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Burger King Corp. v. Rudzewicz: A Whopper of an Opinion

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NOTE

BURGER KING CORP. V. RUDZEWICZ: A WHOPPER OF AN OPINION

A pair of Michigan citizens invested in a Burger King franchise. They filed their application with Burger King's Birmingham, Michigan, district office, which then forwarded the application to the national headquarters in Florida. In the course of negotiations, the franchisees dealt with both offices, but their only physical contact with Florida was through a brief training session which only one of them attended. In addition, they purchased $165,000 worth of restaurant equipment which was was shipped from Florida. The negotiations culminated in a contract whereby the franchisees would pay Burger King one million dollars over twenty years in return for a franchise in Michigan. Upon the failure of the franchisees to make the required payments to the Florida office, Burger King terminated the franchise. When the franchisees subsequently refused to vacate the premises, Burger King filed suit in federal district court in Florida alleging breach of franchise obligations and tortious infringement of its trademarks. The franchisees argued that the claim did not arise in Florida, and that therefore the Florida district court lacked personal jurisdiction over them. On appeal to the Supreme Court, Justice Brennan, writing for a majority of six members of the Court, held that the exercise of personal jurisdiction over these defendants did not offend due process. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174 (1985).

The facts in *Burger King* amply support its holding under prior personal jurisdiction jurisprudence. Nevertheless, certain language contained in the majority opinion is troubling.[1] Under the jurisprudence, once minimum contacts were established the inquiry regarding personal jurisdiction ended, because at that point the defendant had sufficient connection with the forum to subject him to suit. The relationship under examination was that of the defendant to the forum state. Various factors were considered in determining whether the defendant-forum link was strong enough to justify forcing a defendant to litigate in the forum state. The primary considerations were: the purposeful availment re-

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1. See text accompanying infra notes 32-47.

quirement of *Hanson v. Denckla*;[2] benefits received from the forum as in *Milliken v. Meyer*;[3] foreseeability of litigation in the forum as in *World-Wide Volkswagen Corp. v. Woodson*.[4] Other factors have been considered, each of which standing alone have been found insufficient to support personal jurisdiction.[5]

In *Burger King* Justice Brennan wrote: "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered *in light of other factors* to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"[6] This language suggests that the traditional requirements of due process in the assertion of in personam jurisdiction has changed. It appears that the analysis in *Burger King* has turned the defendant-forum link into merely one factor to be weighed equally with other factors, such as the location of the cause of action, the inconvenience to the defendant, the interests of the forum state, and the interests of the plaintiff. This test, then, focuses on the relationship between the forum *and the cause of action*, necessarily deemphasizing the relationship of the defendant with the forum, and elevating those considerations previously given little weight.

Why is the shift of focus important? Such a shift in the analysis could force defendants like those in *World-Wide* to litigate in Oklahoma.[7] Such a shift in focus could force a Delaware bank to litigate in Florida, a state wherein the bank had conducted no activity.[8] By downplaying the necessity of a defendant-forum link, "[e]very seller of chattels would in effect appoint the chattel his agent for service of process."[9]

This note will examine the possibly substantial change that in personam jurisdiction has undergone through this apparent shift in focus, including the lightening of the burden of proof necessary to bring nonresident defendants into a forum which such a shift would effect. Before this analysis can proceed, however, a brief examination of the cases that established a strong defendant-forum relationship as the central inquiry, as well as Justice Brennan's dissents in those cases, must be undertaken.

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2. 357 U.S. 235, 78 S. Ct. 1228 (1958). See text accompanying infra notes 18-24.

3. 311 U.S. 457, 61 S. Ct. 339 (1940). See text accompanying infra notes 12-14.

4. 444 U.S. 286, 100 S. Ct. 559 (1980). See text accompanying infra notes 25-32.

5. See text accompanying infra note 33.

6. *Burger King*, 471 U.S. at 476, 105 S. Ct. at 2184 (emphasis added).

7. *World-Wide*, 444 U.S. 286, 100 S. Ct. 559 (1980). For a discussion of the facts of *World-Wide*, see text accompanying infra notes 25-32.

8. *Hanson*, 357 U.S. 235, 78 S. Ct. 1228 (1958). For a discussion of the facts of *Hanson*, see text accompanying infra notes 18-24.

9. *World-Wide*, 444 U.S. at 296, 100 S. Ct. at 566.

Background

Any examination of the modern concept of in personam jurisdiction must begin with *International Shoe Co. v. Washington*.[10] *International Shoe* recognized that the "doing business" measure of activity established by earlier cases begged the question of whether the activities of the corporate defendant were sufficient under the limits of due process to subject it to suit in the forum. Doing business was a quantitative measure of the activity of the corporation or its agents; what was needed was a qualitative standard by which to evaluate that measure. The Court labelled that standard "minimum contacts":

> [D]ue process requires only that in order to subject a defendant to a 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."[11]

The language "traditional notions of fair play and substantial justice" was taken from *Milliken v. Meyer*.[12] *Milliken* involved a suit against a Wyoming domiciliary who, at the time of the suit, was absent from Wyoming. The Court held that the Wyoming judgment was entitled to full faith and credit in Colorado:

> [T]he authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protections to him and his property by virtue of his domicile may also exact reciprocal duties. . . . The responsibilities of that citizenship . . . [are] not dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state.[13] Under this analysis, the heart of "traditional notions of fair play and substantial justice" is the relationship the defendant has forged with the forum state. The intentional relationship engendered by establishing domicile in a state makes it foreseeable that the state could fairly call the absent domiciliary back to litigate within its borders. A domiciliary receives benefits from his state, such as the protection of its laws, and in return should be required to accept certain responsibilities. To a lesser degree activities of

10. 326 U.S. 310, 66 S. Ct. 154 (1945).

11. *International Shoe*, 326 U.S. at 316, 66 S. Ct. at 158 (quoting *Milliken*, 311 U.S. 457, 463, 61 S. Ct. 339, 343).

12. 311 U.S. at 463, 61 S. Ct. at 343.

13. Id. at 463-64, 61 S. Ct. at 343.

> a non-domiciliary within a state invoke the same policies.[14] Because of this relationship (in *Milliken* a relationship of citizenship), it is fair to call the nonresident defendant to litigate in the forum.

In personam jurisdiction cases after *International Shoe* recognized the problems presented by corporate defendants, and adopted a standard with which to deal with such non-resident parties when they were willing to engage in activity in a state, but were not willing to be sued in that state. An example of this is *McGee v. International Life Insurance Co.*[15] In *McGee*, International Life Insurance, a Texas corporation, had taken over Empire Mutual with whom the California decedent had a life insurance policy. International Life offered to insure the decedent with a new policy on the same terms, but with premiums to be mailed to the Texas office. Upon the death of the insured, the beneficiary of the policy filed a claim, which International Life refused to pay. The beneficiary then filed suit in California against International Life, obtained a judgment, and sought enforcement of the judgment from a Texas court. The Texas court refused to enforce the California judgment, based on a finding that, because service of process on the defendant occurred outside of California, California lacked personal jurisdiction. On appeal, the Supreme Court found that California did have jurisdiction, and held for the beneficiary.

The only contact the defendant had with California was the one insurance policy at issue. Nevertheless, the Court concluded that, because International Life had sought out the California resident and established a contract with him for its economic benefit, "[i]t . . . [was] sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."[16] In so concluding, the Court saw itself as allowing in personam jurisdiction the flexibility needed to cope with the "increasing nationalization of commerce."[17] Built into this new flexibility was the concept of foreseeability: the defendant had solicited the insured's business in California and should have been able to foresee that if a dispute were to arise it would probably be sued upon in California. Moreover, the defendant received the financial benefit of premium payments from California, which made it fair to shoulder the defendant with the burden of defending there.

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14. *International Shoe* broadened the relationship concept in *Milliken* from that of domicile to one based on benefits received from the forum state, by applying the *Milliken* rationale to a corporation.

15. 355 U.S. 220, 78 S. Ct. 199 (1957).

16. Id. at 223, 78 S. Ct. at 201.

17. Id.

Hanson v. Denckla[18] stands for the proposition that the defendant must purposefully avail himself of the benefits of the forum state in order for the forum to assert personal jurisdiction. *Hanson* involved a trust set up at a Delaware bank by a Pennsylvania resident (the testator) who later became a Florida resident. When the testator died in Florida, a dispute arose over the trust funds. The Florida court held that it had jurisdiction over the Delaware bank. The Supreme Court held that Florida did not have jurisdiction: "The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in the State either in person or by mail."[19] The only contact of the Delaware bank with Florida was in the form of communications received from the testator. On the basis of these facts, the Court concluded:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but 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.[20]

In *Hanson*, the majority felt there was not a sufficient connection between the defendant and the forum to establish a relationship upon which personal jurisdiction could be based, since there was no purposeful and deliberate activity by the defendant.[21]

It should be noted that Florida had a substantial interest in resolving the dispute. The will was probated and the power of appointment of the trust executed in Florida. Under Florida law the appointment was invalid. Moreover, the appointment was performed by a Florida resident. In spite of the strength of these interests, the Court refused to extend personal jurisdiction over a party which had not directed its activity at the forum.

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18. 357 U.S. 235, 78 S. Ct. 1228 (1958).

19. Id. at 251, 78 S. Ct. at 1238.

20. Id. at 253, 78 S. Ct. at 1239-40 (emphasis added).

21. In this context, the Court has often found such activities to be those which involve a commercial benefit or a tort. Such actions by their very nature allow parties to anticipate suit in the forum. See, e.g., *McGee*, 355 U.S. 220, 78 S. Ct. 199 (1957); Keeton v. Hustler Magazine, Inc., 464 U.S. 958, 104 S. Ct. 1473 (1984); Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482 (1984).

The dissenting opinion in *Hanson*[22] was written by Justice Black and joined by Justices Brennan and Burton. Black's dissent foreshadowed Brennan's dissent in *World-Wide*:

> It seems to me that where a *transaction* has as much *relationship* to a State as Mrs. Donner's appointment had to Florida its courts ought to have power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident that it would offend what this Court has referred to as "traditional notions of fair play and substantial justice."[23]

The dissent also focused on the business relationship between the testator and the Delaware bank that continued until her death. Unlike the majority, the dissent viewed the maintenance of that business relationship as a deliberate action by the defendant, which, when coupled with the forum's interest in handling the litigation involving a will to be executed in that state, supported an assertion of personal jurisdiction.

Brennan's position became more clear in *World-Wide*,[24] which involved an attempt by an Oklahoma court to assert jurisdiction over a New York wholesaler and a New York retail dealer. The only connection that these two defendants had to the forum was by virtue of the automobile that had been involved in the accident upon which the litigation was based. Justice White, writing for the majority, found that the "fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma"[25] was not sufficient to support the assertion of personal jurisdiction.

The majority developed an analysis giving the non-resident defendant the power to structure his activity so as to avoid suit in the forum. Part of its analysis lay in the concept of foreseeability:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.[26]

Such foreseeability allows the defendant the ability to spread the costs of litigation either by buying insurance, "passing the expected costs on

22. *Hanson*, 357 U.S. at 256, 78 S. Ct. at 1241 (Black, J., dissenting).
23. Id. at 258-59, 78 S. Ct. at 1242 (emphasis added) (Black, J., dissenting).
24. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559 (1980).
25. Id. at 295, 100 S. Ct. at 566.
26. Id. at 297, 100 S. Ct. at 567.

to customers, or, if the risks are too great, severing its connection with the State."[27]

An important distinction arose in *World-Wide* between movement of goods in the stream of commerce and movement by consumers. The essence of this distinction lies in the control over the product and the benefit derived from the presence of the product in the forum. Under the majority's view, if a product is placed into the stream of commerce by the defendant for a commercial benefit, the defendant who realizes a profit from that movement, and thereby benefits from the product's location in the forum, must accept the risk of litigation wherever he sent the product. It would only be fair for that defendant to accept that risk, because he has the ability to anticipate the possibility of suit there and to protect himself by spreading the risk. He could, for instance, buy insurance and pass the costs on to the consumer.

On the other hand, when the consumer is responsible for the movement of the product, the retailer/wholesaler/producer has no method by which to control the risk to which such movement exposes him. In such a case, "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel."[28] In addition, the two factors in *Milliken* (foreseeability arising from an intentionally created relationship and benefits received),[29] which justified calling the nonresident to litigate in the forum, are not present. According to the majority, if a product is moved by the consumer, the manufacturer cannot be said to foresee litigation in the place of removal, because he lacks knowledge of the location of the product. Moreover, if the product is removed to an unknown forum, it is difficult to determine what benefits that state then gives to the manufacturer. In the majority's view, the defendants did not receive any benefit from the car's presence in Oklahoma, nor could it be said that the defendants could foresee the creation of a relationship with Oklahoma which would result in litigation there.

Justice Brennan's strong dissent evidenced his different view of the protections afforded by due process. For Brennan, the defendant's act of putting the automobile into the flow of commerce established a sufficient connection with the state into which the automobile was driven upon which to base jurisdiction. After stating that the majority read *International Shoe* too narrowly, he attacked the weight given the defendant-forum connection. He then stressed the importance of other factors, such as benefits which the defendant derives from the forum, the interests of the forum in the litigation, and inconvenience to the defendant of

27. Id.
28. Id. at 296, 100 S. Ct. at 566.
29. See text accompanying supra notes 12-13.

litigating in the forum. In a footnote, Brennan explained his viewpoint:

> The forum's interest in the litigation is an independent point of inquiry even under traditional readings of *International Shoe*'s progeny. If there is a shift in focus, it is not away from "the relationship *among* the defendant, the forum, and the litigation." Instead it is a shift within the same accepted relationship from the connections *between* the defendant and the forum to those between the forum and the litigation.[30]

Under his understanding of the traditional defendant-forum analysis, Brennan would have held the defendant in *World-Wide* amenable to jurisdiction. He argued that an automobile is a product that is purchased because of its mobility; accordingly, the defendants were benefitting from the use of this product in Oklahoma. Moreover, the defendants clearly benefitted from a national system of advertising and service centers, some of which were located in Oklahoma.

Justice Brennan's approach to personal jurisdiction stresses the forum-cause of action relationship. According to his dissent in *World-Wide*, if a plaintiff can "show that his chosen forum State has a sufficient interest in the litigation (or sufficient contacts with the defendant), then the defendant who cannot show some real injury to a constitutionally protected interest . . . should have no constitutional excuse not to appear."[31] In the first step of this analysis, two different inquiries are raised, either of which when met satisfies this step. The first inquiry examines the forum state's interest in the litigation; the second evaluates the defendant's contacts with the forum state.

This approach is different from that taken in *International Shoe* and its progeny under which personal jurisdiction was based on the defendant-forum relationship, the purpose of which was to protect the defendant from being subjected to a suit in a forum with which he had no connection. As discussed earlier, such protection allowed a potential defendant knowingly to control his activities toward a forum in such a way as to influence his amenability to personal jurisdiction in that forum. Prior jurisprudence did not require an *initial* inquiry of whether *either* the forum state had sufficient interest in the litigation to justify suit in that state *or* the defendant's relationship with the forum was sufficient. In fact, the *World-Wide* majority expressly repudiated the use of other factors to downplay the defendant-forum connection:

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30. Rush v. Savchuk, 444 U.S. at 302 n.4, 100 S. Ct. at 582 n.4 (Brennan, J., dissenting) (citation omitted) (emphasis in the original). The footnote is in Justice Brennan's dissenting opinion in Rush v. Savchuk, 444 U.S. 302, 320, 100 S. Ct. 571, 580 (1980), in which he combined his dissents in both *Rush* and *World-Wide*.

31. 444 U.S. at 312, 100 S. Ct. at 587 (Brennan, J., dissenting).

> Even if the defendant would suffer *minimal or no inconvenience* from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[32]

The Burger King Opinion

As mentioned earlier, Justice Brennan's majority opinion in *Burger King* suggests that the defendant-forum relationship is merely one factor in the analysis. This break from the jurisprudence first appeared in Black's dissent in *Hanson* and was elaborated on in Brennan's dissent in *World Wide*. It thus appears that Brennan wove into *Burger King* a thread of analysis that the prior jurisprudence had rejected.

Considering its facts in light of the jurisprudence, *Burger King* is not a radical decision. The contract involved had a substantial connection with the plaintiff's Florida headquarters. Moreover, the contract contained a clause that stated that Florida law would govern any disputes. Perhaps the most important aspect of the situation was the foreseeability of possible litigation in a forum where the franchisees had a substantial contractual tie. The strong connection of the defendants to the forum through being parties to a contract involving a substantial sum of money to be paid over a period of twenty years fits easily under the traditional defendant-forum test.

After setting out the facts, Brennan wrote that due process was intended to protect liberty interests, then, citing earlier decisions, discussed the need for the defendant purposefully to avail himself of the benefits of the forum. Brennan tracked the prior jurisprudence and then purported to set out the traditional analysis for assertion of personal jurisdiction, which he said involves the establishment of minimum contacts *before consideration of other factors*. At this point some type of analytical jump was made. Prior jurisprudence required the consideration of *all* factors to determine whether there were minimum contacts, which was the equivalent of there being sufficient connection of the defendant with the forum to justify forcing the defendant to litigate there. The impact of considering other factors *after* minimum contacts has been established is not clear, especially since the result in *Burger King* probably would have been no different under the traditional analysis. Nevertheless, it can be argued strongly that the use of minimum contacts as merely one factor in the analysis reduces the importance of the relationship of

32. Id. at 294, 100 S. Ct. at 565-66.

the defendant with the forum. If one considers the previous dissents by Justice Brennan, it would appear that, in *Burger King*, he was referring to the two-step test that he developed in *World-Wide*.[33] The effect of such a test is, in fact, to downplay the defendant-forum connection by weighting other factors equally with it.

At this point, a very basic question must be asked: what purpose does due process protection serve in the context of jurisdiction over the person? *Pennoyer v. Neff*[34] established the basic rule of personal jurisdiction upon the premise that due process serves as a check on state sovereignty:

> The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse.[35]

However, *World-Wide* appeared to characterize due process protection as an element of interstate federalism: "It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[36]

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee[37] addressed and dismissed the *World-Wide* view of the role of due process in the context of jurisdiction over the person.[38] The crux of its language was used by the *Burger King* court.[39] The Court in *Insurance Corp.* found that while due process protection does serve to restrict state power, its ultimate function is the protection of individual liberty interests.[40]

According to *Burger King*, due process "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'"[41] The opinion goes on to say that such protection allows potential defendants to structure their activities so as to provide "some minimum assurance as to where that conduct will and will not render them liable to suit."[42] It appears, then, that after *Insurance Corp.* and *Burger King*

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33. See text accompanying supra note 32.
34. 95 U.S. 714 (1877).
35. Id. at 720.
36. 444 U.S. at 291-92, 100 S. Ct. at 564.
37. 456 U.S. 694, 102 S. Ct. 2099 (1982).
38. Id. at 702 n.10, 102 S. Ct. at 2104 n.10.
39. *Burger King*, 471 U.S. at 471-72, 472 n.13, 105 S. Ct. at 2181-82, 2181 n.13.
40. 456 U.S. at 702-03 n.10, 102 S. Ct. 2099, 2104-05 n.10.
41. 471 U.S. at 471-72, 105 S. Ct. at 2181-82.
42. Id. at 472, 105 S. Ct. at 2182.

the accepted primary purpose of due process is the protection of individual liberty interests.

The important question raised by the foregoing is whether it would be possible for jurisdiction to be asserted in the absence of a defendant-forum link if the other *Burger King* factors were present. If *Burger King* indicates a trend toward the adoption of the position taken by Brennan in his previous dissents,[43] an affirmative answer is suggested. What should the answer be? The answer should be consistent with the purpose underlying due process protection. Since a crucial component of due process is the protection of individual liberty interests, if the nonresident defendant directs his actions at the forum, it is fair to force him to litigate in the forum because his liberty interests have properly been taken into account. Moreover, such direction of activity should be analyzed in conjunction with the benefit that the defendant receives from the forum and the foreseeable possibility of litigation in the forum.

If, however, the defendant-forum link is merely one factor to be considered, the defendant loses the minimum assurance as to where he could be sued. If other factors can make personal jurisdiction possible in the absence of a defendant-forum link established by direct actions of the defendant, the system of personal jurisdiction established by *International Shoe* and its progeny crumbles. Moreover, if, as has been suggested, the defendant-forum link is at the heart of the primary purpose of due process in this context—i.e., protection of the defendant's liberty interests—then the elevation of other considerations would appear to be self-defeating. Nonetheless, this is precisely what Justice Brennan's opinion in *Burger King* does.

Recent Application of Burger King

A recent decision of the Supreme Court supports the interpretation of *Burger King* offered in this article. *Asahi Metal Industry v. Superior Court*[44] involved the assertion of jurisdiction over a Japanese manufacturer in an indemnification action by a Taiwanese distributor who had been held liable in a products liability suit in California. The Supreme Court of California found the assertion of jurisdiction over the manufacturer constitutional. All of the members of the United States Supreme Court agreed that the assertion of jurisdiction would offend due process, but their agreement as a majority extended no further.

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43. Hanson v. Denckla, 357 U.S. 235, 256, 78 S. Ct. 1228, 1241 (1958) (Black, J., dissenting); Kulko v. Superior Court, 436 U.S. 84, 101, 98 S. Ct. 1690, 1701 (1978) (Brennan, J., dissenting); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 299, 100 S. Ct. at 580 (1980) (Brennan, J., dissenting).

44. 55 U.S.L.W. 4197 (U.S. Feb. 24, 1987).

Justice O'Connor wrote part II A of the opinion, in which only three other justices joined. Her decision was based on a finding that the defendant had made no deliberate, purposeful attempt to avail itself of the California market. She distinguished between the mere knowledge of the manufacturer that his product would reach a certain market and what she considered deliberate activity: e.g., designing a product for a particular market, advertising in that state, or marketing the product through a distributor acting as the manufacturer's sales agent.[45]

Justice Brennan, joined by Justices White, Marshall and Blackmun, disagreed with that analysis. They found the regular and systematic placement of over one hundred thousand units of the manufacturer's product into the stream of commerce, coupled with the knowledge that some of the units would end up in California, to be sufficient for the assertion of jurisdiction. Brennan noted that the manufacturer could not claim surprise over being called to California because of its awareness that its product would end up there. Additionally, the manufacturer received substantial revenues over several years from the retail sale of its product in California.[46]

Eight of the members of the Court (all but Justice Scalia) agreed that, upon consideration of other factors after considering the defendant-forum connection, assertion of jurisdiction was not constitutional. Justice O'Connor considered those factors which Justice Brennan, in *Burger King*, said should be considered in light of the defendant-forum connection. She noted that the burden on the Japanese manufacturer would have been excessive; it would have had to defend a suit across the ocean and have a foreign law determine the rights between it and a Taiwanese distributor. Secondly, the forum had little interest in pursuing an indemnity action between two foreign corporations. In addition, the Taiwanese distributor, plaintiff in the indemnity action, failed to demonstrate any interest in having its suit tried in California as opposed to Taiwan or Japan. Finally, the Court was aware that more restraint is required when dealing with foreign countries than with the several states. All of these considerations rendered assertion of jurisdiction over Asahi offensive to "traditional notions of fair play and substantial justice."[47]

Burger King's impact on *Asahi* is evident. Justice O'Connor considered first the defendant-forum connection and then considered other factors. Had she and the three justices joining her felt that, without the requisite defendant-forum connection, assertion of personal jurisdiction was unconstitutional, there would have been no need to go any

45. Id. at 4199.

46. Id. at 4200 (Brennan, J., concurring in part and in the judgment).

47. Id. at 4200 (quoting *International Shoe*, 326 U.S. at 316, 66 S. Ct. at 158, quoting *Milliken*, 311 U.S. at 463, 61 S. Ct. at 343).

further. Yet, she considered the burden on the defendant and interests of the plaintiff and the forum, just as Justice Brennan advocated in *Burger King*. Once again the question arises as to whether a strong interest of the forum state and the plaintiff, along with little inconvenience to the defendant, but without deliberate activity in the forum on the part of the defendant, would support a finding of personal jurisdiction. In light of *Burger King* and *Asahi*, it may.

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