

5-1-1986

## Minimum Contacts in Single Contract Cases: Burger King Has Its Way

Ducan E. Barber

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Contracts Commons](#), and the [Jurisdiction Commons](#)

---

### Recommended Citation

Ducan E. Barber, *Minimum Contacts in Single Contract Cases: Burger King Has Its Way*, 1986 BYU L. Rev. 505 (1986).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1986/iss2/10>

This Casenote is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

## Minimum Contacts in Single Contract Cases: Burger King Has Its Way

Since *International Shoe Co. v. Washington*,<sup>1</sup> courts have struggled to determine when a single business contract is a sufficient contact with a forum state to satisfy due process requirements for asserting personal jurisdiction over non-resident defendants. This issue has resulted in a wide disparity of decisions in lower federal and state courts.<sup>2</sup> However, in a recent decision, *Burger King Corp. v. Rudzewicz*,<sup>3</sup> the Supreme Court articulated a three-pronged test to resolve such issues.<sup>4</sup>

This note first evaluates *Burger King's* test, and concludes that each prong properly addresses due process concerns. It then explores *Burger King's* probable impact on personal jurisdiction determinations in single contract cases, and concludes that although this decision clarifies problem areas, it will not result in complete uniformity because personal jurisdiction remains a fact-oriented inquiry.

### I. THE *Burger King* CASE

In 1978 Brian MacShara and John Rudzewicz, both Michigan residents, applied for a Burger King franchise in Michigan.

---

1. 326 U.S. 310 (1945).

2. See *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596, 601 (7th Cir. 1979), cert. denied, 445 U.S. 907 (1980) (providing a brief review of conflicts among circuit courts in determining personal jurisdiction in single contract cases); *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907, 909-10 (1980) (White, J., dissenting) (providing a list of decisions which are arguably in conflict on this point); Brewer, *Jurisdiction in Single Contract Cases*, 6 U. ARK. LITTLE ROCK L.J. 1, 10-11 (1983); Note, *Long-Arm Jurisdiction in Commercial Litigation: When is a Contract a Contract?*, 61 B.U.L. REV. 375, 384-89 (1981).

3. 105 S. Ct. 2174 (1985).

4. Personal jurisdiction in single contract cases is based on specific rather than general jurisdiction. *E.g.*, *Patterson v. Dietze, Inc.*, 764 F.2d 1145, 1146 (5th Cir. 1985); *Dynamic Concepts v. Modern Chain Mfg. Co.*, 610 F. Supp. 285, 287 (D.R.I. 1985). When a defendant's contacts with a foreign forum are isolated, the cause of action must arise out of those contacts to support jurisdiction. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 & n.8 (1984). When a cause of action is unrelated to defendant's contacts with the forum, defendant's relationship with the forum must be much more substantial. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984). See generally von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-64 (1966).

Their franchise application, filed at Burger King's Birmingham, Michigan district office, was forwarded to Burger King headquarters in Miami, Florida.<sup>5</sup> Burger King, MacShara, and Rudzewicz entered into a preliminary agreement in February 1979, but disputes arose in the negotiations over the final contract.<sup>6</sup> During these negotiations Rudzewicz and MacShara initially dealt with the Birmingham district office but soon learned that the Birmingham office had very little decision-making authority. As a result, they began to turn directly to Miami headquarters to resolve their disputes.<sup>7</sup> In the final agreement, reached in June 1979, Rudzewicz and MacShara obtained "limited concessions" from Miami, and Rudzewicz obligated himself personally to payments exceeding \$1 million over the 20-year franchise relationship.<sup>8</sup>

Although the franchise enjoyed initial success, patronage eventually declined, and defendants fell behind in their monthly payments. Prolonged negotiations began between the franchisees and Miami headquarters. Although Miami headquarters dealt directly with the franchisees by mail and telephone, the problems remained unresolved. Finally, Burger King terminated the contract and ordered Rudzewicz and MacShara to vacate the facility. Defendants refused and continued operation as a Burger King restaurant.<sup>9</sup>

Burger King brought suit against Rudzewicz and MacShara in the United States District Court for the Southern District of Florida. The district court held that personal jurisdiction over these Michigan franchisees was proper under Florida's long-arm statute.<sup>10</sup> The Eleventh Circuit Court of Appeals reversed, stat-

---

5. *Burger King*, 105 S. Ct. at 2179. Burger King is a Florida corporation with its principal place of business in Miami.

6. The pervasive nature of this final agreement was important to the Court's ultimate ruling. *Id.* at 2189 n.28. Franchisees agreed to an initial franchise fee, monthly royalties, advertising and sales fees, and rent. They received a twenty-year license to use Burger King's trademarks and a variety of proprietary information, including market research, training, accounting helps, and cost-control and inventory guidance. They also agreed to submit to "exactingly regulation of virtually every conceivable aspect of their operations." *Id.* at 2178.

7. *Id.* at 2179 n.7.

8. *Id.* at 2179.

9. *Id.* at 2180 n.9.

10. *Id.* at 2180. Typically, courts have held that their long-arm statutes extend to the outermost limits allowed by due process. See *Henry Heide, Inc. v. WRH Prods. Co.*, 766 F.2d 105, 108 (3d Cir. 1985). See generally 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1068 n.33 (Supp. 1985). Determining whether a court may properly assert personal jurisdiction over a nonresident defendant requires an affirmative answer

ing that “[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process.”<sup>11</sup> The Supreme Court granted certiorari and reversed in a six-to-two decision, holding Rudzewicz’s<sup>12</sup> substantial and continuing relationship, voluntarily established with Burger King in Florida, sufficient to satisfy *International Shoe’s* minimum contacts test.<sup>13</sup>

## II. ANALYSIS

### A. *Theoretical Framework: A Three-Pronged Test*

The Supreme Court found Rudzewicz subject to in personam jurisdiction in Florida “[b]ecause [he] established a substantial and continuing relationship with Burger King’s Miami headquarters, received fair notice . . . that he might be subject to suit [there] and . . . failed to demonstrate how jurisdiction in that forum would otherwise be fundamentally unfair.”<sup>14</sup> These three levels of inquiry — (1) nature of the contractual relationship, (2) notice of being subject to suit, and (3) general considerations of fairness — are well-suited to analysis of personal jurisdiction in single contract cases because they go beyond a defendant’s initial contacts and encompass his entire relationship with the forum seeking to assert jurisdiction over him. These three areas of inquiry properly reflect fundamental due process notions which underlie personal jurisdiction analysis. Due process analysis is undertaken to ensure that a defendant is subjected to a court’s jurisdiction only if he has established significant “contacts, ties, or relations”<sup>15</sup> so that he is protected against “judgments without notice.”<sup>16</sup> The common inquiry then, that occurs at each level of the *Burger King* analysis is whether a defendant has received “fair warning that a particular

---

to two questions: “(1) is the assertion of jurisdiction authorized by the [long-arm] statute, and (2) if authorized, is the exercise of jurisdiction under State law consistent with basic due process requirements mandated by the United States Constitution?” *Good Hope Indus. v. Ryder Scott Co.*, 378 Mass. 1, 5-6, 389 N.E.2d 76, 79 (1979).

11. *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1513 (11th Cir. 1984).

12. Only Rudzewicz appealed the district court’s judgment.

13. *Burger King*, 105 S. Ct. at 2190.

14. *Id.*

15. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

16. *Id.* at 324.

activity may subject [it] to the jurisdiction of a foreign sovereign."<sup>17</sup>

1. *Nature of contractual relationship: substantial connection*

*Burger King* explains that a single contract begins to establish minimum contacts only when the contractual relationship creates a "substantial connection" between a nonresident defendant and a forum seeking to assert personal jurisdiction over him.<sup>18</sup> The Court in *Burger King*, found that Rudzewicz began to forge such a connection with Florida when he "deliberately reached out" to solicit and negotiate for a Burger King franchise.<sup>19</sup> The franchise agreement, in which Rudzewicz was personally obligated to pay over one million dollars, was a carefully structured twenty-year association providing for exacting regulation by Burger King in Miami. Although no physical contacts occurred between Rudzewicz and Florida, the parties communicated continuously by mail and telephone. Consequently, the Court held that "it was, at the very least presumptively reasonable for Rudzewicz to be called to account" in Florida for his breach.<sup>20</sup>

The Court thus identifies prior negotiations, contemplated future consequences, and course of dealing as relevant factors for determining whether a contractual relationship has created a substantial connection.

This analysis dispels misconceptions existing in lower courts concerning the meaning of "substantial connection." For example, in determining whether a contract establishes a "substantial connection" with a forum, the Sixth Circuit has indicated that the connection—and thus, the reasonableness of jurisdiction—increases with the size of the contract.<sup>21</sup> Other courts have concluded that a contract provides a substantial connection with a forum depending on the total number of physical contacts re-

17. *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring).

18. *Burger King*, 105 S. Ct. at 2185-86.

19. *Id.* at 2186 (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)).

20. *Id.*

21. That court, in *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 232 (6th Cir. 1972), viewed a \$200,000 contract as giving the forum an increased interest in adjudicating the contract's breach by a nonresident defendant. *Accord Alchemie Int'l, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039, 1050, 1054 (D.N.J. 1981). *Contra Arron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977).

sulting from the parties' course of dealing.<sup>22</sup> *Burger King*, however, holds that a substantial connection is not necessarily related to either the value of a contract or the number of physical contacts with the state.<sup>23</sup>

The *Burger King* Court emphasized that contractual relationships having a substantial connection begin with a commercial actor's deliberate affiliation with a forum.<sup>24</sup> The value of the contract has no direct bearing on a nonresident's deliberate affiliation. Solicitation of, and preliminary negotiations with, forum residents constitute evidence of deliberate affiliation.<sup>25</sup> This view is consistent with past Supreme Court opinions. For example, in *McGee v. International Life Insurance Co.*,<sup>26</sup> defendant's solicitation of an insurance contract with a forum resident established a substantial connection between defendant and the forum because of the defendant's deliberate solicitation within the forum.<sup>27</sup> Jurisdiction was therefore appropriate. However, when "deliberate affiliation" is lacking the Court has been reluctant to

---

22. See *Wisconsin Elec. Mfg. Co. v. Pennant Prods.*, 619 F.2d 676 (7th Cir. 1980); *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596 (7th Cir. 1979). Decided one year apart by the same court, these cases illustrate well how courts slip from strict due process analysis to simply counting how many times a defendant actually entered the forum. Virtually the only distinction between these cases was that in the former, two of defendant's agents visited the forum, whereas in the latter no visits occurred. See Brewer, *supra* note 2, at 7-10. See generally Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77.

23. See *Stuart v. Spademan*, 772 F.2d 1185, 1191 (5th Cir. 1985) ("That the defendant refrained from physically entering the forum state is not of itself sufficient to avoid jurisdiction if a substantial connection otherwise exists.") (citing *Burger King*).

24. 105 S. Ct. 2174, 2186 (1985). Many courts have distinguished between commercial and noncommercial actors in applying personal jurisdiction standards. The fact that defendant is a commercial actor militates in favor of jurisdiction. *Henry Heide, Inc. v. WRH Prods. Co.*, 766 F.2d 105,108 (3d Cir. 1985); *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 933 (1st Cir. 1985); *Dynamic Concepts v. Modern Chain Mfg. Co.*, 610 F. Supp. 285, 288-89 (D.R.I. 1985).

25. *Alchemie Int'l, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039, 1048-51 (D.N.J. 1981) (solicitation jurisdictionally important); see also 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, 429 (1980) ("[A] defendant who solicits or initiates interstate sales transactions by carrier, mail, or telephone must ordinarily litigate wherever his customers live."). For cases holding initiation of negotiations jurisdictionally important, see *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 603 F.2d 1301, 1304 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Vencedor Mfg. Co. v. Gougler Indus.* 557 F.2d 886, 891 (1st Cir. 1977) ("After *McGee* it seems fair to say that one who solicits in a state may be sued there if the transaction he has sought goes sour."); *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173, 1176-77 (7th Cir. 1971). *But see Pedit Bares, Inc. v. P & C Foods Mkts.*, 567 F.2d 933, 937 (10th Cir. 1977).

26. 355 U.S. 220 (1957).

27. *Id.* at 223; see also *Hanson v. Denckla*, 357 U.S. 235, 252 (1958).

find jurisdiction. Thus, the Court denied jurisdiction in *Kulko v. Superior Court*,<sup>28</sup> reasoning that defendant's acquiescence to his daughter's decision to live in the forum could not be analogized to seeking "a commercial benefit from solicitation of business from a resident of California."<sup>29</sup>

Commercial actors that voluntarily reach out to negotiate with residents in a foreign forum only *begin* to create a jurisdictionally significant connection because initiating negotiations with forum residents is inadequate in itself to establish a substantial connection.<sup>30</sup> The "substantial connection" analysis must push beyond preliminary negotiations to examine the parties' entire course of dealing. At issue in examining the parties' course of dealing is not the number of their physical contacts with the forum but the nature of defendant's contractual relationship with forum residents.<sup>31</sup> Physical contacts are not necessary to the creation of a substantial connection.<sup>32</sup> The focus, rather, is on whether a single contract, which can exist "solely by mail and wire communications across state lines,"<sup>33</sup> has created a jurisdictionally significant relationship between a defendant and the forum.<sup>34</sup> Centering the jurisdictional inquiry on a commercial actor's substantial connection with a forum manifested by prior negotiations and course of dealing with forum residents rather than simply counting the number of times he has entered

28. 436 U.S. 84 (1978).

29. *Id.* at 97.

30. *Burger King*, 105 S. Ct. at 2184. "Once it has been decided that a defendant purposely established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Id.* (citation omitted). Thus, analysis does not end here; additional factors must be considered.

31. *Id.* (citation omitted).

32. *Stuart v. Spademan*, 772 F.2d 1185, 1189-90 (5th Cir. 1985) ("A minimum-contacts analysis involves more than counting the nonresident's contacts with the forum.").

33. *Burger King*, 105 S. Ct. at 2184.

34. *Accord Toro Co. v. Ballas Liquidated Co.*, 572 F.2d 1267 (8th Cir. 1978); see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-99 (1980) (physical tie between defendant car dealer and the forum too fortuitous to be jurisdictionally significant). The Seventh Circuit continues to struggle to find jurisdiction in the absence of physical contacts. In *Koster v. Automark Indus.*, 640 F.2d 77 (7th Cir. 1981), the court misperceived the jurisdictional significance of mail and telephone communications as evidence of the nature and extent of a contractual relationship which satisfies minimum contacts. The court's concern was that if such contacts were accorded jurisdictional weight, "virtually every business [would be] subject to suit in any state with which it happened to communicate in some manner." *Id.* at 79. *Burger King's* emphasis on the entire contractual relationship avoids such a result.

the forum, protects his legitimate due process interests in three ways.

First, when a commercial actor initiates contact within a foreign forum seeking commercial benefit, he strongly evidences his intent to purposefully avail himself of the benefits and protections of that forum's laws.<sup>35</sup> Commercial defendants that have thus "deliberately reached-out beyond" their home forum cannot justifiably claim surprise when they are haled into court on a claim resulting from those activities.<sup>36</sup> Second, defendant is protected against being subject to suit in a distant forum as a result of the unilateral activity of another individual.<sup>37</sup> By resting analysis squarely on defendant's conduct, any element of surprise is eliminated and defendant is subject to suit only where he has personally established substantial connections.<sup>38</sup> Third, commercial actors are able to structure their conduct to protect against burdensome litigation in other forums.<sup>39</sup> Thus, nonresident commercial actors will be subject to suit only in those forums where they have established a substantial connection through their deliberate affiliation and subsequent course of dealing with forum residents.

## 2. Notice

Defendants also receive due process protections through the requirement recognized in *Burger King* that they be subject to suit only in those forums where their activities give them fair notice that they could be sued.<sup>40</sup>

Several lower courts have held that simply entering into a contract with a state resident provides fair notice of suit given the reasonable foreseeability of in-state consequences in case of

---

35. See *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 933 (1st Cir. 1985).

36. *E.g.*, *Sales Services v. Daewoo Int'l (America) Corp.*, 719 F.2d 971, 973-74 (8th Cir. 1983). In contrast, see *Patterson v. Dietze, Inc.*, 764 F.2d 1145, 1147 (5th Cir. 1985), where jurisdiction was denied because defendant had not reached out beyond its home forum and defendant's only contact with Texas was that plaintiff happened to live there. Defendant would have been surprised to find itself subject to suit in Texas merely because the plaintiff was a resident of that forum.

37. *Hanson v. Denckla*, 357 U.S. 235, 253 (1957); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 417 (1984).

38. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

39. *Stuart v. Spademan*, 772 F.2d 1185, 1190 (5th Cir. 1985) ("A nonresident may permissibly structure his primary conduct so as to avoid being haled into court in a particular state.").

40. *Burger King*, 105 S. Ct. at 2186-87 (1985) (citation omitted).



breach.<sup>41</sup> For example the Sixth Circuit stated that a defendant established minimum contacts "if the defendant 'should have reasonably foreseen that the transaction would have consequences in that State.'"<sup>42</sup> The court further reasoned that jurisdiction was proper because "the making (and breaking) of a contract . . . will have substantial" in-state consequences.<sup>43</sup> Likewise, in *Product Promotions, Inc. v. Cousteau*,<sup>44</sup> defendant's only contact with the forum seeking to assert jurisdiction was that he was required to deliver a finished product there. The *Cousteau* court stated that "activities outside the State can provide adequate contacts if they have reasonably foreseeable consequences within the State."<sup>45</sup> Nonetheless the only "reasonably foreseeable" in-state consequence that occurred in *Cousteau* was that plaintiff did not receive the finished product there. Similar injury, would result from any breach of contract. Under such a test, personal jurisdiction would become a mechanical or quantitative test; contracts would become per se jurisdictionally sufficient.<sup>46</sup> Although this reasoning might result in jurisdictional uniformity in single contract cases, it does not ensure that jurisdictional decisions comport with due process.

*Burger King* correctly rejects such an automatic test.<sup>47</sup> The Supreme Court has long recognized that "the foreseeability that

41. See *Mississippi Interstate Express v. Transpo, Inc.*, 681 F.2d 1003, 1007-08 (5th Cir. 1982); *Pedi Bares, Inc. v. P & C Foods Mkts.*, 567 F.2d 933 (10th Cir. 1977); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974); see also Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 325 (1970) (*McGee* suggests "that the mere existence of a contract to which a resident of the forum state is a party provides a sufficient basis for the assertion of jurisdiction."). Other courts have refused to find personal jurisdiction on a single contract without more. See *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 603 F.2d 1301, 1303 (8th Cir. 1979), cert. denied, 445 U.S. 911 (1980); *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596, 603-04 (7th Cir. 1979), cert. denied, 445 U.S. 907 (1980).

42. *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 226 (6th Cir. 1972) (quoting *Southern Machine Co. v. Mohasco Indus.*, 401 F.2d 374, 381 (6th Cir. 1968)); see also *Pedi Bares, Inc. v. P & C Foods Mkts.*, 567 F.2d 933, 937 (10th Cir. 1977).

43. *Van Dusen Air*, 466 F.2d at 227-28 (intentionally entering into a contractual relationship sufficient to satisfy *Hanson's* purposeful availment requirement).

44. 495 F.2d 483 (5th Cir. 1974).

45. *Id.* at 496 (footnote omitted).

46. The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical tests" or on "conceptualistic . . . theories of the place of contracting or of performance." *Burger King*, 105 S. Ct. at 2185 (1985) (citations omitted).

47. See also *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) ("It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.").

is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."<sup>48</sup> Defendants are not subject to suit only because their activities could have consequences in the forum.<sup>49</sup> Their activities must be such that they should reasonably expect litigation in that forum.<sup>50</sup>

The policy underlying foreseeability, is to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."<sup>51</sup> That end is at least partially achieved when defendant's activities with a forum are examined to determine if he should have reasonably anticipated suit there. But that end is controverted when jurisdiction is based solely on a contract breach that has an impact on residents. If the simple act of entering a contract were deemed sufficient to provide minimum contacts for assertion of jurisdiction, due process standards would be effectively nullified. In light of *Burger King*, then, courts must look beyond contract and breach to determine whether a potential defendant's activities provide him with fair notice so that he should reasonably foresee possible suit in a foreign forum.<sup>52</sup>

*Burger King* notes that fair notice of suit might also be provided a defendant by the terms of a contract.<sup>53</sup> The Court con-

48. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

49. Although the "effects test" is jurisdictionally meaningful where a nonresident seeks "a commercial benefit from solicitation of business from [an in-state] resident," *Kulko v. Superior Court*, 436 U.S. 84, 97 (1978), it is insufficient in itself to serve as a basis for jurisdiction. See Note, *The Long-Arm Reach of the Courts Under the Effect Test After Kulko v. Superior Court*, 65 VA. L. REV. 175, 183 (1979) ("[I]n determining personal jurisdiction, a court always must consider initially the defendant's conduct and not merely the effects of his conduct in the forum.").

50. Woods, *Pennoyer's Demise: Personal Jurisdiction After Shaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 ARIZ. L. REV. 861, 887-88 (1978). But see Comment, *Federalism, Due Process, and Minimum Contacts: World-Wide Volkswagen Corp. v. Woodson*, 80 COLUM. L. REV. 1341, 1357-61 (1980) (arguing, contrary to *Burger King*, that "defendant's purposeful affiliation with the forum state affords him a reasonable expectation that he would be subject to jurisdiction . . . does not seem to rise to constitutional dimensions").

51. *World-Wide Volkswagen*, 444 U.S. at 297.

52. *Growden v. Ed Bowlin & Assocs.*, 733 F.2d 1149, 1152 (5th Cir. 1984) ("The defendant's conduct and connection with the forum state must be such that [it] should reasonably anticipate being haled into court in the forum state.").

53. For example, in *Jadair, Inc. v. Walt Keeler Co.*, 679 F.2d 131, cert. denied, 459 U.S. 944 (1982), the court opined in dicta that a choice-of-law provision provides defend-

cluded from its examination of the franchise agreement's choice-of-law provision<sup>54</sup> that, although such a provision alone is an insufficient basis for jurisdiction, when considered with other factors, the reasonableness of jurisdiction is increased.<sup>55</sup>

Contracts often stipulate that a particular state's law will control disputes. Lower courts have split on the jurisdictional weight that should be given to these provisions.<sup>56</sup> For example, *Alchemie International, Inc. v. Metal World, Inc.*<sup>57</sup> held that such choice-of-law provisions "militate in favor of jurisdiction."<sup>58</sup> In contrast, the court in *Galgay v. Bulletin Co.*<sup>59</sup> stated that "[i]t is well established that this choice-of-law provision does not have jurisdictional implications."<sup>60</sup> However, *Burger King* explained that such reasoning misperceives the import of the proposition that choice of law and jurisdiction are separate questions. Although choice of law *analysis* is "distinct" from jurisdiction analysis, "[n]othing in our cases . . . suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's laws' for jurisdictional purposes."<sup>61</sup>

It should be clear that such a provision alone is insufficient to support jurisdiction.<sup>62</sup> However, when combined with defend-

---

ant with a reasonable expectation of litigation in the forum whose law is to control disputes. *Id.* at 134 n.8.

54. Choice-of-law and choice-of-forum provisions should be distinguished. The latter specify the forum where disputes are to be brought. The validity of such provisions was upheld in *Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 12-14 (1972), because they provide certainty and neutrality in commercial relations. Choice-of-law provisions designate what law will control.

55. *Burger King*, 105 S. Ct. at 2187.

56. *Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375, 381 n.4 (5th Cir. 1980); *United States Ry. Equip. Co. v. Port Huron & Det. R.R.*, 495 F.2d 1127, 1130 (7th Cir. 1974); *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1971) (choice-of-law provisions indicative of defendant's purposeful availment). Other courts see no jurisdictional value in choice-of-law provisions. See *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 603 F.2d 1301, 1304 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Galgay v. Bulletin Co.*, 504 F.2d 1062, 1066 (2d Cir. 1974); *Agrashell, Inc. v. Bernard Sirota Co.*, 344 F.2d 583, 588 (2d Cir. 1965).

57. 523 F. Supp. 1039 (D.N.J. 1981).

58. *Id.* at 1051.

59. 504 F.2d 1062 (2d Cir. 1974).

60. *Id.* at 1066.

61. *Burger King* 105 S. Ct. at 2187 (emphasis in original). An important distinction between choice-of-law analysis and personal jurisdiction analysis is that the former involves the entire transaction whereas the latter is determined solely by reference to the defendant's conduct.

62. *Baron & Co. v. Bank of New Jersey*, 497 F. Supp. 534, 538 (E.D. Pa. 1980) ("The mere presence of a choice-of-law provision in a contract is not sufficient to vest jurisdic-

ant's deliberate affiliation with a forum, the foreseeability of litigation increases and defendant receives fair notice that he may be subject to suit.<sup>63</sup>

The requirement of fair notice enables potential nonresident defendants to "act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State."<sup>64</sup> Only by considering whether defendant's activities gave him fair notice of suit can the courts serve the ends of "fair play and substantial justice."

### 3. *General considerations of fairness*

Finally, the Court considered whether other factors of "fair play and substantial justice" might militate against Florida's assertion of jurisdiction.<sup>65</sup> It found none. An important aspect of this general fairness inquiry is the state's interest in resolving disputes involving its residents.<sup>66</sup>

tion in a court.").

63. In *Burger King*, the actual provision provides, inter alia, "The choice-of-law designation does not require that all suits concerning this Agreement be filed in Florida." 105 S. Ct. at 2187. The Court noted that this provision should reasonably "have suggested to Rudzewicz that by negative implication such suits *could* be filed there." *Id.* at 2187 n.24 (emphasis in original). The only possible justification for such a statement would be on the grounds of consent.

64. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

65. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Typically courts have weighed the following factors: 1) the burden placed on the defendant in defending in the forum state, 2) the forum state's interest in adjudicating the lawsuit, 3) the plaintiff's interest in obtaining convenient relief, 4) the interstate judicial system's interest in obtaining efficient resolution of controversies, and 5) the shared interest of the states in furthering fundamental substantive social policies. Brewer, *supra* note 2, at 15.

Rudzewicz's ability to call witnesses or present evidence was not impaired. In circumstances when it would be inconvenient for a party with minimum contacts to litigate in a distant forum, relief can be given through a change in venue, see *First Nat'l Bank v. White*, 420 F. Supp. 1331 (D. Minn. 1976), or through *forum non conveniens*, see *Reiman v. First Union Real Estate Equity & Mortgage Invs.*, 614 F. Supp. 255, 259 (D.D.C. 1985). Although it seems unjust to require Rudzewicz to litigate in Florida rather than *Burger King* in Michigan, the Court maintained that "a defendant who has purposefully derived commercial benefit from his affiliations in a forum may not defeat jurisdiction there simply because of his adversary's greater net wealth." *Burger King*, 105 S. Ct. at 2188 n.25. Finally, although the franchise agreement was rigid in form, Rudzewicz had exacted some changes. In addition, "to the extent that *Burger King's* terms were inflexible, Rudzewicz presumably decided that the advantages of affiliating with a national organization provided sufficient commercial benefits as to offset the detriments." *Id.* at 2189.

66. Many courts consider a forum state's interest in adjudicating its residents' disputes to be among the factors considered in deciding personal jurisdiction. *E.g.*, Nelson

The Court found that Florida had a "legitimate interest in holding [Rudzewicz] answerable on a claim related to the contacts he had established in that State,"<sup>67</sup> thus indicating that a state's interest in providing a forum for its residents can enhance defendant's contacts with that state.<sup>68</sup> This interest has been used by lower courts in an attempt to bolster their assertions of jurisdiction over nonresident defendants.<sup>69</sup> Yet this reasoning misperceives the nature of state interests that achieve jurisdictional significance.

States potentially have a wide variety of interests in providing their residents an effective means of redress.<sup>70</sup> Past Supreme Court decisions, however, suggest that the interest that carries jurisdictional significance is one "the State treats as exceptional and subjects to special regulation."<sup>71</sup> In *McGee*, California manifested its interest in providing its residents a means to sue out-of-state insurers by enacting special legislation directed to this point.<sup>72</sup> The state thus acted to assert a jurisdictionally significant interest. By contrast, in *Kulko*, there was no special jurisdictional statute, and thus no jurisdictionally significant state interest despite California's desire to protect the welfare of its minor residents. Although admitting that this interest is unquestionably important, the *Kulko* Court held that it did not carry

---

v. R. Greenspan & Co., 613 F. Supp. 342, 345 (E.D. Mo. 1985). Typically, this interest is considered of secondary importance. *E.g.*, *Land-O-Nod Co. v. Bassett Furniture Indus.*, 708 F.2d 1338, 1340 (8th Cir. 1983). But although it may be of only secondary importance, it is frequently used in an attempt to enhance jurisdictional ties. Consequently, the Supreme Court has had many opportunities to explain its function in personal jurisdiction analysis.

67. *Burger King*, 105 S. Ct. at 2188 (citations omitted).

68. Statutorily manifested interests, however, are insufficient in themselves to support jurisdiction. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). A state's interest in providing a forum is not a substitute for contacts with the defendant. Note, *Rush v. Savchuk: Is the Seider Spoiled or Just Getting Harder?*, 9 *HOFSTRA L. REV.* 247 (1980).

69. *Pedi Barnes, Inc. v. P & C Foods Mkts.*, 567 F.2d 933, 937 (10th Cir. 1977); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 232 (6th Cir. 1972); *Southern Mach. Co. v. Mohasco Indus.*, 401 F.2d 374, 385 (6th Cir. 1968); see Note, *Measuring the Long Arm After Shaffer v. Heitner*, 53 *N.Y.U. L. REV.* 126, 132 n.40, 134-35 (1978) ("[I]f the defendant's contacts are minimal, but the state's interest in providing a forum is strong, the exercise of jurisdiction is constitutional."). But see Currie, *The Growth of the Long Arms: Eight Years of Extended Jurisdiction in Illinois*, 1963 *ILL. L.F.* 533, 569-70 ("The suggestion that *McGee* should be limited to matters . . . in which the State has some 'special' regulatory interest" is not persuasive.) quoted in *Alchemie Int'l Inc. v. Metal World, Inc.*, 523 F. Supp. 1039, 1049 (D.N.J. 1981).

70. Comment, *supra* note 50, at 1346.

71. *Hanson v. Denckla*, 357 U.S. 235, 252 (1958) (citations omitted).

72. *McGee v. International Ins. Co.*, 355 U.S. 220 (1957).

jurisdictional weight because "California has not attempted to assert any particularized interest in trying such cases in its courts by, e.g., enacting a special jurisdictional statute."<sup>73</sup> Similarly, in *Shaffer v. Heitner*,<sup>74</sup> plaintiff-shareholder argued that Delaware's interest in enforcing fiduciary duties of nonresident directors of Delaware corporations enhanced defendant-directors' jurisdictional ties with Delaware. But the Court reasoned that "[i]f Delaware perceived its interest in securing jurisdiction over corporate fiduciaries to be as great as Heitner suggests, we would expect it to have enacted a statute more clearly designed to protect that interest."<sup>75</sup>

The statute upon which jurisdiction is based in *Burger King*, however, is a broad, single-act long-arm statute. It provides for jurisdiction over "[a]ny person, whether or not a citizen or resident of this state," who, inter alia, "[b]reach[es] a contract in this state by failing to perform acts required by the contract to be performed in this state," so long as the cause of action arises from the alleged contractual breach.<sup>76</sup> Whether such broad statutes, purporting to reach virtually every nonresident that breaches a contract with forum residents, manifest jurisdictionally significant interests has never been addressed by the Court and is an issue of debate among lower courts.

In *Pedi Bares, Inc. v. P & C Food Markets*,<sup>77</sup> the court, in a single-contract case, described a broad, single-act statute as "special legislation" and found it jurisdictionally significant.<sup>78</sup> On the other hand, the *Alchemie* court viewed a similar statute as not enhancing jurisdiction because in the statute's enactment, the state legislature had not intended to manifest any particularized interest.<sup>79</sup> *Burger King* is simply unclear as to which view is correct, and is therefore unhelpful to lower courts in deter-

---

73. *Kulko v. Superior Court*, 436 U.S. 84, 98 (1978).

74. 433 U.S. 186 (1977).

75. *Id.* at 214-15; "Delaware, unlike some States, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the state." *Id.* at 216. Two weeks later the Delaware legislature enacted a special service of process statute for nonresident directors of Delaware corporations. DEL. CODE ANN. tit. 10, § 3114 (1984); see *Pestolite, Inc. v. Cordura Corp.*, 449 A.2d 263 (Del. 1982) (enactment of this section was legislative response to *Shaffer v. Heitner*).

76. FLA. STAT. ANN. § 48.193(1)(g) (West Supp. 1984).

77. 567 F.2d 933 (10th Cir. 1977).

78. *Id.* at 937.

79. 523 F. Supp. 1039, 1048 & n.19 (D.N.J. 1981).

mining whether a general long-arm statute creates a jurisdictionally significant state interest.

To the extent that courts wish to use broad, single-act statutes to enhance a state's jurisdictional ties over a nonresident, they should consider whether that statute represents a special legislative interest that is jurisdictionally important.<sup>80</sup> When such general statutes are not intended to manifest a particularized interest, they should have no impact on overall jurisdictional analysis because such long-arm statutes merely represent the generalized interest all states have in providing their citizens with convenient forums to adjudicate disputes.<sup>81</sup>

Interests explicitly enunciated in special jurisdictional statutes give nonresidents notice that certain activities may subject them to personal jurisdiction within the forum. Potential nonresident defendants then have an increased ability to structure their activities with some degree of certainty, knowing that by acting with residents in statutorily designated special circumstances, they may be subjecting themselves to suits in that forum.<sup>82</sup> Generalized long arm statutes, on the other hand, do not provide the specialized notice which due process requires.

## B. *Assessing Burger King's Impact*

### 1. *Factual orientation*

Assessing *Burger King's* impact on personal jurisdiction in single contract cases is difficult because personal jurisdiction

80. *Accord* *Armstrong v. Pomerance*, 423 A.2d 174, 176 (Del. 1980) (although only one contact existed, the statute sufficiently enhanced that contact so that jurisdiction was permitted); *see* *Plumb v. Cottle*, 492 F. Supp. 1330, 1335 (D. Del. 1980) ("A state may through a long arm statute express an interest in asserting jurisdiction over a particular type of case. Such an explicit expression of interest serves to enhance the constitutional sufficiency of contacts that might otherwise be insufficient to support personal jurisdiction.").

81. *See* *Alchemie Int'l, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039, 1048 (D.N.J. 1981), where the court recognized that although the forum had a legislatively manifested interest, that interest did not rise to a jurisdictionally significant level.

82. Recently, the Court, in *Keeton v. Hustler Magazine*, 465 U.S. 770, 776-77 (1984), seemed to indicate that a state's generalized interest—based on the nature of defendant's activities—in providing its residences a convenient forum to litigate disputes with nonresidents could have jurisdictional importance. There, however, the forum state had clearly manifested its interest by judicial decision based on the special nature of libel and defamation damage. The forum had also statutorily manifested its interest in a long-arm statute which specifically provided for service of process on persons circulating false statements in New Hampshire. Thus, New Hampshire's "manifest interest" was statutorily based.

analysis continues to be factually oriented. Rejecting development of "any talismanic jurisdictional formulas," the Court emphasized that "the facts of each case must always be weighed in determining whether personal jurisdiction would comport with fair play and substantial justice."<sup>83</sup> This factual orientation interjects a degree of uncertainty into our legal system. "[S]o long as due process standards continue to be susceptible only of a case-by-case application, reasonable minds will differ in particular cases and the degree of predictability to the legal system will prove elusive."<sup>84</sup> Indeed, *Burger King* not only acknowledges this point but adds that this approach "necessarily requires determinations in which few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable."<sup>85</sup> Yet, lower courts are not left directionless.

The factors identified in *Burger King* — prior negotiations, course of dealing, contemplated future consequences, and contract terms — are a jurisdictional aid because they closely reflect the nature and extent of defendant's contacts with a forum. Nonresidents then, are only subject to suit in foreign forums where they have established significant ties.<sup>86</sup> This emphasis on the total range, nature, and scope of the defendant's activities with forum residents protects defendants from being haled into court in a distant forum because of the unilateral activity of another.<sup>87</sup> Thus the "highly realistic" approach which the Court seeks is achieved.<sup>88</sup> By examination of a defendant's contacts with a forum through *Burger King*'s three-pronged test — (1) the nature of his contractual relationship with forum residents, (2) whether he received fair notice that he could be subject to suit there, and (3) whether there are general fairness considerations militating against assertion of jurisdiction — lower courts should be better able to achieve uniformity in their decisions.

---

83. *Burger King*, 105 S. Ct. at 2189 (1985) (citations omitted).

84. *Wisconsin Elec. Mfg. Co. v. Pennant Prods.*, 619 F.2d 676, 679 (7th Cir. 1980) (citations omitted); cf. Comment, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 U. CHI. L. REV. 156 (arguing for replacement of this factually oriented test with fixed rules).

85. *Burger King*, 105 S. Ct. at 2189 n.29 (citation omitted).

86. These ties may often be representative of ongoing relationships, *PPG Indus. v. Systonetics, Inc.*, 614 F. Supp. 1161, 1165 (D. Pa. 1985), or of continuing obligations, *Roundball Enters. v. Richardson*, 616 F. Supp. 1537, 1540 (S.D.N.Y. 1985).

87. *Olsen by Sheldon v. Government of Mex.*, 729 F.2d 641, 649 (9th Cir.), cert. denied, 469 U.S. 917 (1984) (totality of circumstances examined to determine if nonresident could reasonably anticipate defending suit in a distant forum).

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



This decision, some argue, "will have considerable implications for national entities that can save huge amounts of money by centralizing their debtor-creditor lawsuits in their home states."<sup>89</sup> This should not be so. *Burger King* limits its decision so that such an outcome will not result.

We do not mean to suggest that the jurisdictional outcome will always be the same in franchise cases. Some franchises may be primarily intrastate in character or involve different decisionmaking structures, such that a franchisee should not reasonably anticipate out-of-state litigation. . . . For these reasons, we reject *Burger King*'s suggestion for a "general rule . . . [or even] a *presumption*, that participation in an interstate franchise relationship" represents consent to the jurisdiction of the franchisor's principal place of business.<sup>90</sup>

Contracts, even contracts with large national entities, are not to become as a result of this decision *de facto* jurisdictionally sufficient. A jurisdictional claim can be sustained only upon the particular facts surrounding a contract's formation, contemplated future consequences, and actual execution. Consequently, *Burger King*'s impact can be a source for uniformity, at least to the degree that the limitations inherent in this factual orientation allow, if courts will consider these relevant factors and properly distinguish factually different cases.<sup>91</sup> National entities should have no more advantage than the facts of the particular case give them.

## 2. *Burger King's context and single contract cases*

Single-contract cases have presented particularly difficult situations in which to decide issues of personal jurisdiction. A contract can be created with no more than a phone call or letter dispatched into interstate mail.<sup>92</sup> Courts have, with good reason,

---

89. Lauter, *Brennan Upholds Jurisdiction in Franchise Case*, NAT'L L.J., June 3, 1985, at 5, col. 1.

90. *Burger King*, 105 S. Ct. at 2189 n.28 (emphasis added).

91. See *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 935 n.4 (1st Cir. 1985) (addressing a contract situation not involving a national entity and properly distinguishing *Burger King*).

92. "The test of whether business was transacted within the state must be applied in the context, not of communication and transportation criteria of yesteryears, but of modern day commercial and personal accelerated relationships. The long arm statutes are comrades of the computer." *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1971); see also 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1069 (1969 & Supp. 1985)

struggled to determine at what point a contract provides a sufficient basis for personal jurisdiction. The fact patterns are diverse.

The types of contacts present in *Burger King* were much more expansive than those that normally accompany single-contract cases. The franchise agreement contemplated long-term, continuing, and wide-reaching contacts with Burger King in Florida because of the comprehensive and exacting regulation nonresident franchisees voluntarily accepted as part of the contract obligation. Most single-contract cases, however, involve short-term association with little or no control from the other party. Consequently, the contemplated contacts resulting from the contractual relationship will be fewer and the reasonableness of asserting jurisdiction will correspondingly decrease. Because the single contract in *Burger King* was one which gave rise to extensive contacts the case will not always be appropriately analogized to other single contract cases.

### III. CONCLUSION

Courts have struggled to determine personal jurisdiction in single contract cases. This struggle has resulted in varying and contradictory standards among lower court decisions. *Burger King* was less than an ideal situation for giving direction because the quality and nature of that interstate transaction is readily distinguishable from the typical scenario. A careful reading of *Burger King*, however, gives direction in analyzing personal jurisdiction in single contract cases. Courts should be cautious not to apply this decision too broadly but should push beyond initial contract and breach to determine the nature and scope of a contractual relationship. Only through such an inquiry will defendants be able to structure their conduct to achieve predictability within our legal system.

*Duncan E. Barber*