

ORIGINAL

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PROCEEDINGS BEFORE

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THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-2097

TITLE BURGER KING CORPORATION, Appellant v. JOHN RUDZEWICZ

PLACE Washington, D. C.

DATE January 8, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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BURGER KING CORPORATION, :
Appellant, :
V. : No. 83-2097
JOHN RUDZEWICZ :
- - - - -x

Washington, D.C.
Tuesday, January 8, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:52 o'clock a.m.

APPEARANCES:

JOEL S. PERWIN, ESQ., Miami, Florida; on behalf of
the appellant.

THOMAS H. OEHMKE, ESQ., Detroit, Michigan; on behalf
of the appellee.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Burger King against Rudzewicz.

Mr. Perwin, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JOEL S. PERWIN, ESQ.,
ON BEHALF OF THE APPELLANT

MR. PERWIN: Thank you. Mr. Chief Justice, and may it please the Court, the first question is whether this Court's jurisdiction is conferred by direct appeal under Subsection 1254.2.

We submit that the Circuit Court declared unconstitutional as applied a provision of Florida's long arm statute which confers jurisdiction over one who breaches a contract in Florida by failing to perform acts required by the contract to be performed in Florida, in this case, by failing to make payments under a franchise lease and purchase and sales agreement connected with a Burger King franchise in a suburb of Detroit, Michigan.

Under Subsection 1254.2, the answer to that question depends upon the Circuit Court's chosen resolution of the issue. In this case, as the Circuit Court's opinion states, both parties agree that by its plain language the jurisdictional statute in question

1 plainly reached the conduct at issue.

2 Rather than revisiting that assumption, the
3 Circuit Court proceeded to consider the constitutional
4 question, and concluded that the District Court's
5 exercise of jurisdiction was inconsistent with minimal
6 constitutional requirements.

7 We suggest that on that basis, given that
8 resolution, the prerequisites for the acceptance of a
9 direct appeal under Subsection 1254.2 were satisfied.
10 As this Court said in its 1984 Franchise Tax Board
11 decision, a necessary predicate to the Court of Appeals'
12 holding is that enforcement of the state statute would
13 be inconsistent with federal law, hence invalid under
14 the Constitution. Accordingly, we have jurisdiction
15 under Section 1254.2.

16 We also argued that the parties' stipulation
17 in the District Court was an appropriate one in light of
18 the plain language of this statute and its
19 interpretation by a clear majority of Florida appellate
20 courts. And finally, we argued that independent of the
21 question of direct appeal, the case is one of
22 far-ranging and far-reaching importance.

23 It implicates a way of doing business which is
24 increasingly pervasive in our society, and therefore
25 renders appropriate the acceptance of jurisdiction by

1 this Court.

2 My intention would be to rest with that, to
3 submit the position of our brief on that issue, and in
4 the absence of any inquiries, to proceed to the merits.

5 The question on the merits is whether the
6 Circuit Court erred in holding that Florida's exercise
7 of jurisdiction was inconsistent with the minimal
8 requirements of due process, and that requires, of
9 course, that we aggregate the contacts between these
10 franchisees in Detroit and Burger King's headquarters in
11 Miami and determine whether or not there were sufficient
12 affiliating circumstances to put the franchisees on
13 notice that they might be called to answer in a Florida
14 court for any breach of contract or trademark
15 infringement.

16 The contacts in this case can be abrogated
17 under two general categories. The first might be
18 applicable to a case in which all we had was an arm's
19 length contract for the purchase and sale of goods,
20 independent of the intimacy of the franchise
21 relationship which we have in this case.

22 In other words, even in the abstract there are
23 a category of signals in the course of this relationship
24 and in the contracts that were created between the
25 parties, which we submit were independently sufficient

1 to put the franchisees on notice of the possibility of a
2 defense.

3 For example, three separate contracts, the
4 lease agreement, the franchise agreement, and the
5 purchase and sale agreement for equipment all called for
6 the application of Florida law, creating an unmistakable
7 signal of Florida's interest in the case, and under this
8 Court's pronouncement in the International Shoe case,
9 suggesting that the franchisees avail themselves of the
10 protection and benefits of the forum.

11 Second, the lease agreement called for
12 arbitration to be held in Florida if necessary, which
13 this Court has at least acknowledged might represent a
14 forum of implicit consent to jurisdiction of the Florida
15 courts.

16 Third, the contracts are replete with
17 references to Miami as Burger King's headquarters and as
18 the locus of decisionmaking in this case. They identify
19 Burger King as a Florida corporation. The initial
20 franchise offering circular informed the franchisees
21 that Burger King conducts its business in Miami, that
22 that is the locus of decisionmaking.

23 All notices were required to be sent by the
24 franchisees to Miami. All payments were required to be
25 sent by the franchisees to Miami. Payments for rent,

1 for royalties, advertising, real estate taxes, and that,
2 incidentally or parenthetically, should have made very
3 clear to the franchisees that a default in their
4 payments would necessarily cause economic injury in
5 Miami.

6 Indeed, in its recent decision in the Calder
7 case, this Court in a footnote adopted the "effects"
8 test which had been utilized by the Circuit Court for
9 the proposition that the defendant should have realized
10 that the effects of his conduct would be felt most
11 deeply in the forum.

12 QUESTION: That would be true of just a sale
13 of a particular piece of equipment that is payable in
14 Florida. So you don't argue that this last item you
15 mentioned would be enough in itself.

16 MR. PERWIN: I don't, although as we have
17 indicated, the clear majority of Circuit Court decisions
18 appear to indicate that it might be sufficient in a pure
19 arm's length purchase and sale agreement which calls for
20 the application of the substantive law of the forum. I
21 don't contend that that alone is sufficient.

22 It was, however, it seemed, however, to be
23 sufficient in the torts context in the Calder case, in
24 which the Enquirer article in question was aimed at a
25 resident of California who suffered the injury in

1 California. I don't contend that that is independently
2 sufficient in this case and need not be so in --

3 QUESTION: I don't think you would really argue
4 that just a requirement that Florida law be applied to
5 resolve any disputes would in itself be enough to confer
6 jurisdiction in Florida.

7 MR. PERWIN: I think I agree. I don't think
8 it would be independently sufficient, and again, I need
9 not take that position in light of the plethora of other
10 contacts.

11 Finally, the franchise --

12 QUESTION: Your other two contracts really are
13 the headquarters and an arbitration provision. Is that
14 right?

15 MR. PERWIN: Well, there was the requirement
16 of all the payments that he made to --

17 QUESTION: Right. Supposing I opened a bank
18 account in a Florida bank, and they said any disputes
19 would be resolved under Florida law, and if we can
20 arbitrate, we will arbitrate here at headquarters.
21 Could they sue me for amounts above what I had on
22 deposition?

23 MR. PERWIN: If the cause of action grew out
24 of the contact, I would suggest that they could. That
25 is a tougher case than this one.

1 QUESTION: Why is it tougher? Why isn't it
2 exactly the same case?

3 MR. PERWIN: Because -- it is not exactly the
4 same thing. Because this case involves a far more
5 symbiotic business relationship. This case involves a
6 degree -- that was the second point I was about to get
7 to. This case involves a degree of intimate control by
8 the franchisor of the quality of the franchisee's
9 enterprise and operation.

10 QUESTION: But that is control exercised in
11 Michigan.

12 MR. PERWIN: No, I would respectfully
13 disagree. I would assert as strongly as I can that the
14 control was exercised from Miami. It is true, and the
15 record certainly supports the contention that the
16 immediate physical contact between the franchisees and
17 Burger King was their contact with the Michigan regional
18 office, but the control that we have been discussing was
19 exercised exclusively from Miami, both in terms of the
20 documents that were created and in terms of more
21 occasional or ad hoc exercises of control from Miami. I
22 would be happy to --

23 QUESTION: You have international franchisees,
24 as I understand the record, London and some other
25 places. Could you get jurisdiction over a London

1 franchisee in Miami the same way?

2 MR. PERWIN: I don't know that we have ever
3 attempted to do so, but I think the same arguments would
4 apply.

5 QUESTION: Your theory would apply, wouldn't
6 it?

7 MR. PERWIN: I think it would. It might be
8 argued in that case, it may turn out in that case that
9 Burger King operates in connection with its overseas
10 outlets from some central depository overseas, which
11 would be a policymaking --

12 QUESTION: But that would be no different from
13 your Michigan branch office, would it?

14 MR. PERWIN: It would be if it were a
15 policymaking body with independent decisionmaking
16 authority.

17 QUESTION: Oh, I see.

18 MR. PERWIN: In this case, we do not have
19 that. Not only does the evidence, taken in the light
20 most favorable to the trial court's exercise of
21 jurisdiction to make that clear, the uncontradicted
22 evidence makes clear that it was the Miami headquarters
23 which had total decisionmaking authority in this case,
24 and that the franchisees knew it.

25 There were two or three occasions in which the

1 franchisees, as was an appropriate practice, took a
2 complaint or grievance or request to the Michigan
3 headquarters and were told that they were powerless to
4 adjudicate or respond to the request because all
5 decisionmaking was repositied in the Miami headquarters.

6 QUESTION: Mr. Perwin, just as a matter of
7 curiosity, where was the defendant served? How was he
8 served?

9 MR. PERWIN: He was served under Florida's
10 long arm statute by direct personal service in
11 Michigan.

12 QUESTION: In Michigan?

13 MR. PERWIN: Yes, Your Honor.

14 QUESTION: Mr. Perwin, it isn't clear to me,
15 at least, whether Florida itself would apply the
16 standards for personal jurisdiction that you apparently
17 stipulated would be sufficient. What is the Florida law
18 on the personal jurisdiction standard? Aren't the
19 courts in that state in some disagreement?

20 MR. PERWIN: Yes, there is some disagreement,
21 Your Honor. We have abrogated 13 intermediate appellate
22 court decisions representing all five of the
23 intermediate appellate districts, in the absence of a
24 dispositive ruling by the Florida Supreme Court, all of
25 which hold that this statute means what it says, and

1 that the mere failure to perform an act, including the
2 failure to make payments, required to be performed in
3 Florida, is independently sufficient to invoke the long
4 arm statute.

5 QUESTION: Well, I guess the Court of Appeals
6 itself recognized that it isn't clear in Florida law.

7 MR. PERWIN: I would argue exactly the
8 opposite. The Court of Appeals accepted the parties'
9 agreement that --

10 QUESTION: The Court of Appeals accepted the
11 parties' stipulation in lieu of a determination of what
12 Florida law provides. Isn't that correct?

13 MR. PERWIN: Yes, Your Honor.

14 QUESTION: Do you think you can just stipulate
15 to jurisdiction?

16 MR. PERWIN: No, Your Honor, I do not think --

17 QUESTION: For our purposes?

18 MR. PERWIN: There certainly can be no
19 stipulation to the jurisdiction of this Court. It might
20 be a different question as to whether in the posture of
21 the constitutional question as presented to the Circuit
22 Court the parties might stipulate that Florida law is X
23 or Y. I would not question the Circuit Court's
24 prerogative to revisit that stipulation and to undertake
25 an independent inquiry of the Florida cases.

1 QUESTION: It could make our decision just
2 advisory if we are deciding it on the basis of your
3 stipulation as to what Florida law is.

4 MR. PERWIN: I would respectfully submit that
5 the decision would not be on the basis of the parties'
6 stipulation but on the basis of the Circuit Court's
7 holding that given that stipulation the statute was
8 unconstitutional as applied.

9 I agree that the Circuit Court had the
10 prerogative to revisit that assumption. My position is
11 that because the Circuit Court did not do so, but
12 accepted the stipulation, and proceeded to find that
13 invocation of the statute was inconsistent with the
14 requirements of due process, that the Circuit Court
15 necessarily declared the statute unconstitutional as
16 applied.

17 QUESTION: Well, the Court of Appeals I
18 thought did not hold that as a matter of state law the
19 Florida statute would allow state courts to exercise
20 jurisdiction.

21 MR. PERWIN: That's correct. There is no
22 formal holding to that effect. The Circuit Court merely
23 begins its opinion by acknowledging the parties'
24 stipulation and then declines to revisit it, not
25 expressly, but by effectively proceeding to the

1 constitutional question.

2 QUESTION: Mr. Perwin, why don't we call it
3 the Court of Appeals? That has been the name for years
4 now, not Circuit Court.

5 MR. PERWIN: I apologize, Your Honor. The
6 Court of Appeals.

7 In addition, Your Honor, I would respectfully
8 submit that the case, regardless of the posture in which
9 it reaches this Court, has far-reaching implications for
10 the nature of franchise relationships. It implicates
11 the franchise relationship as it exists in the United
12 States. It implicates other forms of relationships in
13 which a central manufacturer deals with a number of
14 disparate enterprises, and therefore is appropriate for
15 review in that context.

16 QUESTION: Just to make sure I understand what
17 you and Justice O'Connor have been talking about, the
18 Court of Appeals majority opinion says that Rudzewicz
19 concedes that his activities fall within the reach of
20 the Florida long arm statute.

21 Now, there may have been a stipulation, but
22 the Court of Appeals talks about in terms of a
23 concession.

24 MR. PERWIN: Yes, Your Honor, that is what I
25 am referring to, and what I find significant in that is

1 that the Court of Appeals appeared to have accepted that
2 concession rather than undertaking any scrutiny of the
3 Florida decisions in this area, and thus far we have
4 undertaken such scrutiny in our briefs and we have
5 suggested that the clear majority of Florida decisions
6 comport with the parties' agreement below.

7 There was a second set of contacts in this
8 case independent of the disparate and abstract
9 references to Florida as the center of decisionmaking
10 for Burger King which are perhaps even more significant,
11 and that is that this was not an arm's length purchase
12 and sales agreement, which is the subject matter of the
13 many Circuit Court opinions that we have discussed in
14 this case in our briefs.

15 This was a 20-year interdependent franchise
16 agreement, a lease and sublease agreement whose purpose
17 was to create a continuing relationship between the
18 parties, not to separate them at some arm's length, but
19 a continuing relationship between the parties in which
20 the franchisees willingly subjected themselves to a
21 degree of intimate control over the quality and the very
22 finest details of the franchise operation, and received
23 substantial consideration for that agreement, the
24 consideration of minimizing the risk of failure and of
25 maximizing the chances of success by trading on a

1 national reputation, a national marketing structure, and
2 a built-in clientele.

3 That, it seems to me, is a central
4 distinguishing feature of your typical purchase and
5 sales agreement in which you have parties from two
6 jurisdictions, and which it calls for the application of
7 the law of one of them.

8 In this case the franchisees had the
9 unilateral power to reject the formation of that
10 relationship. They had the perfect option, had they
11 desired, to create a purely local enterprise to control
12 it 100 percent free of any or almost any connection with
13 interstate commerce and to do so free of any control by
14 anyone else.

15 They made the decision to reject that option.
16 Instead they applied to Burger King Corporation for
17 franchise operation. Mr. Rudzewicz is and was the
18 senior partner in an accounting firm. He had no
19 expertise or knowledge in the restaurant business. He
20 did this because by subjecting himself to such rigid
21 standards and controls, he was able to achieve or seek
22 an investment success in an area in which he might not
23 otherwise have been able to do so.

24 He made that affirmative voluntary decision,
25 and that seems to us to be the most significant

1 character of this relationship. He purposefully entered
2 into a meaningful business relationship with a
3 corporation which he knew to be centered in another
4 jurisdiction, and there are a plethora of decisions by
5 this Court on both sides of the issue which seem to make
6 that a controlling factor.

7 For example, in the McGee case, it was the
8 insurer who had solicited the business of the insured by
9 sending voluntarily and unilaterally a reinsurance
10 certificate into his state. In Keeton, it was the
11 magazine who had made the purposeful decision to
12 disseminate in the jurisdiction. In Calder, it was the
13 newspaper which purposefully directed its article toward
14 the plaintiff.

15 All cases in which the defendant had the
16 unilateral ability to avoid the contact which he
17 voluntarily created, and on the other side of the
18 ledger, in, for example, the Hanson case, it was because
19 the trustee had undertaken no unilateral activity of his
20 own which might have subjected himself to jurisdiction
21 that this Court denied Florida's jurisdiction.

22 In the Kulko Case, it was because the wife had
23 moved voluntarily to California and the husband had no
24 control over that activity and had undertaken no
25 unilateral contact of his own, that this Court held that

1 the exercise of jurisdiction was inappropriate.

2 In the Rush case, it was because the insured
3 had no control over the ubiquity of his insurer, State
4 Farm, and over its presence in some other jurisdiction,
5 that this Court held that the exercise of jurisdiction
6 over the insured was inappropriate.

7 And it was in the Worldwide Volkswagen case
8 that the Court held that the regionally focused retail
9 and wholesale outlet had no control over the decision of
10 a purchaser to create a contract with a jurisdiction
11 1,500 miles away.

12 In every one of those cases, the dispositive
13 observation seems to have been that the defendant
14 purposefully engaged in activity which he had the
15 unilateral control or ability to avoid, and that is
16 precisely what we have in this case.

17 In addition, the cause of action grew out of
18 that activity. There is no question that the requirement
19 of a connection for the exercise of specific
20 jurisdiction was satisfied, and finally, it seems to us
21 that there is no significant unfairness in Florida's
22 exercise of jurisdiction under those circumstances.

23 We listed five factors which we thought
24 relevant to the issue of fairness. I would like to
25 mention all five, and then come back to two, with your

1 permission.

2 One, Florida of course has an interest in
3 protecting a Florida corporation. That encompasses the
4 notion of sovereignty. It also reflects -- it reflects
5 at the deepest sense the state's interest in prescribing
6 a statute which reaches as far as possible to protect
7 the contractual expectations of Florida residents.

8 As I mentioned, or may have mentioned, in the
9 Keeton case this Court seemed to place dispositive
10 reliance upon New Hampshire's interest in adjudicating a
11 libel action even for the benefit of a New York resident
12 against a California publisher primarily because New
13 Hampshire had an interest in protecting its own
14 residents from the exposure to libelous material, and it
15 was the interest of the forum that seemed to be
16 important.

17 So, there are cases which stress this, and
18 Florida has an undeniable interest in protecting the
19 business expectations of its residents in the context of
20 a contractual obligation. We will hear a lot of talk
21 about the inconvenience of the franchisees having to
22 travel to Florida and about the interest of Michigan.

23 That kind of argument works both ways, and it
24 is equally relevant to emphasize that Burger King had a
25 contractual expectation in Miami that Florida by the

1 plain language of its jurisdictional statement sought to
2 accommodate that expectation, and that the inconvenience
3 of having to prosecute the suit in Michigan would have
4 been comparable.

5 Second, Florida has an interest, of course, in
6 enforcing its own law, and that interest is magnified in
7 this case by the assertion that the law of some other
8 jurisdiction might apply.

9 Third, Burger King has an interest in a
10 convenient forum and in some consistency of result
11 across a regulatory system which depends for its
12 economic success upon the adherence by franchisees to a
13 rigid and exacting set of operating requirements.

14 QUESTION: Don't some states have some laws
15 about franchises that Burger King would have to abide by
16 if it was going to franchise?

17 MR. PERWIN: Yes, Your Honor.

18 QUESTION: Well, in that respect there
19 wouldn't be any national uniformity.

20 MR. PERWIN: The only laws of which I am aware
21 are comparable to that in Michigan, in which the --

22 QUESTION: Comparable, but not the same.

23 MR. PERWIN: Not the same, no. They are all --

24 QUESTION: And there are some states that
25 don't have them at all.

1 MR. PERWIN: Yes, Your Honor, some states
2 don't have them at all. But most of them, as Michigan's
3 does, appears to focus on the relationship between the
4 parties before a contract is formed, on the offer and
5 acceptance, the disclosure of information, and to that
6 extent of course Burger King has to comply with the laws
7 of any jurisdiction.

8 QUESTION: And whatever its contract said.

9 MR. PERWIN: Well, I suppose that's a choice
10 of --

11 QUESTION: Well, I mean, absent that law, the
12 validity of the contract would be governed by Florida
13 law.

14 MR. PERWIN: Perhaps in the --

15 QUESTION: Is that right?

16 MR. PERWIN: Yes, Your Honor.

17 QUESTION: And under Michigan's law, under the
18 franchise law in Michigan, it would be settled under
19 Michigan law. Is that right?

20 MR. PERWIN: Yes, Your Honor.

21 QUESTION: All right.

22 MR. PERWIN: But in this case my position is
23 that there is no conflict between Florida law and
24 Michigan law. In a case in which -- and therefore both
25 can apply undisturbed. In a case in which there is such

1 a conflict, I would argue that the parties' voluntary
2 choice of substantive law should override the franchise
3 law of any interested jurisdiction unless under the
4 typical choice of law analysis the application of the
5 law chosen by contract is so fortuitously related to the
6 cause of action as to render its application unfair, and
7 if the law, franchise law of the other interested
8 jurisdiction is so fundamental to its policy that the
9 Florida court might agree to yield, it is unclear that
10 either criteria is satisfied in this case.

11 QUESTION: That in any event is a choice of
12 law question rather than a jurisdictional question.

13 MR. PERWIN: Yes, it is, Your Honor, and what
14 is relevant for the purposes of jurisdiction is not so
15 much the question of what substantive law might apply as
16 a product of that process, but rather that the parties
17 put in their contract that they agree to comply with the
18 law of the state of Florida, and therefore had reason to
19 know that they were both invoking the benefits of
20 Florida law and might be called to answer for breach of
21 contract in a Florida court.

22 What is important is that they contracted for
23 the application of Florida law, and not simply that the
24 substantive choice of law process might call for the
25 application of Florida law.

1 QUESTION: May I just ask this question, just
2 again limited to your point about your client's interest
3 in a consistent interpretation of the law. In addition
4 to different franchise law possibilities in different
5 states, aren't there all sorts of things that may be
6 governed by local law?

7 I mean, I suppose they have to comply with
8 Michigan food and drug laws, Michigan zoning laws, usury
9 laws. There are all kinds of laws that might not be the
10 same as they are in Florida, so it is really conceivable
11 that everything can be done on a nationwide basis on
12 this theory?

13 MR. PERWIN: No, of course, it is not
14 conceivable, but that does not undermine the objective
15 of trying to create some centrality of decisions on the
16 contract issues that exist between the parties, on the
17 question of breach, on the measure of damages, on the
18 expectations of the parties in a contractual
19 relationship.

20 Obviously, if a franchisee fails to comply
21 with some sanitary law which is in effect in the
22 locality, it will be the operation of that law which
23 determines the outcome. But it seems to me that that
24 observation does not undermine the central objective of
25 Burger King in trying to obtain some substantive

1 consistency in connection with the central relationship
2 between -- contractual relationship between the parties,
3 and that is best served by -- I mean, this Court has
4 said in a variety of contexts that that is best served
5 by adjudication of these issues in a single court.

6 That was first said in 1816 in Martin versus
7 Hunters Lessee, in which this Court established the
8 right of review over state decisions of constitutional
9 dimension, and the central thesis of that opinion is
10 that uniformity of decisionmaking in a judicial context
11 is essential, and as recently as the M.S. Bremen case
12 upholding the enforcement of a forum clause, the Court
13 said the same thing about consistency of result.

14 With your permission, I would like to reserve
15 the balance of my time for rebuttal.

16 CHIEF JUSTICE BURGER: Very well.

17 Mr. Oehmke.

18 ORAL ARGUMENT OF THOMAS H. OEHMKE, ESQ.,

19 ON BEHALF OF THE APPELLEE

20 MR. OEHMKE: Mr. Chief Justice, may it please
21 the Court, an interesting aspect of this case, of
22 course, is that the question of whether this is a direct
23 appeal or not was suggested when the Court noted its
24 probable jurisdiction. We felt that that was an issue
25 that deserved some briefing on our part, and indeed in

1 our reply brief did spend some substantial time on that
2 portion, but not to ignore the minimum contacts
3 requirement, of course.

4 Obviously, this Court could elect not to take
5 a direct appeal and certainly rule on the issues by
6 petition for certiorari, but for just a moment I would
7 like to comment on whether or not there is a direct
8 appeal, knowing, of course, this Court's desire to, if
9 it can, allow the --

10 QUESTION: What do you mean, direct appeal?

11 MR. OEHMKE: An appeal. I am sorry.

12 QUESTION: Just an appeal?

13 MR. OEHMKE: Yes, an appeal as opposed to a
14 petition for cert. Thank you, Justice White. In this
15 case here --

16 QUESTION: Did we not postpone jurisdiction?

17 MR. OEHMKE: Yes. I suppose we implied that
18 that may have been a note of probable jurisdiction, but
19 I think it meant that we needed to wrestle with that
20 issue somewhat in our briefing, and we did that.

21 QUESTION: At least not take it for granted.

22 MR. OEHMKE: That's right. Thank you, Mr.
23 Chief Justice.

24 Now, in this case here we think it was
25 possible to read the Court of Appeals opinion and not

1 necessarily come to the conclusion that the Court of
2 Appeals ruled the Florida statute unconstitutional. The
3 Court of Appeals, we believe, could have said, but
4 didn't, because it never made a pronouncement, that we
5 are holding it unconstitutional or we are not --

6 QUESTION: Didn't they at least hold it
7 unconstitutional as applied?

8 MR. OEHMKE: Yes, they did, Justice White.

9 QUESTION: Isn't that the basis for an
10 appeal?

11 MR. OEHMKE: I think not. When we look at the
12 word "as applied," we see some mention of it certainly
13 in previous cases, but as applied to a particular
14 defendant rather than as applied to everyone in a
15 particular state.

16 QUESTION: Can you point to a single case that
17 suggests that a holding that a statute is
18 unconstitutional as applied is not a basis for an
19 appeal?

20 MR. OEHMKE: No, I can't, because we had some
21 struggle as we looked for the term or the phrase "as
22 applied," to try to learn and be educated what the Court
23 has meant by that in the past.

24 QUESTION: What about Donkey Walker?

25 QUESTION: Yes, the Donkey Walker case.

1 MR. OEHMKE: We think that if you apply it
2 only to one --

3 QUESTION: How about Donkey Walker?

4 MR. OEHMKE: I can't respond to that case,
5 Justice Brennan.

6 QUESTION: Well, I am afraid you are wasting
7 your time, counsel, because that case seems to settle
8 it.

9 MR. OEHMKE: If that certainly is the
10 sentiment of the Court, then it would settle it.

11 QUESTION: You do what you want to.

12 MR. OEHMKE: Thank you. We just think the
13 Court did not declare the statute unconstitutional as it
14 applied to everyone in the state. We think what the
15 Court said was that perhaps you may fall within the
16 literal grasp or the literal meaning of the statute, but
17 we are not going to declare the statute
18 unconstitutional.

19 All we are going to say is that when we see
20 whether this Court has jurisdiction over the defendant.
21 In this particular case it works a manifest injustice
22 because it is unfair to him. He has no minimum contacts
23 in Florida.

24 I would like to move along if I can to the
25 issue of minimum contacts and what we think is really

1 happening here. Burger King is actually asking this
2 Court to allow it by means of this case to be able to
3 take jurisdiction over a franchisee wherever that
4 franchisee is found.

5 Mr. Perwin seemed to concede to Justice
6 Stevens --

7 QUESTION: What about the contract clause?
8 What do the contracts say about that?

9 MR. OEHMKE: The contract had a choice of law
10 provision, and it had a choice of forum provision for
11 arbitration, but not for litigation. With respect to
12 the choice of law provision, we think that there is case
13 law that says that when a state like Michigan has a
14 comprehensive, systematic Franchise Act, as they do,
15 that parties can't agree to disregard that and just
16 apply any other law that they particularly would like to
17 see applied.

18 So, we think that the choice of law provision
19 here is inapplicable. Parties can't contract to ignore
20 a major piece of public policy legislation in a state.
21 But further, Burger King has admitted in their briefs
22 and in court that Michigan law applies here. In essence
23 they are abandoning what the contractual language says.

24 We have cited many points in our -- many times
25 in our response brief --

1 QUESTION: What if we disagree with you on
2 that, and that there is a clause for the application of
3 Florida law which is perfectly valid. You haven't lost
4 your case just because of that, have you?

5 MR. OEHMKE: I don't think we have. In this
6 particular case here, even if we are going to choose to
7 apply Florida law, there still has to be minimum
8 contacts on the part of the defendant, who had
9 absolutely no contacts with the State of Florida
10 whatsoever.

11 Interestingly, the choice of forum provision
12 in the contract only applied to arbitration, not to
13 litigation, so we think that the choice of law forum
14 here not only should not be applied, because we have a
15 Michigan comprehensive statute that regulates franchises
16 that Florida doesn't have, but we also think that Burger
17 King has abandoned that argument.

18 As we take a look at the issue of whether or
19 not Mr. Rudzewicz did have minimum contacts, we find a
20 whole host of things that he never did in Florida. We
21 find that he didn't incorporate his business there, but
22 rather, in Michigan. He had no employess in Florida.
23 All employees were in Michigan.

24 That he had no business location or site for
25 doing business in Florida, only in Michigan. That he

1 didn't have an agent in the forum. He promulgated no
2 advertisements directed to a Florida market. He did not
3 solicit business within the State of Florida, either in
4 person or by mail or by TV or radio or periodical.

5 He did not do anything deliberate and
6 purposeful in Florida to avail himself of the market in
7 Florida or the benefits and protections of the laws of
8 the State of Florida.

9 QUESTION: Except to sign the contract.

10 MR. OEHMKE: Except to sign the contract,
11 Justice Marshall, the contract which did say that it was
12 entered into and made in Florida, when the reality of
13 the situation was, physically it was signed in Michigan,
14 and Burger King then mailed it down to its headquarters
15 people for signing.

16 That was the only thing that he did, was to
17 sign a contract with a Florida-based corporation, and
18 perhaps secondly, as Burger King has argued, he failed
19 to mail a check to the State of Florida, or failed to
20 mail his checks for royalty and for advertising
21 payments.

22 So, Burger King suggests that a non-act, a
23 failure to do an act, a failure to mail a check in and
24 of itself is a contact if the state law requires you to
25 do that. We think the Florida law can be construed

1 quite well constitutionally.

2 QUESTION: But, of course -- I think the
3 argument is a little bit different. They say that where
4 you contracted to perform an act that is to be -- where
5 the effect is to take place in Florida, and fail, then
6 that is an act within the state.

7 MR. OEHMKE: We have to believe that this --
8 Justice Rehnquist, that this is not a substantial enough
9 contact to elevate itself to the level of a
10 constitutionally imagined minimum contact.

11 Failure to mail a check standing by itself
12 flies in the face of the history of decisions that have
13 said you ought to have a purposeful, an affirmative act,
14 where you deliberately intend to invoke the benefits and
15 protections of the laws, and that should probably lead
16 one to conclude that you have a continuous and
17 systematic doing of business in a state. There was no
18 continuous and systematic doing of business in
19 Florida.

20 QUESTION: Well, isn't it relevant in that
21 regard that the contract envisioned a 20-year
22 relationship with the Florida corporation, and the
23 length and the detail of the involvement with that
24 corporation seemed to make it foreseeable that your
25 client might be hauled before the Florida court?

1 MR. OEHMKE: I think not for this reason,
2 Justice O'Connor. All of the contacts between Mr.
3 Rudzewicz and Burger King were contacts with the Burger
4 King office in Birmingham, Michigan, a suburb of
5 Detroit, where Burger King had dozens of staff and a
6 fully furnished office.

7 The contacts with Rudzewicz were there. They
8 interviewed him there to see if they liked him as a
9 franchisee. They blessed and approved him as a
10 franchisee there. Correspondence arrived from that
11 particular office. He went and visited that office
12 during the course of the negotiations, never visited
13 Florida, and every single contact he had was with the
14 Birmingham, Michigan, office of Burger King.

15 When it came time to sign the contract, they
16 brought the contract to him in Michigan. He signed it
17 and gave them his \$40,000 check in Michigan, plus
18 another five for a site development fee. So, I think
19 that the mere fact that one contracts with a corporation
20 that may be headquartered elsewhere or doing business
21 elsewhere does not put one on notice that they are
22 necessarily going to be sued there.

23 QUESTION: Can you assume that your client had
24 legal advice before he signed this contract?

25 MR. OEHMKE: In fact, our client did not have

1 legal advice, but that is not in the record, Justice
2 Marshall. We have evidence in the record that says
3 there is a state requirement that you give a contract
4 seven days in advance for the obvious purpose so one can
5 think about it and cogitate about it.

6 This contract was given to Mr. Rudzewicz four
7 days in advance, and he was told to either sign it or
8 rip out all of his \$180,000 worth of furniture,
9 fixtures, and equipment, so I think one can conclude
10 from the record that --

11 QUESTION: He was in this to the extent of
12 \$180,000 and didn't have a lawyer?

13 MR. OEHMKE: That's right. Well, he didn't
14 have a lawyer advising him at that time, Your Honor.
15 There is nothing in the record about that.

16 Justice O'Connor, I would like to go back and
17 share something with the other justices that we did not
18 put in our reply brief that has to do with notice. In
19 the joint appendix is the Burger King prospectus, which
20 was the document that they used to encourage people to
21 take the franchise up.

22 At Pages 17 through 21 in the prospectus,
23 Burger King is required by Michigan law to list all of
24 the litigation that it is involved in. When you look at
25 Page 17 to 21, there are seven cases that Burger King

1 disclosed. Six out of the seven of those cases are not
2 in Florida. There is only one case in Florida.

3 So, if one takes a look at the prospectus,
4 which lists cases in Colorado and New Jersey, Indiana,
5 Connecticut, Georgia, and then one in Florida,
6 certainly --

7 QUESTION: Maybe it was the pendency of those
8 cases that led them to draft a form of contract that
9 required application of Florida law.

10 MR. OEHMKE: I think in part it was, Justice
11 Rehnquist, but I think what Burger King has had in
12 mind --

13 QUESTION: Also, it may have been that they
14 were being sued.

15 MR. OEHMKE: As a matter of fact, in all of
16 those cases they were defendants, Justice White.

17 QUESTION: That doesn't prove anything.

18 MR. OEHMKE: To we as lawyers it doesn't, and
19 as the Court, but to a Certified Public Accountant who
20 doesn't understand the difference between defendant and
21 plaintiff, for him to read the fact that there are six
22 out of seven cases in other states, I think, doesn't put
23 him on notice that he could only expect to be used in
24 Florida.

25 QUESTION: Are you serious in saying a

1 Certified Public Accountant doesn't know the difference
2 between a plaintiff and a defendant?

3 MR. OEHMKE: I am not serious in only stopping
4 at that point. I am not trying to be facetious. He
5 doesn't understand what that means when you look at
6 where you are going to sue somebody or where you are not
7 going to sue somebody.

8 In this particular case, in the appendix,
9 Burger King was the defendant in every case, and they
10 were being sued where they were found. I just don't
11 think he understands the implication of that when it
12 comes to jurisdiction and being put on notice where he
13 is going to be sued.

14 So, in this particular case here, he was not
15 put on notice. To come back to Justice Rehnquist's
16 question for just a moment, I think that Burger King has
17 finely tuned and finely honed a contract to the point
18 where they have invoked every incantation that they can
19 to be given the best possible chance of suing people in
20 Florida, where they are filing.

21 Burger King does business in the State of
22 Michigan. It has some 60 restaurants there, and it has
23 a Michigan regional office.

24 QUESTION: It may well be that had your client
25 chosen to initiate litigation, he could have sued in

1 Michigan. Michigan could have claimed minimum contacts.
2 It would be upheld.

3 MR. OEHMKE: I agree.

4 QUESTION: But that doesn't mean that only
5 Michigan could take jurisdiction.

6 MR. OEHMKE: You are right in your analysis
7 that we could have sued in Michigan had we been quicker
8 to the draw, but we don't think that Florida should take
9 jurisdiction here because there is no continuous and
10 systematic doing of business in the State of Florida.

11 He didn't go there and didn't do anything
12 there, and I don't think that as a CPA he is put on
13 notice by the mere fact that he is dealing with a
14 Florida headquarters corporation, that he can be
15 expected to be sued there.

16 Other cases that we have heard, cases where
17 corporations are incorporated in Delaware, just the mere
18 fact that that is where they are incorporated doesn't
19 necessarily mean that one can be expected to be sued
20 where it is incorporated or where its headquarters.

21 You know, if that is true, just because one
22 does business with a corporation that is headquartered
23 or located in another state, you can be expected to sue
24 there, be sued there, if that alone is enough, then
25 everyone who does business with another corporation

1 ought to find out where they are incorporated, and where
2 they are located, and they ought to build into the cost
3 of the operation of their business enough money to go to
4 that state and defend.

5 One of the themes that has come through some
6 of these cases is that Burger King is in a better
7 position economically to build into the cost of their
8 doing business enough money to finance litigation for
9 them to go where they are doing business.

10 QUESTION: Does that theme come through from
11 any of the cases of this Court?

12 MR. OEHMKE: No, they haven't. They have come
13 through from some of the Court of Appeals cases.

14 QUESTION: If they had gone to arbitration,
15 where would the arbitration have been conducted?

16 MR. OEHMKE: In Florida, as far as we can
17 tell, Mr. Chief Justice, because of the choice of forum
18 provision, because parties can contract, of course, to
19 go to a different state.

20 They could contract to go to Germany or Guam,
21 we suppose, to arbitrate, but we don't think the parties
22 can contract and confer jurisdiction on a state by the
23 mere pledge that that is where they are going to go. We
24 think the choice of law provision is different than a
25 choice of forum provision, and we don't think that you

1 can choose a forum to litigate in if there is no minimum
2 contact of a defendant there.

3 QUESTION: Are you contending this is a
4 contract of adhesion? You are not doing that, are you?

5 MR. OEHMKE: We have made that allegation
6 throughout our litigation at every level, Justice
7 Blackmun.

8 QUESTION: Are you arguing that here?

9 MR. OEHMKE: Yes, we have argued that in our
10 brief. We have used that phrase. And the reason why we
11 argue that in part is because this is a some -- I can't
12 tell you the exact number of pages, 10 or 12 or 14-page
13 franchise agreement that is typeset in single space. It
14 has two variables, I believe, that you can put in the
15 contract, the date it it signed in the franchise
16 agreement and the jural form of who the franchisee is
17 going to be.

18 QUESTION: You have an experienced businessman
19 with a substantial amount of money invested, and a
20 Certified Public Accountant on top of that.

21 MR. OEHMKE: That is right. The facts,
22 Justice Blackmun, will indicate here that Mr. Rudzewicz
23 was orally told throughout the entire six-month
24 negotiation process with the Detroit Burger King people
25 that he could do business as a franchisee in a corporate

1 forum, and it was only when four days before the
2 franchise was to open that Burger King said, we are not
3 going to let you do business in the form of a
4 corporation, you must be individually liable.

5 He screamed surprise, and they said, through
6 Mr. Hoffman, their regional manager, fine, you are
7 surprised, tear out the \$180,000 worth of equipment or
8 sign the contract.

9 We feel that it was not only the nature of the
10 contract but the way the economic gun was pointed to his
11 head that forced him in that four-day period, less than
12 what the state statute requires, to sign it. Those are
13 facts in the record.

14 QUESTION: You say that -- you contend this is
15 a contract of adhesion. What significance do you think
16 that has under our minimum contacts jurisdiction cases?

17 MR. OEHMKE: Only this, Justice Rehnquist. To
18 the extent that one wishes to give some credence to a
19 choice of law provision, I think if there is any weight
20 to that or weight to arbitrating in Florida versus
21 Michigan, I think one can ignore that because of the
22 nature of this contract. There was nothing to be
23 bargained in this contract by Mr. Rudzewicz.

24 QUESTION: You say you should ignore it. I
25 don't believe I follow your argument.

1 MR. OEHMKE: First of all, we have argued that
2 we think it is unlawful to force the parties to go to
3 Florida just because -- because Michigan law -- because
4 there are no contacts there, but to the extent you wish
5 to give some weight to the fact that the parties openly
6 and voluntarily negotiated and agreed on a choice of law
7 forum -- choice of law provision, we don't think there
8 was any -- there was no bargaining, and so I think you
9 can ignore giving any weight to that aspect of the
10 contract.

11 QUESTION: So you say then perhaps there
12 should be a trial, I suppose -- perhaps your opponent
13 would dispute what you say -- on the issue of whether
14 there was some sort of economic duress in signing a --
15 before you decide whether a state could take
16 jurisdiction or not?

17 MR. OEHMKE: No, we don't say that. We are
18 saying that the Court ought to do a test and at least
19 check and see whether there are minimum contacts of a
20 particular defendant in a state, and the District Court
21 in this case said, yes, Florida law applies here. It
22 did the first prong of a test, but it didn't do the
23 second prong of the test.

24 All we are saying is, if one wishes to invoke
25 the good services and offices of a Federal District

1 Court as a trial court, that trial court not only looks
2 at the state long arm statute, but ought to do a check
3 and see whether the second prong of that test is met.
4 Namely, does the defendant have some contact in that
5 state, some minimum contact.

6 QUESTION: Yes, but going back to your
7 contract of adhesion argument, the District Court in
8 this case found that there was no economic duress.

9 MR. OEHMKE: That's right.

10 QUESTION: Doesn't that blow that out of the
11 water? Because we are not going to review findings of
12 fact.

13 MR. OEHMKE: No, and we are really not asking
14 you to take that up as an issue. Justice Blackmun asked
15 me if we are contending it. Yes, we have contended it
16 throughout, but it is not an issue that we are
17 presenting to this Court.

18 We have talked about a theme, not in this
19 Court but in some Courts of Appeals, where it is Burger
20 King who can build into the cost of their doing business
21 the money it takes to do a litigation like this.

22 The record below does indicate that at this
23 point in time Burger King has been paid more than
24 \$30,000 in legal fees. At this point in time -- that is
25 just for the District Court action. Rudzewicz is liable

1 personally not only for his own attorney fees if he
2 should not prevail, but the attorney fees for Burger
3 King.

4 QUESTION: Well, you feel it would be
5 different then if instead of a franchise agreement this
6 were -- all the facts, but it were a merger agreement
7 between Wendy's, which was doing business only in
8 Michigan but had a huge net worth, and Burger King?

9 MR. OEHMKE: I am sorry, I don't follow you,
10 Justice Rehnquist.

11 QUESTION: Let's assume that your client,
12 instead of being a CPA who didn't know the difference
13 between a plaintiff and a defendant, was actually a
14 very, very substantial Michigan businessman who had a
15 net worth of millions in all sorts of business
16 enterprises all through Michigan, but the facts of this
17 case were exactly the same.

18 MR. OEHMKE: Yes.

19 QUESTION: You say the result should be
20 different.

21 MR. OEHMKE: Yes, I think the result should be
22 different in this sense, that just because someone has a
23 great net worth and happens to be a CPA doesn't
24 necessarily put him on notice about the fine points of
25 jurisdiction or venue.

1 QUESTION: But I thought your argument a
2 moment ago was that because Burger King was able to have
3 such a big operation, it could pay attorneys' fees much
4 more easily than your client. Is that a factor in your
5 argument?

6 MR. OEHMKE: Yes, it is, and build into their
7 cost of running the franchise enough money to pay for
8 their going to Michigan, because they are already in
9 Michigan and they have local attorneys in Michigan
10 anyway.

11 This case is being -- we are -- on this
12 particular case in Michigan District Court on
13 enforcement of the judgment. They have attorneys in
14 Michigan, and an office there. We think they should
15 build into the cost of franchises another penny a
16 Whopper or whatever it costs to build up the funds they
17 need to go to Michigan and to sue their franchisees
18 where their franchisees are found.

19 QUESTION: Now, is there any one of our cases
20 on minimum contact that supports that view?

21 MR. OEHMKE: No, there is not, Justice
22 Rehnquist. We just think that Burger King is in a
23 better position. We suggest that as some logic that may
24 offer some fruit here. In this particular case --

25 QUESTION: Do I understand your theory that

1 when a fat cat is sued by a small cat, the fat cat has
2 to pay?

3 MR. OEHMKE: No, we are just saying that when
4 the fat cat sues the small cat, the fat cat is in a
5 better position to build into the cost of taxing the
6 franchisee enough money to pay for the litigation.

7 QUESTION: And therefore he has to pay.

8 MR. OEHMKE: No, not that he has to pay. Only
9 that he is in a better position. What we are suggesting
10 is --

11 QUESTION: So what? Who pays?

12 MR. OEHMKE: This is -- I guess this gets us
13 down to the -- who pays? In this case the defendant has
14 paid. But our thinking is that the nature of a
15 franchise relationship is a new type of doing business.

16 QUESTION: Is it any different from any other
17 contract? You put in a contract what you want.

18 MR. OEHMKE: Right, sir.

19 QUESTION: And if you fail to put in your
20 protection, you are unprotected.

21 MR. OEHMKE: That's right. That would be
22 right. But this Court still applies.

23 QUESTION: If you fail to put in there that
24 you should be tried in Michigan only, you have lost it.

25 MR. OEHMKE: Only if one can agree that people

1 can contract jurisdiction away. We don't think there
2 are any minimum contacts in Florida, and we think even
3 if the parties put a bold face choice of forum provision
4 in there, since there were no minimum contacts in
5 Florida, we think it would be contrary to public
6 policy. The parties can't confer jurisdiction by
7 contract.

8 All I am suggesting with the economic argument
9 is that Burger King franchises are small business
10 operations essentially. Mr. Rudzewicz, the investment
11 for this particular franchise is around \$225,000. This
12 is running a small hamburger operation serving
13 essentially a community, serving essentially a
14 neighborhood.

15 It is a new form and one of the new ways of
16 doing business in this country. The ma and pa grocery
17 store have been substituted in large part by 7-11's.
18 The hamburger stands have been substituted by
19 MacDonal'd's and Wendy's and Burger Kings. But they are
20 still -- the nature of them is still a small restaurant,
21 still serving a small community, run by small business
22 people, and Burger King comes to the State of Michigan,
23 it does business in the State of Michigan by opening 16
24 restaurants and putting an extensive staff there.

25 We think they should opt to sue their

1 franchisees in Michigan, too. They haven't done that.
2 They have elected not do to that, not to sue their
3 franchisees. They want to bring them all to Miami,
4 including, I guess, the ones from London and Spain and
5 New Zealand and Guam, where they elsewhere have offices,
6 and perhaps Alaska and Hawaii.

7 That would be manifestly unfair, to make a new
8 rule in minimum contacts that says, just because you are
9 dealing with a national business headquartered in one
10 spot, you should go to them because you are put on
11 notice they might sue you there, even if there are no
12 minimum contacts.

13 We think it is manifestly unfair that he
14 should have to travel the 1,200 miles to Miami to fight
15 this lawsuit when he never set foot in Miami about this
16 deal, and has no contact with that state. And Burger
17 King's new approach that they are suggesting here is
18 wholly different from what it used to be, and from what
19 is, from what is the state of law at this present time.

20 The Court of Appeals noted that all of the
21 contacts were in Michigan. They reviewed the record,
22 and they noted the fact that Rudzewicz was interviewed
23 there, and that the Michigan office discussed price
24 terms, and that the Michigan office attended the final
25 closing ceremony, and that there was no evidence that

1 Rudzewicz bargained with anyone in Miami, only with
2 people in Michigan.

3 So, every single contact with Burger King
4 happened in the State of Michigan, with the Michigan
5 staff, and the bargaining occurred there, and the
6 acceptance of these gentlemen as franchisees occurred in
7 the State of Michigan. So we think that since all
8 essential elements of the transaction are found in
9 Michigan, that is where the lawsuit should be, and that
10 is where the contacts are.

11 We feel there needs to be some protection of
12 franchisees in order to protect it as a form of
13 business. If this Court were to rule that franchisees
14 could be sued wherever the headquarters of the franchise
15 was, then franchisees who do business in the future have
16 to be able to say, I have to build into the cost of
17 doing business enough reserve money to one day be able
18 to go to Florida and defend myself against Burger King.

19 If you take a look at the normal profit on the
20 sale of a hamburger, it is around ten cents on a \$1.25
21 hamburger, and to finance a lawsuit like this, to pay
22 both sides might cost a couple of hundred thousand
23 dollars, which means selling about two million
24 hamburgers in order to make enough profit to set them
25 aside in reserves to defend a case like this.

1 The local business is not in a good position,
2 is not well equipped in serving a small community to
3 have to finance such distant litigation. Of course,
4 there is the inconvenience on the part of the
5 franchisees, who had to either bring deposition
6 testimony down or bring all of the live witnesses down.

7 All of the people that Mr. Rudzewicz dealt
8 with were in Michigan.

9 QUESTION: That may sound good, but what about
10 arbitration? He would have had to go to Florida to
11 arbitrate. Do you agree with that?

12 MR. OEHMKE: I agree that we would have to go
13 to Florida to arbitrate.

14 QUESTION: The 1,200 miles. And you may need
15 some witnesses.

16 MR. OEHMKE: That is right. Yet one can make
17 some distinction between the arbitration process and the
18 litigation process. Not completely. It certainly is
19 more expeditious, takes less time, doesn't require as
20 many trips down.

21 QUESTION: I don't know what you would say.
22 Suppose you went to -- there was an arbitration. You
23 went to Florida to arbitrate, and you lost.

24 MR. OEHMKE: Yes.

25 QUESTION: And you didn't live up to the

1 arbitrator's award. Could you be sued in Florida to
2 enforce the award?

3 MR. OEHMKE: I think so, Justice White. I
4 think it could be enforced in the State of Florida. I
5 would then have to argue to this Court about the nature
6 of that contract of adhesion and get into that as an
7 issue more solidly than we have brought that issue
8 here.

9 We think that there should be a three-pronged
10 test, in conclusion, to determining whether or not the
11 -- where a person should be sued. We think the first
12 test should be whether the defendant commits a
13 purposeful act or an affirmative act to avail himself of
14 the benefits and protections of the State of Florida.
15 We don't think Rudzewicz did any act in this particular
16 case to do that, certainly not a substantial act.

17 Secondly, we think that it ought to be fair
18 and reasonable that he be sued in Florida. We don't
19 think it is fair and reasonable in this case.

20 And thirdly, we think there should be some
21 connection between the subject matter of the lawsuit,
22 namely, the operation of a Burger King franchise, and
23 the State of Florida, particularly in light of the fact
24 that Michigan has passed comprehensive legislation
25 regulating the behavior of franchisors and franchisees,

1 legislation that would apply here. We feel --

2 QUESTION: Wasn't he sued for failing to make
3 payments?

4 MR. OEHMKE: Yes, he was.

5 QUESTION: And the payments were to be made in
6 Florida?

7 MR. OEHMKE: Yes, he was, Justice O'Connor,
8 and he was brought into Florida on the sole basis that
9 he had failed to send his check. And that was all that
10 was done.

11 So we feel that that three-pronged test, were
12 it adopted by this Court, reiterated by this Court,
13 would certainly summarize a fair test that would show
14 franchisees that you are not different from Sears
15 Catalogue or from Volkswagen or from any other person
16 who does business in this country, as this Court has
17 passed for years and years on the issue.

18 You have to go find the franchise -- the
19 defendant, where the defendant was found, where there
20 was some minimum contact, assuming, of course, we are
21 not talking about a tort, but in a contract case, you
22 have got to go where there is some minimum contact.
23 That law applies to franchisees as well as it applies to
24 franchisors.

25 We think that there is no reason why Burger

1 King should ask this Court to adopt a new philosophy of
2 letting them for the sake of uniformity and national
3 consistency sue every single person in the State of
4 Miami.

5 That is unfair, and I think that if we look at
6 what that will mean, it will mean, and Burger King
7 conceded that, perhaps bringing franchisees from foreign
8 countries to Miami, if they can get away with that, to
9 sue people in Miami. That is not the kind of fairness
10 that we think the constitution contemplates.

11 If there are no questions, I thank you very
12 much.

13 CHIEF JUSTICE BURGER: Very well.

14 Do you have anything further?

15 ORAL ARGUMENT OF JOEL S. PERWIN, ESQ.,

16 ON BEHALF OF THE APPELLANT - REBUTTAL

17 MR. PERWIN: A few points, Your Honor, if I
18 may. Very briefly, a few disparate points.

19 Number One, Mr. Rudzewicz was represented by
20 counsel throughout his dealings with Burger King. His
21 lawyer was out of town the weekend before the closing.
22 He did not ask for a delay in order to consult with his
23 lawyer.

24 At the time of trial he had a net worth of \$1
25 million and was making \$170,000 a year. The trial court

1 -- the District Court found that there was no economic
2 duress or coercion in any form. The Court of Appeals,
3 of course, did not reach that issue.

4 Number Two, there were a fair number of
5 contacts with the regional office. We don't deny that.
6 On the other hand, it cannot be denied that there were
7 substantial --

8 QUESTION: May I just ask on this sort of fat
9 cat-small cat argument, would it be a different case if
10 he just owned a mom and pop grocery store?

11 MR. PERWIN: Yes.

12 QUESTION: You think you would not have
13 jurisdiction, even if you had all your other factors?

14 MR. PERWIN: Well, a mom and pop grocery store
15 is not a franchise.

16 QUESTION: But they had a contract to be able
17 to use the name, whatever, some franchise product, as a
18 lot of them do, saying, and any dispute of it will be
19 governed by Florida law, and we will arbitrate in
20 Florida if we have to, and wouldn't it be the same
21 case?

22 MR. PERWIN: Yes, it would, if the plaintiff
23 had the same measure of control over the activities of
24 the enterprise.

25 QUESTION: Correct, with respect to the

1 product in dispute.

2 MR. PERWIN: With respect to the product, and
3 it weren't simply an arm's length purchase and sale
4 agreement which included a license. That is one of the
5 keys to this case, is that from Miami, Burger King
6 exercised intimate daily control over the quality of
7 this franchise, not just through the manuals and the
8 contracts, but through day-to-day contacts, and there
9 weren't just contacts with the regional office on the
10 policy questions, on the question that needed to be
11 negotiated, there were direct contacts by telephone and
12 by letter directly between Miami and the franchisees.

13 It is incorrect to say that their only
14 expectation was that the sole physical embodiment of
15 Burger King was in Michigan. That is simply incorrect.

16 QUESTION: Just to boil it down, you really
17 don't rely on the fact that he had \$1 million.

18 MR. PERWIN: No, it is just rebuttal.

19 QUESTION: If he were bankrupt, it would be
20 the same case.

21 MR. PERWIN: If he were --

22 QUESTION: Or just on the fringe.

23 MR. PERWIN: If the facts were otherwise the
24 same, yes. I caution that --

25 QUESTION: If the contractual relationship was

1 otherwise the same.

2 MR. PERWIN: Yes. I caution that as the Court
3 has said repeatedly, every case should be cited on its
4 own facts, but yes, if that were the only change, I
5 submit, I agree that the burden of my position is that
6 jurisdiction would be appropriate.

7 QUESTION: It is quite important, because the
8 question whether a wealthy man has a right to move for
9 want of jurisdiction on a different standard than one
10 who doesn't have much money is really a fairly important
11 question of whether we administer the law with an even
12 hand.

13 MR. PERWIN: I agree, and a fairly disturbing
14 implication. It is equally disturbing from the other
15 side that a corporation should somehow be at a
16 disadvantage because of its net worth before this
17 Court.

18 QUESTION: I take your argument on that point
19 to mean that a CPA making \$170,000 a year with a net
20 worth of \$1 million is sufficiently sophisticated to
21 have arm's length dealing with anybody.

22 MR. PERWIN: I would agree, Your Honor, and I
23 believe so, and in this case that arm's length dealing
24 produced a contract which called for an intimate 20-year
25 relationship controlled by a company whose finest

1 details were controlled by a company based in Florida
2 and entitled to the protection of a Florida law which
3 sought to preserve its business, its legitimate business
4 expectations.

5 The nature of that contract was inherent in
6 Burger King's business relationship. The due process
7 clause should not be utilized to force Burger King to
8 increase the price of its hamburgers and to pass them on
9 to franchisees and on to the public in order to
10 decentralize. That is an internal business decision,
11 and the due process clause should not reach that far.

12 The opinion of the Court of Appeals should be
13 reversed, and the cause remanded with instructions to
14 affirm the District Court's judgment.

15 CHIEF JUSTICE BURGER: Thank you, gentlemen.
16 The case is submitted.

17 (Whereupon, at 11:50 a.m., the case in the
18 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:
#83-2097 - BURGER KING CORPORATION, Appellant v. JOHN RUDEWICZ

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BY Paul A. Richardson

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