *Id.*

82) *Id.*

that “if general jurisdiction is not appropriate, however, a state court can exercise only specific, or case-linked, jurisdiction over a dispute” with three conditions:⁸³⁾ (1) The defendant must have “purposefully availed itself of the privilege of conducting activities within the forum State” or have purposefully directed its conduct into the forum State; (2) The plaintiff’s claim must “arise out of or relate to” the defendant’s forum conduct; and (3) The exercise of jurisdiction must be reasonable under the circumstances.⁸⁴⁾ She added other factors to be considered, such as “the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.”⁸⁵⁾

She argued that BMS purposefully availed itself of California, distributing the drug through a California-based company with \$1 billion sales in California.⁸⁶⁾ Also, the non-resident claims were related to BMS in-state conduct, such as marketing and distribution of the drug, which is done nation-wide in the same way, and which resulted in the injuries of residents and non-residents of California.⁸⁷⁾ In addition, she contended that the consolidated actions of residents and non-residents in one court would benefit the plaintiffs to minimize legal costs and to maximize remedies on claims.⁸⁸⁾ After going through other conditions and factors, the dissent concluded that California state courts properly exercised specific jurisdiction over BMS.

83) *Id.*, at 1785.

84) *Id.*, at 1785-1786.

85) *Id.*, at 1786.

86) *Id.*

87) *Id.*

88) *Id.*, at 1786-1787.

4. Lessons from the U.S. Supreme Court's Recent Application of Specific Jurisdiction

The U.S. Supreme Court has created a variety of principles to test "minimum contacts" to exercise personal jurisdiction over non-resident defendants since *International Shoe* including purposeful availment, foreseeability, a stream of commerce, and burden-interest of parties. However, in its recent cases against non-resident corporate defendants, the Court did not simply take the stream-of-commerce theory, but relied on the purposeful availment test to judge the defendant's conduct in the forum state. It can be interpreted that the Court is much more concerned with the due process rights of defendants in determining personal jurisdiction.

As the U.S. Supreme Court strongly appealed in these three cases on specific jurisdiction, the fundamental premise of the legal system of personal jurisdiction is to protect the due process rights of non-resident defendants against a court's coercive power over them who might be sued in a remote and inconvenient forum. The Court put more emphasis on the burden of non-resident defendants more than the interests of the resident plaintiffs or the forum state. We should be in deference to such application.

However, the Court left out how to balance out the burden and the interest of the parties involved. Especially, the decisions of *McIntyre* and *Bristol-Myers* are criticized as shown in their dissenting opinions. In case of the lawsuits filed by consumers alleging product liability against the non-resident company, the burden of the consumers, who are in an economically weaker position, suing the company by travelling to the company's principal place of business or place of incorporation, should be concerned. It is criticized that the Court in *McIntyre* did not approve foreseeability to allow specific jurisdiction in the state of injury where the

injured consumers reside.⁸⁹⁾ Also, the Court in *McIntyre* did not approve the stream of commerce approach to evaluate specific jurisdiction against the company.⁹⁰⁾

Moreover, the Court's analysis on the affiliation or connection of the defendant to the forum state is rather rigidly done. The Court in *Bristol-Myers* focused on the connection of the defendant company's alleged product with the forum, not acknowledging any relevant link of the company itself to the forum state. The approach of the "claim-linked" or the "connection to the underlying controversy" might cause some trouble to assert specific jurisdiction in one forum for alleging different types of claims together against a non-resident corporation if the company diversifies its business activities in different states and nations. Thus, at the end, general jurisdiction might be the only answer to obtain personal jurisdiction.

The U.S. Supreme Court's recent decisions limited the scope of specific jurisdiction.⁹¹⁾ These three cases prove that it is not easy to draft a strategy for consumer-plaintiffs to claim specific jurisdiction against non-resident corporate defendants because of the Court's strict interpretation and application of the Court-created rules on specific jurisdiction. So, it appears that, for plaintiffs who do not want to waste time arguing personal jurisdiction in U.S. courts for years and to be thrown out of the court for lack of jurisdiction later, the only safeguard is to assert general jurisdiction in a forum of the company's place of incorporation or principal place of business.

89) Symeon C. Symeonides, "Choice of Law in the American Courts in 2017: Thirty-First Annual Survey," 66 *American Journal of Comparative Law* 1, 9 (2018).

90) Michael Vitiello, "Limiting Access to U.S. Courts: The Supreme Court's New Personal Jurisdiction Case Law," 21 *U.C. Davis J. Int'l L. & Pol'y* 209, 258 (2015).

91) *Id.*

IV. Conclusion

General rules on civil procedure including jurisdiction may be similar in the U.S. and Korea. However, the interpretation and application of their jurisdictional principles appear to be slightly different in two countries. As witnessed in the above U.S. cases, the U.S. Supreme Court applied its own created jurisdictional rules very limitedly while the Korean Supreme Court tended to exercise its international jurisdiction more extensively.⁹²⁾

In Korea, international jurisdiction can be asserted under Article 2(1) of the Act on Private International Law,⁹³⁾ stating that “in case a party or a case in dispute is substantively related to the Republic of Korea, a [Korean] court shall have the international jurisdiction.”⁹⁴⁾ This provision looks similar to the principles of U.S. general and specific jurisdiction which require certain minimum contacts with the forum state. However, based on this provision, the Korean Supreme Court exercised international jurisdiction over foreign defendants when either plaintiffs or defendants have contacts or relations with Korea.⁹⁵⁾ It is different from the U.S. application which authorizes personal jurisdiction based on the defendant’s contacts with the forum, irrelevant of the plaintiff’s contacts, as the U.S. Supreme Court in *Walden* emphasized.

Moreover, when the Korean Supreme Court interprets the provision that

92) The Korean Supreme Court tends to recognize extensive jurisdiction, arguing that jurisdiction is not exclusive, but concurrent. Korean Supreme Court Decision, 2010da18355 decided on July 15, 2010 (considering the Chinese plaintiff’s intent to bring an action in Korean court rather than the convenience of the defendant Chinese airline defendant)

93) Korean conflict of law.

94) Article 2(1) of Act on Private International Law. https://elaw.klri.re.kr/kor_mobile/viewer.do?hseq=37432&type=sogan&key=9 (last visited on Jan. 31, 2019).

95) Korean Supreme Court Decision, 2013Meu1196 decided on May 16, 2014 (recognizing jurisdiction over non-resident defendant husband in a divorce case, by reviewing several substantial connection of the plaintiff wife with Korea while mentioning some connection of the defendant with the forum).

the underlying dispute is substantively related to Korea,⁹⁶⁾ the Korean Court may consider a defendant's overall activities in the forum⁹⁷⁾ similar to the California Supreme Court's sliding scale approach in the Bristol-Myers decision, rather than focusing on the defendant's claim-specific activities in the forum as the majority of the Court in Bristol-Myers did.

How to interpret and apply its own jurisdictional rules is left to the discretion of its judicial authority. Thus, the different interpretation or application of similar jurisdictional rules in the U.S. and Korea is not questionable. However, disregarding such different practices in two countries, any wrong assumption that the U.S. courts interpret and apply the similar jurisdictional principles in the same way as Korean courts do might lead the danger of a wrong approach to or misunderstanding the U.S. jurisdictional rules.

For example, in a Korean tort lawsuit claiming injury, the effect argument is easily used to assert jurisdiction in the forum where the defendant's tortious act occurred or reached to the plaintiff.⁹⁸⁾ However, the U.S. Supreme Court in *Walden* proved that the effect analysis shall not be simply utilized. The Court in *Walden* announced that the proper question for the effect argument is "not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."⁹⁹⁾ Therefore, to understand the others' legal principles in a more adequate way, it should be done by their perspective, not by our own prejudgment.

In sum, the U.S. Supreme Court's recent cases on personal jurisdiction

96) Article 2(1) of Act on Private International Law.

97) Korean Supreme Court Decision, 2010da18355 decided on July 15, 2010 (recognizing international jurisdiction of Korean courts for the Chinese parents who sought remedies under the employment contract between their flight-attendant daughter killed in airplane crash in Korea with the Chinese airline defendant).

98) *Id.*

99) *Walden v. Fiore*, 134 S.Ct., at 1125.

are helpful to understand the U.S. jurisdictional principles for Korean civil litigants in U.S. courts as well as for those who try to recognize U.S. judgments in Korean courts.¹⁰⁰⁾ The strict application of personal jurisdiction in the recent U.S. Supreme Court decisions has been criticized since they narrow plaintiffs' choice of forum.¹⁰¹⁾ However, non-resident or foreign defendants, who have to deal with the lawsuits in a remote and inconvenient U.S. court, may benefit from such tightening application, which protects defendants' due process rights and provides guidelines how to file a motion to dismiss for lack of personal jurisdiction.

In addition, when judgment holders of U.S. courts file lawsuits to recognize their U.S. judgments in Korean courts, Korean courts have to review whether the U.S. courts which rendered the final judgments have jurisdiction under the Korean jurisdictional principles.¹⁰²⁾ As witnessed in *McIntyre, Walden, and Bristol-Myers*, the U.S. Supreme Court reversed the decisions of state or lower federal courts for lack of personal jurisdiction. How Korean courts decide on jurisdictional requirements in the recognition of U.S. courts' judgments in Korea is up to Korean courts. However, the U.S. Supreme Court's different approach to jurisdiction may be useful to review how U.S. state or lower federal courts decided on jurisdiction over Korean defendants there.¹⁰³⁾

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100) In a product liability lawsuit seeking reimbursement from the Korean corporate defendant, which was separately established from the manufacturer, by the U.S. distributor after obtaining a default judgment in a federal district court in New York and filing a lawsuit in Korea to recognize the U.S. court's final judgment in Korea, Korean Supreme Court did not approve the U.S. court's jurisdiction by applying "foreseeability" test. Korean Supreme Court Decision, 2012da21737 decided on Feb. 12, 2015.

101) Jeff Lingwall and Chris Wray, "Fraudulent Aggregation: The Effect of Daimler and Walden on Mass Litigation," 69 Fla. L. Rev. 599 (2017).

102) Article 217(1)① of Korean Civil Procedure Act, <http://law.go.kr/engLsSc.do?tabMenuId=tab45#> (last visited Jan. 31, 2019).

103) In case where the plaintiffs in U.S. courts had obtained default judgments, Korean defendants might have failed to object to U.S. courts' jurisdiction.

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<국문초록>

미국 민사절차의 특정 인적관할에 관한 최근 판결

최영란*

본 논문은 미국 민사소송절차의 인적 관할(personal jurisdiction) 중, specific jurisdiction (특정관할 또는 특별관할)에 대한 최근의 논의사항을 알아보기 위하여, 2010년 이후 미국 연방대법원의 J. McIntyre Machinery, Ltd. v. Nicastro (2011), Walden v. Fiore (2014) 및 Bristol-Myers Squibb Co. v. Superior Court of California (2017) 판결을 검토한다. 세 개의 판결 모두 특정관할 원칙을 협의로 해석하여, 법정지 법원의 특정관할을 인정하지 않았다.

원고가 피고에 대해 일반관할이 있는 법원에 소송을 제기할 수 없는 경우, 특정관할을 근거로 피고의 주소지 또는 주된 사무소 소재지 이외의 법원에 소송을 제기할 수 있으나, 법정지 법원이 특정관할을 행사하기 위해서는 분쟁사안이 법정지와 관련이 있어야 한다.

특히 가장 최근의 Bristol-Myers 판결에서 연방대법원은 특정관할을 협의로 적용하여, 캘리포니아의 비거주자인 소비자가 BMS(비거주 회사)를 상대로 한 제조물책임소송에서 캘리포니아 주법원의 특정관할을 인정하지 않았다. 대법원은 비록 BMS가 캘리포니아(법정지)에 다른 연구소, 사무소가 있고, 분쟁의 쟁점인 회사의 의약품(Plavix)이 미국 전역뿐만 아니라 캘리포니아 주민들에게 판매되었고, 그 의약품으로 인해 캘리포니아 주민과 비거주자 원고가 상해를 입었음에도, 소송의 청구원인인 회사의 의약품(Plavix)과 캘리포니아가 관련이 없기에, 캘리포니아 법원이 특정관할이 없다고 판시하였다.

주제어: 미국 민사소송, 재판관할, 인적 관할, 특정관할, 특별관할, 국제사법

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<Abstract>

Recent Decisions on Specific Personal Jurisdiction in the United States Civil Procedure

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In the U.S. Civil Procedure, personal jurisdiction is categorized into specific jurisdiction (or case-specific jurisdiction) and general jurisdiction (or all-purpose jurisdiction). Specific jurisdiction or case-specific jurisdiction may be asserted when the cause of action arises out of or relates to the contacts with the forum state even if the defendant's contacts with the state are isolated or sporadic. General jurisdiction may be referred when the cause of action does not arise from or relate to the defendant's contacts with the forum state.

This paper looks over three U.S. Supreme Court cases on specific jurisdiction, *J. McIntyre Machinery, Ltd. v. Nicastro* in 2011, *Walden v. Fiore* in 2014, and *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County* in 2017. Specific jurisdiction in all three cases was denied on different grounds. Here, the review of these three cases will help to grasp how the U.S. Supreme Court has interpreted and applied the long-established principles of specific jurisdiction, especially for litigation practices in the future.

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Key Word: United States Civil Procedure, Personal Jurisdiction, Specific
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