The Longarm Reaches Too Far--Burger King Corp. v. Rudzewicz

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Supreme Court Ramifications

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Defined broadly, jurisdiction is the court's power to hear and determine controversies.1 Courts must have jurisdiction over the subject matter of the controversy as well as jurisdiction over the

1. Ashlock v. Ashlock, 360 Ill. 115, 195 N.E. 657, 659 (1935). Many definitions of jurisdiction exist. See Atwood v. Cox, 88 Utah 437, 55 P.2d 377, 380 (1936). However, they all fundamentally mean the power or capacity given by the law to an official entity, such as a court, to entertain and determine certain controversies. 55 P.2d at 380; see In re Estate of DeCamillis, 66 Misc. 2d 882, 888, 322 N.Y.S.2d 551, 556 (Sur. Ct. N.Y. County), aff'd mem., 38 App. Div. 2d 687, 327 N.Y.S.2d 554 (1st Dep't 1971). Literally, the meaning of jurisdiction is "the saying or declaring (dictio) of the law (juris)." R. Casad, Jurisdiction in Civil Actions 1-1 (1983).

2. See R. Casad, supra note 1, at 1-2. "A court is said to have jurisdiction of the subject matter of an action if the case is one of the type of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority." Id. There is a distinction to be drawn between courts of general jurisdiction and those of limited jurisdiction. See id. at 1-3; see also D. Siegel, New York Practice § 8 at 10 (1978) (describing limited jurisdiction of federal courts). Each state has a court of general jurisdiction which is empowered to hear almost every type of case. R. Casad, supra note 1, at 1-3. The states also have courts of a more specialized nature whose jurisdiction extends only over particular types of cases. Id. The extent of a court's jurisdiction is determined by statutory or constitutional provisions which explicitly outline the parameters of that court's power. Id. at 1-3.

Although states have courts of both general and limited jurisdiction, all federal courts are courts of limited jurisdiction. Id. The primary limitations placed on the jurisdiction of federal courts are found in the Constitution. See U.S. Const. art. III, § 2. Federal courts, which include the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish," id. at § 1, cl. 1, have the power to hear cases authorized by the Constitution and any statutory provisions enacted by Congress. R. Casad, supra note 1, at 1-3. The Supreme Court has original jurisdiction only in cases involving ambassadors and those in which a state is a party. U.S. Const. art. III, § 2, cl. 2. The Supreme Court's appellate jurisdiction extends to any case included in its grant of subject matter jurisdiction, subject to any exceptions and regulations made by Congress. Id. at cl. 2. Congress has further restricted the jurisdiction of the lower federal courts by requiring that additional statutory criteria be met. See 28 U.S.C. § 1332 (1976) (codifying diversity jurisdiction in civil cases, but further providing that the amount in controversy must exceed $10,000 ex-
parties before a valid judgment may be entered. If either exclusive of interest and costs.

Due to the limited nature of federal jurisdiction, a federal court must dismiss an action for want of subject matter jurisdiction regardless of how far the action has progressed. See Owens Equip. and Erection Co. v. Kroger, 457 U.S. 365, 377 n.21 (1978) (Supreme Court dismissed action for lack of complete diversity even though verdict was returned for plaintiff at trial level); see also Fed. R. Civ. P. 12(h)(3). The court must act on the motion of either party, including the party who alleged proper jurisdiction, or it can act on its own motion. See id. This rule helps to assure that federal courts do not infringe on the powers reserved to the states by the ninth and tenth amendments of the Constitution. C. WRIGHT, THE LAW OF FEDERAL COURTS 22-24 (1983).

3. See Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 224 (D.N.J. 1966). Personal jurisdiction is defined as "the Court's ability to assert judicial power over the parties and bind them by its adjudication." Id. In order for a valid judgment to be entered, the Due Process Clause of the fourteenth amendment requires that the defendant have notice of the suit and an opportunity to be heard. D. SIEGEL, supra note 2, § 58 at 59. Moreover, the clause requires a jurisdictional basis, i.e., a connection between the forum state and either the defendant or the case. See id.

Traditionally, jurisdictional basis existed if the defendant was "physically present" in the state. See Pennoyer v. Neff, 95 U.S. 714, 720 (1878). This theory continues to provide for jurisdictional basis where: (1) the defendant is domiciled in the state; (2) the defendant is physically present; or, (3) the defendant consents to the court's jurisdiction. Id. See generally Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Considerations, 65 YALE L.J. 289 (1956) (discussion and criticism of rule making physical presence in forum state a sufficient basis for jurisdiction).

In Milliken v. Myers, 311 U.S. 457 (1940), the Court allowed the exercise of personal jurisdiction over an absent defendant found to be domiciled within the state. Id. at 463. Since the state provided the domiciliary with certain rights and benefits, it was considered his duty to respond to a lawsuit in that state. Id.

The Court, in Philadelphia and Reading Ry. v. McKibben, 245 U.S. 264 (1917), noted that the exercise of personal jurisdiction over a foreign corporation is consistent with the Due Process Clause of the fourteenth amendment when its corporate activities reached a level that supported a finding of "corporate presence." Id. at 265.

Similarly, the Supreme Court has upheld the exercise of in personam jurisdiction based upon acts done within a state, reasoning that the actor had "impliedly consented" to the court's jurisdiction by engaging in these specified acts. See Hess v. Pawloski, 274 U.S. 352 (1927) (implied consent based on the use by an individual of a state's highways). These subsequent bases of jurisdiction were recognized by the Supreme Court in an effort to circumvent the restrictions imposed by Pennoyer due to the impracticability of strict adherence to the Pennoyer test. See Kurland, The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts from Pennoyer to Denckla: A Review, 25 U. Chi. L. REV. 569 (1958).

The fourteenth amendment Due Process Clause requires that the defendant have notice of the suit and an opportunity to be heard. See St. Clair v. Cox, 106 U.S. 350, 356 (1882); D. SIEGEL, supra note 2, § 58 at 59. There must be a reasonable probability that the defendant will receive actual notice of the pending litigation before the service of process will be deemed adequate. See Shaffer v. Heitner, 433 U.S. 186, 206 (1977); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950); Doherty & Co. v. Goodman, 294 U.S. 625, 627 (1935). The procedure employed could be personal service on the defendant in any form allowed by law, so long as there is a reasonable probability of notice to the defendant. See R. CASAD, supra note 1, at 1-6 - 1-7.

Unlike subject matter jurisdiction, see supra note 2, lack of personal jurisdiction is a waivable defect, i.e., the defendant may consent to jurisdiction, or an objection may be deemed
ment is missing, the judgment entered in the proceeding is void and will not be entitled to full faith and credit in other forums.8


4. R. Cass, supra note 1, at 1-2.


Although the merits of a case may not be relitigated after a previous adjudication, a judgment is conclusive upon the merits only if the court had jurisdiction to render judgment. Williams v. North Carolina, 325 U.S. 226, 229 (1945). The doctrine of Full Faith and Credit “comes into operation only when . . . the jurisdiction of the court in another state is not impeached, either as to the subject matter or to the person.” Id. at 228 (quoting Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873)) (emphasis added). If the question of jurisdiction has been previously litigated, that determination is final. See, e.g., Durfee v. Duke, 375 U.S. 106, 111 (1963) (jurisdiction over subject matter final); Baldwin v. Iowa State Traveling Men’s Ass’n, 285 U.S. 522, 525-26 (1931) (jurisdiction over person final). Moreover, the determination of personal jurisdiction is final if the defendant consents to it, see D. Siegel, supra note 2, § 98 at 114, or if the defendant appears without objecting to it. Id. § 111 at 159; see Pennoyer v. Neff, 95 U.S. 714, 720 (1878).

The Constitution also states that “Congress may by general laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.” U.S. Const. art. IV, § 1, cl. 2. Congress has passed legislation effectuating this clause. See 28 U.S.C. § 1738 (1976). The provision provides:

The Acts of the legislature of any State, Territory or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law and usage in the courts of such State, Territory or Possession from which they are taken.

Id. (emphasis added).
The standards promulgated by the Supreme Court for determining an appropriate exercise of in personam jurisdiction, although accepted as proper guidelines, are vague, and tend to promote

By enacting this statute, Congress codified the Full Faith and Credit Clause as it applied to the states and extended this concept to the federal courts, requiring that a final, valid state judgment be accorded full faith and credit in the federal system. See Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 & n.6 (1982).

Although it is well established that federal courts are obliged to give judgments of a state court the same preclusive effect as the courts of that state would, see Allen v. McCurry, 449 U.S. 90, 96 (1980), there have been exceptions to the Full Faith and Credit doctrine. See, e.g., McDonald v. City of West Branch, 466 U.S. 284, 104 S. Ct. 1799, 1802 (1984) (section 1738 not applicable to arbitration award); Thomas v. Washington Gas Light Co., 448 U.S. 261, 286 (1980) (successive workman’s compensation awards not barred by Full Faith and Credit Clause); Williams v. North Carolina, 325 U.S. 226, 229 (1945) (Full Faith and Credit Clause not applicable when court did not have jurisdiction to enter underlying judgment). For background and historical information on the Full Faith and Credit Clause, see generally Jackson, Full Faith and Credit - The Lawyer’s Clause of the Constitution, 45 COLUM. L. REV. 1 (1945) (discussion of judicial evolution of Full Faith and Credit Clause); Nadelman, Full Faith and Credit to Judgments and Public Acts, 56 MICH. L. REV. 33 (1957) (application of Full Faith and Credit Clause to “Public Acts”); Radin, The Authenticated Full Faith and Credit Clause: Its History, 39 ILL. L. REV. 1 (1944) (historical evaluation of Full Faith and Credit Clause); Reese & Johnson, The Scope of Full Faith And Credit to Judgments, 49 COLUM. L. REV. 153 (1949) (survey of decisions interpreting Full Faith and Credit Clause).

International Shoe was the first case to discard the territorial theory of personal jurisdiction articulated in Pennoyer v. Neff, 95 U.S. 714, 720 (1878). International Shoe Co. argued that its corporate activities were insufficient to establish its corporate presence in Washington as a basis of jurisdiction. International Shoe, 326 U.S. at 315. It contended that its activities amounted to “mere solicitation” of business, which had previously been held insufficient as a basis of jurisdiction. Id. at 315-16. The Supreme Court was thus presented with an opportunity to expand the traditional territorial power concept of jurisdiction that had been the rule since Pennoyer and which had become obsolete due to factors such as the increasing mobility of the nation. See Hess v. Pawloski, 274 U.S. 352 (1927) (statute authorizing service of process on state official for action arising out of nonresident’s use of vehicle within state upheld). Given this opportunity, the Court stated that the physical presence of a defendant was no longer required to enter a valid personal judgment against him. The Court further noted:

Due 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".

International Shoe, 326 U.S. at 316 (citations omitted).

The International Shoe standards were promulgated with the intention of avoiding mechanical or quantitative rules when determining in personam jurisdiction. See id. at 319. The Supreme Court opted for a factual determination in each case under a due process
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uncertainty in establishing this important threshold requirement.7
One area of particular uncertainty in determining a proper exercise of in personam jurisdiction is where a single contract acts as the basis of jurisdiction.8

analysis rather than applying any rigid rule of law. See id.

The standards articulated in International Shoe have been closely scrutinized by commentators. See Nordenberg, State Courts, Personal Jurisdiction and the Evolutionary Process, 54 Notre Dame Law. 587, 595 (1979) (flexibility of International Shoe standards creates uncertainty of application); Comment, Constitutional Limitations on State Long Arm Jurisdiction, 49 U. Chi. L. Rev. 156, 160-64 (1982) (rejecting International Shoe's balancing approach for fixed rules and principles).

Similarly, Justice Black refused to join the Court in "formula[ing] broad rules as to the meaning of due process[,]" International Shoe, 326 U.S. at 322 (Black, J., dissenting). One of Justice Black's main concerns was that "application of this natural law concept . . . makes judges the supreme arbiters of the country's laws and practices." Id. at 326 (Black, J., dissenting). In other words, Justice Black feared that the ad hoc rules set forth in the case would leave important determinations too much to the discretion of the court deciding the question of jurisdiction, thereby promoting uncertainty in the law, as well as infringing on the powers reserved to the states by the United States' constitutional form of government. See id. (Black, J., dissenting).

In McGee v. International Life Ins. Co., 355 U.S. 220 (1957), the Supreme Court, applying the International Shoe test, stressed fairness between the respective parties, thereby deemphasizing the fact that the contact in issue was minimal. Id. at 225. For purposes of a due process analysis, the Court held that it was "sufficient . . . that the suit was based on a contract which had substantial connection with that state." Id.; see infra note 44 and accompanying text.

The next year, in Hanson v. Denckla, 357 U.S. 235 (1958), the Supreme Court acknowledged that jurisdiction was no longer restricted by Pennoyer, but reaffirmed certain jurisdictional limitations that might have been undermined by the language of McGee. Id. at 251. The Court stated that "the requirements for personal jurisdiction over non-residents have evolved from the rigid rule of Pennoyer . . . to the flexible standard of International Shoe . . . but it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." Id. The Hanson Court required something more than a showing of convenience to the parties. Id. at 253. The Court proclaimed that the exercise of jurisdiction by a forum state is not justified unless "there [is] some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." Id.

7. Note, World-Wide Volkswagen Corp. v. Woodson: A Limit to the Expansion of Long-Arm Jurisdiction, 69 Calif. L. Rev. 611, 630 (1981). "One cannot deny that the balancing approach grants the court a great deal of discretion. In addition, it creates a sizeable amount of uncertainty due to the inconsistencies that are liable to result from a court's balancing of various considerations." Id. See also Comment, supra note 6, at 160 (balancing approach should be rejected due to inherent unpredictability). But see Nordenberg, supra note 6, at 594-95 (balancing approach preferable despite unpredictability).

Recently, in *Burger King Corp. v. Rudzewicz*, the Supreme Court of the United States evaluated a state court's exercise of jurisdiction based upon a franchise agreement. The Court held that the exercise of in personam jurisdiction over a franchisee, pursuant to the Florida longarm statute, would not violate the Due Process


11. *Id.* at 1508. The appellate court did not reach the merits of the lower court ruling, deciding that the district court lacked personal jurisdiction over Rudzewicz. *Id.* at 1508. The Court of Appeals for the Eleventh Circuit found the exercise of jurisdiction in this instance offensive to due process. *Id.* at 1513. Burger King then appealed this determination. See *Burger King v. Rudzewicz*, 471 U.S. 105 S. Ct. 2174 (1985).


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

(g) Breaching a contract in this state by failing to perform acts required by the
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Clause of the fourteenth amendment.\textsuperscript{12}

In \textit{Burger King}, a large Miami-based franchisor brought an action in the Federal District Court of Florida against two Michigan franchisees for breach of their franchise agreement and for tortious infringement of trademarks.\textsuperscript{13} The franchisees entered a special appearance to contest the court's exercise of personal jurisdiction over them as Michigan residents.\textsuperscript{14} After this motion was denied, and a trial was had, the District Court entered judgments against both franchisees.\textsuperscript{15}

The Court of Appeals reversed the judgment of the District Court,\textsuperscript{16} finding that jurisdiction had been exercised in violation of due process.\textsuperscript{17}

contract to be performed in this state.

\textit{Id.}

12. \textit{Burger King}, 471 U.S. at \underline{\ldots}, 105 S. Ct. at 2190.
13. \textit{Id.} at \underline{\ldots}, 105 S. Ct. at 2180. Rudzewicz and MacShara entered into a franchise agreement with Burger King wherein Burger King licensed the use of its trademarks and service marks for 20 years and leased a standardized restaurant for the same period of time. \textit{Id.} at \underline{\ldots}, 105 S. Ct. at 2178. Moreover, pursuant to the agreement: the franchisees were educated by Burger King in restaurant management; the operation of the business was strictly regulated by Burger King to insure uniformity; and, the franchisees paid a $40,000 franchise fee and obligated themselves to substantial indebtedness arising from many different fees. \textit{Id.} at \underline{\ldots}, 105 S. Ct. at 2178.

Franchise supervision was conducted through a two-tiered system which consisted of a series of district offices which reported to the main office in Miami. \textit{Id.} at \underline{\ldots}, 105 S. Ct. at 2178-79. After protracted negotiations, Rudzewicz and MacShara began the operation of their franchise in 1979. \textit{Id.} at \underline{\ldots}, 105 S. Ct. at 2179. Due to poor business, the franchisees found themselves behind in their monthly obligations. \textit{Id.} at \underline{\ldots}, 105 S. Ct. at 2179. After extensive negotiations between the Miami office and the franchisees proved fruitless, the Miami headquarters terminated the franchise agreement and ordered the franchisees to vacate the premises. \textit{Id.} at \underline{\ldots}, 105 S. Ct. at 2179-80. After the franchisees disregarded the notice of termination and continued to operate the restaurant as a Burger King facility, the franchisor brought suit for tortious infringement of trademarks and service marks. \textit{Id.} at \underline{\ldots}, 105 S. Ct. at 2179-80.

14. \textit{Burger King}, 471 U.S. at \underline{\ldots}, 105 S. Ct. at 2180. The defendants contended that the cause of action did not arise in the state of Florida and, therefore, the Florida longarm statute did not reach them, as they were Michigan residents. \textit{Id.} at \underline{\ldots}, 105 S. Ct. at 2180.
15. \textit{Burger King}, 471 U.S. at \underline{\ldots}, 105 S. Ct. at 2180. The district court entered judgment against both franchisees for $288,875 in contract damages. \textit{Id.} at \underline{\ldots}, 105 S. Ct. at 2180. The court ordered both franchisees to cease operating the restaurant as a Burger King facility. \textit{Id.} at \underline{\ldots}, 105 S. Ct. at 2180. The court also awarded costs and attorney's fees to Burger King. \textit{Id.} at \underline{\ldots}, 105 S. Ct. at 2180.
17. \textit{Id.} The Court of Appeals noted:

In sum, we hold that the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida. Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone
Burger King appealed to the Supreme Court of the United States. The Supreme Court held that there was no due process violation, stating that "there is substantial record evidence supporting the District Court's conclusion that the assertion of personal jurisdiction over Rudzewicz in Florida for the alleged breach of his franchise agreement did not offend due process." In so holding, the Court noted that the franchisee had established a substantial and continuing relationship with the franchisor's headquarters in the forum state and that the contract documents and the course of dealing between the parties afforded the franchisee with fair notice of possible litigation in the forum state. The Court further noted that the franchisee had failed to demonstrate how jurisdiction in that forum would otherwise be fundamentally unfair.

of due process.

Id.

18. Burger King v. Rudzewicz, 471 U.S. at ----, 105 S. Ct. at 2181. The Supreme Court decided that even though an appeal did not properly lie in this instance, see id. at ----, 105 S. Ct. at 2181 & n.12, the importance of the question presented required the granting of certiorari. Id. at ----, 105 S. Ct. at 2181.


20. Id. at ----, 105 S. Ct. at 2185.

21. Id. at ----, 105 S. Ct. at 2186. The Court stated:

[T]his franchise dispute grew directly out of "a contract which had a substantial connection with that state." ... Eschewing the option of operating an independent local enterprise, Rudzewicz deliberately "reach[ed] out beyond" Michigan and negotiated with a Florida corporation for the purchase of a long term franchise and the manifest benefits that would derive from affiliation with a nationwide organization. ... Upon approval, he entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida. ... Rudzewicz' refusal to make the contractually required payments in Miami, and his continued use of Burger King's trademarks and confidential business information after his termination, caused foreseeable injury to the corporation in Florida. For these reasons it was, at the very least, presumptively reasonable for Rudzewicz to be called to account there for such injuries.

Id. at ----, 105 S. Ct. at 2186-87 (citations omitted).

22. Id. at ----, 105 S. Ct. at 2186-87. The Burger King Court observed that the contract documents emphasized that Burger King's operations were conducted from the Miami headquarters. Id. at ----, 105 S. Ct. at 2186. Moreover, all notices and payments were to be sent to Miami, and all agreements were deemed made and enforced there. Id. at ----, 105 S. Ct. at 2186. As to the course of dealings between the parties, the Court noted "that decisionmaking authority was vested in the Miami headquarters." Id. at ----, 105 S. Ct. at 2186-87. The Court highlighted the provisions in the franchise documents which stipulated that all disputes would be governed by Florida law. See id. at ----, 105 S. Ct. at 2187.

23. Burger King, 471 U.S. at ----, 105 S. Ct. at 2187-88. The Burger King Court found no legitimate reason for denying Florida's assertion of jurisdiction. Although the Court
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The Supreme Court was still unwilling to find that an individual's contract with an out of state resident was a sufficient basis for personal jurisdiction when standing alone, but the circumstances surrounding the formulation and execution of the contractual agreement had to be analyzed in light of the "minimum contacts" test of *International Shoe Co. v. Washington.* A two-justice dissent maintained that the circumstances of the case warranted a finding of unfairness sufficient to offend due process. In formulating his dissent, Justice Stevens followed the rationale of the Court of Appeals and contended that Rudzewicz had no reasonable notice of the possibility of litigation in Florida and therefore was financially unprepared for the cost of distant litigation.

While *Burger King* purportedly follows the reasoning of contem-
porary jurisdictional decisions, it is submitted that the Court misapplied the basic principles set forth in *International Shoe Co. v. Washington* and could conceivably affect each state with a longarm statute. The purpose of this Article is to show how the *Burger King* Court misapplied the principles of *International Shoe* and the possible effect the decision could have on two jurisdictions, New York and California.

I. MIS-APPLICATION OF *INTERNATIONAL SHOE*

One of the basic aims of the vague jurisdictional test promulgated by *International Shoe* was to avoid the application of mechanical rules in the exercise of personal jurisdiction. It is suggested that the Supreme Court in *Burger King* upheld personal jurisdiction in a case that may give rise to nationwide jurisdiction for franchisors through the application of a mechanical test, even though the Court purports to reject such a formulation.

The franchise agreement, which established the jurisdictional basis in *Burger King*, was a standard form contract. The agree-

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30. See *Burger King v. Rudzewicz*, 471 U.S. at ____, 105 S. Ct. at 2182. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (no basis of jurisdiction where defendant's only connection with forum state was plaintiff's decision to drive through it); *Kulko v. California Superior Court*, 436 U.S. 84 (1978) (defendant not subject to jurisdiction in California when only connection was result of permitting daughter to live with his ex-wife there).


This article is concerned only with an exercise of jurisdiction based upon a single contract. Since the *Burger King* Court did not reach the question of whether tortious infringement of trademarks would be an act sufficient to constitute a valid jurisdictional basis, it is unnecessary to discuss that issue in this article. See *Burger King v. Rudzewicz*, 471 U.S. at ____, 105 S. Ct. at 2180 n.11.

32. See supra note 6.


34. *Burger King v. Rudzewicz*, 471 U.S. _____, 105 S. Ct. 2174, 2185, 2189 (1985). The *Burger King* Court explicitly rejected the formulation of a mechanical rule and clearly manifested an intention to evaluate each jurisdictional case on its individual facts. *Id.* at _____, 105 S. Ct. at 2189.

35. See id. at _____, 105 S. Ct. at 2178-79; see also H. BROWN, FRANCHISING REALITIES AND REMEDIES § 1.03(4) (1981) (franchisor seldom, if ever, modifies potentially onerous terms of
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ment required a large downpayment by the franchisee and envisioned substantial contractual indebtedness on his part. The duration of the agreement is identical in all Burger King agreements. Due to the inherent disparity of bargaining power between franchisors and franchisees, the terms of the agreement are to a large extent non-negotiable. Therefore, since all Burger King agreements are substantially identical, every franchisee who defaults in his payment obligations should be subject to the personal jurisdiction of the Florida courts when sued by Burger King. Since it is not inconceivable that any franchise agreement that couples a long-term obligation with substantial indebtedness will be viewed as an adequate basis for personal jurisdiction, it is submitted that this holding creates a mechanical rule in a large number of single contract cases.

36. Burger King v. Rudzewicz, 471 U.S. at ___, 105 S. Ct. at 2178-79. The Burger King franchisees' initial investment was $40,000. id. at ___, 105 S. Ct. at 2178, and Rudzewicz' total expected indebtedness exceeded $1 million. id. at ___, 105 S. Ct. at 2179. See generally H. Brown, supra note 35, at § 1.04(1) (1981) (fees and obligations of potential franchisees).

37. Burger King v. Rudzewicz, 471 U.S. at ___, 105 S. Ct. at 2178. Both the licensing agreement and the lease in Burger King continued over a 20 year period. Id. at ___, 105 S. Ct. at 2178.

38. H. Brown, supra note 35, at § 1.01(5) 1-6. Harold Brown has asserted as follows:

There is still a gross disparity between the parties [to a franchise agreement], both at the inception and during the relationship, not merely in skilled bargaining power, financial strength, and the availability of experienced professional advisors, but also functionally in the access to relevant information, and in economic exposure to loss. Sophisticated marketers and attorneys have created agreements and systems of operation which strap the franchisee to contracts and practices of adhesion. These agreements and systems are presented to the prospective franchisee on a take-it-or-leave-it basis, with callous disregard for fair play and even fundamental rights.

Id. (footnote omitted).

39. See supra notes 35-38 and accompanying text.

40. See Burger King v. Rudzewicz, 471 U.S. at ___, 105 S. Ct. at 2178. Since Burger King is one of the largest franchisors in the world, with over 3,000 outlets, conducting 80% of its business through franchise operations, almost 2,400 franchisees could be haled into a Miami court to answer suits based on their franchise agreement. See id. at ___, 105 S. Ct. at 2178.

41. Cf. Burger King v. Rudzewicz, 471 U.S. at ___, 105 S. Ct. at 2190 (Stevens, J., dissenting) (majority relied on standard boilerplate language as basis of jurisdiction). But see Burger King, 471 U.S. at ___, 105 S. Ct. at 2189 n.28 (potential of creating mechanical rules noted, but citing distinguishing factors). Although footnote 28 in the Burger King opinion may preclude an extension of Burger King by analogy to other types of franchise agreements, it does nothing to alleviate the general applicability of this case to Burger King franchise agreements. See id. at ___, 105 S. Ct. at 2189 n.28.
Another basic guideline mandated by the *International Shoe* Court for determining the propriety of an exercise of personal jurisdiction was that "the maintenance of the suit should not offend traditional notions of fair play and substantial justice." In *McGee v. International Life Insurance Co.*, the Supreme Court expanded the *International Shoe* test perhaps to its constitutional limit by upholding a California court’s exercise of jurisdiction over a Texas insurance company based on a single insurance contract. This decision placed a greater emphasis on considerations of "fair play and substantial justice" than it did on the requirement of "certain minimum contacts." The Court held that the exercise of jurisdiction was proper because the contract had "a substantial connection with the state."

A year later, in *Hanson v. Denckla*, the Supreme Court held that a Delaware trustee was not subject to the personal jurisdic-
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tion of a Florida state court based on the unilateral decision of the settlor of the trust to exercise her power of appointment in Florida.\textsuperscript{48}

Under Hanson, the Court’s focus was directed to purposeful activity between the defendant and the state seeking to exercise jurisdiction.\textsuperscript{49} The more recent decisions\textsuperscript{50} have concentrated on the “purposeful availment” test of Hanson, determining whether the defendant carried on activities that gave him reasonable notice that he could be haled into the court of a foreign state,\textsuperscript{51} but also have recognized the importance of considerations of “fairness” inherent in a due process analysis.\textsuperscript{52}

It is submitted that the Burger King Court places far too much emphasis on defendant’s activities while totally ignoring the aspects of fairness necessary to a proper due process analysis.\textsuperscript{53} The

\textsuperscript{48} Id. at 253. At issue in Hanson was the validity of a trust established in Delaware by a Pennsylvania resident who ultimately became a domiciliary of Florida. Id. at 238-39, 253. If valid, the $400,000 trust would pass to the settlor’s grandchildren pursuant to an inter vivos appointment. Id. at 239. If invalid, it would pass to the settlor’s daughters pursuant to the residuary clause of her will. Id. at 240.

After the settlor’s death, the settlor’s daughters, Florida residents, brought an action to determine whether the $400,000 should pass to them under the residuary clause of the settlor’s will. Id. At the same time, the executrix of the estate brought a declaratory action in Delaware to determine who was entitled to the assets. Id. at 242. The Florida court declared the appointment invalid and held that the funds passed under the will. Id. at 243. The Delaware court determined that the appointment and trust were valid and held that the assets passed under the appointment. Id. at 242. Prior to this determination, the Florida decree had been entered and the Florida residents moved to have the Delaware court afford the decree full faith and credit. Id.

The motion for full faith and credit was denied by the Delaware Supreme Court because Florida law required the joinder of the trustee as an indispensable party in determining the validity of the trust. Id. at 254. Since the Florida court never properly acquired jurisdiction over the person of the trustee, id., the Delaware court held that the Florida judgment was invalid, id. at 255, and therefore not entitled to full faith and credit in the Delaware courts. Id.

\textsuperscript{49} Hanson, 357 U.S. at 253. The Hanson Court reasoned that: “[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” Id. (citing International Shoe, 326 U.S. 310, 319 (1945)) (emphasis added).


\textsuperscript{51} World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980). In World-Wide Volkswagen, the Supreme Court realized that foreseeability was important, and required “that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” Id. (citations omitted).


\textsuperscript{53} See Shaffer v. Heitner, 433 U.S. 186, 222-25 (1977) (Brennan, J., concurring and dissenting). Justice Brennan analyzed the contacts present in Shaffer and concluded that
Court rejected out of hand any comparison of the net wealth of the parties in ascertaining the fairness of jurisdiction. The Court also subjugated the fairness requirement by requiring the defendant to overcome a finding of "purposeful availment" of the forum state's laws with a "compelling case" of unfairness. It is submitted that a finding of "purposeful availment" under the Burger King decision creates a presumption of jurisdiction rebuttable only by a compelling case of unfairness. If McGee went too far in allowing jurisdiction based on considerations of fairness, then it is submitted that Burger King goes too far in emphasizing defendant's purposeful activity as an exclusive basis for personal jurisdiction.

II. STATE COURT JURISDICTION AFTER BURGER KING

In Burger King, the Supreme Court held that a construction of the Florida longarm statute categorizing payments required to be made in Florida as "acts required to be performed in this they were sufficient to warrant a constitutional finding of jurisdiction. Id. This determination was primarily based on the forum state's manifest interest in asserting jurisdiction over a corporation formed under the laws of the state. Id. at 223. See Nordenberg, supra note 6, at 619 (Justice Brennan's discussion of defendant's contact with forum state "tacked on" at end of opinion and had "minimal" place in his analysis).

54. Burger King v. Rudzewicz, 471 U.S. 234, 105 S. Ct. 2174, 2188 n.25 (1985). The Burger King Court stated that jurisdiction may not be avoided merely on the basis of the adversary's greater wealth, unless other "compelling considerations" are present. Id. at ___ , 105 S. Ct. at 2188 n.25.

55. Id. at ___, 105 S. Ct. at 2185. Once a defendant has been found to have purposefully directed activities at a forum state, the Burger King Court asserted that he must present a "compelling case" that jurisdiction is unreasonable. Id. at ___, 105 S. Ct. at 2185.

56. Id. at ___, 105 S. Ct. at 2186. In Burger King, the Court found an assertion of jurisdiction to be "presumptively reasonable," id., and later required a showing of "compelling" considerations to defeat an assertion of jurisdiction. Id. at ___, ___, 105 S. Ct. at 2185, 2188 n.25.

57. Cf. Hanson v. Denckla, 357 U.S. 235, 251 (1958). The Hanson Court, commenting on McGee, noted:

[I]t is a mistake to assume that this trend [toward expanding jurisdiction over non-resident defendants] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However 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. (citations omitted).

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state" was consistent with the federal constitutional requirement of due process. Although an exercise of jurisdiction may be permissible under the Federal Constitution, a state is not compelled to confer that jurisdictional power upon its court system. Therefore, each state is free to phrase and interpret statutes and rules of jurisdiction to a level that falls short of that allowed by the Federal Constitution. The Supreme Court has no right or power to compel a state to alter the construction of its jurisdictional statute because it does not extend to the bounds of the Federal Constitution. The remainder of this article will attempt to determine the effect of the Burger King decision on the jurisdictional approach of New York and California.

A. New York

New York's longarm statute is found in section 302 of its Civil Practice Law and Rules. This section has a provision, amended in 1979, conferring jurisdiction over a non-resident defendant based upon contracts. It is under this provision that jurisdiction based upon a franchise agreement could be invoked.

The amendment to section 302 was added as a remedial measure to confer jurisdiction on defendants who were never physi-

59. Id. at § 48.193(1)(g).
63. See Mechanical Contractors Assoc. of America, Inc. v. Mechanical Contractors Assoc. of Northern California, Inc., 342 F.2d 395, 398 (9th Cir. 1965).
65. Id.
66. Id. Section 302(a)(1) of New York's Civil Practice Law provides, in part: As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent:
1. transacts any business within the state or contracts anywhere to supply goods or services in the state . . .
Id. at § 302(a)(1).
67. See id.
Prior to this amendment, the law was settled that a mere shipment of goods into New York was insufficient to allow a New York tribunal to exercise jurisdiction over a non-resident defendant, but a “solicitation plus” doctrine allowed jurisdiction when the defendant not only shipped goods into the state, but also solicited business in New York.

This amendment had the effect of creating a more expansive jurisdiction for New York courts, granting jurisdiction based upon contracts to supply goods or services in the state regardless of the situs of contract formation. When deciding whether an act forms an adequate basis for jurisdiction, the appellate courts have interpreted the jurisdictional statute broadly.

The New York case most analogous to Burger King is Reiner v. Schwartz. In Reiner, the defendant traveled to New York to execute an agreement which made the defendant the sole salesman in plaintiff’s New England market. Alleging that there was a contractual breach, the plaintiff sought to exercise jurisdiction over the Massachusetts resident. The New York court upheld this exercise of jurisdiction and stated that the facts and circumstances were sufficient to find “the purposeful creation of a continuing relationship with a New York corporation.”

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73. See Lupton, 105 App. Div. 2d at 6, 482 N.Y.S.2d at 650. Jurisdiction under the New York longarm statute is proper “whether or not the defendant is physically present, as long as the business activity is sufficiently purposeful.” Id., 482 N.Y.S.2d at 650.


75. Id. at 649, 363 N.E.2d at 552, 594 N.Y.S.2d at 845.

76. Id., 363 N.E.2d at 552, 594 N.Y.S.2d at 845.

77. Id. at 653, 363 N.E.2d at 554, 594 N.Y.S.2d at 848. One difference between Reiner and Burger King is that the defendant in Reiner was physically present within the state. Id.
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In *Reiner*, the Court of Appeals quoted with approval the Supreme Court's holding in *Hanson* that the nature of the defendant's activity must be a purposeful availment of the privileges inherent in conducting activities in the forum state. This "purposeful activity" requirement was reemphasized in *McGowan v. Smith*. The *Reiner* Court also recognized the necessity of tempering the exercise of jurisdiction so as to comport with "traditional notions of fair play and substantial justice," but this requirement seems to be secondary to a finding of purposeful activity by the defendant.

Attempting to cull generalized rules from the case law, it is submitted that a New York court would look for purposeful activity on the defendant's part and then examine notions of fairness. It is submitted that New York courts, when faced with the facts of *Burger King*, would find jurisdiction proper in that the defendant had established a continuing relationship with a New York resident and that this cause of action arose out of this transaction of

at 649, 363 N.E.2d at 552, 394 N.Y.S.2d at 845. The Supreme Court in *Burger King* did not decide if the defendant could be deemed present in the forum state, see *Burger King* v. *Rudzewicz*, 471 U.S. —, 105 S. Ct. 2174, 2186 n.22, since this determination was not necessary to the holding. Id. at —, 105 S. Ct. at 2186 n.22. The *Reiner* court notes that cases involving physical presence of the defendant are the "clearest sort of case[s]" of section 302 jurisdiction. *Reiner*, 41 N.Y.2d at 652, 363 N.E.2d at 553, 394 N.Y.S.2d at 847. Surely a less clear, yet permissible, case could be made out without physical presence of the defendant. See *Lupton Assoc. v. Northeast Plastics*, Inc., 105 App. Div. 2d 5, 6, 482 N.Y.S.2d 647, 650 (4th Dep't 1985); *Hoffritz for Cutlery, Inc. v. Amjac*, Ltd., 763 F.2d 55, 60 (2d Cir. 1985); see also *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 17-19, 256 N.E.2d 506, 508-09, 308 N.Y.S.2d 357, 340-41.

Furthermore, it is submitted that the requirement of payments under the Burger King agreement could be construed as "contracting to supply . . . services within the state" in accordance with section 302(a)(1). Although this precise question has not yet been decided by New York's highest court, the Court of Appeals has decided that an incidental provision of services is insufficient to confer jurisdiction under this section. As these payments clearly are not incidental to the franchise agreement, it is submitted that a contractually required remission of payments in New York could fall within the language of the amended statute.

B. California

The California longarm statute is broad and wide-ranging. The wording of the statute requires that exercises of jurisdiction be consistent with both the state and federal constitutions. The California courts have determined that the boundaries of the California statute are defined by the "minimum contacts" test of International Shoe.

California courts will exercise jurisdiction in any situation which


86. Supra note 66.


89. See supra note 88.

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may be deemed "reasonable." When a party seeks to base jurisdiction upon a single act, the cause of action must be closely related to the defendant's activities within the forum state before the exercise of jurisdiction will be proper. In determining whether jurisdiction is reasonable, the California courts look for some purposeful activity on the part of the defendant. In addition, there must be a determination that the exercise of jurisdiction would be fair under the circumstances. The factors that enter into the determination of what is fair and reasonable center around convenience to the parties. When both prongs of this test are met, the exercise of jurisdiction is proper under California law.

Applying these rules to the facts of the Burger King case, it is submitted that the California courts would exercise jurisdiction over a Michigan individual on the basis of a franchise agreement requiring the remission of payments in California. The franchisees made contact with Burger King through their application for a franchise and negotiated in the forum state when creating the agreement. The franchisees contractually obligated themselves to extensive indebtedness to the franchisor and benefited economically from the franchise agreement. An economic benefit "as a matter of commercial actuality" satisfies the minimum con-

94. Id. at 672, 660 P.2d at 404, 190 Cal. Rptr. at 180.
98. Id. at ___, 105 S. Ct. at 2179.
99. See id. at ___, 105 S. Ct. at 2178. The Court in Burger King listed the benefits received by a franchisee from a franchisor. Id.
tacts requirement of the California test. It is submitted that the California court should find the exercise of jurisdiction reasonable, in furtherance of its policy of expansive jurisdiction over non-resident defendants, unless it finds a disparity in the bargaining powers of the parties such as would create inherent unfairness to the defendant and there is no overriding interest in regulating franchisors.

III. CONCLUSION

The existing case law of New York and California would seem to support the exercise of jurisdiction under the facts as found by the district court of Florida and adopted by the Supreme Court in Burger King. The Supreme Court has effectively dispelled any doubt on this issue that had existed in these jurisdictions prior to the Burger King decision, particularly under California's broad statute. The potential ramification of this decision is not in the creation of a new basis of personal jurisdiction, but rather, in the creation of nationwide service of process in favor of franchisors over their franchisees so long as the agreements are deemed to give "sufficient notice" to all parties involved. One can only hope that the Supreme Court will heed its own warning and avoid an

100. See Secrest Machine Corp. v. Superior Court, 33 Cal. 3d 664, 669, 660 P.2d 399, 403, 190 Cal. Rptr. 175, 179 (1983). A manufacturer engages in economic activity "as a matter of commercial actuality" when it is reasonably foreseeable that he will realize a gain. See Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 64, 80 Cal. Rptr. 113, 120 (1969).


102. Cf. supra note 38. Should a finding of fact be entered by the court that the franchisees were not sufficiently experienced in business dealings to be charged with constructive knowledge that California was the actual corporate headquarters of the franchisor, it would be unconscionable to require the franchisees to litigate in California. See Burger King v. MacShara, 724 F.2d 1505, 1513 (11th Cir. 1984).


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unfair exercise of personal jurisdiction on the basis of standard-ized franchise agreement language.105

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105. Id. at ____ , 105 S. Ct. at 2190 (Stevens, J., dissenting). "[T]he [Burger King] Court seems ultimately to rely on nothing more than standard boilerplate language contained in various documents to establish that respondent 'purposefully availed himself of the benefits and protections of Florida's laws.' " Id. at ____ , 105 S. Ct. at 2190 (Stevens, J., dissenting).