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Jurisdictional Analysis in Commercial Litigation - The Single Contract Case - Burger King Corp. v. Rudzewicz

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JURISDICTIONAL ANALYSIS IN COMMERCIAL LITIGATION—THE SINGLE CONTRACT CASE

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)

INTRODUCTION

The transaction of business on a daily basis is becoming more and more of an interstate activity. Multistate litigation is becoming increasingly common, and courts are called on more and more frequently to assert jurisdiction over non-residents. Yet courts have had difficulty determining which types of commercial contacts between a defendant and a forum state satisfy the constitutional standards of due process.[1]

The modern requirement for *in personam* jurisdiction was set forth in *International Shoe Co. v. Washington.*[2] A state cannot assert *in personam* jurisdiction over a nonresident defendant unless it establishes that the nonresident has "minimum contacts" with the state such that maintenance of the suit would not "offend 'traditional notions of fair play and substantial justice.' "[3] In *International Shoe* the Court held that a state could assert jurisdiction over a nonresident if he had "continuous and systematic"[4] dealings with the state which gave rise to the cause of action, but it could not assert jurisdiction if the contacts were isolated and the cause of action was unrelated to those contacts.[5]

The issue of whether isolated contacts can ever serve as the basis for jurisdiction was decided by the Court in *McGee v. International Life Insurance Co.*[6] The Court attempted to refine its jurisdictional test a year later in *Hanson v. Denckla.*[7] While *McGee* and *Hanson* serve as the major guidelines in determining whether

1. *See* Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 445 U.S. 907, 909 (1980) (White, J., joined by Powell, J., dissenting from denial of certiorari).

2. 326 U.S. 310 (1945).

3. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

4. *Id.* at 317.

5. *Id.*

6. 355 U.S. 220 (1957).

7. 357 U.S. 235, *reh'g denied*, 358 U.S. 858 (1958).

to assert jurisdiction in commercial litigation, they have been interpreted inconsistently by lower courts since they were handed down.[8] The Court tried to clarify the principles established by these cases in several more recent decisions,[9] but inconsistent analysis is still found among the lower courts.[10]

The Court in its decision in *Burger King Corp. v. Rudzewicz*[11] sought to lend more guidance to the lower courts in determining jurisdictional issues in single contract cases.[12] It set out factors which should be examined to determine if this single contact is sufficient to give the nonresident warning that he is amenable to suit in that jurisdiction.

FACTS

In the fall of 1978, John Rudzewicz and Brian MacShara, both Michigan residents, decided to purchase a Burger King restaurant franchise in a Detroit, Michigan, suburb. They contacted Burger King's district office in Michigan and jointly applied for a franchise. Their application was forwarded to Burger King's Miami headquarters for approval.[13] At the time they applied for the franchise, Rudzewicz and MacShara were given a copy of Burger King's franchise offering circular, which states in part that "[t]he business activities of Burger King Corporation are conducted by the officers and directors of the corporation, all of whom may be contacted [in the Florida office]."[14]

Neither Rudzewicz nor MacShara went to the Florida office to negotiate the contract. Instead they negotiated with the Michigan district manager for five months before a preliminary agreement was approved in February, 1979.[15] During that five-month

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8. *Compare* Electro-Craft Corp. v. Maxwell Elecs. Corp., 417 F.2d 365 (8th Cir. 1969) *with* Iowa Elec. Light & Power Co. v. Atlas Corp., 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980).

9. Rush v. Savchuk, 444 U.S. 320 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court of Cal., 436 U.S. 84, *reh'g denied*, 438 U.S. 908 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977).

10. *See* Brewer, *Jurisdiction in Single Contract Cases*, 6 U. ARK. LITTLE ROCK L.J. 1 (1983); Note, *Long-Arm Jurisdiction in Commercial Litigation: When Is a Contract a Contact?*, 61 B.U.L. REV. 375 (1981).

11. 471 U.S. 462 (1985).

12. The single contract case arises from the breach of a contract between residents of different states. Neither party has any contact with the other, or with the other's home state, except this one contract.

13. *Burger King Corp.*, 471 U.S. at 466. Burger King is a Florida corporation with its principal place of business in Miami. *Id.* at 464. It has 10 district offices which report to the Miami headquarters. *Id.* at 466.

14. Record at 11 App.

15. *Burger King Corp.*, 471 U.S. at 466. At the end of each stage of negotiations, the Miami office mailed the franchisees documents for their signatures, which they signed and returned to the Miami office for completion. The headquarters then mailed copies of the executed documents to the franchisees for their files. Burger King Corp. v. MacShara, 724 F.2d 1505, 1507 (11th Cir. 1984).

period, MacShara went to Miami to attend the required management training course, and the franchisees purchased restaurant equipment from Burger King's Davmore Industries division in Miami for $165,000.[16]

Before the final agreements were signed, the parties began to disagree over the contract terms such as site-development fees and monthly rent computations. During these disputes, Rudzewicz and MacShara negotiated with the Michigan office as well as the Miami office, and finally they secured limited concessions.[17]

The final contract was signed in June, 1979 and provided that Rudzewicz and MacShara would lease the Burger King facility for twenty years and remit all rent and other fees to the Miami headquarters.[18] The documents also contained provisions which stated that the agreement was "deemed made and entered into in the State of Florida and shall be governed and construed under and in accordance with the laws of the State of Florida."[19] By signing the final agreements, Rudzewicz obligated himself personally to payments exceeding $1,000,000 over the twenty-year term of the franchise.[20]

The facility operated by Rudzewicz and MacShara did not enjoy great success, and they were soon delinquent in remitting rent payments to Burger King in Miami. Officials in Miami entered into extended but unsuccessful negotiations with the franchisees by mail and by telephone and eventually terminated the franchise and ordered Rudzewicz and MacShara to vacate the premises. They refused and continued to operate the facility as a Burger King restaurant.[21]

Burger King filed suit for trademark infringement and breach of contract in the United States District Court for the Southern District of Florida. Rudzewicz and MacShara appeared specially to challenge the court's jurisdiction, but the district court denied

16. *Burger King Corp.*, 471 U.S. at 466-67.

17. *Id.* at 467. The franchisees discovered the district office was powerless to resolve their disputes and could only channel their communications to the Miami office, and they therefore dealt directly with the headquarters in negotiating the contract. Rudzewicz and MacShara obtained a $10,439 rent reduction for their efforts. *Id.* at 467 nn.7-8. The dissent disagreed with these facts. The court of appeals and the dissent maintained that the Michigan manager evaluated the initial application and notified the franchisees on behalf of the corporation of its approval and that the defendant was in contact only with the Michigan office during the negotiations. *Id.* at 488-89.

18. Burger King Corp. v. MacShara, 724 F.2d at 1507.

19. *Burger King Corp.*, 471 U.S. at 481 (quoting the record).

20. *Id.* at 467.

21. *Id.* at 468.

their motion and ruled in favor of Burger King on the merits.[22]

Rudzewicz appealed that decision to the Court of Appeals for the Eleventh Circuit.[23] A divided panel of that court reversed the district court's judgment, concluding that to assert jurisdiction under the facts of this case "would offend the fundamental fairness which is the touchstone of due process."[24] The Supreme Court granted certiorari and reversed the decision of the Eleventh Circuit, holding that the district court's exercise of jurisdiction pursuant to Florida's long-arm statute did not violate the due process clause of the fourteenth amendment.[25]

BACKGROUND

The due process standard for asserting in personam jurisdiction over a nonresident defendant was set out by the United States Supreme Court in *International Shoe Co. v. Washington.*[26] The *International Shoe* test allows a state court to exercise jurisdiction over a nonresident who is served with process outside of the state boundaries if that person has established "certain minimum contacts" with the state.[27] The test, as the Court stated, is not "simply mechanical or quantitative."[28] It requires a detailed analysis of the facts in each case in order to decide the jurisdictional question.[29] To determine if a nonresident has met the minimum con-

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22. Burger King Corp. v. MacShara, 724 F.2d at 1508. The district court exercised jurisdiction pursuant to Florida's long-arm statute, FLA. STAT. § 48.193(1)(g) (Supp. 1984), which provides:

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this sub section thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
>
> . . . .
>
> (g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.

23. MacShara did not appeal his judgment. In addition, Rudzewicz reached a compromise with Burger King and waived his right to appeal the court's decision regarding the trademark infringement. *Burger King Corp.*, 471 U.S. at 469-70 & n.11.

24. Burger King Corp. v. MacShara, 724 F.2d at 1513.

25. *Burger King Corp.*, 471 U.S. at 487.

26. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The Court held:

> [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.'

Id. at 316 (quoting Milliken v. Meyer, 311 U.S. at 457, 463 (1940)).

27. *Id.*

28. *Id.* at 319.

29. "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Id.*

tacts test, the court must examine the "relationship among the defendant, the forum, and the litigation."[30]

Applying the minimum contacts test to the facts in *International Shoe*, the Supreme Court concluded that the Washington court could assert jurisdiction. Activities carried on by International Shoe in the state were "neither irregular nor casual" but were "systematic and continuous," and those activities gave rise to the obligation sued on.[31]

In *McGee v. International Life Insurance Co.*,[32] the Court applied the principles set out in *International Shoe* to a situation which the Court in *International Shoe* left undecided. The *McGee* Court examined the question of when isolated contacts with a forum state are sufficient to allow the state to assert jurisdiction over a nonresident defendant.[33] In upholding the assertion of jurisdiction by California over a nonresident insurance company which had only one policy in force within the state, the Court, while not actually expanding the doctrines of *International Shoe*, emphasized factors other than the defendant's conduct within the forum and stressed the "fairness aspect" of *International Shoe*'s minimum contacts test.[34] The decision firmly established that the

30. Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

31. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). International Shoe Company was a Delaware corporation. The firm had no office in Washington and its only employees within the state were salesmen who solicited orders for the company. The salesmen had no authority to enter into contracts, all orders had to be approved by the home office, and all orders were shipped from points outside Washington. The state of Washington was seeking to collect unemployment taxes based on commissions paid by the company to its Washington salesmen. *Id.* at 312-14. The test was easy to apply to these facts because the contacts were substantial and continuous, and the cause of action was directly related to those contacts. But the decision gave little guidance in situations where either the contacts were isolated but gave rise to a related cause of action or the contacts were continuous and systematic but the cause of action was unrelated to those contacts. The guidelines in these areas have continued to develop over the past forty years. *See* Murchison, *Jurisdiction Over Persons, Things and Status*, 41 LA. L. REV. 1053, 1090-91 (1981) (gray areas remained in two classes of cases).

32. 355 U.S. 220 (1957).

33. International, a Texas insurance company, assumed the insurance obligations of Empire Mutual Insurance Company of Arizona in 1948. International mailed a reinsurance certificate to Lowell Franklin, one of Empire's policyholders in California, offering to continue his insurance coverage. Franklin accepted the offer, and from 1948 until his death in 1950, Franklin mailed the premiums from his California home to International's Texas office. The suit was an action on that policy, which apparently was the only policy International had issued in California. *Id.* at 221-22.

34. The Court determined that jurisdiction was proper because it was "based on a contract which had substantial connection" with the forum. *Id.* at 223. In finding the connection to be substantial, the Court considered several relevant factors: the defendant solicited the contract with a California resident, the California resident accepted the contract and mailed premiums from his home, the defendant would effectively be judgment proof if California plaintiffs were forced to litigate small claims in distant forums, and the state had an interest in providing its citizens with a means of redress. *Id.*

physical presence of a defendant within the forum is not necessary for the assertion of jurisdiction to be proper[35] and that contact by mail can be sufficient.[36]

The cases decided by the Supreme Court from *International Shoe* through *McGee* greatly expanded the scope of personal jurisdiction. However, when the Court rendered its opinion in *Hanson v. Denckla*[37] denying Florida jurisdiction over a Delaware trustee, it was apparent that the Court did not intend to eliminate all restrictions on the state courts' assertion of personal jurisdiction over nonresidents.[38] One distinction the Court seemed to draw between the situation in *Hanson* and that in *McGee* was that, although the contacts in *Hanson* were quantitatively as great as in *McGee*, the contacts in *McGee* were initiated by the defendant and in *Hanson* they were not.[39] This distinction led to a clarification of the *International Shoe* test by requiring that the defendant must, by some act, "purposefully [avail] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[40]

Hanson, with its reliance on the defendant's contacts with the forum and its "purposeful availment" test, did not eliminate the problems the courts had when applying the minimum contacts test to determine if jurisdiction was proper in a given case. The state courts continued to interpret liberally the fairness aspect of the minimum contacts test in favor of asserting jurisdiction. They were likely to find the state's interest in the litigation to be paramount

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35. *Id.* at 222, 224. *See* Calder v. Jones, 465 U.S. 783 (1984) (sale of newspapers within forum); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) (sale of magazines within forum); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950) (solicitation of insurance contracts through the mail).

36. McGee v. International Life Ins. Co., 355 U.S. at 223; Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950).

37. 357 U.S. 235, *reh'g denied*, 358 U.S. 858 (1958). Mrs. Dora Donner, while a Pennsylvania resident, executed a trust instrument in Delaware, naming a Delaware bank as trustee. Mrs. Donner subsequently moved to Florida. From Florida she corresponded with the Delaware trustee about the administration of the trust, and the trustee remitted the trust income to her in Florida. Mrs. Donner executed a power of appointment over the remainder of the trust in Florida. The controversy arose over the validity of that appointment. *Id.* at 238-39, 252.

38. But *Hanson* did not in fact slow the expansion of personal jurisdiction. *See* Buckeye Boiler Co. v. Superior Court of Los Angeles County, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965). This may be true because the *Hanson* decision can be interpreted as doing justice under the particular facts of the case. The effect of the Florida decision invalidating the appointment was to augment the $1,000,000 gift to two daughters at the expense of two grandchildren. Hanson v. Denckla, 357 U.S. at 240. *See* J. COUND, J. FRIEDENTHAL, & A. MILLER, CIVIL PROCEDURE: CASES AND MATERIALS 84 (3d ed. 1980).

39. Hanson v. Denckla, 357 U.S. at 252. In declining to uphold jurisdiction, the Court stated that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Id.* at 253.

40. *Id.*

to the burden placed on the defendant.[41] Twenty years after *Hanson*, the Supreme Court decided several jurisdictional cases in an attempt to offer more direction to the lower courts.

In 1977 in *Shaffer v. Heitner*,[42] the Court expanded the minimum contacts test to all cases, holding that the presence of property within the state will not automatically give that state the right to exercise jurisdiction over the person. Other minimum contacts must be found.[43] The Court in *Shaffer*[44] reemphasized the importance of the defendant's contacts with the forum. The defendant must have purposefully entered the forum state at some time or have directly invoked the benefit or protection of that state's laws in some way before the state can properly exercise jurisdiction.[45]

The importance of the defendant's purposeful contact with the forum was again emphasized by the Court in 1980 in its decision in *World-Wide Volkswagen Corp. v. Woodson*.[46] Before a forum state can constitutionally assert jurisdiction over a nonresident defendant, that individual must have reason to believe that his conduct has in some way rendered him liable to suit within that state.[47]

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41. *See, e.g.*, Buckeye Boiler Co. v. Superior Court of Los Angeles County, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

42. 433 U.S. 186 (1977).

43. *Id.* at 212-13. The Court prior to 1977 had established that a person did not have to be physically present within the forum state for that state to assert in personam jurisdiction if it could be established that the nonresident had sufficient contact with the state to justify the assertion of jurisdiction. McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); International Shoe Co. v. Washington, 326 U.S. 310 (1945). However, it was still the Court's policy to allow the assertion of jurisdiction over a nonresident based on the attachment of property located within the forum, regardless of the lack of other deliberate contacts.

44. In *Shaffer*, the plaintiff brought a shareholder's derivative action against a Delaware corporation's nonresident directors and officers. The Delaware court asserted jurisdiction pursuant to a Delaware statute providing for attachment of any stock in a Delaware corporation to provide *quasi in rem* jurisdiction over its owner. Shaffer v. Heitner, 433 U.S. at 189-91, 194.

45. *Id.* at 213-16. The Supreme Court reaffirmed its position the following year in Kulko v. Superior Court of Cal., 436 U.S. 84, *reh'g denied*, 438 U.S. 908 (1978). In *Kulko*, the parties were New York residents, but the mother later moved to California. The daughter remained in New York with her father but later decided she wanted to live in California with her mother. The father consented and bought her an airline ticket to California. The mother then brought suit in California against the father for increased child support. The Court held that California's assertion of jurisdiction violated due process because the nonresident defendant did not purposefully avail himself of the benefits and protections of California's laws. *Id.* at 86-88, 94, 96. While the contacts with the state seem sufficient to allow jurisdiction on a related cause of action, the Court in its reasoning makes a distinction between an act for commercial benefit and one which is strictly personal. *Id.* at 95, 97.

46. 444 U.S. 286 (1980). In *World-Wide*, the action was brought in Oklahoma against the New York distributor and the New York retailer of a car bought in New York and involved in an accident in Oklahoma. Neither defendant sold cars in Oklahoma nor did any business there. The Oklahoma court asserted jurisdiction on the grounds that it was foreseeable that the automobile would travel to Oklahoma and the defendants derived a benefit from their products being used there. The United States Supreme Court reversed that determination and emphasized that the defendant had done nothing to avail itself of the benefits of Oklahoma law. *Id.* at 288-90, 295.

47. *Id.* at 296-97.

The Court explained:

> [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.[48]

International Shoe and its progeny established the general principles to be used by the courts in jurisdictional analysis. The defendant must perform some affirmative act which causes consequences in the forum, and that act must be purposefully or foreseeably connected with the forum state in such a way as to invoke the benefits and protections of the state's laws and give the defendant reason to anticipate suit in that jurisdiction. Courts must examine the facts in each case to determine if the requirements are met.

Signing a contract with another party is an affirmative act with anticipated future consequences, but the courts are divided as to whether a single contract alone is sufficient to satisfy jurisdictional requirements.[49] In the years that followed *McGee* and *Hanson*, several federal courts of appeals decided cases where the defendant's only contact with the forum was a single contract. In some of the cases jurisdiction was upheld,[50] but in others jurisdiction was denied.[51] The decisions in several of the cases where jurisdiction was upheld seemed to indicate a belief that *McGee* permits the assertion of jurisdiction whenever a nonresident enters into an agreement with a resident.[52] The circuit courts have arrived at inconsistent results in other cases not because they have used different jurisdictional tests or considered different factors, but because they have given different jurisdictional value to the facts common to all single contract cases. For example, compare the results reached and the analysis in *Southwest Offset, Inc. v.*

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48. *Id.* at 297.

49. *See* Brewer, *supra* note 10; Note, *supra* note 10.

50. *E.g.*, Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co., 623 F.2d 375 (5th Cir. 1980); Pedi Bares, Inc. v. P&C Food Mkts., Inc., 567 F.2d 933 (10th Cir. 1977); Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974); Ajax Realty Corp. v. J.F. Zook, Inc., 493 F.2d 818 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); Electro-Craft Corp. v. Maxwell Elecs. Corp., 417 F.2d 365 (8th Cir. 1969).

51. *E.g.*, Iowa Elec. Light & Power Co. v. Atlas Corp., 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980); Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973).

52. *E.g.*, In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972). It appears this reliance on *McGee* is misplaced. In *Hanson* the Court stressed that the defendant in *McGee* had a substantial connection with the forum and that it was the defendant who made the initial solicitation. *McGee*, as construed in *Hanson*, does not authorize an assertion of jurisdiction based on the existence of a single contract alone, but rather requires an examination of other factors which indicate purposeful activity. Hanson v. Denckla, 357 U.S. 235, 251-52 (1958).

Hudco Publishing Co., Inc.[53] with those of *Lakeside Bridge and Steel Co. v. Mountain State Construction Co., Inc.*[54]

In *Southwest Offset* the plaintiff was a Texas printer who brought suit against an Alabama publisher in Texas. The plaintiff solicited the defendant's business in Alabama, and the defendant subsequently placed several orders with the plaintiff in Texas. In asserting jurisdiction, the court emphasized the defendant's role in placing the subsequent orders, rather than the plaintiff's initial solicitation, and the fact that Texas could be deemed the "place" of the contract since all but the first order were accepted at the plaintiff's Texas office, the printing apparently was to be done there even though the contract did not specify, and the contract provided for shipment to the defendant in Alabama F.O.B. Dallas.[55] In *Lakeside*, the plaintiff was a Wisconsin manufacturer who brought suit against a West Virginia purchaser for breach of contract under which Lakeside was to provide the West Virginia purchaser with materials to be used in a construction project in Virginia. As in *Southwest Offset*, the plaintiff visited the defendant's office in West Virginia to solicit the contract and the defendant subsequently mailed a purchase order to the plaintiff in Wisconsin. In determining that Wisconsin could not assert jurisdiction, the court in *Lakeside* examined the same factors that the *Southwest Offset* court examined, but they assigned those factors different weight. In *Lakeside* the court emphasized the plaintiff's initial contact rather than the defendant's subsequent conduct and stated that the formalities of contract execution are not determinative and at best show unilateral activity on the part of the plaintiff, which cannot be imputed to the defendant to show purposeful availment of the benefits and protections of the forum's laws.[56]

Recognizing that the Court's current jurisdictional standards offer little guidance to the business community, Justice White has frequently urged the Supreme Court to address the important question of jurisdiction in the single contract case.[57] The Court took the opportunity to clarify its position by reviewing *Burger King Corp. v. Rudzewicz.*[58]

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53. 622 F.2d 149 (5th Cir. 1980).

54. 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980).

55. *Southwest Offset, Inc.*, 622 F.2d 150, 152.

56. *Lakeside*, 597 F.2d 598, 603-04.

57. Chelsea House Publishers v. Nicholstone Book Bindery, Inc., 455 U.S. 994 (1982) (White, J., joined by Burger, C.J., and Powell, J., dissenting from denial of certiorari); Baxter v. Mouzavires, 455 U.S. 1006 (1982) (White, J., joined by Powell, J., dissenting from denial of certiorari); Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 445 U.S. 907, 909 (1980) (White, J., joined by Powell, J., dissenting from denial of certiorari).

58. *Burger King Corp.*, 471 U.S. at 476, 478-79 (inference based on the holding and reasoning of the *Burger King* Court).

INSTANT CASE

The Court's Test

The *Burger King* Court emphasized that *Hanson*'s requirement of purposeful activity on the part of the defendant is as applicable in contract cases as it is in any other context. The Supreme Court clearly rejected the idea that a contract between a forum resident and a nonresident can, standing alone, establish sufficient minimum contacts for the proper assertion of jurisdiction. The court faced with the issue must find other factors which, when viewed along with the contract, indicate that the nonresident established a purposeful connection with the forum state.

Under the *Burger King* test, the court seeking to assert jurisdiction must still establish that the assertion of jurisdiction over the nonresident is reasonable and consistent with the due process standard of fundamental fairness. The unfairness or unreasonableness of asserting jurisdiction is minimized by the Court since the added inconvenience or burden of defending in a distant forum is not very great today with our advanced means of transportation and communication. It must be considered, however, because while the lack of inconvenience to the defendant alone cannot establish jurisdiction, unreasonableness can defeat jurisdiction.[59] To defeat jurisdiction the unfairness to the defendant would have to outweigh the considerations of purposeful availment and create a burden on the defendant which could not be eliminated by some other means, such as a change of venue.[60] The instance where unfairness will defeat jurisdiction even though the nonresident has the requisite minimum contacts with the forum will be rare, if ever, because where a nonresident has "availed himself of the privilege of conducting business [within the forum] and . . . his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum. . . ."[61]

After evaluating the negotiations leading up to the formation of the contract, the terms incorporated into the contract, and the anticipated consequences of signing the contract, the Court held that Rudzewicz voluntarily established a substantial and continuing relationship with Burger King's Miami headquarters by seek-

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59. *Id.* at 476-78. *See* 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, 421 (1980).

60. *Burger King Corp.*, 471 U.S. at 477.

61. *Id.* at 476.

ing to affiliate with a national organization rather than operating an independent local restaurant and by signing a twenty-year franchise agreement with the corporation. The agreement signed by the parties called for regulation of Rudzewicz' business by the Miami headquarters and remittance of rent payments to that office.[62] Additionally, the documents contained provisions which state that the agreements would be governed by Florida law.[63]

The Court upheld the assertion of jurisdiction by the Florida court by finding that Rudzewicz was an "experienced and sophisticated"[64] businessman who voluntarily negotiated and signed a long-term agreement with a Florida corporation and who received adequate notice from the contract documents and the parties' entire course of dealings that he might be subjected to suit in Florida for breach of that contract.[65]

ANALYSIS

The *Burger King* decision does not reduce the jurisdictional question in single contract cases to a simple formula. It still requires that the issue be determined by weighing the facts of the case, but it reduces the potential for inconsistent analysis of the issue in such cases by examining elements common to all contract cases and determining which are to be evaluated in deciding whether the defendant purposefully established minimum contacts within the forum and whether the assertion of jurisdiction is otherwise fair. Its analysis centered on the parties' prior negotiations and actual course of dealings, the terms embodied in the contract documents, and the contemplated future consequences of their agreement.

Courts in the past have inconsistently dealt with the physical connection, or lack thereof, of the defendant with the forum. While all courts seem to acknowledge that physical presence within the forum has not been required to establish jurisdiction since *McGee*,[66] some have stressed heavily the physical location of the negotiations between the parties and forum visits by the defendant and have minimized the importance of contact by telephone or through

62. *Id.* at 479-80.

63. *See supra* note 19 and accompanying text.

64. *Burger King Corp.*, 471 U.S. at 484 (quoting the district court).

65. *Id.* at 487. The dissenting justices did not disagree with the majority's test to be applied or with the factors which should be analyzed in determining whether the assertion of jurisdiction is proper. They arrived at an opposite conclusion because they disagreed with the majority's interpretation of several important facts, such as where and with whom the negotiations took place, who would supervise and lend support to the franchisees in the future, what constituted performance and whether that performance was required in Florida, and the relative bargaining positions of the parties. *Id.* at 487-88 (Stevens, J., joined by White, J., dissenting).

66. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

the mails. Others have exactly reversed the emphasis, ignoring the physical location of the negotiations and concentrating on the forum ties established during negotiations.[67] The *Burger King* decision indicates that the latter approach is the better approach. The Court realized that the complexion of business has changed and the use of the telephone and the mails for the transacting of business is increasingly common, thus obviating the need for physical presence within a state in order to establish a business relationship there.[68]

The Court's analysis of the facts in *Burger King* shows that the question to be answered by courts in deciding the jurisdictional issue in single contract cases is not whether the defendant has any physical ties with the forum, because in most such cases there will be minimal physical contacts with the forum state, but rather whether the negotiations were so connected to the forum that the defendant should have foreseen the possibility of litigation there.[69]

The course of dealings among the parties here reinforced that the decision-making authority was vested in the Miami office. All of the agreements came out of Florida and were signed by Burger King executives in Florida.[70]

Another factor common to all contract cases to which the lower courts have assigned inconsistent jurisdictional value is the initial contact between the parties. Some courts have viewed the initial solicitation of the forum resident by the defendant as critical to a finding that the defendant has acted purposefully toward the forum,[71] but others have ignored the fact that the defendant did not make the initial contact and have instead given more weight to the subsequent conduct of the parties.[72] The analysis used by the *Burger King* Court is in accord with the latter approach.[73]

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67. *Compare* Telco Leasing, Inc. v. Marshall County Hosp., 586 F.2d 49 (7th Cir. 1978) *with* Southwest Offset, Inc. v. Hudco Publishing Co., 622 F.2d 149 (5th Cir. 1980); Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974).

68. *Burger King Corp.*, 471 U.S. at 476.

69. *Id.* at 478-80 (inference based on reasoning and holding of the Court).

70. *Id.* at 480-81. *See supra* notes 13-20 and accompanying text.

71. *See, e.g.*, Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062 (4th Cir. 1982); Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980); Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973); O'Hare Int'l Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971).

72. *See, e.g.*, Southwest Offset, Inc. v. Hudco Publishing Co., 622 F.2d 149 (5th Cir. 1980); Pedi Bares, Inc. v. P&C Food Markets, Inc., 567 F.2d 933 (10th Cir. 1977); Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974); Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374 (6th Cir. 1968).

73. The Court did not take advantage of an opportunity to directly address the issue of the initial contact, a factor which is frequently interpreted to be a key point in jurisdictional analysis but one which is given varying weight by the different lower courts. While the Court apparently did not consider that factor material to its decision, its not specifically addressing the weight the initial contact was accorded in its analysis could leave lower courts to decide that jurisdiction is improper unless the defendant has made the initial contact.

While the defendant in *Burger King* made the initial contact with the forum resident by filing a franchise application,[74] the Court focused its analysis on the role of the defendant in the negotiations and why, because of his role in these negotiations, Rudzewicz should have expected to be sued for breach of contract in Florida. To the extent that a defendant negotiates contract terms and the contract is not obtained through "fraud, undue influence, or overweening bargaining power,"[75] any unfairness which might otherwise be associated with the exercise of long-arm jurisdiction over the defendant disappears.

The Court viewed Rudzewicz and MacShara as experienced businessmen who saw the profit potential of associating with a national restaurant chain and who deliberately reached out beyond their own state and negotiated with a Florida corporation in order to obtain economic benefits from a long-term franchise agreement.[76]

It is well established that the parties to an agreement can expressly consent to jurisdiction and expect the courts to enforce that agreement even without other deliberate contacts with the forum.[77] This rule has been consistently applied by the lower courts. But a choice-of-law provision is an example of a contract term which has been assigned varying degrees of jurisdictional significance by the lower courts.[78]

The decision in *Burger King* makes it clear that a choice-of-law provision in a contract is a significant factor in support of asserting long-arm jurisdiction over nonresident defendants.[79] The Court determined that this kind of provision standing alone would not be sufficient to confer jurisdiction but, when combined with other acts that normally take place in a business transaction such as direct communications by mail or telephone, it reinforced the

74. *Burger King Corp.*, 471 U.S. at 466.

75. *Id.* at 486 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972)).

76. *Id.* at 479-80. The majority rejected the argument advanced by the dissent and the circuit court that the parties were not in equal bargaining positions by attaching significance to the fact that Rudzewicz was a senior partner in a Detroit accounting firm who was represented by counsel throughout the negotiations and to the fact that Rudzewicz did in fact succeed in negotiating a reduction in the rent. *Id.* at 484-85.

77. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964).

78. *Compare* Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026 (5th Cir. 1983), *cert. denied*, 466 U.S. 962, *reh'g denied*, 467 U.S. 1257 (1984); Marathon Metallic Bldg. Co. v. Mountain Empire Constr. Co., 653 F.2d 921 (5th Cir. 1981); Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974); O'Hare Int'l Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971) *with* Southwest Offset, Inc. v. Hudco Publishing Co., 622 F.2d 149 (5th Cir. 1980); Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980); Telco Leasing, Inc. v. Marshall County Hosp., 586 F.2d 49 (7th Cir. 1978).

79. The agreement signed by Rudzewicz and MacShara contained such a choice-of-law provision stating that Florida law would govern any litigation on the contract. *See supra* text accompanying note 19.

defendant's deliberate affiliation with the state and the foreseeability of litigation there.[80]

The majority of the circuit court of appeals, with whom Justice Stevens, dissenting in *Burger King*, agreed, was critical of reliance on standard "boilerplate language" in determining that jurisdiction exists because it may mean that nonresident consumers will be subjected to the jurisdiction of foreign courts simply because they have purchased goods under contracts containing such language.[81] However, using the analysis of the *Burger King* Court, the problems with consumer contracts envisioned by the circuit court will not materialize. First, the Court emphasized that a choice-of-law provision is not sufficient to confer jurisdiction without the presence of other factors showing that the defendant intended to associate himself with the forum. Second, the Court, before upholding consent clauses, has always determined that the parties were in equal bargaining positions and that the agreement signed was not a contract of adhesion.[82]

The Court in its analysis recognized that a contract is merely the embodiment of the parties' agreement and that the consequences of the agreement are "the real object of the business transaction."[83] The contemplated consequences and obligations stemming from a contract between the plaintiff and the defendant are among the factors often considered by courts in jurisdictional analysis, but not without difficulty and confusion. Some courts have imputed performance by the plaintiff within the forum to the defendant in determining the defendant's contacts, but others have held that the plaintiff's activities are not enough to tie the defendant to a forum.[84] In *Burger King*, the Court emphasized that it is the obligations required of the defendant under the contract which are important in the jurisdictional analysis and that there must be some conduct on the part of the defendant to show that he intended to establish a relationship with a forum resident and that, because

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80. *Burger King Corp.*, 471 U.S. at 482.

81. *Id.* at 487-90 (Stevens, J., dissenting); Burger King Corp. v. MacShara, 724 F.2d 1505, 1510 (11th Cir. 1984).

82. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972); National Equip. Rental, Ltd. v. Szukhent, 375 U.S. at 311, 315-16 (1964).

83. *Burger King Corp.*, 471 U.S. at 479 (quoting Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 317 (1943)).

84. *Compare* Pedi Bares, Inc. v. P&C Food Mkts., Inc., 567 F.2d 933 (10th Cir. 1977); In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); Electro-Craft Corp. v. Maxwell Elecs. Corp., 417 F.2d 365 (8th Cir. 1969) *with* Iowa Elec. Light & Power Co. v. Atlas Corp., 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980); Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973).

of that conduct, he could reasonably foresee the possibility of litigation within the forum.[85]

The *Burger King* opinion makes it clear that a court considering the appropriateness of asserting jurisdiction cannot stop its analysis with the determination that the defendant has purposefully availed himself of the benefits and protections of the forum's laws. It must still examine the fundamental fairness of asserting jurisdiction under the circumstances.[86] The Court's opinion in this area gave the lower courts much guidance as to factors that should be considered, the relative importance of those factors, and alternate ways of solving problems which may be encountered.[87]

While recognizing that these considerations can sometimes establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts that would otherwise be required,[88] the Court emphasized the heavy burden that is on the nonresident defendant who has deliberately affiliated himself with the forum state and who wishes to challenge the assertion of jurisdiction on fairness grounds. The Court held that for such a defendant to defeat jurisdiction, "he must present a *compelling* case that the presence of other considerations would render jurisdiction unreasonable."[89] Most such considerations may be accommodated through means short of finding jurisdiction unconstitutional.[90]

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85. *Burger King Corp.*, 471 U.S. at 478-79. The contemplated consequences or obligations the Court found to be relevant in *Burger King* were that Rudzewicz entered a 20-year agreement envisioning continuing contacts with a forum resident, he was contractually required to send payments to the forum, and the agreement contained a choice-of-law provision. *Id.* at 480. This enumeration of the factors which made Rudzewicz' amenability to suit in Florida foreseeable should clarify for the lower courts the relevance of such factors in jurisdictional analysis. While some courts have always considered choice-of-law provisions and provisions for payment by the defendant within the forum state important, others have not, considering them immaterial or of secondary value. *See* Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026 (5th Cir. 1983), *cert. denied*, 466 U.S. 962, *reh'g denied*, 467 U.S. 1257 (1984); Scullin Steel Co. v. National Ry. Utilization Corp., 676 F.2d 309 (8th Cir. 1982); Southwest Offset, Inc. v. Hudco Publishing Co., 622 F.2d 149 (5th Cir. 1980); Pedi Bares, Inc. v. P & C Food Markets, Inc., 567 F.2d 933 (10th Cir. 1977); O'Hare Int'l. Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971).

86. *See supra* text accompanying notes 59-61.

87. *Burger King Corp.*, 471 U.S. at 476-78. The Court stated that lower courts should evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 477 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

88. *Id.*

89. *Id.* (emphasis added).

90. *Id.* While noting that at some point the inconvenience to the nonresident defendant may become "so substantial as to achieve *constitutional* magnitude" and thereby "defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities," the Court mentioned several times in its decision that substantial inconvenience to the defendant can be accommodated by a change in venue. *Id.* at 477, 478, 484 (emphasis in original).

CONCLUSION

The decision in *Burger King* should eliminate some of the confusion in applying the due process jurisdictional test in single contract cases, but it has left questions in some areas. The Court cleared up the misconception that *McGee*[91] allowed the assertion of jurisdiction based on a single-contact contract alone and made it clear that *Hanson*[92] required an examination of additional factors to determine if the nonresident had established a purposeful connection with the forum state.

The Court emphasized that the nonresident must have fair notice that he is amenable to suit within the forum and that amenability must be determined from the nonresident's affirmative conduct. Forum activities on the part of the plaintiff are irrelevant to the jurisdictional determination. Courts should look to the overall negotiations and course of dealing between the parties and to the agreement which came out of those negotiations to determine whether the defendant's connection with the forum was such that he should have foreseen the possibility of litigation there. The contract terms which tend to establish a deliberate relationship with the forum are relevant to the jurisdictional analysis. This decision makes it clear that a choice-of-law provision in the contract is one such term, and it should be a significant factor in support of asserting jurisdiction over a nonresident even though it should not be interpreted as express consent to jurisdiction and cannot independently confer jurisdiction as a choice-of-forum provision can.

While the Court made clear the jurisdictional importance of the negotiations between the parties which culminated in the agreement and the contemplated consequences of that agreement, it left less clear the significance, if any, which should be attached to the defendant's breach of that agreement. Breach cannot be interpreted as an anticipated consequence of a contract, but the *Burger King* Court found that Rudzewicz' refusal to make payments required under contract "caused foreseeable injuries to the corporation in Florida" and implied that this foreseeability of injury should have given Rudzewicz reason to anticipate suit in Florida.[93] This reasoning appears to be a revitalization of the effects test

91. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

92. Hanson v. Denckla, 357 U.S. 235, *reh'g denied*, 358 U.S. 858 (1958).

93. *Burger King Corp.*, 471 U.S. at 480.

for jurisdiction[94] which the Court rejected under the facts of *Kulko*[95] but did not reject as a basis for jurisdiction in commercial litigation,[96] but it seems to be inconsistent with the Court's language that the foreseeability of causing injury in the forum is not a "sufficient benchmark" for exercising personal jurisdiction.[97] The use of this seemingly inconsistent language without explanation has left confusion as to the importance of the in-forum effects of a nonresident's conduct in jurisdictional analysis.

One jurisdictional question which remains undecided after *Burger King* is the extent to which purchases made within the forum can constitute contacts sufficient to justify the assertion of jurisdiction over a nonresident.[98] The Court rejected the notion that an ordinary consumer with no other contacts with the forum will be subjected to jurisdiction in a distant forum simply because of nominal purchases made there, but it did not expressly address the issue of commercial purchases and the effect of those purchases on determining whether the nonresident intended to establish a purposeful relationship with forum residents.[99]

Courts analyzing the appropriateness of asserting jurisdiction have commonly made a distinction between nonresident buyers and nonresident sellers, with jurisdiction being asserted more frequently over sellers than buyers because sellers have traditionally been viewed as the dominant parties in a transaction and are considered more able to defend in a foreign jurisdiction. The *Burger King* decision weakened the buyer/seller distinction, and it seems unlikely that courts will be able to base jurisdiction on that distinction alone. The courts must look behind the buyer/seller relationship to the involvement of the parties in the transaction and must consider all factors, including the role of the parties in the negotiations, the relative bargaining power of the parties, the amount of money involved, and whether it was an isolated transaction or a continuing relationship. After *Burger King* the cor-

94. Under this test, a court may exercise jurisdiction over a nonresident whenever the nonresident commits an act or omission which has an effect within the forum if the exercise of jurisdiction would be reasonable. This is true even if the effects are caused by actions taken outside the forum state. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS 37 (1971).

95. Kulko v. Superior Court of Cal., 436 U.S. 84, 96, *reh'g denied*, 438 U.S. 908 (1978).

96. *Id.* The Court stated that the test would apply when a nonresident sought a commercial benefit from the solicitation of business from a forum resident. *Id.* at 97.

97. *Burger King Corp.*, 471 U.S. at 474 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980)).

98. The Court in Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984), held that purchases were not sufficient to support an assertion of jurisdiction where the cause of action is not related to the defendant's activities within the forum but it did not address the issue in terms of a related cause of action.

99. The Court did not consider that the franchisees in this case had purchased equipment for $165,000 from a Burger King subsidiary in Florida. *Burger King Corp.*, 471 U.S. at 466-67.

rect distinction for the courts to make is not between buyers and sellers but between active and passive involvement in the transaction.

The fact that franchising is becoming increasingly common, as more and more entrepreneurs seek the easy entry into the marketplace that franchising offers and the benefits that flow from affiliation with a national organization, seems to be an underlying factor in the Court's decision in this case. Its ruling indicates that the Court is not willing to give the burden on the defendant more weight in franchise cases than it does in other cases. Fairness dictates that a defendant who derives profits from deliberate contacts with the forum should be responsible for the costs such activities incur. Entering a long-term franchise agreement with a forum resident is a deliberate action and, therefore, the burdens of litigation are knowingly incurred, even though a small business operating at a single location in its home state may not have the resources necessary to defend an action in a distant state.

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