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Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174 (1985)

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Civil Procedure—PERSONAL JURISDICTION—DUE PROCESS LIMITS THE REACH OF FLORIDA’S LONG-ARM STATUTE IN BRINGING CONTRACT DEFENDANTS TO THE HOME OF THE WHOPPER—*Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985)

To protect their citizens from wrongdoing by nonresidents, state legislatures have enacted statutes giving their courts personal jurisdiction over nonresidents who cause certain injuries within their territory. In contract disputes, long-arm jurisdiction in Florida may be predicated upon section 48.193(1)(g), Florida Statutes.¹ This provision vests in Florida courts personal jurisdiction over nonresidents who breach a contract in Florida “by failing to perform acts required by the contract to be performed in this state.”² This criterion was intended to provide an objective determination of whether a defendant is within the reach of the long-arm power of Florida courts. It has been used to assert jurisdiction based on a lesser degree of contact with Florida than is required under another provision that also may apply in contract-related disputes.³

In *Burger King Corp. v. Rudzewicz*,⁴ the United States Supreme Court held that the United States District Court for the Southern

1. FLA. STAT. § 48.193 (1985) provides in part:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

...
(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

2. FLA. STAT. § 48.193(1)(g) (1985).

3. See, e.g., *Lacy v. Force V Corp.*, 403 So. 2d 1050, 1052 (Fla. 1st DCA 1981).

FLA. STAT. § 48.181 (1985) provides that any nonresident individual or foreign business organization that accepts the privilege of carrying on a business in Florida impliedly appoints the secretary of state as his agent for service of process in any dispute arising out of a transaction incidental to that business, and that service in that manner would be just as valid as if process were served personally.

In *Devaney v. Rumsch*, 228 So. 2d 904, 907 (Fla. 1969), Justice Boyd stated the purpose of this provision to be:

[T]hat any individual or corporation who has exercised the privilege of practicing a profession or dealing in goods, services or property, whether in a professional or nonprofessional capacity, within the State in anticipation of economic gain, be regarded as operating a business or business venture for the purpose of service under Florida Statutes § 48.181, F.S.A., in suits resulting from their activity within the State.

For a discussion of the differences between § 48.181 and § 48.193, see Rohr, *Personal Jurisdiction in Florida: Some Problems and Proposals*, 5 NOVA L.J. 365, 371 (1981) (the two statutes substantially overlap but are not duplicative because they are tied to different methods of service of process).

4. 105 S. Ct. 2174 (1985).

District of Florida could exercise personal jurisdiction over a non-resident defendant in a breach of contract case pursuant to section 48.193(1)(g), Florida Statutes. In doing so, the Court noted that the mere existence of a contract could not automatically establish contacts with a forum state sufficient to meet the constitutional limitations on long-arm statutes.⁵ The Court held that the nature and extent of all of the nonresident defendant's relevant activities should be examined to determine whether he purposefully established contacts with the forum state. The Court thus rejected the use of mechanistic tests focusing solely on the place of performance of a contract or its breach when determining whether the invocation of long-arm jurisdiction meets constitutional muster. This result spurned the approach frequently taken by courts applying Florida law.

The purpose of this Note is to examine the Supreme Court's decision in *Burger King*. The Court's analysis in this case will then be contrasted with that in a line of state and federal court decisions in which section 48.193(1)(g), Florida Statutes, was invoked to acquire personal jurisdiction over nonresidents based on the existence of a contract requiring performance in Florida. Finally, the influence of the *Burger King* decision on recent Florida decisions will be reviewed.

I. PERSONAL JURISDICTION: THE DUE PROCESS ISSUES

For jurisdiction to be exercised over a nonresident defendant, his contact with the forum state must not only bring him within the terms of its long-arm statute for service of process, but prove sufficient in degree to satisfy constitutional mandates. In a series of cases the Supreme Court has determined that the fourteenth amendment's due process clause protects litigants from being unreasonably forced to defend themselves in distant forums.

The Supreme Court's 1945 decision in *International Shoe Co. v. Washington*⁶ is the foundation for modern jurisdictional analysis. *International Shoe*, a Delaware corporation with headquarters in St. Louis, Missouri, maintained no offices in the state of Washington. The company's only contact with the state was through the employment of several sales representatives who worked in Washington, soliciting orders for the company's shoes and earning commissions on their sales. The shoes were then shipped from out-of-

5. *Id.* at 2185.

6. 326 U.S. 310 (1945).

state manufacturers to the purchasers.⁷ Washington claimed the company owed a percentage of the commissions paid to the sales representatives to its unemployment compensation fund and brought suit to recover the unpaid amounts. Finding that the “regular and systematic” operations of the company within the state were sufficient to constitute “doing business,” the Washington Supreme Court held the company was subject to suit in the state’s courts.⁸ On appeal, the Supreme Court affirmed the decision, stating:

[D]ue process requires only that in order to subject a defendant to judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”⁹

The sales representatives engaged in continuous activity within the state of Washington spanning a number of years and involving a substantial volume of merchandise. During this period the company enjoyed the benefits and protections of the laws of the state. The Court determined that it was reasonable for Washington to require that International Shoe subject itself to the judicial processes of that state.

While the decision in *International Shoe* established a basis for the protection of due process rights, its minimum contacts, fair play, and substantial justice criteria were inherently ambiguous. As states increased their use of long-arm jurisdiction, further judicial clarification was needed. In *Hanson v. Denckla*,¹⁰ the Court elaborated its standards. *Hanson* concerned the rights to a trust created in Delaware by a settlor who later moved to Florida. The Florida Supreme Court declared the trust invalid. The Delaware Supreme Court held that the Florida decision was not entitled to full faith and credit because the Florida court had lacked personal jurisdiction over the trust company or jurisdiction over the property.¹¹

7. *Id.* at 314. This system ensured that the company would not be subject to in rem jurisdiction. See McDermott, *Personal Jurisdiction: The Hidden Agendas in the Supreme Court Decisions*, 10 VT. L. REV. 1, 6 (1985).

8. *International Shoe*, 326 U.S. at 314.

9. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1937)). In *International Shoe*, the Court replaced the previous tests of “consent” and “presence” for the validity of personal jurisdiction over nonresident defendants with an analysis focusing on the quality of the defendant’s contacts with the forum. *Id.* at 317.

10. 357 U.S. 235 (1958).

11. *Id.* at 238.

The United States Supreme Court affirmed the Delaware decision and reversed the Florida decision.¹²

The contacts between the trust company and the state of Florida arose through the settlor, domiciled in Florida, exercising her power of appointment under the trust. The Court determined this contact was too insubstantial to support personal jurisdiction. "It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."¹³ The purposeful availment requirement protects nonresidents from being forced to defend suits in distant forums based on fortuitous or passive contacts with a state. Once a party has purposefully availed himself of the privilege of conducting business within a state, he should foresee the possibility of having to defend a suit there and may not claim unfairness or surprise when required to do so. Subsequent case law has determined that foreseeability is to be examined from the perspective of the defendant and not of the plaintiff.¹⁴

The Supreme Court revisited the minimum contacts doctrine in *World-Wide Volkswagen v. Woodson*,¹⁵ discussing the quantum of contact required. In *World-Wide Volkswagen*, a purchaser of an automobile in New York was injured in a car accident in Oklahoma. The purchaser brought suit against the manufacturer, importer, distributor, and retailer. The retailer and distributor contested personal jurisdiction on due process grounds. The Oklahoma Supreme Court found that the automobile was intended by design to be mobile, thus affording the manufacturer and distributor ample notice that it might be used in Oklahoma.¹⁶ This notice, together with the income obtained from the sale of the automobiles that were used nationwide, provided the basis for the exercise of personal jurisdiction over the nonresident defendants.¹⁷

The Supreme Court rejected the Oklahoma court's reasoning as

12. *Id.* at 256.

13. *Id.* at 253.

14. *See, e.g., Shaffer v. Heitner*, 433 U.S. 186 (1977). In *Shaffer*, the Court concluded that *International Shoe's* fairness precepts were applicable to quasi in rem actions. *Id.* at 212. The Court also reiterated that choice of law findings would not determine jurisdictional issues. *Id.* at 215. In a concurring opinion, Justice Stevens emphasized the requirement of fair notice. *Id.* at 218 (Stevens, J., concurring).

15. 444 U.S. 286 (1980).

16. *Id.* at 290.

17. *Id.* at 290-91. The Supreme Court found that the Oklahoma court had not separately considered the statutory and constitutional standards for jurisdiction. *Id.* at 290.

it was applied to the distributor and retailer because it would mean, in effect, that every seller would have "appoint[ed] the chattel as his agent for service of process."¹⁸ The Court concluded that the foreseeability which is required under due process is not the foreseeability that a product will enter the market in a particular state, but that the defendant should anticipate defending a suit in the particular forum.¹⁹ The Court found that the distributor's conduct did not meet this foreseeability test.

The emphasis the Court has placed on substantial contacts has not prevented it from finding sufficient contacts based on a single transaction within the forum state. In *McGee v. International Life Insurance Co.*,²⁰ an insurance company operating out of Texas mailed a reinsurance certificate to a California resident. The corporation maintained no offices in California, did not regularly solicit business there, and only insured the California resident because it had assumed the obligations of an Arizona insurance company.²¹ The Supreme Court determined that the Texas insurance company had sufficient contacts with California to support personal jurisdiction in a California court because the insurance contract had been delivered to a California resident, and because that resident had paid premiums on the policy.²² Courts have cited *McGee* in support of the proposition that nonresident defendants may be subject to the personal jurisdiction of a foreign state based on a single contract,²³ although the decision was arguably limited a year later by the purposeful availment standard of *Hanson*.²⁴

II. *Burger King*

Against this backdrop of minimum contacts and basic fairness requirements, the Supreme Court in its 1985 Term considered the case of two Burger King franchisees, both of whom were Michigan residents, who had been sued in the United States District Court for the Southern District of Florida on a contract claim.

18. *Id.* at 296.

19. *Id.* at 297.

20. 355 U.S. 220 (1957).

21. *Id.* at 223.

22. *Id.* In his opinion for the Court, Justice Black noted a trend toward expanded jurisdiction in state courts, in part due to the nationalization of commerce. *Id.* at 222-23.

23. See, e.g., *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972).

24. See, e.g., *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980).

A. The Facts and the Trial

John Rudzewicz and Brian MacShara decided in the fall of 1978 to apply to the Burger King Corp. for a franchise operation in the Detroit area. They submitted an application to Burger King's district office in Michigan, which forwarded the application to the company's main office in Miami, Florida.²⁵

Burger King conducts its franchise business according to what it describes as a comprehensive "Burger King System." Franchisees are licensed to use Burger King trademarks and service marks for twenty years and are supplied with extensive proprietary information as well as managerial training, marketing, and advertising assistance throughout the relationship.²⁶ In return, the franchisees pay an initial franchising fee and agree to submit monthly royalty and rental payments. The franchisees must also abide by Burger King's comprehensive regulation of virtually every aspect of their operation.²⁷ The system is administered from Burger King's Miami headquarters and from regional offices throughout the country. The Miami office sets corporate policy and intervenes directly only when there are major problems with franchisees. Regional offices are responsible for direct supervision of the restaurants.²⁸ Rudzewicz and MacShara negotiated for approximately four months with Burger King representatives in Michigan and Florida. As negotiations progressed, the Miami headquarters took the lead role in resolving disputes.²⁹ After obtaining limited concessions from the corporation, the partners agreed to take over an existing restaurant in Drayton Plains, Michigan. MacShara attended mandatory training courses in Miami, new equipment was purchased from a Burger King division and restaurant operations began in the summer of 1979.³⁰ The business enjoyed a brief success but soon fell behind in monthly payments to the Miami office. Despite prolonged mail and telephone negotiations with the franchisees aimed at salvaging the operation, Burger King terminated the franchise agreement, ordering Rudzewicz and MacShara to vacate

25. Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174, 2179 (1985).

26. *Id.* at 2178.

27. *Id.* Burger King Corp. imposes these standards to protect its national image. *Id.*

28. *Id.* at 2179.

29. *Id.* at 2179 n.7. Disputes included rent computation, site development fees, and assignment of liability. *Id.* at 2179.

30. *Id.* at 2179.

the premises. When they refused, Burger King brought suit in the United States District Court for the Southern District of Florida.³¹

Subject matter jurisdiction was based on both diversity of citizenship and federal jurisdiction over trademark disputes.³² Personal jurisdiction over the parties was grounded on section 48.193(1)(g), Florida Statutes, because Burger King alleged that Rudzewicz and MacShara had breached their contract that required monthly payments to Burger King's headquarters in Florida.³³ Rudzewicz and MacShara appeared specially, arguing that the court lacked personal jurisdiction over them because they were not residents of Florida and the cause of action did not arise in Florida. The district court was not persuaded. It held that personal jurisdiction could properly be exercised pursuant to Florida's long-arm statute.³⁴ Following a bench trial, the court found that Rudzewicz and MacShara had breached their franchise agreement and infringed on Burger King's trademark and service marks. Judgment was entered against them for \$228,875 in damages; they were ordered to close their Drayton Plains operation and surrender possession to Burger King.³⁵

B. *The Decision of the Eleventh Circuit*

Rudzewicz appealed to the United States Court of Appeals for the Eleventh Circuit, where a divided panel reversed the lower court's decision.³⁶ The court noted the judicial confusion on the issue of personal jurisdiction over a nonresident defendant based on a contractual obligation.³⁷ The court found that Rudzewicz and MacShara were within the reach of section 48.193(1)(g), Florida Statutes, but it went beyond the facial requirements of the long-arm statute and addressed the due process issues.³⁸ The majority emphasized that, aside from the management training course and monthly payments to Burger King headquarters, the franchise agreement provided for no contact with Florida. The only face-to-face negotiations between the franchisees and Burger King repre-

31. *Id.* at 2180.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* Costs and attorneys' fees were also awarded to Burger King. *Id.*

36. *Burger King Corp. v. MacShara*, 724 F.2d 1505 (11th Cir. 1984), *rev'd sub nom.*, *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985). MacShara did not join in the appeal. The trademark claim was settled. *Burger King*, 105 S. Ct. at 2180 n.11.

37. *Burger King*, 724 F.2d at 1508.

38. *Id.* at 1508-10.

sentatives involved personnel from the corporation's Michigan office.³⁹ The restaurant was located in Michigan, and all franchise services were provided by the Michigan office. "To Rudzewicz, the Michigan office was for all intents and purposes the embodiment of Burger King."⁴⁰ Moreover, the franchisees maintained no offices in Florida and were financially unprepared to defend a suit there. Although the franchisees' activities brought them within the terms of Florida's long-arm statute, the Eleventh Circuit held that exercise of personal jurisdiction under these circumstances "would offend the fundamental fairness which is the touchstone of due process."⁴¹

Judge Johnson dissented, claiming that the court had ignored binding precedent in determining that Rudzewicz and MacShara could not be sued in Florida.⁴² He maintained that the controlling standard in the Eleventh Circuit, derived from *Product Promotions, Inc. v. Cousteau*,⁴³ was whether the nonresident "has purposefully availed himself of the . . . forum state's laws, whether the forum state has any special interest in exercising jurisdiction, and whether the convenience of the parties favors litigating in another state."⁴⁴

Each of these criteria, in Judge Johnson's determination, had been examined and satisfied.⁴⁵ Contrary to the majority's findings, Judge Johnson found that it was not fundamentally unfair to require the franchisees to defend a suit in Florida.⁴⁶ Rudzewicz, a senior partner in a large accounting firm, was an experienced business executive who had initiated and conducted negotiations with a Florida corporation culminating in an agreement involving over one million dollars. The specter of the unsophisticated, unsuspecting consumer, obligated through some fortuitous occurrence to defend himself in a distant forum against a corporate Goliath, was simply inappropriate to the case at hand.⁴⁷

While Judge Johnson correctly asserted that the court was

39. *Id.* at 1511.

40. *Id.*

41. *Id.* at 1513. In reaching its conclusion, the court cited *In-Flight Devices Corp. v. Van Dusen Air*, 466 F.2d 220 (6th Cir. 1972), which noted that the revenues and market range of a local business leave the average franchisee unprepared for litigation in a distant forum.

42. *Burger King*, 724 F.2d at 1513 (Johnson, J., dissenting).

43. 495 F.2d 483 (5th Cir. 1974).

44. *Burger King*, 724 F.2d at 1513 (Johnson, J., dissenting) (citations omitted).

45. *Id.*

46. *Id.*

47. *Id.* at 1514. In his dissent, Judge Johnson referred only to Eleventh Circuit precedents and did not attempt to distinguish the Supreme Court cases cited by the majority.

bound to follow the analysis enunciated in prior decisions, the court was not obligated to arrive at any preordained result. Jurisdictional determinations are necessarily dependent upon the facts presented in each case. An analysis of the majority opinion reveals that the approach delineated in *Product Promotions* was indeed followed. The factors were simply weighed differently. The majority was more attentive to the local nature of the franchise operation and the unequal bargaining position which even an experienced business executive occupies when dealing with one of the world's largest restaurant organizations.

C. *The Decision of the Supreme Court*

Burger King appealed the decision to the Supreme Court. Uncertain whether the Eleventh Circuit had declared section 48.193(1)(g), Florida Statutes, unconstitutional on its face or merely in its application in this particular case, the Court dismissed the appeal. Instead, it treated the personal jurisdiction issue as a petition for certiorari. The Court granted the petition and reversed.⁴⁸

At the crux of the Supreme Court's decision in *Burger King* is the familiar requirement that a nonresident "defendant's conduct and connection with the forum state [be] such that he should reasonably anticipate being haled into court there."⁴⁹ The Court determined that no single consideration, test, or "conceptualistic . . . theor[y] of the place of contracting or of performance" would be determinative of jurisdictional questions.⁵⁰ Recognizing the need for a more realistic approach toward personal jurisdiction in contract cases involving nonresidents, the Court stated: "It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum."⁵¹

Significantly, the Court said that in general a contract alone cannot establish the minimum contacts necessary to support personal jurisdiction,⁵² but the Court found what it considered to be impor-

48. *Burger King*, 105 S. Ct. at 2190. The vote was six to two. Justice Brennan wrote the majority opinion. Justice Powell did not participate. Justices Stevens and White dissented.

49. *Id.* at 2183 (citation omitted).

50. *Id.* at 2185 (citations omitted).

51. *Id.* at 2186.

52. *Id.* at 2185.

tant additional contacts between the defendants and the forum state.⁵³ Rudzewicz had “deliberately ‘reach[ed] out beyond’ Michigan and negotiated with a Florida corporation.”⁵⁴ The parties specified in the franchise agreement that it had been entered into in Miami and was governed by Florida law. Rudzewicz voluntarily accepted “long-term and exacting regulation of his business from Burger King’s Miami headquarters.”⁵⁵ Viewing the overall relationship between the parties, the Supreme Court found that the minimum contacts required by due process were present.⁵⁶

Justice Stevens dissented, arguing that forcing the franchisees to litigate in Florida was decidedly unfair.⁵⁷ He noted that most contacts were with the Michigan office, and that all business operations were focused there. Despite the majority’s holding that the mere existence of a contract ostensibly calling for performance in the forum state would not automatically satisfy due process, Justice Stevens maintained that the Court relied on “nothing more than standard boilerplate language contained in various documents” in reaching its decision.⁵⁸ He found the Eleventh Circuit’s reasoning more persuasive than the “superficial analysis” of the majority.⁵⁹

As in the Eleventh Circuit’s handling of the case, doctrinal disagreements appeared less important than differences in how the facts were weighed. On a practical level, Justice Stevens’ analysis seems more appealing. Forcing the Michigan franchisees to litigate in distant Miami posed greater burdens than requiring a multinational corporation to bring its action in Michigan. The burdens of litigation, however, will always vary from case to case and are not controlling in jurisdictional determinations.

III. CASE LAW IN FLORIDA BEFORE *Burger King*

The Supreme Court’s holding in *Burger King*, that the mere existence of a contract is inadequate to establish the minimum con-

53. *Id.* at 2186.

54. *Id.* The Court emphasized that Rudzewicz had initiated contacts with Burger King in Miami, carrying on continuous negotiations over a period of many months, knowing it was the Miami office which made the key decisions in these negotiations. *Id.* at 2186-87. The Eleventh Circuit, in contrast, had highlighted the role of the district office manager in the contract formation process. *Burger King*, 724 F.2d at 1507.

55. *Burger King*, 105 S. Ct. at 2186.

56. *Id.* at 2190.

57. *Id.* at 2190 (Stevens, J., dissenting).

58. *Id.*

59. *Id.*

tacts necessary for personal jurisdiction in the forum state, points up a recurring weakness in how Florida courts apply the state's long-arm statute in contract cases. Prior to *Burger King*, Florida courts had engaged in an expansive exercise of jurisdiction over nonresidents based on the most tenuous contacts with the state. The Florida Supreme Court has not construed section 48.193(1)(g), Florida Statutes, but several district courts of appeal have found nonresidents subject to personal jurisdiction in Florida based solely on a contract. Often they have done so without properly considering the due process issues.

In *Engineered Storage Systems v. National Partitions, Inc.*,⁶⁰ the Third District Court of Appeal upheld the exercise of personal jurisdiction over Engineering Storage Systems, a California corporation which had defaulted on payments to National Partitions, a Florida company.⁶¹ The court held that section 48.193(1)(g) confers jurisdiction over a nonresident defendant who has breached a contract requiring performance within the state, and that it is unnecessary to demonstrate any other activity within the state.⁶²

The defendants in *Engineered Storage Systems* argued that breach of contract alone, without a showing of other contacts with the forum state, could not satisfy the due process requirements of *International Shoe*.⁶³ In an opinion by Judge Ferguson, the court addressed the issue but gave it only superficial treatment in a footnote.⁶⁴ It concluded that section 48.193 requires only that one of its enumerated criteria be met in order for personal jurisdiction to arise. Inasmuch as the defendants met one of the specified criteria, the court found that maintenance of the suit against them in Florida was proper.⁶⁵ While this reading of the statute may have been accurate, the decision was hardly responsive to Engineered Storage Systems' due process argument. No explanation was given of how the statute, irrespective of its own requirements, conformed to constitutional standards or inherently satisfied the minimum contacts requirement in this particular case.

60. 415 So. 2d 114 (Fla. 3d DCA 1982).

61. *Id.*

62. *Id.*

63. *Id.* at 115 n.3.

64. *Id.*

65. *Id.* In response to Engineered Storage Systems' due process claims that contacts other than the agreement between the parties must be shown, the court stated: "We disagree. A reading of the statute to require the doing of more than one of the enumerated acts, even for the limited purpose of avoiding a perceived constitutional problem, would be strained." *Id.*

In *Engineered Storage Systems*, the Third District relied upon a Florida Supreme Court decision in a products liability case in which the court applied section 48.193(1)(f), Florida Statutes,⁶⁶ the provision of the long-arm pertaining to injuries to persons or property caused by a nonresident. In that case, *Ford Motor Co. v. Atwood Vacuum Machine Co.*,⁶⁷ Ford filed a third-party complaint against Atwood, a foreign corporation, alleging the defective manufacture of a door hinge that Ford had installed in its automobiles. Atwood moved to dismiss for lack of personal jurisdiction, contending that Ford's third-party allegations were beyond the scope of the statute.⁶⁸ The supreme court first held that the facts alleged were sufficient to place Atwood within the purview of the long-arm statute.⁶⁹ It then addressed the due process issues.⁷⁰

The court traced the development of the minimum contacts requirements under the due process clause, acknowledging the basic economic and political structure of the United States as the moving force behind the need to expand personal jurisdiction in a state court beyond that state's border. "A manufacturer engaged in interstate commerce," the court reasoned, "which expects its products to be used in other states, can reasonably expect to be held subject to the jurisdiction of those other states' courts."⁷¹ The supreme court therefore upheld jurisdiction under section 48.193(1)(f). It was this holding—that a defendant may satisfy minimum contacts requirements without engaging in any direct ac-

66. FLA. STAT. § 48.193(1)(f) (1985) provides that personal jurisdiction in a Florida court may arise by:

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

1. The defendant was engaged in solicitation or service activities within this state; or
2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade or use.

67. 392 So. 2d 1305 (Fla. 1981).

68. *Id.* at 1307.

69. *Id.* at 1380.

70. *Id.*

71. *Id.* at 1312. In his dissent in *Ford Motor Co.*, Justice Sundberg was unable to "fathom" how the court found reasonable the amenability to suit. He pointed out that, in *World-Wide Volkswagen*, the Supreme Court had refused to hold that a manufacturer's product placed in the stream of commerce carried with it an implied consent to personal jurisdiction. Rather than protecting the Florida consumer, he argued, the holding in *Ford Motor Co.* would increase the burden of out-of-state litigation for most citizens while giving an unfair advantage to national manufacturers, who are readily equipped to litigate in all states. *Ford Motor Co.*, 392 So. 2d at 1314-15. (Sundberg, J., dissenting).

tivity within the state—which the court in *Engineered Storage Systems* applied by analogy to uphold personal jurisdiction under section 48.193(1)(g), Florida Statutes.⁷²

The Second District Court of Appeal rendered a decision similar to the one in *Engineered Storage Systems* when it decided *Madax International Corp. v. Delcher Intercontinental Moving Services, Inc.*⁷³ Madax, an Oregon corporation doing business in Europe, had contracted with Delcher in Florida for the shipment of household furniture to Belgium. Despite successful movement of the articles, Madax refused payment, and Delcher filed suit in St. Petersburg, Florida.⁷⁴ The Second District gave the due process issues scant consideration in holding that the trial court had personal jurisdiction over Madax. The court merely recited section 48.193(1)(g), pointed to the allegations placing Madax within its terms, and concluded that personal jurisdiction was valid.⁷⁵ Other contacts with the state were deemed irrelevant because jurisdiction was claimed under section 48.193(1)(g) for breach of contract, rather than section 48.181, which required allegations that the defendant had conducted business in the state.⁷⁶

These cases and others illustrate a rule of Florida law which, when coupled with the provisions of the long-arm statute, unwarrantedly expands jurisdictional limits. Where there is an express promise to pay and no place for payment is specified, Florida courts will apply a presumption that payments are due at the creditor's residence.⁷⁷ When a nonresident then defaults on payments owed to a Florida creditor, the default is treated as breach of a contract requiring performance within the state and, regardless of other contacts with the state, the nonresident is subject to the jurisdiction of Florida courts.

These Florida cases involved agreements not only breached in Florida, but entered into within the state. A nonresident who enters into a contract in Florida should reasonably anticipate being haled into a Florida court upon its breach. Where the agreement is executed outside Florida, however, suit within the state is less

72. *Engineered Storage Systems*, 415 So. 2d at 115 n.3.

73. 342 So. 2d 1082 (Fla. 2d DCA 1977).

74. *Id.*

75. *Id.* at 1083-84.

76. *Id.* at 1084.

77. This common law presumption is generally applied in Florida to determine venue in breach of contract actions. See *Madax*, 342 So. 2d at 1084; *M.A. Kite Co. v. A.C. Sanford, Inc.*, 130 So. 2d 99 (Fla. 1st DCA 1961).

foreseeable.

In *Kane v. American Bank*,⁷⁸ nonresident guarantors defaulted on a note issued by a Florida bank. Process was served pursuant to section 48.193(1)(g), and the defendant filed a motion to quash, arguing that personal jurisdiction was improper because the guarantee agreements had been executed outside Florida.⁷⁹ Although the agreement did not specify where payment was to be rendered, the Fifth District Court of Appeal upheld personal jurisdiction over the nonresident.⁸⁰ The court found that the guarantee of a note given to a Florida bank constituted sufficient contacts to satisfy the *International Shoe* test. Further, the court reasoned that it was "certainly within the reasonable expectations of the Guarantor that he will be called upon to honor his promise in the forum where he intended to cause an effect, where he did in fact cause an effect, where he promised to perform and where he failed to perform."⁸¹

The *Kane* decision represents an all-too-common approach taken by Florida courts in upholding personal jurisdiction over a nonresident.⁸² Despite the court's strained attempt to highlight the significance of the guarantee agreement with the Florida bank, the contact between the guarantor and the forum state was limited to a naked contract.⁸³ It is unrealistic to assume that a nonresident should expect to be forced to litigate in a foreign forum based solely on an agreement consummated outside the state and which does not express a requirement of performance within the state.

Florida courts have not always been so willing to expand the reach of the state's long-arm statute in contract cases without properly addressing due process issues. In *Lakewood Pipe, Inc. v. Rubaii*,⁸⁴ the Second District Court of Appeal was presented with a case involving a nonresident corporation which had assumed the contractual obligations of a Florida corporation, Federal Supply. As part of the assignment agreement, Lakewood Pipe became guarantor of Federal Supply's brokerage agreements. When Fed-

78. 449 So. 2d 974 (Fla. 5th DCA 1984).

79. *Id.* at 975.

80. *Id.* at 976.

81. *Id.*

82. See also *James Carroll Assocs. v. Video Applications, Inc.*, 421 So. 2d 3 (Fla. 5th DCA 1982) (per curiam) (affirming a decision finding personal jurisdiction over a nonresident who had executed a promissory note outside the state).

83. *Kane*, 449 So. 2d at 976. The court merely recited the implications of entering a guarantee agreement.

84. 379 So. 2d 475 (Fla. 2d DCA 1980).

eral Supply filed for bankruptcy, Rubaii asserted his claim for brokerage services and sought to invoke Lakewood Pipe's guarantee.⁸⁵

Although Rubaii's claim came within the literal language of section 48.193(1)(g), the court did not uphold personal jurisdiction.⁸⁶ "Even where there is facial jurisdiction under the Florida long-arm statute," the court stated, "the party over which jurisdiction is asserted must have sufficient minimum contacts with Florida to satisfy due process requirements."⁸⁷ The court found those contacts lacking in this case.

The court distinguished its earlier decision in *Madax* by noting that Rubaii was not a party to the agreement under which suit was brought.⁸⁸ The court was unwilling to assert personal jurisdiction over a nonresident who merely assumed a third party's obligation to a Florida resident. Although the cases may be distinguishable, it would have been preferable for the court to have expressly disavowed *Madax* to the extent that it had held that minimum contacts are automatically present once the long-arm has been successfully invoked for purposes of service of process.

The approach of the Second District in *Lakewood Pipe* was adopted and refined by the First District in *Lacy v. Force V Corp.*⁸⁹ Force V, a Florida corporation, sued Lacy, a nonresident, for misrepresentation and breach of a contract to deliver a printing press in Florida. Lacy claimed that his isolated transaction with the corporation did not constitute sufficient minimum contacts with Florida to allow personal jurisdiction in Florida courts.⁹⁰

The court first established that the allegations of a contractual breach placed the conduct within the applicable section of the long-arm statute,⁹¹ but this determination did not result in an automatic finding of contacts sufficient to satisfy due process requirements. The court then examined the constitutional issues. Although Lacy's contacts with Florida were limited to a single transaction, they did not necessarily fall short of the constitutional standards.⁹² The court instead applied standards developed by the

85. *Id.* at 476.

86. *Id.* at 477.

87. *Id.*

88. *Id.* In *Lakewood Pipe*, the nonresident merely assumed the obligations under an agreement entered into by another corporation with a third party. The court was unable to see this as purposeful availment.

89. 403 So. 2d 1050 (Fla. 1st DCA 1981).

90. *Id.* at 1051.

91. *Id.* at 1052.

92. *Id.* at 1054.

Supreme Court in the progeny of *International Shoe*, stating that "the single most important factor to be considered is whether the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there."⁹³

The court stated that determinations of foreseeability where jurisdiction is based on breach of contract require consideration of factors that are not relevant in other types of actions.⁹⁴ In a two-part analysis, the court first examined the case to determine if the minimum contacts resulted from the defendants' own acts.⁹⁵ The court then analyzed the "relative conveniences and inconveniences of the parties, as well as . . . the basic equities involved in either prosecuting or defending the suit within the forum."⁹⁶

The contract between Lacy and Force V required that a printing press of specific proportions be delivered to the plaintiff in Florida and that payment be held in escrow until Force V accepted the machinery.⁹⁷ From these facts the court determined that "[b]ecause the contract was required to be performed in Florida, it was not unreasonable from the defendant's perspective to foresee that an alleged breach of the contract might be litigated in Florida, or that enforcement of Lacy's rights under the contract might depend on the laws of Florida."⁹⁸

The exercise of personal jurisdiction over Lacy was upheld, but only after a thorough examination of the facts; it was not a foregone conclusion once applicability of the long-arm statute was found. Rather, reasons for exercising jurisdiction were examined and weighed against the due process rights of a nonresident defendant. The First District's decision in *Lacy* illustrates the careful attention courts should give to due process concerns in determining personal jurisdiction. It stands in stark contrast to such decisions as *Engineered Storage Systems* and *Madax*.

IV. CASE LAW IN FEDERAL COURTS BEFORE *Burger King*

Although federal courts have sometimes been more diligent in examining due process issues when Florida's long-arm statute is invoked in a contract case, they have a checkered record. In diversity

93. *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. 286, 287 (1980)).

94. *Id.* at 1055. The court cited this analysis from *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974).

95. *Lacy*, 403 So. 2d at 1056.

96. *Id.*

97. *Id.* at 1052.

98. *Id.* at 1056.

of citizenship cases, federal courts are authorized to invoke the provisions of the long-arm statute of the state in which they are sitting in order to acquire personal jurisdiction over nonresidents.⁹⁹ In applying section 48.193(1)(g), Florida Statutes, some federal courts have properly considered the due process issues. Too frequently, however, they have followed the Florida cases which have subjected a nonresident defendant to personal jurisdiction merely on the strength of a contract.

In *Thompson v. King*,¹⁰⁰ the United States District Court for the Middle District of Florida considered the exercise of personal jurisdiction over a nonresident who had defaulted on an obligation to a Florida resident. King, a South Carolina resident, allegedly breached a contract requiring him to pay \$40,000 for Thompson's interest in a partnership that did business in the United Arab Emirates. Thompson contended King's failure to make the payments constituted breach of a contract requiring performance in Florida. The court found that this allegation was sufficient to confer personal jurisdiction under section 48.193(1)(g).¹⁰¹ Having determined that the Florida long-arm statute was applicable, the court stated "there can be no doubt" that section 48.193(1)(g) satisfies due process requirements because "breaching a contract by failing to perform acts required to be performed within a particular state creates reasonably foreseeable consequences within that state."¹⁰² Where the defendant deliberately entered a contract requiring payment in Florida, the court found it fair and reasonable to subject him to its jurisdiction.¹⁰³

The district court's discussion of due process requirements reveals little analysis of the defendant's connection with Florida. The inquiry into the nature and extent of the relevant contacts was confined to the contract itself. The court did not explain why the document and the performance it entailed constituted sufficient minimum contacts with Florida.

In *Moltz v. Seneca Balance, Inc.*,¹⁰⁴ the United States District Court for the Southern District of Florida had before it an action against three nonresident guarantors of a promissory note issued by a Florida maker. The note, part of a stock purchase agreement,

99. FED. R. CIV. P. 4(e).

100. 523 F. Supp. 180 (M.D. Fla. 1981).

101. *Id.* at 184.

102. *Id.* at 185.

103. *Id.*

104. 606 F. Supp. 612 (S.D. Fla. 1985).

was executed and made payable in Florida.¹⁰⁵ Contemporaneously, three nonresidents executed a guarantee of the note, specifying the applicability of New York law but not the place of payment. The defendants objected to the exercise of personal jurisdiction in Florida, contending that section 48.193(1)(g) was inapplicable and that, in any event, there had not been the requisite minimum contacts.¹⁰⁶

The court first determined that the Florida long-arm was applicable for service of process because the promissory note had been executed in Florida and was payable in Florida. Additionally, the guarantee, which did not specify a place of payment, was presumptively payable in Florida.¹⁰⁷ The court then addressed the issue of whether the requisite minimum contacts existed between the defendants and the forum state. Without discussion, the court stated that "Florida law recognizes that a person (or business) who (which) executes a contract requiring the performance of some acts in that state *does have* 'minimum contacts' with the forum."¹⁰⁸ This assertion suggests that the mere applicability of section 48.193(1)(g) by itself satisfies due process requirements, and that the second tier of the analysis ostensibly employed by the court was illusory. As in many state court decisions, due process concerns were ignored once the Florida long-arm was successfully invoked.

The court belatedly attempted to distinguish its decision from *Lakewood Pipe*, where minimum contacts were not found despite the facial applicability of section 48.193(1)(g). In *Lakewood Pipe*, the federal court reasoned, the party seeking to assert jurisdiction was merely a gratuitous beneficiary of a contract with a Florida resident. In *Moltz*, the nonresidents themselves had executed contracts requiring performance in the state.¹⁰⁹ While this is admittedly a distinction, it does not focus on an important jurisdictional criterion. A beneficiary of a contract may be treated differently than the executor, but this does not explain why the act of entering a contract by itself provides sufficient minimum contacts for due process purposes.

The United States Court of Appeals for the Eleventh Circuit

105. *Id.* at 614.

106. *Id.*

107. *Id.* at 615.

108. *Id.* at 616 (emphasis added).

109. *Id.* at 617. The court also emphasized that the plaintiff in *Lakewood Pipe* was not a party to the contract upon which the jurisdictional claim was based.

and its predecessor, the Fifth Circuit, have shown greater sensitivity to due process concerns where personal jurisdiction has been sought against a nonresident defendant in a contract case. This phenomenon is perhaps best illustrated not by a Florida case, but by *Product Promotions, Inc. v. Cousteau*,¹¹⁰ a case arising out of Texas prior to the Eleventh Circuit being created from the Fifth Circuit.

Product Promotions, a Texas corporation, had contracted with the famous marine explorer Jacques Yves Cousteau and his Cousteau Group Companies to test a device which *Product Promotions* hoped to market.¹¹¹ Upon successful completion of the testing, the test results and the Cousteau name were used in a nationwide advertising campaign. Soon after the campaign began, Cousteau's attorneys demanded that the commercials not be aired, and they threatened suit to protect the Cousteau name.¹¹² *Product Promotions* then filed suit in the United States District Court for the Northern District of Texas, alleging breach of contract, misrepresentation, and conspiracy to commit fraud.¹¹³ Personal jurisdiction was asserted, based on a provision of the Texas long-arm statute similar to the Florida provision later at issue in *Burger King*.¹¹⁴ Cousteau's motion to dismiss on grounds of lack of personal jurisdiction was granted by the district court.¹¹⁵ *Product Promotions* appealed to the Fifth Circuit.

The Fifth Circuit held that, based on the performance contemplated by the contract, the Texas long-arm statute conferred personal jurisdiction over nonresidents in the Texas courts.¹¹⁶ The court then turned to the due process issues. Following the analytical framework established by the Supreme Court, the court considered whether the requisite minimum contacts were present. It also sought to determine whether these contacts "support[ed] an inference that the nonresident defendant purposefully availed himself of the benefits of conducting business in the forum."¹¹⁷ Although most of the work under the contract had been performed along the Mediterranean Coast, the court found that the purpose of the con-

110. 495 F.2d 483 (5th Cir. 1974).

111. *Id.* at 487.

112. *Id.* at 488.

113. *Id.*

114. Compare TEX. REV. CIV. STAT. ANN. art. 2031 b (4) (quoted in *Product Promotions*, 495 F.2d at 489, 491) with FLA. STAT. § 48.193(1)(g) (1985)).

115. *Product Promotions*, 495 F.2d at 489.

116. *Id.* at 492.

117. *Id.* at 495.

tract and the delivery of the completed work to Texas constituted sufficient minimum contacts with reasonably foreseeable consequences within the forum state.¹¹⁸

This determination of foreseeability did not end the court's inquiry. The court also considered the basic equities and relative conveniences and inconveniences to the parties.¹¹⁹ Unable to find that defending a suit in Texas imposed any hardship which rose to the level of interference with substantial justice or due process, personal jurisdiction over one of the Cousteau companies was upheld.¹²⁰

Of course, another notable decision was handed down by the Eleventh Circuit in *Burger King*. There, the court went well beyond the facial requirements of section 48.193(1)(g). It delved into a thoughtful due process analysis that turned on the relative bargaining power of the parties and the burdens of requiring the franchisees to litigate in Florida.¹²¹ The court did not hold that breach of a contract requiring performance within the state, by itself, could never establish personal jurisdiction over the nonresident defendant. Indeed, the court pointedly stated that personal jurisdiction would arise "[w]here commercial parties of comparable bargaining strength contract for performance of manufacturing or services within that state's bounds" even if the negotiations occurred elsewhere.¹²² Rather, the court concluded that, given all the circumstances of the *Burger King* case, requiring Rudzewicz and MacShara to defend themselves in a Miami court did not comport with the traditional notions of fair play and substantial justice.¹²³ Although the Eleventh Circuit was eventually reversed, that result was due primarily to the Supreme Court's attaching different weights to the factors involved in the case. In fact, the Eleventh Circuit's analysis was quite similar to the mode ultimately employed by the Supreme Court. As such, the circuit court demonstrated a sensitivity and sophistication that are benchmarks for other courts to measure themselves against in the application of section 48.193(1)(g).

118. *Id.* at 496.

119. *Id.* at 498.

120. *Id.* Personal jurisdiction over some of the affiliated companies was dismissed because of lack of evidence of an agency relationship. *Id.* at 493-94.

121. *Burger King*, 724 F.2d at 1512.

122. *Id.* at 1513.

123. *Id.*

V. THE IMPACT OF *Burger King* IN FLORIDA

The Supreme Court's decision in *Burger King* has had an immediate and salutary effect on Florida courts which subsequently have decided personal jurisdiction questions involving nonresidents in contract cases. Two decisions stand out, *Duke Power Co. v. Hollifield*¹²⁴ and *National Equipment Leasing, Inc. v. Watkins*.¹²⁵

In *Duke Power*, the North Carolina utility was served with a third-party complaint by Jacksonville-based Seaboard Coast Line Railroad, seeking indemnity in a personal injury action under a 1950 contract between Duke and Seaboard's predecessor. Seaboard relied on *Engineered Storage Systems* to argue that minimum contacts requirements are not relevant once a prima facie showing of breach of contract satisfying section 48.193(1)(g) has been made.¹²⁶ The First District squarely rejected this contention on the strength of *Burger King* and held that the contract entered into by Duke Power did not constitute purposeful establishment of minimum contacts with the state of Florida.¹²⁷ Finding the contacts merely fortuitous, the court declined to "strain all notions of fair play and substantial justice" and reversed the lower court's decision upholding personal jurisdiction.¹²⁸

In *National Equipment Leasing*, Watkins operated a small business in Georgia and entered a lease with National Equipment Leasing in Atlanta. The lessor later moved to Florida and, when Watkins failed to make payments, brought suit under section 48.193(1)(g), Florida Statutes.¹²⁹ The Fifth District affirmed a lower court decision that denied personal jurisdiction over Watkins.¹³⁰ In a well-reasoned concurring opinion, Judge Cowart explained:

A judicial holding that solely by failing to make contractual payments due in any foreign state the payor impliedly consents to submit himself to the jurisdiction of such foreign state and impliedly agrees that it is reasonable to expect him to defend law

124. 471 So. 2d 1365 (Fla. 1st DCA 1985).

125. 471 So. 2d 1369 (Fla. 5th DCA 1985).

126. *Duke Power Co.*, 471 So. 2d at 1366.

127. *Id.* at 1367.

128. *Id.* at 1368.

129. *National Equip. Leasing*, 471 So. 2d 1369, 1369 (5th DCA 1985) (per curiam) (Cowart, J., concurring).

130. *Id.*

actions in such foreign state, exceeds the bounds of common sense and reason and of constitutional due process.¹³¹

Judge Cowart also attempted to distinguish the decision from the court's earlier holding in *Kane*.¹³² The guarantees executed by the nonresidents in *Kane* were part of basic loan transactions, Judge Cowart claimed, which created contacts with the forum and alerted the guarantors to the possibility of suit in Florida.¹³³ While this distinction is not wholly persuasive, the court's holding demonstrates a significant departure from its prior course.

VI. CONCLUSION

Florida courts should continue the trend demonstrated in *Duke Power* and *National Equipment Leasing*. A determination that a nonresident's conduct brings him within the language of section 48.193(1)(g), Florida Statutes, may no longer by itself be assumed to establish personal jurisdiction over a nonresident defendant in a contract case. That conclusion is only the halfway point in the analysis. Only where the activity complained of falls within the purview of the long-arm statute *and* where the minimum contacts requirements of due process have been satisfied may personal jurisdiction be asserted. If nothing else, the Supreme Court's decision in *Burger King* underscores the imperative that Florida courts—and, therefore, practitioners—must address due process issues when considering the exercise of personal jurisdiction over a nonresident defendant. No longer may these issues be treated so cavalierly.

Robert C. Shearman

131. *Id.* at 1370-71.

132. *Id.* at 1372.

133. *Id.*