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Quest for a Bright Line Personal Jurisdiction Rule in Contract Disputes—Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174 (1985)

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QUEST FOR A BRIGHT LINE PERSONAL JURISDICTION RULE IN CONTRACT DISPUTES—*Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985).

The United States Supreme Court has returned to a personal jurisdiction methodology similar to that used a century ago. Under the traditional nineteenth century doctrine, the Court applied concrete and mechanical rules in jurisdiction disputes. With increased social mobility and technological advancements, however, these rules became inadequate. Responding to the deficiencies of its doctrine, the Supreme Court formulated a flexible test for personal jurisdiction in *International Shoe Co. v. Washington.*[1] Gradually, the Court's flexible test turned into a vague doctrine, incapable of consistent application by lower courts. The inconsistency caused by the Court's rule also affected businesses that desired predictability for conducting their transactions. Accordingly, since the late 1970's, the Court has been chipping away at the abstract, flexible test enunciated in *International Shoe* by reasserting bright line, concrete jurisdictional rules for various factual situations.

Recently, in *Burger King Corp. v. Rudzewicz,*[2] the Court stopped short of providing a concrete rule for personal jurisdiction disputes in contract situations. Prior movement toward bright line tests, however, suggests that the Court is searching for a personal jurisdiction rule applicable to contract cases. The Court should adopt, for contract disputes, a rule favoring buyer's or consumer's forums. A clear rule is particularly crucial for contract relationships where predictability and certainty are prime objectives.[3] The most satisfactory rule for obtaining certainty in contract cases would, at the threshold, determine whether one of the contracting parties is an individual consumer or a commercial buyer.[4] If an individual consumer is participating in the transaction, the consumer's forum should be the place of litigation.[5] If there is no individual consumer, there should be a presumption in favor of the commercial buyer's forum as the place of litigation.[6]

1. 326 U.S. 310 (1945).
2. 105 S. Ct. 2174 (1985).
3. *See* Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 445 U.S. 907, 910–11 (1980) (White, J., dissenting from denial of certiorari) (in commercial relations "certainty of result is a prime objective").
4. *See infra* notes 153–58, 175–203 and accompanying text.
5. *See infra* notes 153–59, 175–93 and accompanying text.
6. *See infra* notes 153–60, 194–203 and accompanying text.

I. OVERVIEW: EVOLUTION OF PERSONAL JURISDICTION STANDARDS

In the late nineteenth century and early twentieth century, the Supreme Court articulated personal jurisdiction rules based on the sovereign powers of state courts.[7] This territorial doctrine of personal jurisdiction, symbolized by *Pennoyer v. Neff*[8] and based on notions of presence, consent, and domicile, lent itself to easy, though rigid, applications.[9]

Traditional territorial theories of personal jurisdiction, based on state sovereignty rights, gradually produced inadequate results.[10] Confronted with an increasingly mobile population, courts could not rely on the territorial doctrine to reach defendants such as out-of-state motorists.[11]

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7. *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1064, at 208 (1969) (flexibility not the motivating principle for adoption of the territorial concept of personal jurisdiction).

8. 95 U.S. 714 (1878). *Pennoyer* involved an ejectment action where Marcus Neff sought recovery of Oregon land he had owned. Sylvester Pennoyer defended by asserting title from a sheriff's deed given at an execution sale. The execution sale stemmed from an earlier judgment against Neff in favor of an attorney, J. H. Mitchell, for services rendered by Mitchell. There was no personal service on Neff, who was out of state, in the action by Mitchell against Neff for the attorney's fees. A default judgment was entered against Neff when he failed to appear. Neff's land was attached and sold to Pennoyer under a sheriff's deed. The Supreme Court held the original default judgment invalid and asserted that presence of the defendant in the forum was a prerequisite to the assertion of personal jurisdiction unless the defendant consented to jurisdiction.

9. For a preeminent example of rigid application of jurisdiction rules, see Grace v. MacArthur, 170 F. Supp. 442, 444 (E.D. Ark. 1959) (presence rule allowed jurisdiction over a person "moving in interstate commerce . . . in a regular commercial aircraft, flying in the regular navigable airspace above the [forum] State"); *see also* Smith v. Gibson, 83 Ala. 284, 285, 3 So. 321 (1888) (general rule is that "every country has jurisdiction over all persons found within its territorial limits . . . . [h]owever transiently the defendant may have been in the State").

10. *See generally* Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241 (*Pennoyer's* rules gradually abandoned). *See also* Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME LAW 699, 699–700 (1983). Lewis argues that state sovereignty notions "served as the centerpiece of *Pennoyer v. Neff*," and have resurfaced several times even though such notions should have been rendered obsolete in International Shoe Co. v. Washington, 326 U.S. 310 (1945), Shaffer v. Heitner, 433 U.S. 186 (1977), and Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

The problem with the consent basis of jurisdiction was that a state could determine the existence of implied or express consent from a corporation's transaction of interstate business within the forum even though the state could not constitutionally exclude the corporation from transacting business in the forum. *See* 4 C. WRIGHT & A. MILLER, *supra* note 7, § 1066, at 220 (citing International Harvester Co. v. Kentucky, 234 U.S. 579 (1914) (determining the existence of consent from business activity in forum), and International Textbook Co. v. Pigg, 217 U.S. 91 (1910) (inability to exclude corporation doing interstate business)).

The problem with the presence theory was that courts found it difficult, if not impossible, to give a corporation a place of presence without imputing to the corporation the activities of shareholders, officers, or agents. *See* Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930). In practice, the crucial factual determination turned on whether a corporation was "doing business" within the forum. However, presence and doing business were themselves conclusory terms that provided little guidance in determining whether or how much business was conducted in the forum. *Id.*

11. 4 C. WRIGHT & A. MILLER, *supra* note 7, § 1065, at 214–17.

Moreover, interstate commerce developed at a rapid pace. Under the traditional bases of jurisdiction, courts did not have sufficient means to attain personal jurisdiction over nonresidents not physically present in the forum, but doing business in the forum.[12] The United States Supreme Court responded to this problem in *International Shoe Co. v. Washington.*[13] The Court altered the foundation of personal jurisdiction from presence, consent, and domicile, to the existence of minimum contacts between the defendant and the forum.[14] The new minimum contacts standard served to ensure that a court's assertion of personal jurisdiction would be reasonable,[15] thus satisfying due process requirements.[16]

After *International Shoe,* many courts broadly asserted personal jurisdiction over parties not previously amenable to suit.[17] The new standard did not base personal jurisdiction on clear cut rules as the *Pennoyer* test did.[18] Instead, application of the new standard required courts to examine the facts of each case before determining whether the quality and nature of a nonresident's activity with a forum allowed the nonresident to be fairly subjected to a suit in the forum.[19] Courts thus had greater discretion to weigh the facts of each case and assert jurisdiction when it seemed fair.

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12. *Id.* § 1067, at 224.

13. 326 U.S. 310 (1945).

14. *Id.* at 316.

15. *Id.*

16. The due process clause "is the only source of the personal jurisdiction requirement." Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982). The requirement mentioned by the *Ireland* Court is "that there be 'minimum contacts' between the nonresident defendant and the forum State." *Id.* Due process questions arose after *International Shoe* when defendants challenged personal jurisdiction on the ground that their rights would be violated without a finding of minimum contacts. The *Pennoyer* Court had earlier relied on due process rights, but equated those rights with the satisfaction of state sovereignty requirements.

17. Much of the expansion of personal jurisdiction resulted from the increased use of long-arm statutes. After *International Shoe,* many state legislatures passed "single-act" long-arm statutes that allowed personal jurisdiction when nonresidents were doing business in the state, *see, e.g.,* Federal Ins. Co. v. Michigan Wheel Co., 267 F. Supp. 639 (S.D. Fla. 1967), when nonresidents committed any one of the enumerated acts within the forum, *see, e.g.,* Elkhart Eng'g Corp. v. Dornier Werke, 343 F.2d 861 (5th Cir. 1965), or, in some instances, when nonresidents committed acts outside the forum but caused effects within the forum, *see, e.g.,* Gray v. American Radiator & Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). *See also* 4 C. WRIGHT & A. MILLER, *supra* note 7, §§ 1068–69.

18. The *Pennoyer* Court ruled that personal jurisdiction is valid if a defendant was personally served within the forum, voluntarily appeared there, or otherwise consented to jurisdiction. *See* 4 C. WRIGHT & A. MILLER, *supra* note 7, § 1064, at 209. The *International Shoe* Court did not provide set rules, but "merely furnishe[d] a guide by which each case may be decided on its particular facts." 4 C. WRIGHT & A. MILLER, *supra* note 7, § 1067, at 233. *See also* Hanson v. Denckla, 357 U.S. 235, 251 (1958) ("[T]he requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff,* 95 U.S. 714, to the flexible standard of *International Shoe Co. v. Washington,* 326 U.S. 310.").

19. *International Shoe,* 326 U.S. at 319.

The *International Shoe* standard proved difficult for courts to apply because of its susceptibility to different interpretations.[20] The Court articulated the new personal jurisdiction standard as one test, but formed the test around two components: (1) minimum contacts or the defendant's affiliation with the forum, and (2) fair play and reasonableness.[21] Two distinct ways of viewing this bifurcated test emerged, each of which stressed one component over the the other.[22] While the Court initially emphasized reasonableness, eventually it settled on the defendant's affiliation with the forum. Questions developed, however, about the purpose of the minimum contacts requirement: was it a requirement intended to protect the individual liberty interest of the defendant or was it a requirement meant to restrict each state's power?[23]

In addition to questions about its purpose, the minimum contacts standard proved difficult to apply because few precedential rules emerged from the Supreme Court. In the first dozen years after *International Shoe,* the Supreme Court decided personal jurisdiction disputes on a case by case basis, weighing the specific facts of each case but failing to explain the weight of the various facts. Lower courts had little guidance for deciding when to exercise jurisdiction. The Court, after almost twenty years of silence, responded to the lower court problem by fashioning a series of bright line personal jurisdiction rules, each applicable to a different fact pattern and each based upon hidden nondoctrinal issues.[24] The Court has followed this pattern of setting forth distinct guidelines in each of its personal jurisdiction cases since 1977.

In 1985, the Supreme Court addressed personal jurisdiction questions in the context of contractual relationships. In *Burger King Corp. v. Rudzewicz,*[25] the Court attempted to clarify and reemphasize its explanation of the ambiguities in personal jurisdiction doctrine. The Court also solidified emphasis on the defendant's contacts.[26] The Court characterized the minimum contacts requirement as a threshold inquiry, while notions of fair play and reasonableness formed a secondary inquiry.[27] The *Burger King* opinion also reaffirmed that minimum contacts are constitutionally necessary to protect defendants' liberty interests.[28] Despite the recent

20. *See infra* notes 30–59 and accompanying text.
21. *See International Shoe,* 326 U.S. at 316.
22. *See infra* notes 30–59 and accompanying text.
23. *See infra* notes 39–59 and accompanying text.
24. *See infra* notes 60–116 and accompanying text.
25. 105 S. Ct. 2174 (1985).
26. *Id.* at 2183.
27. *Id.* at 2182, 2184. See *infra* notes 30-59 and accompanying text for development of the Court's two-pronged jurisdiction test.
28. *Id.* at 2183.

pattern of bright line rules, the *Burger King* opinion did not produce a workable rule for contract cases.[29]

II. DEVELOPMENT OF THE TWO-PRONGED PERSONAL JURISDICTION TEST EMPHASIZING MINIMUM CONTACTS: *INTERNATIONAL SHOE* AND SUBSEQUENT CASES

The Supreme Court, in *International Shoe,*[30] departed from prior case law to allow personal jurisdiction if a defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[31] One interpretation of the Court's language used fair play and substantial justice as the standard against which minimum contacts are measured, thus tying the two concepts together.[32] An alternative interpretation of *International Shoe's* phraseology separated the two concepts into two requirements: (1) contacts, ties, or relations between the defendant and the forum (minimum contacts), and (2) reasonableness (fair play and substantial justice).[33]

The phrase "such that" in the Court's articulation of the minimum contacts standard seems deliberately to connect the two concepts: minimum contacts and fair play.[34] However, in later cases, particularly *Hanson*

29. *See infra* notes 142–49 and accompanying text.

30. 326 U.S. 310. In *International Shoe,* Washington State sought to impose unemployment compensation taxes on International Shoe Company for payments made by the company to its salesmen in Washington. *Id.* at 313. The company's salesmen lived in Washington and earned commissions of over $31,000 annually. *Id.* International Shoe Company, incorporated in Delaware with its principal place of business in Missouri, employed salesmen who lived and solicited business in Washington. *Id.* Washington State assessed unemployment compensation taxes against International Shoe based on the salesmen's commissions. *Id.* at 312. The company refused to pay the taxes and was served by the Tax Commissioner with an order and notice of assessment. *Id.* Service was made on one of the resident sales agents and by mailing notice to International Shoe's Missouri offices. *Id.* The defendant argued that the company was not present in the state and that the statute allowing service by mail violated the due process clause. *Id.* at 315.

The Supreme Court concluded that the company's activities in Washington were systematic and continuous. *Id.* at 320. International Shoe's activities resulted in a large volume of interstate business from which the company received the benefits and protections of the laws of Washington. *Id.* Moreover, the tax liability at issue arose out of those continuous activities. *Id.* The Court held that the activities constituted minimum contacts that made it fair and reasonable for a Washington court to assert jurisdiction. *Id. International Shoe* did not present a difficult set of facts for identifying minimum contacts. *See* Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal,* 59 N.C.L. REV. 429, 460 (1981). The Court recognized that, in subsequent cases, more difficult assessments of the contacts that justify subjecting of a defendant to jurisdiction would arise. 326 U.S. at 319.

31. *International Shoe,* 326 U.S. at 316 (quoting Millikin v. Meyer, 311 U.S. 457, 463 (1940)).

32. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 125 n.9 (1985).

33. *Id.*

34. *See id.*

v. Denckla,[35] the Court used minimum contacts to protect state sovereignty.[36] The *Hanson* Court characterized the minimum contacts inquiry as a threshold requirement designed to ensure that the forum state has power to adjudicate.[37] Reasonableness considerations were relegated to secondary significance.[38] Thus, the Court in *Hanson* began pointing to the second interpretation of *International Shoe:* minimum contacts as a threshold requirement and fair play as a secondary inquiry.

In *World-Wide Volkswagon Corp. v. Woodson*,[39] the Supreme Court seemed to validate the second interpretation by explicitly severing personal jurisdiction analysis into a two-pronged test. The *World-Wide* Court stated that the minimum contacts requirement has two functions: (1) ensuring that the forum state does not impinge on the sovereignty of other states, and (2) protecting the defendant against the burdens of defending a suit in an inconvenient forum.[40]

35. 357 U.S. 235 (1958). In *Hanson*, the Court first suggested that contacts act as a threshold limit to protect territorial sovereignty. *See id.* at 251. Reasonableness factors were thus relegated to a lesser significance even though they would not be fully articulated until *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). *See* Jay, *supra* note 30, at 439 (1981); see also *infra* text accompanying notes 51–55 for a list of the reasonableness factors.

The Court, 22 years after the *Hanson* decision, provided explicit evidence, in *World-Wide*, of a two-pronged jurisdiction analysis. Recent hornbook law indicates that the threshold prong refers to minimum contacts. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 32, at 125 n.9. See *infra* text accompanying notes 129–32 for *Burger King's* indication that fair warning is another label for the threshold determination. Only when minimum contacts are found to exist do fair play and substantial justice become relevant considerations. The fair play and justice considerations have been labeled as the reasonableness branch. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 32, at 125 n.9.

36. *Hanson*, 357 U.S. 235. The Court stated that "[h]owever minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." *Id.* at 251.

37. *Hanson*, 357 U.S. at 251. *See* Jay, *supra* note 30, at 439 n.57.

38. The other considerations regarding reasonableness were pre-*World-Wide* opinions and were fully synthesized in *World-Wide*, 444 U.S. at 292. *See infra* text accompanying notes 51–55 for a list of the reasonableness requirements.

39. 444 U.S. 286, 292 (1980).

40. *Id.* at 292. *See generally* Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1042 n.118 (1983). Professor Drobak explained that the term "minimum contacts" has had various interpretations since its use in *World-Wide*:

> When it used the term minimum contacts, the [*World-Wide*] Court meant prelitigation connections with the forum state sufficient to meet the requirements of *International Shoe*. To some courts and commentators, the term minimum contacts represents the entire personal jurisdiction doctrine composed of one test requiring prelitigation connections with the forum that are analyzed in the context of many different factors. *See, e.g.*, Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 230 (1967); Hazard, *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems*, 66 CORNELL L. REV. 564, 568–72 (1981). To other courts and commentators, the term minimum contacts represents the prelitigation connections that meet the power test of jurisdiction while the other factors are considered under a second test requiring the forum to be reasonable. *See, e.g.*, Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 413–29 (1981); Posnak, *A Uniform Approach to Judicial Jurisdiction After* World-Wide *and*

World-Wide's first component, ensuring sovereignty, resurrected the traditional territorial basis for personal jurisdiction.[41] The Court's insistence that minimum contacts protect state sovereignty created a problem. Previous cases asserted that minimum contacts protect defendants' individual liberty rights.[42] The problem, then, was whether the existence of minimum contacts, as a means for satisfying due process requirements, acted to protect individuals' rights or states' rights. If minimum contacts ensured states' rights, individual defendants would not be able to waive personal jurisdiction since individuals cannot grant the sovereign powers it did not previously have.[43]

The Court clarified its position in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,*[44] explaining that sovereignty concerns do not independently limit personal jurisdiction.[45] Instead, the due process clause should be seen as a preservation of individual liberty interests.[46] The *Ireland* case repudiated any notion that state sovereignty considerations would restrict personal jurisdiction if the forum was otherwise reasonable.[47] Nonetheless, minimum contacts are necessary to guarantee the individual liberty interests.[48]

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the Abolition of the "Gotcha" Theory, 30 EMORY L.J. 729, 730 (1981); *cf.* Woods, Pennoyer's *Demise: Personal Jurisdiction After* Shaffer *and* Kulko *and A Modest Prediction Regarding* World-Wide Volkswagen Corp. v. Woodson, 20 ARIZ. L. REV. 861, 881–82 (1978) (three-part test, with *Hanson* requirement defined as a separate component). Under either model, prelitigation connections with the forum are of paramount importance.

41. *World-Wide,* 444 U.S. at 292. *See* Jay, *supra* note 30, at 438–40.

42. 4 C. WRIGHT & A. MILLER, *supra* note 7, § 1067, at 45 (Supp. 1985).

43. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) (individual actions cannot change the powers of sovereignty).

44. 456 U.S. 694 (1982).

45. *Id.* at 702 n.10.

46. *Id.*

47. Lewis, *supra* note 10, at 723. *But see* Drobak, *supra* note 40, at 1015. Professor Drobak argues that *Ireland* did nothing more than confirm that federalism is preserved as a by-product of the protection of litigants rights and that the Court had never expressed otherwise. *Id.* at 1046–50. Professor Drobak also states that inconsistency between *Ireland* and *World-Wide* would not exist if "we could treat the explanation in *World-Wide Volkswagen* as an aberration caused by thoughtless, infelicitous drafting and so disregard it." *Id.* at 1047. According to Professor Drobak, *Ireland* and *World-Wide* should be and can be reconciled with each other. *Id.* Regardless of whether the two opinions can be reconciled, sovereignty issues are not independent restrictions on personal jurisdiction. At most, *Ireland* departed significantly from the suggestion in *World-Wide* that sovereignty issues act as a real barrier to a court's assertion of personal jurisdiction. *Id.*

48. *Ireland,* 456 U.S. at 703 n.10 ("[O]ur holding today does not alter the requirement that there be 'minimum contacts' between the nonresident defendant and the forum State.") *But see id.* at 709 (Powell, J., concurring in the judgment). Justice Powell argued that the majority has read minimum contacts out of the personal jurisdiction test and that, under its opinion, the protection of an individual's liberty interest depends solely on a balancing of the reasonableness factors.

The *Ireland* majority asserted that the test for personal jurisdiction required that "the maintenance of the suit . . . not offend traditional notions of fair play and substantial justice." *Ireland,* 456 U.S. at 703 (quoting *International Shoe,* 326 U.S. at 316). Conspicuously absent from this test is *International*

The *Ireland* Court, while ruling that minimum contacts preserve the individual liberty interest, did not demonstrate how the minimum contacts requirement operated to safeguard the individual liberty interest.[49] In *Burger King,* the Court explained its position.[50]

Under the second component of *World-Wide's* personal jurisdiction formulation, the Court emphasized that the defendant's burden should be a primary factor, but should be determined in the context of four other factors: the forum state's interest in hearing the case,[51] the plaintiff's interest in an efficient resolution of the case,[52] the interstate judicial system's interest in an efficient solution,[53] and the shared interest of all the states in advancing substantive social policies.[54] These five contextual factors constitute the "reasonableness" or "fairness" branch of personal jurisdiction analysis.[55] The reasonableness branch originated in *International Shoe's* statement that jurisdiction cannot offend "fair play and substantial justice."[56]

World-Wide's reasonableness factors have become the second prong of the Court's personal jurisdiction test.[57] To satisfy the first prong, a defendant must have a minimum affiliation with the forum.[58] Once this threshold requirement of minimum contacts is satisfied, the reasonableness factors can be considered.[59]

Shoe's requirement of "minimum contacts . . . such that" a suit does not offend notions of fair play and substantial justice. Justice Powell's observation, then, seems valid when examining the *Ireland* majority's enunciation of its test. Nevertheless, the *Ireland* majority stipulated that minimum contacts are required.

49. Whether sovereignty (as opposed to individual liberty) was a valid personal jurisdiction consideration, it was nonetheless apparent from *World-Wide* that minimum contacts preserved state sovereignty requirements by stipulating that a state does not have power to make a binding judgment unless the defendant has the requisite contacts, ties, or relations with the forum. *World-Wide,* 444 U.S. at 294.

50. *See infra* notes 129–32 and accompanying text.

51. *World-Wide,* 444 U.S. at 292 (citing McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957)).

52. *Id.* at 292 (citing Kulko v. California Superior Court, 436 U.S. 84, 93, 98 (1978)).

53. *Id.*

54. *Id.*

55. *Id.*

56. *International Shoe,* 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

57. *World-Wide,* 444 U.S.at 291–92.

58. *Id.* at 294 ("[T]he Due Process Clause does 'not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.'" (quoting *International Shoe,* 326 U.S. at 319)).

59. *See infra* notes 129–41 and accompanying text.

III. THE SUPREME COURT'S RECENT TREND TOWARD BRIGHT LINE PERSONAL JURISDICTION TESTS

In addition to the problem of interpreting *International Shoe's* test, commentators have questioned whether jurisdiction disputes should be solved with an interest balancing test or with bright line rules.[60] Advocates of interest balancing stress that it is the most precise measure of justice since all relevant factors are taken into account and weighed against each other.[61] Since bright line tests usually emphasize a single factor, contervailing interests are left unconsidered.[62] While recognizing its liabilities, bright line advocates maintain that their method is more efficiently applied by trial courts and more effectively reviewed by appellate courts.[63]

In its most recent cases, the Supreme Court opted for a series of broadly applicable jurisdictional rules instead of a discretionary balancing test.[64] The bright line jurisdiction rules emphasize a single factor—the defendant's minimum contacts with the forum.[65]

The Court's motive for moving toward clear rules is uncertain. One commentator, though, has suggested that the Court wanted to dramatically reassert its traditional role as the supreme enforcer of personal jurisdiction by making the doctrine easier to review.[66] A second motive attributed to the Court is an interest in preventing lower courts from making biased decisions. Bias results from lower courts having a self-interest in hearing the

60. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds its Reach: A Comment on* World-Wide Volkswagen Corp. v. Woodson *and* Rush v. Savchuk, 58 N.C.L. REV. 407 (1980).

61. *See id.* at 409, 430–31. *Cf.* Jay, *supra* note 30, at 451–52.

62. Advocates of the bright line method recognize the weakness of emphasizing only one factor, but insist that their method is more efficient. *See* Louis, *supra* note 60, at 430–32. According to Professor Louis, "the balancing test is hardly inherently inimical to the achievement of proper case results. Indeed, by definition it seeks the 'just' result in every case, whereas the more mechanical approach obviously does not and cannot." *Id.* at 430–32.

63. *Id.* at 431–32. Balancing tests require extensive judicial energy since all relevant interests must be weighed on a case by case basis. Moreover, it is difficult for appellate courts to police balancing tests since a multitude of factors are weighed and since each decision is potentially distinquishable from any other. *See id.* Bright line tests, to the contrary, focus on a single variable, making them easier to apply and to review. *See id.*

For the argument that bright line rules are not necessarily cost efficient, *see* Jay, *supra* note 30, at 459 n.182. According to Professor Jay,

> [a]nyone making such an argument would have to lower expectations for cost savings by factoring the incredible persistence of American lawyers into the equation. Not only will briefs and oral arguments continue to bring every conceivable factor to the courts' attention, but we can expect new levels of ingenuity directed toward persuading the trier . . . .

See also Drobak, *supra* note 40, at 1057–58. Professor Drobak argues that the Court's bright line approach emphasizing minimum contacts is justified because it protects defendants from answering to an unrelated sovereign. *Id.*

64. *See infra* notes 79–116 and accompanying text.

65. Louis, *supra* note 60, at 432.

66. *Id.* at 423.

dispute.[67] According to this theory, a balancing approach affords state courts too much discretion to search for methods of asserting jurisdiction.[68]

Regardless of the Court's motive for preferring bright line jurisdiction rules,[69] a series of these standards has evolved.[70] Each rule is applied under the threshold minimum contacts inquiry.[71] The rules are narrowly focused on the contacts between the defendant and the forum state.[72] The effect of each rule is to create a strong presumption in favor of personal jurisdiction when the standard is applied to its corresponding fact pattern.[73]

When deciding which bright line rule is best for any given fact pattern, the Court appears to have examined underlying substantive issues to fully understand the future ramifications of a stipulated rule and to ensure that unreasonable results will not occur.[74] These substantive issues, however, are rarely mentioned by the Court when justifying the rule.[75] The Court's quest for clear rules lends credence to the suggestion that it is motivated by "hidden agendas."[76] The term "hidden agenda" is used to denote the

67. *Id.* at 431. Professor Louis identified the sources of lower court bias:

> The potential sources of [the forum court's] self-interest are certainly numerous. For example, an affirmative jurisdictional finding may (1) allow the creation or augmentation of an estate or fund for tax or local creditor purposes, (2) allow the assertion of state regulatory or taxing authority, (3) provide a local forum for state residents, (4) allow more sympathetic, and possibly more liberal, local juries and judges to decide issues and assess damages, (5) allow the choice of local substantive law, and (6) obviate the need for local attorneys to seek out, rely upon and divide their fees with out-of-state counsel [footnotes omitted].

Even though there are countervailing forces, Professor Louis doubts their ability to neutralize the powerful local interest bias. *Id.*

68. *Id.*

69. An additional motive has been attributed to the Court. *See* Jay, *supra* note 30, at 459. Professor Jay suggests that the Court asserted a bright line test for personal jurisdiction because "lower courts understandably have not been able to see the light. [footnote omitted]." *Id.* The Court, then, may have been persuaded to provide guidance for lower courts in the form of bright line rules that limit the relevant considerations. *Id.*

70. This Note expresses no opinion regarding whether a bright line test or balancing test is the superior approach for personal jurisdiction methodology. Instead, the Note demonstrates the Court's movement toward bright lines and attempts to explain and define the *effects* of that movement.

71. *See* Louis, *supra* note 60, at 432 (bright line tests focus on the defendant's contacts).

72. *See* Justice Brennan's dissent in *World-Wide*, 444 U.S. at 299–300 (Brennan, J., dissenting). Brennan's dissent also applies to Rush v. Savchuk, 444 U.S. 320 (1980).

73. For example, in products liability cases, every person in the chain of distribution is presumptively subject to personal jurisdiction wherever the products passing through his hands are sold to customers in the ordinary course of business. *See* Louis, *supra* note 60, at 417; *see also infra* notes 90–94 and accompanying text.

In libel cases, a general presumption is created in favor of jurisdiction in the forum at which the intentional tort is aimed. *See infra* notes 99–104 and accompanying text.

74. *See generally* McDermott, *Personal Jurisdiction: The Hidden Agendas in the Supreme Court Decisions*, 10 VER. L. REV. 1, 2 (1985).

75. *Id.* at 2.

76. *See id.*

Court's underlying policy rationale. The phrase is not intended to imply that the Court has been underhanded when announcing its rules.

Personal jurisdiction cases seem to present sterile, doctrinal questions. However, underlying substantive policies often motivate the Supreme Court to make rules that apply to particular fact patterns.[77] Since each fact pattern requires a separate rule based on distinct nondoctrinal policies, the Court's jurisdiction rules often seem inconsistent with each other.[78] Nevertheless, careful examination of the Supreme Court's recent jurisdiction cases reveals the underlying motivations behind each rule, demonstrating the Court's apparent need to examine nondoctrinal issues to ensure generally fair results.

In 1977, the Court decided *Shaffer v. Heitner,*[79] a shareholders derivative suit brought against the officers and directors of a corporation and its subsidiary.[80] *Shaffer* stands for the clear rule that corporate officers and directors may not be sued, via sequestration or attachment procedures, in the place of incorporation merely because they are officers or directors.[81] Underlying the *Shaffer* decision is a concern that any other result would lead to corporate officers being sued in distant forums for simply being an officer or director or for owning stock with a situs in the forum.[82] A rule other than that established by the *Shaffer* Court would have discouraged individuals from becoming corporate officers in distant forums.

77. *Id.*

78. *Id.* (Court's use of hidden agendas suggests one reason why it has "failed to develop a consistent analytically sound approach to personal jurisdiction"). *Cf.* Jay, *supra* note 30, at 459 (Court has combined "contradictory aspects of the past, leading to a situation in which lower courts understandably have not been able to see the light") (citing to lower court opinion that complained about lack of guidance from the Supreme Court: Powder Horn Nursery v. Soil and Plant Laboratory, 20 Ariz. App. 517, 514 P.2d 270, 272, 274–75 (1973)). *Cf.* Louis, *supra* note 60, at 409 ("In my opinion the Court's new approach is a fair and workable one that strikes an appropriate balance between [fair results and clear rules for states].").

79. 433 U.S. 186 (1977).

80. *Id.* at 190–92. Jurisdiction was based on the attachment of stock owned by the officers and directors and chartered in the Delaware forum. *Id.* The Supreme Court held that there were insufficient contacts between the officers and directors and the forum because the defendants did not purposefully avail themselves of the privilege of conducting activities in the forum. *Id.* at 216. The Court notably asserted that in rem and quasi in rem jurisdiction disputes should be governed by the minimum contacts test. *Id.* at 212. The Court emphasized that defendants must have a reasonable expectation of being "haled before [the forum] court." *Id.*

81. *See generally* McDermott, *supra* note 74, at 26–27; Louis, *supra* note 60, at 412–13.

82. *See* McDermott, *supra* note 74, at 26 (attachment statute used in *Shaffer* would allow jurisdiction "over *any* defendant who owned *any* stock in any company incorporated in Delaware").

The Court's 1978 decision in *Kulko v. California Superior Court*[83] affected interstate child support disputes.[84] The *Kulko* Court ruled that allowing a child to live with a divorced spouse in another forum does not automatically subject the consenting parent to personal jurisdiction.[85] The rule was based on social policy considerations.[86] The Court did not want to impede parental participation in original visitation agreements.[87] Any other rule would discourage divorced parents from letting their children visit ex-spouses, since such visits could expose the parent to jurisdiction in the ex-spouses' forum.[88] The Court's result was designed to protect harmony in family relationships.[89]

In 1980, the *World-Wide* decision[90] indicated in dictum that when a business delivers its products into the stream of commerce expecting that the products will be purchased by consumers in the forum state, and when those products subsequently injure forum consumers, the business is subject to personal jurisdiction in the forum.[91] The *World-Wide* result gives notice to designers, manufacturers, assemblers, and others in the chain of distribution that litigation is possible when products are put into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.[92] However, if a consumer purchases a product from a

83. 436 U.S. 84 (1978).

84. *Id.* In *Kulko,* the California Supreme Court asserted jurisdiction over a New York resident because he purposefully sent his daughter to California to live with her mother. *Id.* at 89. The parents had previously divorced. The wife moved to California, the husband stayed in New York, and the two children stayed, during the school year, in New York. After the children moved to California to live with their mother, she sued for increased child support and full custody. *Id.* at 87–89. The United States Supreme Court disallowed jurisdiction on the ground that the mother and the child initiated the activity in California and that unilateral activity by the plaintiff does not constitute minimum contacts. *Id.* at 94.

85. *Id.* at 94.

86. *Id.* at 93.

87. *Id. See also* McDermott, *supra* note 74, at 23.

88. *Kulko,* 436 U.S. at 93.

89. *See id.* at 98 (asserting jurisdiction would have "impose[d] an unreasonable burden on family relations").

90. 444 U.S. at 288–90. *World-Wide* held that personal jurisdiction could not be asserted by an Oklahoma court over a nonresident regional automobile distributer and a nonresident automobile dealer in a suit arising out of an automobile accident that occurred in Oklahoma. *Id.* at 288–90. The Oklahoma forum did not have jurisdiction over the retailer and distributer because they did not initiate activity with the forum. Instead, the unilateral activities of the plaintiff, by driving into Oklahoma, established activity with the forum. *Id.* at 298.

91. See *Burger King,* 105 S. Ct. at 2182 for a verbatim restatement of the *World-Wide* rule.

92. *See* Louis, *supra* note 60, at 417:

> A manufacturer or distributer is subject to jurisdiction in any state in which it makes efforts, directly or indirectly, to market its products, including their delivery 'into the stream of commerce with the expectation that they will be purchased by consumers in the forum State'" [quoting *World-Wide,* 444 U.S. at 298, where the Court suggests comparison with Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961)]. In other words, every person in the chain of distribution is presumptively amenable to jurisdiction on a products liability claim wherever the goods passing through his hands are eventually sold to consumers in the

local dealer and takes the product to another forum where the consumer is injured, the distant forum cannot exercise jurisdiction over the dealer.

Had the Court allowed jurisdiction in *World-Wide,* local businesses from across the country could be haled into distant courts solely because those businesses had some previous contact with the product.[93] The Court expressed concern that local entreprenuers would be exposed to suit even though products had been removed from the stream of commerce. This risk could severely disrupt interstate commerce and could financially overwhelm small businesses.[94]

In 1980, the Court also decided *Rush v. Savchuk,*[95] which invalidated the "*Seider* doctrine."[96] The *Seider* doctrine allowed plaintiffs to sue nonresident defendants in the plaintiffs' home states by attaching the defendants' liability insurance policies. The *Rush* Court asserted that minimum contacts are not met when the nonresident defendant's only contact with the forum was an insurance policy with a company doing business in the forum state.[97] By ruling that the lower court did not have jurisdiction in *Rush,* the Court forced the plaintiff to sue in a forum other than his home state. The Court, then, was concerned with preventing a forum from applying its substantive law to tort actions that are more appropriately the affairs of other states.[98] Further, the *Seider* doctrine unfairly left defendants exposed to suit wherever their insurance companies had an office.

In 1984, the Court addressed personal jurisdiction disputes in two libel cases. In *Keeton v. Hustler Magazine,*[99] the Court found it "unquestionable" that minimum contacts existed between the defendant and the forum, since the defendant deliberately entered the forum's market by sending magazines there.[100] *Calder v. Jones,*[101] the second libel case, allowed jurisdiction over a nonresident reporter and editor of the magazine that published the libelous material.

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ordinary course of business.

93. The Court demonstrated its concern, suggesting that a different result would mean "[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." *World-Wide,* 444 U.S. at 296. The Court's concern can be illustrated by the possibility of a local druggist being amenable to jurisdiction in a distant forum when a cigarette lighter explodes in that forum. *See* Jay, *supra* note 30, at 449.

94. *World-Wide,* 444 U.S. at 296.

95. 444 U.S. 320 (1980).

96. Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312 (1966) (contract obligations of insurance companies to insureds under liability insurance policies are debts that can be attached under state law if the insurer does business in the forum state).

97. *Rush,* 444 U.S. at 332–33.

98. *See* Jay, *supra* note 30, at 470–71.

99. 465 U.S. 770 (1984).

100. *Id.* at 774, 777. The *Keeton* decision demonstrated that once minimum contacts are found to exist, it is very difficult to prove that jurisdiction is unreasonable. *Id.* at 774.

101. 465 U.S. 783 (1984).

Both *Keeton* and *Calder* are examples of the Court's general presumption in favor of jurisdiction when defendants are charged with intentional actions expressly aimed at the forum state.[102] This rule is grounded on the notion that intentional torts are based on purposeful conduct directly aimed at forum residents.[103] According to the Court, selling the libelous magazines or tabloids constituted intentional, tortious activity, sufficient to satisfy the minimum contacts requirement.[104]

Also in 1984, the Court decided *Helicopteros Nacionales de Colombia, S.A. v. Hall.*[105] In *Helicopteros,* the Court adopted two new personal jurisdiction labels: "general" and "specific" jurisdiction. Since general jurisdiction applies to those cases where the cause of action is unrelated to the defendant's activities in the forum,[106] it requires that the defendant have systematic and continuous activities in the forum.[107] Specific jurisdiction, on the other hand, may be asserted in cases where the claim arises out of or relates to the defendant's activity with the forum. Under specific jurisdiction disputes, because the claims have a nexus with the activity, a single and isolated contact can be sufficient.[108]

The *Helicopteros* Court provided the distinct rule that purchases made in the forum, even if occurring at regular intervals, are insufficient to constitute the systematic and continuous activity necessary for assertion of general jurisdiction.[109] *Helicopteros* highlights the difficulty of obtaining general jurisdiction in contract cases.[110] The underlying policy for the *Helicopteros* rule is that it would be undesirable for United States trade if foreign purchasers[111] were forced to defend suits in the states on claims resulting from use of the American product on foreign soil.[112]

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102. *Id.* at 789. *See also* McDermott, *supra* note 74, at 41.

103. *See* McDermott, *supra* note 74, at 41.

104. *See Calder,* 465 U.S. at 789.

105. 466 U.S. 408 (1984). *Helicopteros* involved a wrongful death action brought in Texas against a Colombian corporation whose helicopter crashed in Peru. The defendant corporation provided helicopter transportation for South American companies. *Id.* at 410. The defendant's contacts with Texas were (1) that the defendant's chief executive officer flew to Texas to negotiate the transportation contract, (2) that the defendant purchased most of its helicopters from a Texas company, and (3) that the defendant's helicopter pilots, including the pilot of the helicopter in the crash at issue, were sent for training to Texas. *Id.* at 416.

106. *Id.* at 414–15.

107. *Id.*

108. *Id. See generally* von Mehren & Trautman, *Jurisdiction to Adjudicate,* 79 HARV. L. REV. 1121 (1966) (comprehensive analysis of the sources of general and specific jurisdiction).

109. *Helicopteros,* 466 U.S. at 418.

110. *See* Knudsen, Keeton, Calder, Helicopteros, *and* Burger King—International Shoe's *Most Recent Progeny,* 39 U. MIAMI L. REV. 809, 830–32 (1985).

111. Although the defendant in *Helicopteros* was a foreign buyer, the Court gave no indication that its general jurisdiction rule would not apply to sellers. The same policy rationale of protecting international trade would apply whether dealing with foreign buyers or sellers.

112. *See* McDermott, *supra* note 74, at 45 (citing Brief for the United States as Amicus Curiae at

The Court stated its *Helicopteros* rule broadly, suggesting that it applies to situations beyond foreign purchases.[113] The Court's hidden agenda, though, would seem to suggest that the rule is only applicable to foreign purchases since the Court meant to protect international trade.[114] It is uncertain from this broad articulation whether United States buyers, purchasing from United States sellers, are subject to *Helicopteros'* rigorous rule. When the Court fails to state its substantive agenda or provide a specific rule, lower courts may apply the standard to fact patterns that are not within the parameters of the Court's policy rationale.[115] Therefore, the Court should enunciate its hidden agendas or state distinct rules to avoid misapplication.

Although the Court's recent personal jurisdiction decisions demonstrate a pattern toward finding bright line jurisdiction rules with substantive underpinnings, the *Burger King* opinion provided few clear rules for specific jurisdiction contract cases.[116]

IV. *BURGER KING:* A QUESTION OF FAIR WARNING TO A CONTRACTING PARTY

A. The Facts Before the Court

In 1978, Rudzewicz and MacShara, citizens of Michigan, applied for a franchise to Burger King's Michigan district office hoping to affiliate

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11–14, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984)). *See* Knudsen, *supra* note 110, at 828 n.135 (Court never mentioned the real reason for its decision—an adverse effect on foreign trade).

113. *Helicopteros,* 466 U.S. at 418 ("[M]ere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions (citing to Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923)).

114. *See supra* note 112 and accompanying text.

115. The Court cited the *Rosenberg* case, 260 U.S. 516 (1923), as direct support for its rule. *Rosenberg,* decided in 1923, utilized the presence theory, *see supra* note 9, to deny a New York court jurisdiction over a small retailer of men's clothing who had purchased a large part of its merchandise from the plaintiff in New York. 260 U.S. at 518. The retailer made the purchases by correspondence and by its officers directly visiting the New York seller. *Id.* The Court concluded that "[v]isits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the State." *Id.*

The cite to *Rosenberg* indicates that the *Helicopteros* rule could be applied to United States purchases from United States sellers. However, *Rosenberg* is not persuasive precedent since it was decided over 60 years before *Helicopteros,* when interstate commerce meant something entirely different than it does today. Moreover, *Rosenberg* relied on the presence theory of jurisdiction: a fictional theory previously abandoned by the Court. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957). Therefore, the Court's reliance on *Rosenberg* is arguably suspect, as are any deductions made from the *Rosenberg* opinion. Regardless, the Court suggested that *Rosenberg* is good law under the recent personal jurisdiction test. The point remains, however, that the Court should articulate its hidden agendas or state its rules in specific terms, to avoid misapplication of its rules.

116. *See infra* notes 142–49 and accompanying text.

themselves with Burger King's nationwide organization.[117] The application was forwarded to Burger King's Miami, Florida headquarters, where a preliminary agreement was entered into with the franchisees.[118] After four months of negotiations and close to a final agreement, the parties began to disagree over certain contract provisions.[119] During the disputes, the franchisees negotiated with the Michigan district office as well as the Miami headquarters and ultimately signed a final contract providing that the franchise relationship be established in Miami, that it be governed by Florida law, and that all payments be to the Miami headquarters.[120] The franchisees obtained limited concessions from the Miami headquarters.[121] The twenty-year franchise relationship obligated Rudzewicz and MacShara to payments exceeding one million dollars.[122]

In 1979, when the franchisees fell behind in their monthly payments to the Miami headquarters, the parties again entered into extended negotiations.[123] After Burger King officials in Florida unsuccessfully negotiated by mail and telephone, the headquarters terminated the relationship, ordering the franchisees to vacate the premises.[124] The franchisees refused and continued to operate the restaurant.[125] Burger King then sued in a Florida federal court for breach of contract and trademark infringement.[126] The district court asserted jurisdiction, but was reversed by the Eleventh Circuit Court of Appeals.[127] The United States Supreme Court, however, upheld the district court's assertion of jurisdiction.[128]

B. Elaboration of the Two-Pronged Test

The *Burger King* Court reasserted its previously used two-pronged test for personal jurisdiction: (1) minimum contacts; and (2) fair play and reasonableness.[129] Under the first prong, the Court emphasized that individuals must have fair warning that a particular activity may subject them to

117. *Burger King*, 105 S. Ct. at 2179.
118. *Id.*
119. *Id.*
120. *Id.* at 2178–79.
121. *Id.* at 2179 & n.8. For example, the franchisees secured a $10,439 reduction in rent their third year.
122. *Id.* at 2179.
123. *Id.* at 2179–80.
124. *Id.* at 2180.
125. *Id.*
126. *Id.*
127. 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).
128. *Burger King*, 105 S. Ct. at 2180–81. Rudzewicz, alone, appealed the lower court judgment and only appealed the breach of contract claim.
129. *Id.* at 2182–85.

jurisdiction in a certain forum.[130] Fair warning, if it exists, is sufficient to establish minimum contacts.[131] Minimum contacts, then, operate to safeguard the individual liberty interest because potential defendants have fair warning of their susceptibility to personal jurisdiction. Defendants are afforded an opportunity to structure their conduct with some assurance as to where they might be subject to suit.[132] The Court reaffirmed its use of the five reasonableness factors that were synthesized in *World-Wide*,[133] again stressing that the reasonableness considerations should not be taken into account until the threshold fair warning requirement is met.[134]

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130. *Burger King*, 105 S. Ct. at 2182. Fair warning is not a new concept in the Court's developing personal jurisdiction doctrine. The concept originated in *Hanson* when the Court held that a defendant must "purposefully [avail] itself of the privilege of conducting activities within the forum State." Hanson v. Denckla, 357 U.S. 235, 253 (1958). In *Shaffer*, the Court required that defendants have reason to expect to be "haled before [the forum] court." Shaffer v. Heitner, 433 U.S. 186, 216 (1977), *cited in* Kulko v. California Superior Court, 436 U.S. 84, 97–99 (1978).

In *World-Wide*, the Court stated that "[w]hen a [defendant] 'purposefully avails itself of the privilege of conducting activities within the forum State,' *Hanson v. Denckla*, 357 U.S. at 253, it has *clear notice* that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by . . . severing its connection with the State." (emphasis added). *World-Wide*, 444 U.S. at 297.

131. *See Burger King*, 105 S. Ct. at 2183 (foreseeability of causing injury is not sufficient to establish necessary contacts, but foreseeability of being "haled into court" is sufficient) (quoting *World-Wide*, 444 U.S. at 297).

132. *Burger King*, 105 S. Ct. at 2182:

> By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign" [citing Shaffer v. Heitner, 433 U.S. at 218 (Stevens, J., concurring in the judgment)], the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some assurance as to where that conduct will and will not render them liable to suit" [citing *World-Wide*, 444 U.S. at 297].

133. *See supra* notes 51–59 and accompanying text. Again, the five reasonableness factors are: (1) the defendant's burden; (2) the plaintiff's interest; (3) the forum state's interest; (4) the interstate judicial system's interest; (5) the shared interest of the several states. *World-Wide*, 444 U.S. at 292.

The reasonableness factors are not extensively dealt with in this Note. Commentators have correctly perceived that the threshold minimum contacts prong is the cutting edge of the Court's approach. Louis, *supra* note 60, at 422. Nonetheless, the Court can be criticized for not explaining the apparent similarity between the personal jurisdiction reasonableness factors and the factors examined in forum non conveniens and choice of law doctrines. *See, e.g.*, Brewer, *Jurisdiction in Single Contract Cases*, 6 U. ARK. LITTLE ROCK L.J. 1, 17 (1983); *see also* Seidelson, *Recasting* World-Wide Volkswagen *as a Source of Longer Jurisdictional Reach*, 19 TULSA L.J. 1, 9 (1983); Note, *Long-Arm Jurisdiction in Commercial Litigation: When is a Contract a Contact?*, 61 B.U.L. REV. 375, 378 n.23 (1981). *See generally* Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980). A second criticism of the reasonableness factors pertains to the Court's reasoning for relegating the plaintiff's due process interest to lesser importance than the defendant's due process interest. *See* Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 8 & n.25 (1984).

134. *Burger King*, 105 S. Ct. at 2184 ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of [reasonableness] factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice' " (quoting *International Shoe*, 326 U.S. at 320)).

For the first time, the Court suggested that a rebuttable presumption in favor of jurisdiction exists if the defendant had fair warning.[135] Evidence that the Court used a presumption is found in two separate parts of the opinion. First, the Court stated that if a defendant availed itself of the privilege of conducting business in the forum, satisfying the fair warning requirement, then "it is presumptively not unreasonable" to allow jurisdiction in the forum.[136] Second, in the Court's discussion of the contacts between Rudzewicz and the forum, the Court stated that "it was . . . presumptively reasonable for Rudzewicz to be called to account there for [the] injuries."[137] The defendant has the burden of rebutting the presumption by presenting a compelling case that it would be unreasonable for the forum court to assert jurisdiction even if the defendant had fair warning.[138]

The two-pronged test makes it very difficult to overcome a threshold finding that the minimum contacts requirement is met.[139] The reasonableness considerations will only overcome the presumption in favor of jurisdiction if a party is put to a severe disadvantage.[140] Moreover, most considerations that would render jurisdiction unreasonable can usually be accommodated with the forum non conveniens doctrine or with choice of law rules.[141]

C. *The Clear Rules Movement Postponed*

In some previous lower court cases it had been argued that a single contract, without more, provided sufficient minimum contacts between a nonresident defendant and the forum state.[142] Nevertheless, there remained a deep division on this issue.[143] The *Burger King* Court ruled that a single contractual relationship between a forum resident and a nonresident does

135. *Burger King*, 105 S. Ct. at 2184, 2186.

136. *Id.* at 2184.

137. *Id.* at 2186.

138. *Id.* at 2185. For an article stating that the Court's "tremendous [procedural] change" is significant and salutory, see Knudsen, *supra* note 110, at 840, 845. Professor Knudsen notes a "past general rule that placed the entire burden of proving jurisdiction on the plaintiff." *Id.* at 839 & n.211 (citing McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 188 (1936); Taylor v. Portland Paramount Corp., 383 F.2d 634, 639 (9th Cir. 1967); Northcross v. Joslyn Fruit Co., 439 F. Supp. 371, 376 (D. Ariz. 1977)).

139. *See Burger King*, 105 S. Ct. at 2185.

140. *Id.*

141. *Id.*

142. *See* Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 445 U.S. 907, 909–10 (1980) (White, J., dissenting from denial of certiorari) (collecting cases which assert that a single contract is sufficient).

143. *Id.* at 909 (White, J., dissenting from denial of certiorari) ("the question has deeply divided the federal and state courts").

not automatically satisfy the minimum contacts requirement.[144] This single contract standard provides little guidance for lower courts faced with determining how a contract relates to the defendant's affiliation with the forum.[145] The Court provided no other rules. Perhaps the Court was reluctant to address the myriad of factual possibilities in contract cases.

The Court stalled the clear rules movement at a crucial juncture. If due process is intended to give fair warning, then contract relationships demand clear rules upon which contracting parties can rely. Certainty of result is a prime goal of contracting parties.[146] A potential defendant cannot predict amenability to suit without precise, workable personal jurisdiction rules.[147] The *Burger King* Court admitted that the due process clause should provide opportunities for individuals to anticipate where they might be amenable to jurisdiction.[148] If individuals are uncertain about their amenability to suit because there are no clear rules, then they might choose to avoid certain contractual relationships for fear of having to litigate in inconvenient forums.[149] Interstate transactions are thus assisted by bright line rules.

V. *BURGER KING:* FLAWS IN THE FAIR WARNING CONCEPT

The Court's reliance on fair warning to establish minimum contacts does not provide a great deal of certainty for contracting parties. The fair warning notion relies on circular reasoning. The concept is based on the premise that parties can anticipate their own amenability to personal jurisdiction. However, contracting parties cannot anticipate amenability to

144. *Burger King*, 105 S. Ct. at 2185.

145. The Court did examine the contacts between Rudzewicz and Florida, but did not enunciate a clear rule for contract cases. The *Burger King* case was relatively easy for the Court to decide since Rudzewicz had numerous and long term contacts with Florida. In addition, Rudzewicz was a knowledgeable business person with extensive experience as an accountant. *Id.* at 2179. Rudzewicz also agreed to the Florida choice of law provision.

146. *See Lakeside Bridge*, 445 U.S. at 910–11 (White, J., dissenting from denial of certiorari).

147. The Court has translated the fair warning requirement into a somewhat more practical approach. Jay, *supra* note 30, at 444. Defendants should have "some minimum assurance as to where that conduct will and *will not* render them liable to suit." *World-Wide*, 444 U.S. at 297. Under this approach, defendants will nonetheless need clear rules to give them the requisite assurance of where they will be held accountable for their actions.

148. *Burger King*, 105 S. Ct. at 2182.

149. *See Lakeside Bridge*, 445 U.S. at 910–11 (White, J., dissenting from denial of certiorari): "The question at issue [personal jurisdiction in contract cases] is one of considerable importance to contractual dealings between purchasers and sellers located in different States. The disarray among federal and state courts . . . may well have a disruptive effect on commercial relations in which certainty of result is a prime objective." *Cf.* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 577: "[C]are should be taken . . . not to . . . discourage people from engaging in interstate transactions [footnotes omitted]."

personal jurisdiction unless they know the rule for jurisdiction.[150] Therefore, contracting parties, to predict jurisdiction, need rules based on something other than their own anticipation of amenability to jurisdiction. Moreover, if a rule is ambiguous or if the judicial decision will be based on complex or multiple factors, the parties' predictions about amenability to suit are less than reliable.

Burger King's jurisdictional approach relies on legal conclusions such as whether there is a "purposeful availment," a "continuing obligation," or a "substantial connection."[151] However, it is virtually impossible for a potential defendant to predict how a judge will characterize a particular activity.[152] As a result, contracting parties have inadequate information on which to base decisions about where and when to conduct their commercial activities if they want to avoid subjecting themselves to suit in a particular forum.

Therefore, the Court's own analytical structure mandates a bright line rule for contract cases. The analysis emphasizes fair warning to the defendant, but a defendant is most fairly warned with a bright line rule. Admittedly, jurisdictional rules cannot completely eliminate uncertainty since there is room for some discretion in virtually any approach taken. Nevertheless, the fair warning problem could be mitigated in many instances; the key is to avoid ambiguous balancing processes.

VI. BEYOND *BURGER KING:* A PROPOSED BRIGHT LINE PERSONAL JURISDICTION RULE FOR CONTRACT DISPUTES

Contract transactions can be separated into two categories: (1) transactions involving the typical individual consumer, and (2) transactions in the commercial context.[153] The individual consumer category is exemplified

150. *See World-Wide,* 444 U.S. at 297. The fair warning inquiry centers on the defendants' ability "to structure their primary conduct with some minimum assurance as to where conduct will or will not render them liable to suit." *Id. But see World-Wide,* 444 U.S. at 311 n.18 (Brennan, J., dissenting). Justice Brennan said: "[T]he reasoning begs the question. A defendant cannot know if his actions will subject him to jurisdiction in another State until we have declared what the law of jurisdiction is."

151. *See Burger King,* 105 S. Ct. at 2183–84.

152. Although a valuable aid, precedent alone cannot be relied upon to determine whether a defendant's situation might lead to jurisdiction. A court would be forced to deny jurisdiction any time prior cases did not provide explicit approval of jurisdiction. A fair forum could be denied jurisdiction solely because there was no precedent. Jurisdiction would thus be locked into a "perpetual status quo." Jay, *supra* note 30, at 443.

153. *See generally* Currie, *supra* note 149, at 576–77. Professor Currie suggests a distinction between Fourth N.W. Nat'l Bank v. Hilson Indus., 264 Minn. 110, 117 N.W.2d 732 (1962), and Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871 (1959). In both cases jurisdiction over the buyer was not allowed (in *Conn,* the Utah Supreme Court refused to enforce an Illinois judgment against the buyer, while in *Hilson* the forum court refused to assert jurisdiction). In *Hilson,* the buyer was a business

by the standard mail-order customer who agrees to a rigid offer with fixed terms.[154] The second category consists of transactions where the purchaser is a corporation or some other commercial individual or enterprise. The distinction is made because a different rule should be applied to each category. Individual customers cannot be expected to exercise a great deal of business sophistication.[155] By contrast, most corporations and other business entities can be expected to have a higher degree of business experience and expertise.[156]

A threshold determination should designate the category into which the buyer fits. This determination would involve legal conclusions by the trial judge.[157] Since defendants would have to anticipate a judge's decision, there would be uncertainty in a few borderline cases. However, in most cases it should not be difficult to conclude the category into which a particular buyer fits. The first category would be defined very narrowly and would not usually include buyers other than those who engage in mail-order type transactions, procurement of insurance policies, or other small scale consumer contracts.[158]

Once the disputed transaction was categorized, a bright line rule could be articulated for each category. Accordingly, where the transaction involved an individual consumer, the consumer's forum should have personal jurisdiction over the litigation ("consumer's forum rule").[159] In business

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corporation, while in *Conn* the buyer was an individual mail-order consumer. The decisive factor distinguishing the cases was that the business in *Hilson* had not sent agents into the seller's state, as had the individual consumer in *Conn*. Had the *Hilson* buyer sent agents into the seller's state, Professor Currie suggests that the court might have asserted jurisdiction over the buyer. The cases would then be distinguishable only because the buyer in *Conn* was an individual mail-order buyer while the buyer in *Hilson* was a business purchaser.

154. *See, e.g.*, Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871 (1959).

155. That individuals cannot be expected to negotiate in mail-order or insurance type transactions has given rise to contract principles governing "adhesion" contracts. *See* Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 632–33 (1943) ("[S]tandardized contracts have . . . been used to control and regulate the distribution of goods from producer all the way down to the ultimate consumer."). *See generally* Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960).

156. *See generally* von Mehren & Trautman, *supra* note 108, at 1167–68 (distinction between consumer and corporation is illustrated by multistate activities of corporations versus localized existence of consumers). *Cf.* McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) ("When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof.").

157. *See supra* notes 151–52 and accompanying text for discussion of legal conclusions presently used by the Court.

158. For example, the rule would apply to cases like *Conn*, 9 Utah 2d 250, 342 P.2d 871 (mail-order); *McGee*, 355 U.S. 220 (insurance contract); and Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950) (insurance contract).

159. For the purposes of the consumer's forum rule, the consumer's forum would be relatively easy to locate. In nearly all cases, the consumer's forum would be the forum to which the products were delivered to the buyer for consumption.

relationships, the rule needs slight modification and less rigidity. For corporate entities or sophisticated business persons, a presumption in favor of personal jurisdiction in the buyer's forum should be created ("commercial enterprises rule").[160] The presumption could be overcome, however, by a freely negotiated and reasonable forum selection clause, by the defendant showing that the buyer fully expected that a suit would occur in the seller's forum, or by the defendant showing that the buyer's forum would be unreasonable.

A. *Overcoming the Presumption Under the Commercial Enterprises Rule*

Three avenues could be used to overcome a presumption in favor of the buyer's forum. Each of the methods for overcoming the presumption is consistent with the Court's previous jurisdiction pronouncements. First, as the *Burger King* Court indicated, forum selection clauses, when freely negotiated and reasonable, are a means for establishing jurisdiction in the seller's forum.[161] Contracting parties should therefore make forum selection clauses an integral part of contract negotiations.[162] Contracting parties would be able to stipulate the forum for solving any disputes, thus satisfying the Court's ardor for predictability.[163]

Second, there are certain factors which would overcome the presumption that the buyer's forum is most appropriate, by establishing that the buyer fully expected any litigation to occur in the seller's forum.[164] For example, the *Burger King* Court isolated factors which, when taken together, can overcome the presumption. The Court pointed out that the franchisees derived unique benefits by affiliating themselves with the nationwide

160. The buyer's forum, in a business relationship, would not be difficult to locate. As with the consumer's forum rule, the buyer's forum would usually be the forum to which the products are sold. Some judicial discretion may be involved in determining if a forum other than the place of delivery was thought, by either party, to be the buyer's forum for application of the rule. When drafting forum selection clauses, the parties should always stipulate which forum is to be considered the buyer's, especially if a forum other than the place of delivery were to be used.

161. *Burger King*, 105 S. Ct. at 2182 n.14 (citing *Ireland*, 456 U.S. at 703) (personal jurisdiction requirement is a waivable right); National Equip. Rental v. Szukhent, 375 U.S. 311, 316 (1964) (parties may stipulate, in advance, to submit potential controversies to a particular forum); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 17 (1972) (forum selection provisions are enforceable and not offensive to due process if they are "freely negotiated" and not "unreasonable and unjust")).

162. *See The Bremen*, 407 U.S. at 12–14. The choice of forum clause in *The Bremen* was given full effect since it was made in an arms-length transaction by experienced and sophisticated businessmen. Uncertainty and inconvenience can be avoided if forum selection clauses are negotiated and agreed to in advance.

163. *Burger King*, 105 S. Ct. at 2182.

164. *See id.* at 2178–80, 2185–89.

Burger King organization.[165] The franchisee had entered a long term, twenty-year contractual relationship with the franchisor.[166] In the negotiations between the Florida headquarters and the franchisees, the franchisees obtained concessions.[167] The contract documents demonstrated that the real decisionmaking authority for Burger King was vested in the Miami headquarters and not the Michigan district office.[168] The franchisees engaged in direct and continuous communication, by mail and telephone, with the Florida offices.[169] Furthermore, the choice of law provision in the contract supported the notion that the franchisees anticipated the possibility of suit in Florida.[170]

Third, the presumption in favor of the corporate buyer's forum could be overcome if the defendant provided a compelling case demonstrating the unreasonableness of jurisdiction in the buyer's forum.[171] Defendants would have this safety valve even if they failed to show the existence of a freely negotiated, fair forum selection clause[172] and failed to provide extensive evidence demonstrating that the buyer should reasonably have expected litigation in the seller's forum.[173] Such a reasonableness requirement would provide the flexibility necessary to prevent rigid, unfair results.[174]

B. Support for the Proposed Bright Line Rules

The proposed bright line rules for both types of contract disputes has doctrinal as well as substantive support.[175] First, the Court's own fair warning doctrine demands a bright line rule so that contracting parties can adequately predict their amenability to suit.[176] The proposed rules would guarantee that contracting parties know about a Court's predisposition

165. *Id.* at 2189.
166. *Id.* at 2179, 2187.
167. *Id.* at 2179.
168. *Id.* at 2186–87.
169. *Id.* at 2187.
170. *Id.*
171. *Id.* at 2184–85.
172. *See supra* notes 161–63 and accompanying text.
173. *See supra* notes 164–70 and accompanying text.
174. *Burger King*, 105 S. Ct. at 2184–89. See *supra* note 133 for a list of the five reasonableness factors. The reasonableness prong, as a safeguard, is purposefully absent from the consumer's forum rule. *See supra* notes 153–60 and accompanying text. The reason for its absence is that the initial categorization of the buyer as an individual consumer or as a business entity provides the trial court sufficient flexibility and discretion to avoid unfair results.
175. See *infra* notes 185–93 and accompanying text for specific support of the consumer's forum rule; see also *infra* notes 194–203 and accompanying text for specific support of the commercial enterprises rule.
176. *See supra* notes 150–52 and accompanying text.

toward the buyer's or consumer's forum.[177] Parties would also be aware that there are three ways to overcome the presumption favoring the buyer's forum in business relationships.[178]

A substantive advantage of the proposed rules is that they would not be susceptible to rigid, unfair application. Under the commercial enterprises rule, if the seller's forum was especially appropriate, as in *Burger King*, then the presumption of jurisdiction in the buyer's forum could be overcome.[179] Use of a presumption, instead of a rigid, absolute rule, would satisfy the Court's prediliction for fair warning while permitting flexibility for cases not contemplated by the author of an inflexible rule.[180] Even under the consumer's forum rule, the trial court would have flexibility and discretion to avoid unfair results by characterizing the mold into which the buyer will fit.[181]

The proposed standards are further supported by their compatibility with the Court's propensity to avoid interfering with interstate commerce.[182] Because results would be predictable, the rules would assist those sellers engaged in interstate contracts. If the potential cost of litigation in a distant forum was too high, sellers could abstain from selling their products there or insist on a forum selection clause.[183]

Additionally, the proposed rules are supported by their applicability and effectiveness in various commercial disputes. The rule would be applicable and workable, for example, in transactions involving individual consumers, small businesses, or large corporations.[184] The applicability of the commercial enterprises rule to *Burger King's* franchise problem is evidence of usage beyond disputes involving typical buy/sell transactions.

1. Specific Rationale for the Consumer's Forum Rule

The consumer's forum rule is consistent with the Court's prior jurisdiction philosophy and conforms to general principles of fairness. The Court

177. The fair warning requirement would be satisfied because the requirement is based on a clear rule that favors the buyer's forum.

178. *See supra* notes 161–74 and accompanying text.

179. *See id.*

180. *See Burger King*, 105 S. Ct. at 2189.

181. See *supra* notes 153–54 and accompanying text for the two categories of contract transactions.

182. *See supra* note 112 and accompanying text (evidence of the Court avoiding interference with interstate commerce in Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408 (1984)).

183. With a bright line rule, sellers could realistically anticipate their amenability to suit and can thus predict, with some certainty, the potential cost of litigation in a particular forum. Sellers would not be compelled to abstain from selling their products in certain forums because of highly speculative beliefs that they may be amenable to suit. A bright line rule would remove the uncertainty, possibly encouraging interstate commerce where none had occurred before.

184. *See supra* notes 153–60 and accompanying text.

has long demonstrated a jurisdiction philosophy that is sensitive to individual consumers. Most recently, the *Burger King* Court acknowledged that consumer relationships require unique attention.[185] Previously, in *McGee v. International Life Insurance Co.*,[186] the Court held that an individual purchaser of life insurance could sue the out-of-state insurance company in the buyer's forum. The *McGee* Court ruled that the contract had a substantial connection with the consumer's forum and that jurisdiction could be asserted on that basis.[187] The Court's opinion in *Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*,[188] demonstrated the same philosophy favoring the individual consumer's forum. The *Travelers Health* Court allowed jurisdiction in a consumer's forum over a mail-order insurance business that created continuing obligations with individual consumers in the forum state.[189]

Moreover, general principles of fairness support the consumer's forum rule. Ordinary consumers should not be expected to negotiate choice of forum issues.[190] Additionally, individual consumers probably do not contemplate the jurisdiction question when making a purchase.[191] If the seller inserts a choice of forum clause into the contract, ordinary consumers probably would not recognize the provision's potential significance.[192] With the proposed consumer's forum rule, sellers would have fair warning of potential litigation in the consumer's forum and could conduct their activities accordingly. Consumers would be protected from the unreasonable burden of litigating in a distant forum.[193]

185. *Burger King*, 105 S. Ct. at 2189.

186. 355 U.S. 220 (1957).

187. *Id.* at 223.

188. 339 U.S. 643 (1950).

189. *Id.* at 647.

190. It offends common sense to treat a printed form which closes an installment sale [of farm equipment] as embodying terms to all of which the individual knowingly assented. The sales pitch aims solely at getting the signature on the form and wastes no time explaining or even mentioning the print. Before [finding] that an individual purchaser has knowingly and intelligently consented to be sued in another State, . . . more proof of the fact [should be required] than is provided by his mere signature on the form.

National Equip. Rental v. Szukhent, 375 U.S. 311, 334 (1964) (Brennan, J., dissenting).

191. It strains credulity to suggest that these Michigan farmers ever read this contractual provision about . . . 'accepting service of any process within the [forum] State' . . . . And it exhausts credulity to think that they or any other laymen reading these legalistic words would have known or even suspected that they amounted to an agreement of the [defendants] to let the company sue them in [the forum state] should any controversy arise.

Id. at 332–33 (Black, J., dissenting).

192. *See id.*

193. *See* Spiegel, Inc., v. FTC, 540 F.2d 287 (7th Cir. 1976). The Seventh Circuit upheld an order issued by the Federal Trade Commission insofar as the order mandated that the Spiegel catalog retailer cease and desist from suing mail-order customers in a Cook County, Illinois forum, where Spiegel has its principal place of business. The court held that the Commission exceeded its authority by finding that

2. *Specific Rationale for the Commercial Enterprises Rule*

A bright line rule favoring the buyer's forum in business relationships would be more appropriate than a rule favoring the seller's forum.[194] Generally, jurisdiction has been asserted over nonresident defendant sellers in the buyer's forum more often than over nonresident defendant buyers in the seller's forum.[195] The proposed rule is thus consistent with the trend in lower court decisions since both the rule and the court decisions favor the buyer's forum. Moreover, sellers usually initiate transactions with the buyers and set most of the terms on which they will sell.[196] It is the seller, then, who customarily has control over the terms of the contract and who can increase prices if the cost or risk of distant litigation is too high. Buyers do not have similar means of compensating themselves for distant litigation. Therefore, the realities of our economy provide a strong basis for a bright line rule presuming jurisdiction in the buyer's forum instead of the seller's forum.[197]

The commercial enterprises rule, at initial glance, seems inconsistent with *Burger King's* holding that jurisdiction be allowed over the franchisees in the franchisor's forum.[198] The proposed rule would create a presumption in favor of a buyer's forum or, in a franchise suit, in the franchisee's forum.[199] The proposed rule, however, is consistent with *Burger King. Burger King's* holding indicates, without doubt, that the

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Spiegel's actions amounted to a per se violation of the due process clause, but nonetheless upheld the Commission's order under the Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(6)(1982). *See* 540 F.2d at 291–95 (section 5 states inter alia: "[t]he Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce"). The *Spiegel* case demonstrates judicial recognition of the unreasonable burden placed on mail-order consumers when faced with litigation in the seller's forum. *See* 540 F.2d at 294.

194. Courts have often distinguished between the buyer's and the seller's forum. *See, e.g.*, Oswalt Indus. v. Gilmore, 297 F. Supp. 307, 312–13 (D. Kan. 1969); Annot., 20 A.L.R. 1201 (1968). *But see* In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 232–33 (6th Cir. 1972) (buyer/seller distinction has some usefulness, but care should be taken to distinguish between active and passive buyers).

195. *See In-Flight*, 466 F.2d at 232; *Oswalt*, 297 F. Supp. at 312–13. *See also* Currie, *supra* note 149, at 576.

196. *See In-Flight*, 466 F.2d at 233.

197. Some commentators and judges warn against excessive use of the buyer/seller distinction. *See In-Flight*, 466 F.2d at 233; Currie, *supra* note 149, at 576. The proposed commercial enterprises rule accommodates this warning by utilizing a rebuttable presumption. *See supra* notes 161-74 and accompanying text. The *In-Flight* court expressed concern over the notion that certain buyers can hardly be characterized as passive parties. *In-Flight*, 466 F.2d at 233. The proposed rule would provide adequate flexibility to accommodate those situations where buyers were especially active and the seller's forum was, thereby, appropriate. *See supra* notes 164–70 and accompanying text.

198. *See Burger King*, 105 S. Ct. at 2190.

199. A franchisor is equivalent to a seller and a franchisee is equivalent to a buyer.

seller's or franchisor's forum can be appropriate.[200] However, the Court reached its conclusion after a detailed examination of the extensive factual background, which pointed toward jurisdiction in the seller's forum.[201] Indeed, the *Burger King* opinion seems to contain an unstated presumption favoring the buyer's forum, a presumption overcome by the extensive facts that gave the *Burger King* defendant warning of suit in Florida.[202] The entire opinion is devoted to demonstrating that courts must carefully analyze the factual underpinnings of each case to determine if the seller's forum is appropriate.[203]

In addition to drawing support from the *Burger King* opinion, the commercial enterprises rule gains support from its favorable treatment of both buyers and sellers. Buyers enjoy the presumption of jurisdiction in their home forum. Sellers, likewise, enjoy the certainty of knowing where their conduct will likely make them amenable to suit. Sellers, then, can take protective measures, such as increasing prices to compensate for the risk of distant litigation or negotiating a forum selection clause. Moreover, if sellers do not want to risk amenability in distant forums they can sell their products elsewhere.

VII. CONCLUSION

In recent personal jurisdiction cases prior to *Burger King,* the Supreme Court provided bright line rules to determine jurisdiction in various factual contexts.[204] Although the *Burger King* Court did not provide a distinct rule for contract cases, it elaborated on its two-pronged test for personal jurisdiction and emphasized that fair warning to the defendant is the decisive personal jurisdiction requirement.[205] The fair warning requirement, however, is flawed and demonstrates the need for a bright line rule in contract disputes.[206]

A rule establishing personal jurisdiction in the consumer's forum in contract disputes would be reasonable and consistent with the Court's prior jurisdiction philosophy favoring buyers and seeking clear rules.[207] A modification of the rule creating a presumption in favor of the buyer's forum

200. *See Burger King,* 105 S. Ct. at 2185 (the Court found substantial record evidence supporting the assertion of jurisdiction over the franchisee, in the franchisor's forum).

201. *Burger King,* 105 S. Ct. at 2178–80, 2185–89.

202. *See id.*

203. *See id.*

204. *See supra* notes 60–116 and accompanying text.

205. *See supra* notes 129–41 and accompanying text.

206. *See supra* notes 150–52 and accompanying text.

207. *See supra* notes 153–59, 185–93 and accompanying text.

would be desirable for transactions involving corporate entities or knowledgeable business people.[208] The presumption in business situations could be overcome by using a forum selection clause, by demonstrating that the buyer expected litigation in the seller's forum, or by showing that jurisdiction in the buyer's forum is unreasonable.[209] Both proposed rules are consistent with the Court's prior jurisdiction pronouncements, are compatible with interstate commerce, and are broadly applicable.

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208. *See supra* notes 153–60, 194–203 and accompanying text.
209. *See supra* notes 161–74 and accompanying text.