

**SUPREME COURT
OF THE UNITED STATES**

ORIGINAL

In the Matter of:)
BENDIX AUTOLITE CORPORATION,) No. 87-367
Appellant,)
v.)
MIDWESCO ENTERPRISES, INC.)

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

Pages: 1 through 48
Place: Washington, D.C.
Date: Wednesday, March 23, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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 BENDIX AUTOLITE CORPORATION, :
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 Appellant, :
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 v. : No. 87-367
 :
 MIDWESCO ENTERPRISES, INC. :
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Washington, D.C.

Wednesday, March 23, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:46 o'clock p.m.

APPEARANCES:

NOEL C. CROWLEY, ESQ., New York, New York; on behalf of the appellant.

IRA J. BORNSTEIN, ESQ., Chicago, Illinois; on behalf of the appellee.

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P R O C E E D I N G S

(1:46 P.M.)

1
2
3 CHIEF JUSTICE REHNQUIST: We will hear arguments
4 next in Bendix Autolite Coproration versus Midwesco
5 Enterprises, Inc.

6 Mr. Crowley, you may proceed whenever you are
7 ready.

8 ORAL ARGUMENT OF NOEL C. CROWLEY, ESQUIRE
9 ON BEHALF OF THE APPELLANT

10 MR. CROWLEY: Mr. Chief Justice, and may it
11 please the Court, the appellant in this lawsut is Bendix
12 Autolite Corporation. It had a contract with the appellee,
13 Midwesco Enterprises, under which Midwesco sold and
14 installed in State of Ohio a particular boiler which turned
15 out to be defective.

16 The contract was fully performed in the State of
17 Ohio, but Bendix has been denied the right to maintain an
18 action in the State of Ohio because the applicable four-year
19 statute of limitations had expired, and whether the action
20 is maintainable at this time depends on the constitutionality
21 under the commerce clause of a particular Ohio tolling
22 statute which suspends the running of the period of
23 limitations in situations as we have here where the defendant
24 can't be served within the State of Ohio.

25 Both the District Court and the Circuit Court have

1 held, and we say incorrectly, that the Ohio tolling statute
2 constitutes an impermissible burden on interstate commerce.
3 Those rulings were incorrect, we contend, because the supposed
4 burden on commerce is so slight and so speculative as to make
5 it questionable whether the burden has any reality at all.

6 QUESTION: You say then that the Ohio tolling
7 statute should have been allowed to be applied by the Ohio
8 courts and therefore it would not have run against you in
9 your action against Midwesco?

10 MR. CROWLEY: Precisely so. We maintain that
11 such theoretical burden as may exist is purely incidental
12 to a valid state purpose and is clearly outweighed by the
13 resultant benefits which have been achieved for the benefit
14 of Ohio citizens, and those benefits, as I will explain in
15 a moment, are not at all theoretical, but have been
16 explicitly recognized as valid and legitimate objects of
17 state concern by this Court's 1982 decision in the case of
18 G.D. Searle and Company against Cohn, which we cite in our
19 brief.

20 Now, the obvious purpose of the Ohio tolling
21 statute is to preserve the right of Ohio citizens to assert
22 claims against individuals and corporations who are not
23 amenable to service within the state either because they once
24 lived there and later moved away or because they are
25 concealing themselves within the state, or because they never

1 lived there at all.

2 QUESTION: Well, it also -- it just doesn't benefit
3 Ohio citizens, does it? Anybody who is --

4 MR. CROWLEY: No, just --

5 QUESTION: Anybody who sues in Ohio.

6 MR. CROWLEY: Certainly that would follow.
7 Yes, indeed.

8 QUESTION: All right.

9 MR. CROWLEY: The statute here in question is
10 virtually identical to a particular New Jersey statute which
11 this Court reviewed in the Searle case. Now, we are
12 accused by our opponents here of misreading Searle, and also
13 as behaving as though Searle fully disposed of all the
14 issues and compels a decision in our favor. That is not our
15 position, and I think our brief acknowledges that it is not
16 the case.

17 But the Searle case does conclusively establish
18 that a statute of the sort we are talking about does have
19 a legitimate state purpose, and it is a purpose that remains
20 valid and subsisting, notwithstanding the adoption by the
21 State of Ohio of an alternative method of addressing the same
22 concern, and that is the process for longarm service.

23 Arrangements for in-state service continue to be
24 of benefit, as this Court pointed out in Searle, because it
25 can't always be guaranteed that a particular company, a

1 particular out of state company or out of state individual
2 can actually be found.

3 QUESTION: Mr. Crowley --

4 MR. CROWLEY: Yes, Your Honor.

5 QUESTION: -- if the only way to satisfy the
6 requirement of Ohio's statute is for the foreign company to
7 come in and actual register to do business for all purposes,
8 do you concede that it would fail under the commerce clause?

9 MR. CROWLEY: No, we don't at all concede. We
10 welcome the chance to point out that we don't suppose that to
11 be the situation at all in Ohio, that that isn't by any means
12 the only way --

13 QUESTION: I guess you didn't hear my question then
14 or maybe I misstated it.

15 MR. CROWLEY: Forgive me.

16 QUESTION: If the only way of complying with the
17 Ohio statute is to register for all purposes, do you concede
18 that the commerce clause burden would be such that the
19 statute would fail?

20 MR. CROWLEY: No, and I understand Your Honor's
21 question, and it is a little hard to reckon with the question
22 if that was the only way of complying. The Ohio statute
23 doesn't require any kind of behavior at all.

24 QUESTION: We will get to that in a minute. I
25 would like you to address that question first, and I just

1 wonder what authority you rely on for thinking that that
2 would not be so burdensome as to fail.

3 MR. CROWLEY: What it is not, Justice O'Connor, what
4 it is not is a forced licensure statute. We concede that
5 if it were a forced licensure statute, that if as a practical
6 matter the only way you could do business in Ohio was to
7 qualify to do business, we would concede under that set of
8 facts that it would fail, but there is a great disparity
9 between what we are talking about here and the so-called
10 forced licensure statutes.

11 QUESTION: I'm not sure I'm following you. Do you
12 concede that if the only way to get the benefit of the shorter
13 statute of limitations were to become licensed for all
14 purposes in Ohio, it would be unconstitutional?

15 MR. CROWLEY: No, we do not so concede.

16 QUESTION: I thought that's what you just said.

17 MR. CROWLEY: No. We thought if it could fairly
18 be said of the statute that you had to qualify to do
19 business, that --

20 QUESTION: In order to do what?

21 MR. CROWLEY: In order to seriously expect to
22 do business in the state, as, for example, in the Allenberg
23 Cotton case, where there is a familiar kind of statute and
24 where the situation is such that you are under that statute
25 denied access to the courts of the state unless and until

1 you qualify to do business, and they are describing business
2 which is of an interstate character. The Court very
3 properly said as far as we are concerned, very properly said
4 that a statute of that sort is so tantamount to a direct
5 order to license --

6 QUESTION: Well, I thought that was my question
7 exactly.

8 MR. CROWLEY: Well, I had difficulty with --

9 QUESTION: And I have different responses from
10 you now to Justice Scalia and to me and I don't know what
11 your position is.

12 MR. CROWLEY: I am putting it badly, but I under-
13 stand our position and I am going to try once again to
14 explain it.

15 It is, if you, as a condition of doing business if
16 you had an Allenberg Cotton type of situation, properly
17 described as a forced licensure situation, and if the
18 consequence of not being qualified to do business was that
19 you can't go to the courts of that state, in other words,
20 you can sell things, but if the people don't voluntarily
21 pay you you have no --

22 QUESTION: Well, here the consequence is simply
23 that the statute of limitations is not tolled.

24 MR. CROWLEY: Yes, exactly, and we don't think that
25 that is sufficiently coercive.

1 QUESTION: You think that is different somehow.

2 MR. CROWLEY: It most assuredly is different. It
3 is not sufficiently coercive as to obligate somebody to
4 do anything. It is not an intolerable situation to sell
5 things and to be subject to suit and to have to defend suit
6 on the merits and not have the defense of the statute of
7 limitations.

8 So, again, yes, if it were true that it was forced
9 licensure it would be invalid. It is not, even if it was
10 the only means of compliance, and it is not, an invalid
11 statute here because of the great disparity in severity of
12 sanctions between forced licensure and this.

13 QUESTION: Now, the courts below in this case
14 apparently did not find that the statute, the tolling
15 statute would be met by a provision in the contract.

16 MR. CROWLEY: We are puzzled and to some extent
17 confounded by what the reasoning of the Circuit Court was
18 in that regard. They acknowledged that it could have
19 happened, that there could have been a designation of an
20 agent in this individual contract which would not have --

21 QUESTION: But they said that didn't answer the
22 question.

23 MR. CROWLEY: Yes, and we are at a loss to know
24 just what they meant by that. If they meant that there
25 would have been other remaining constitutional questions

1 as applied to other people, that treatment was wrong for
2 the reason we say it is wrong in our brief, that --

3 QUESTION: How are we to know what the state law
4 is on that subject?

5 MR. CROWLEY: I think there is nothing in
6 the statute itself which even refers to licensure, so all
7 that can be said of licensure is that it is one means of
8 appointing an agent for the service of process. We certainly
9 have an Ohio state law and we have cited it in our brief
10 that says the means by which you serve a company is among
11 other things to serve an agent. You serve somebody who is
12 appointed as an agent, you have served the company. So I
13 take it it follows inexorably from that that any time you have
14 somebody designated as an agent who is resident in the State
15 of Ohio so that you can make the service within that state,
16 you have provided a means of service and you have defeated
17 the tolling statute, so that it simply doesn't apply.

18 QUESTION: He has to be an agent for service in
19 all matters, not just in the particular contract.

20 MR. CROWLEY: No, there is nothing in the
21 statute to suggest that that would be the case. If he is an
22 agent for the particular service that is being made --

23 QUESTION: That would do it.

24 MR. CROWLEY: -- that should be in all respects
25 sufficient. There is nothing in any of the statutes, any of

1 the decisions to suggest anything to the contrary. We have
2 other cases from other jurisdictions, and we cite them in
3 our brief, saying that with respect to the federal counterpart
4 of the Ohio statute, saying that where there is a designation
5 by contract it can be as limited as the parties to the
6 contract want to make it.

7 In this case the designation not only could have
8 been limited to Bendix, it could have been limited even as
9 to Bendix to claims arising out of this particular contract.
10 And that would have been a full and sufficient answer to the
11 attempt to apply the tolling statute in this case.

12 QUESTION: Tell me, what is the case that holds
13 that would have been a sufficient answer?

14 MR. CROWLEY: It is a particular Virginia District
15 Court opinion, and it is quoted in our brief.

16 QUESTION: A Virginia case?

17 MR. CROWLEY: Yes.

18 QUESTION: Nothing from this State of Ohio?

19 MR. CROWLEY: No, but it is not talking about a
20 particular statute, it is just talking about, in general
21 about the designation of agents. Certainly --

22 QUESTION: The Ohio statute hasn't been construed
23 on this point, though, has it?

24 MR. CROWLEY: Forgive me.

25 QUESTION: The Ohio statute has not been construed

1 on this point. There are no Ohio authorities supporting
2 your position?

3 MR. CROWLEY: I think there are Ohio decisions
4 that confirm that if a corporation has an agent present
5 within the state, that that makes it present within the state
6 for purposes of the tolling statute. I think that much is
7 established, and I don't think there should be any remaining
8 question once that is established on, of course, that
9 point.

10 QUESTION: That is something of a burden, to have
11 a general corporation resident for -- what you are saying
12 is, you have to agree in order to get the benefit of the
13 -- or not to be -- not to have the burden of the tolling
14 statute you have to have a resident there for all purposes
15 and be sued by anybody who wants to sue you in that state.

16 That is something of a burden.

17 MR. CROWLEY: If that were the fact that would be
18 a substantial burden.

19 QUESTION: No, but those are the only cases that
20 you have in Ohio that talk about a general agent for
21 service, right?

22 MR. CROWLEY: I don't understand that the cases
23 we have in mind establish whether it is general or
24 specific, and I can't imagine any reason why a narrow and
25 specific appointment, if indeed it is a real appointment,

1 should be any the less efficacious as regards the
2 particular claim to which it is addressed. I guess if I
3 don't do anything else today I should like to differentiate
4 this case from the forced licensure kind of case.

5 In forced licensure, where you tell the court --
6 correction, tell the company that it can't use the courts
7 of that state unless it qualifies to do business that
8 statute has no purpose other than to induce licensure. It
9 doesn't serve any interests of the state simply to deny
10 various companies access to the courts. It only makes
11 sense as an inducement to make them do something. Nothing --

12 QUESTION: But isn't one proviso of the Allenberg
13 holding that the company has to be engaged only in interstate
14 commerce?

15 MR. CROWLEY: Oh, very much so. Yes, if the
16 company is become localized and is a domesticated company,
17 it is indistinguishable from any other company resident in
18 Ohio, and I take it for that reason there is no
19 constitutional problem as to that, and it would be perfectly
20 valid to deny that company access to the courts unless and
21 until it is qualified to do business.

22 But reverting to the other point, there is not the
23 tiniest suggestion that this tolling statute here in question
24 is intended to induce any kind of behavior at all on the part
25 of companies or individuals or anybody else, nothing to

1 suggest that the legislature didn't fully achieve its
2 purpose simply when it extended the limitation period,
3 that it had any purpose beyond that or that it cared at all
4 about whether somebody qualified to do business entered
5 into business or not, and if they had had any such intent,
6 if the idea had been to compel companies to take out a
7 license, certainly the statute would have been poorly suited
8 to that end, and there isn't the tiniest hint or
9 suggestion in the record in this case that as -- that it has
10 had that practical effect, that companies that might not have
11 been of a mind to do so have ever felt compelled to qualify
12 to do business, and it simply isn't the same kind of
13 restraint that we are talking about.

14 We have read the recent or modern commerce
15 clause cases by this Court, and we understand that some
16 of them go further than some scholarly commentators would
17 have had it go, or than some members of the Court itself
18 would have had it go, but at least with those cases, all
19 of them involved matters that had the potential, at least,
20 for some serious economic or regulatory dislocation.

21 If, for example, you try to regulate the width
22 of a truck or the length of a truck, as was done in the
23 Raymond Motor case, or the South Carolina against Barnwell
24 Brothers case, that is a serious restraint. We have
25 no trouble understanding that that is something to talk

1 about there when the conversation turns to burden on
2 commerce. Telling an Arizona grower that he has to stop
3 bulk shipping his cantalope into nearby California and
4 instead has to construct his own packing facility so that
5 the State of Arizona can enjoy the good will associated
6 with his cantalopes by having them labeled as Arizona
7 cantalopes, that is a serious burden. We don't fail to
8 understand that.

9 Telling a New Jersey land fill operator that he
10 can't accept refuse that is generated outside the State
11 of New Jersey. That, you don't have to examine that with
12 a microscope. Discouraging out of state banks and out of
13 state insurance companies from setting up shop within a
14 particular state, that is a real burden.

15 But in contrast to what is going on here, the
16 restraint here, and we are indebted to Chief Justice
17 Rehnquist for his dissent from the denial of certiorari in
18 the case of Coons against American Honda Corporation, and
19 we want to incorporate by reference everything he said about
20 the supposed restraining effect of the New Jersey statute
21 there in question, and his wording describing that burden
22 was, it is slight.

23 We would say that certainly it is slight --

24 QUESTION: Do you also rely on his dissent in the
25 Allenberg Cotton case?

1 MR. CROWLEY: No, I don't think --

2 QUESTION: You don't.

3 MR. CROWLEY: It occurs to us, it occurs to us
4 that this case may be a fitting occasion for the Court
5 saying that there is a burden that is so slight, so
6 speculative, so insubstantial that it shouldn't ever be
7 subjected to hostile scrutiny either under the so-called
8 per se test or the balancing test, and this would be an
9 occasion for that, but to reach the result we want we
10 certainly don't have to go that far, and certainly don't
11 have to reverse *Allenberg Cotton*. We accept that rule as
12 a rule of forced licensure, and our quarrel with the courts
13 below is that they simply made the automatic association,
14 because we are talking here, we are using some of the same
15 concepts. We are talking about appointments of agents for
16 service. We are talking about qualifying to do business.
17 And on the basis of that every lower court that has
18 considered this matter either in this case or in the case
19 of *Coons against American Honda* has made the automatic
20 association that, oh, this is one of those forced
21 licensure cases, and without any analysis at all, any
22 examination of what truly is happening under this Ohio
23 statute, have left to the conclusion that on the
24 authority of *Allenberg Cotton* and the *Dahnke-Walker* case
25 and the other famous licensure cases, that this is simply

1 another illustration of that same principle.

2 QUESTION: Mr. Crowley, I have a special concern
3 about whether this statute is discriminatory in the sense
4 that it is peculiarly directed against out of state companies
5 or against interstate business. Is it or isn't?

6 MR. CROWLEY: It most assuredly is not.

7 QUESTION: You could be, I take it, a domestic
8 company in that state or could have been at the time of the
9 alleged tort and then if you move your company elsewhere
10 you would still be liable.

11 MR. CROWLEY: Absolutely.

12 QUESTION: The tolling statute would apply. Or
13 if you were a private citizen, never mind companies --

14 MR. CROWLEY: Absolutely.

15 QUESTION: -- if you were a private citizen and
16 didn't even move your residence but -- well, I guess you
17 could be served at your residence, I don't know. If you
18 moved out of the state and came back it would be tolled
19 while you were gone.

20 MR. CROWLEY: I take it that it would, and the cases
21 seemed -- the Ohio cases seemed to indicate that where there
22 is a sojourn of substantial length out of the state, that
23 the tolling does apply. If it is a vacation trip, that seems
24 not to count.

25 But all of that is -- proceeds on the assumption

1 that the only way to avoid the detriment of the tolling
2 statute is to qualify to do business. We suppose that
3 that is a matter of greater interest to the Court, and so
4 we put that first.

5 The patent reality is that no such circumstance
6 has been shown to be the case. No impediment whatever to
7 putting it in the contract, putting the appointment -- and
8 putting it in a very limited fashion.

9 QUESTION: Do you suppose there is any burden
10 in the problem of having to negotiate the appropriate
11 period of limitations in a contract? Most people don't
12 have to negotiate this sort of provision.

13 MR. CROWLEY: I don't understand that any such
14 negotiations would be necessary at all. All you have to do
15 is to say in the contract, I have an agent, he is in
16 Columbus.

17 QUESTION: Yes, but supposing the Ohio company
18 said, we want the benefit of the existing statute. We
19 are not going to give up that right. What are you going
20 to give us for that?

21 MR. CROWLEY: I think we have sort of anticipated
22 that question, first of all, that that would be a puzzling
23 response for the other company to make, because presumably
24 they benefit from having an in-state agent on whom they
25 can effect the service, so it would be puzzling to see them

1 resist it, but if they did, arbitrarily or whatever, the
2 other company simply writes them a letter unilaterally
3 designating, saying, if you have any quarrel with this
4 contract, any claim, we have appointed somebody our agent,
5 he is in the City of Cleveland, and here is where you can
6 find him.

7 QUESTION: And how long will he be there?

8 MR. CROWLEY: I think that is a sufficient answer
9 to the whole of it.

10 We see in the record and we concede it is a
11 somewhat unsatisfactory record of exchanges with the Ohio
12 Secretary of State's office.

13 QUESTION: Well, that may be -- if you make a
14 contract, that may be right, but what about product
15 liability?

16 MR. CROWLEY: This --

17 QUESTION: You don't write around to somebody
18 who gets hurt by one of your products.

19 MR. CROWLEY: Well, that is a distinguishable
20 case, not the case presented here, but we are indebted to
21 Judge Potter in the District Court in Toledo for making
22 the suggestion in oral argument that it might be perfectly
23 feasible for a company to designate an agent on the product
24 itself, and that is not an issue we are raising here --

25 QUESTION: Does Ohio have any formal mechanism

1 by which you may appoint an agent for service of process
2 in the state without qualifying to do business?

3 MR. CROWLEY: That is the -- what I was starting
4 to explore, talking about the correspondence that is in the
5 record that was exchanged with the Ohio Secretary of State's
6 office, and there are two letters. The letters are really
7 contradictory.

8 The first letter says, we would not accept for
9 filing any such designation apart from the licensure
10 process, in effect. I am paraphrasing. The second letter
11 said we would accept such a letter. We didn't mean to say
12 what we apparently said in the earlier letter, and we
13 would in fact accept something if we were satisfied after
14 an appropriate investigation that it was not intended to
15 circumvent our licensing procedure. That is to say, if it
16 was done by somebody wholly in interstate commerce --

17 QUESTION: Does this statute have to either stand
18 up or fall in one piece? Maybe it might be completely
19 valid as applied in this case and invalid as applied in
20 some other circumstance.

21 MR. CROWLEY: The answer to the question, put in
22 those terms, is, assuredly not. It doesn't have to stand
23 or fall in one case, and this being the kind of case it is,
24 its validity, we would respectfully submit, should be
25 judged on the basis of the operative considerations as we

1 find it. I would also, on --

2 QUESTION: The operative considerations are those
3 where there is no agent been appointed, right?

4 MR. CROWLEY: Forgive me, Justice --

5 QUESTION: One of the operative considerations that
6 we find is, there was no agent appointed in Ohio.

7 MR. CROWLEY: Yes, and that argument is made.

8 QUESTION: There could have been.

9 MR. CROWLEY: There could have been.

10 QUESTION: That is your answer.

11 MR. CROWLEY: And if there is a remaining
12 burden, it is because they didn't make the designations, not
13 because of any infirmity in the statute, is our answer. We
14 would also point out that this matter of trying to isolate
15 the burden becomes even more illusory when you consider
16 is there even a single claim.

17 First of all, I will digress and say there is
18 not a single transaction that is shown in the record here
19 to have ever been discouraged, much less a company been
20 discouraged from doing business by reason of anything we
21 are talking about here, but on the question of what burden
22 there is, how can you tell that a particular claim, if it
23 was brought in the period as extended by the tolling
24 statute would not have been brought sooner if there had been
25 no tolling statute, if there didn't need to be, and in this

1 regard I am reminded of my earliest apprenticeship in the
2 practice of law, where it was explained to me, facetiously,
3 I am sure, that the operative principle in the scheduling
4 of work activities is, don't put off until tomorrow what
5 you can put off indefinitely.

6 So who's to say that what didn't have to be
7 done today by reason of --

8 QUESTION: If you represent plaintiffs, I don't
9 imagine you explained that operative principle to them, that
10 we are not going to get to your work any sooner than we
11 have to.

12 MR. CROWLEY: I hope I didn't pay attention to
13 the lesson and don't observe it. But certainly if you are
14 given to understand you have a specified length of time
15 to do something you can be excused for taking that seriously
16 and acting in conformity to it.

17 That brings me finally to the question of
18 retroactive application. We concede we could have brought
19 up the issue of retroactive application from the earliest
20 time. There was never any impediment. We were discouraged
21 from doing so because of the treatment the retroactivity
22 issue got in the Coons case, where the State of New Jersey
23 deliberated about that, examined the issue of retroactivity
24 and said they weren't going to -- they were not going to make
25 it prospective only.

1 Well, it was on that set of facts that it looked
2 like an argument to which the courts were inhospitable, and
3 we didn't make the point. Then, after we had written our
4 brief in chief in the Sixth Circuit, the New Jersey court
5 reversed itself and said, it is a case that should only be
6 applied prospectively and not retroactively, and at that
7 point with that enhanced value of the argument, we made it,
8 made it only in our reply brief. The Sixth Circuit declined
9 to deal with it on the merits because it came only in the
10 reply brief. We think it should have been understandable
11 the way it arose, and it either is or it isn't, and that
12 is -- we don't think it should be necessary to reach that
13 point, our main point being that there is no -- no under
14 analysis, an analysis that has never been made in any of
15 the lower courts, under analysis any real burden on commerce,
16 and that is our argument.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Crowley.

18 Mr. Bornstein, we will hear now from you.

19 ORAL ARGUMENT OF IRA J. BORNSTEIN, ESQUIRE

20 ON BEHALF OF THE APPELLEE

21 MR. BORNSTEIN: Mr. Chief Justice, and may it
22 please the Court, as counsel indicated, the issue before
23 this Court is very simply whether or not the Ohio tolling
24 statute is what has been construed as a forced licensure
25 provision. And as counsel concedes, each and every

1 court which has been faced with this provision or a similar
2 provision has found it to be a constitutional violation.
3 That includes the lower courts here as well as the courts
4 in the Coons case, as well as the McKinley court.

5 And the question that we have to look at, as the
6 Court indicated in Hughes versus Oklahoma, is the practical
7 operation of the statute. That is the focus, and what you
8 have to look at is, there is a tolling statute here, and
9 the tolling statute says that in order to obtain its
10 benefits there must be physical presence in the state.

11 Now, even though it is somewhat of an anachronism
12 as we pointed out, Ohio may very well be the only state now
13 that holds that physical presence in the state is not the
14 equivalent to being subject to service under the longarm
15 jurisdiction. It is only the same as actual physical
16 service within the confines of the state.

17 And what we have here is a situation where Bendix
18 had the defendant, Midwesco, served under longarm, and
19 because of that fact and the fact that there must be
20 physical presence, it is necessary to see how that physical
21 presence can be obtained, and the only means and manner in
22 which it can be done is via the qualifications statute of
23 the State of Ohio.

24 QUESTION: Well, that isn't exactly what the
25 Court of Appeals said in its opinion, is it? I mean, there

1 is a sentence in the opinion of the Sixth Circuit that
2 says that we acknowledge that Midwesco could have chosen to
3 name an agent as part of its contract with Bendix.

4 MR. BORNSTEIN: I agree, and I believe what the
5 court said is incorrect. I don't believe that in the Ohio
6 Foreign Corporation Act that is possible. The Ohio
7 Foreign --

8 QUESTION: Well, do you want us then to say the
9 Sixth Circuit was just wrong on that as a matter of Ohio
10 law?

11 MR. BORNSTEIN: Well, what the Sixth Circuit
12 said is that they could have put their provision in there.
13 They didn't state and did not make a decision as to whether
14 or not there would be any validity of such a provision.
15 They merely stated that there could have been such a
16 provision in there, and in fact I believe that there would
17 not have been any validity because it would allow a
18 corporation to easily circumvent the entire corporate
19 scheme setup in the State of Ohio. One could easily then
20 engage in business by going ahead and entering into these
21 agreements, these side agreements without having to become
22 qualified and appoint an agent.

23 QUESTION: Well, the answer to the question,
24 though, seems to me to affect the extent of the burden
25 on interstate commerce. If it can be done that easily,

1 it seems to me that is less of a burden. Wouldn't you
2 agree?

3 MR. BORNSTEIN: If it can be done that easily,
4 it would be less of a burden.

5 QUESTION: And it would be helpful to know.

6 MR. BORNSTEIN: It would be helpful to know.

7 QUESTION: So are we stuck just as we were
8 in the Searle case with not knowing and having to send
9 it back?

10 MR. BORNSTEIN: No, I don't believe we are,
11 because in Searle the reason that they were stuck was
12 there was what was considered to be a footnote in the
13 Velmohos case which seemed to indicate that possibly there
14 were other means in which it could be done, and in fact
15 after remand, and Coons turned out to be the culmination
16 of Searle, the Supreme Court of New Jersey found there was
17 no other way, and in fact the same argument that there
18 could have been some type of contractual provision was
19 raised in Coons, and the New Jersey Supreme Court said it
20 can't be done.

21 QUESTION: Well, that was New Jersey, not Ohio.

22 MR. BORNSTEIN: That's correct, but Ohio has
23 the same type of Foreign Corporation Act, almost identical.

24 QUESTION: But, Mr. Bornstein, in that passage
25 from the Sixth Circuit's opinion they say two arguments

1 are made. One is appointing an agent, and the other is
2 giving notice to the Secretary of State. Then they say
3 they could have appointed an agent, so that is something we
4 have to deal with. They say as to the suggestion giving
5 notice to the Secretary of State it is highly speculating
6 and devoid of any statutory support. Now, that suggests to
7 me by implication that they thought probably the first thing,
8 appointing an agent for the contract, did have some
9 statutory support.

10 MR. BORNSTEIN: Well, I don't believe so. I
11 believe all that they were stating was that the provision
12 could have been in there, and I believe that because of
13 the fact the provision was not in there and therefore it was
14 moot, they were not going to issue a decision as to
15 whether or not it was valid, but we did raise the argument
16 in the Sixth Circuit before the court that under the Ohio
17 statutory scheme it would not be valid and it would allow
18 one to circumvent it.

19 QUESTION: Well, they certainly didn't use your
20 argument in dealing with the question at all, did they?

21 MR. BORNSTEIN: They did not make any statement
22 in there one way or the other.

23 As part of the statutory scheme under Section
24 1703.041 of the Ohio Code one is required to appoint a
25 statutory agent in order to transact business within

1 the state, and the effect of that provision, as Ohio
2 recognizes, is that a foreign corporation would become
3 subject to the general jurisdiction of Ohio courts for
4 any and all transitory causes of action, and the courts in
5 the cases we have cited have pointed out that the only
6 thing that they would look to then is whether or not the
7 corporate defendant could be served within the confines of
8 the state. That is it. It does not matter whether the
9 plaintiff resides in the state or not. It is a question of
10 whether or not the defendant could be served.

11 QUESTION: You think that's the only way that
12 the Ohio statute can be complied with? Suppose you have
13 a state that isn't doing business in the state but it
14 does -- it does no business but it does rent an office
15 there. You think that that would not comply with the
16 statute unless they actually registered with the Secretary
17 of State?

18 MR. BORNSTEIN: If they have an office within
19 the state then they are able to be physically served
20 within the state. It is not the same thing.

21 QUESTION: Sure, so that would comply.

22 MR. BORNSTEIN: Then that would comply. They
23 could be served in the state. We could not be served
24 within the state.

25 QUESTION: Well, the next step is, they don't have

1 an office there but they have an agent there who is in
2 somebody else's office.

3 MR. BORNSTEIN: But they can't be --

4 QUESTION: Now, what is the matter with that?

5 MR. BORNSTEIN: Well, the thing is that in this
6 instance there wasn't one, and the question is whether or
7 not they can be compelled to come in and appoint an agent
8 within the state.

9 QUESTION: But you seem to acknowledge that they
10 can appoint an agent within the state without complying
11 with the whole licensing scheme of the Secretary of State.

12 MR. BORNSTEIN: No, I don't mean -- when I
13 said that --

14 QUESTION: I think you gave it away when you said
15 you could have an office there without doing business
16 in the state and they could serve you with that office. I
17 think you gave it away then, didn't you?

18 MR. BORNSTEIN: No, because there is still
19 physical presence within the state. If there is physical
20 presence within the state under the tolling statute then you
21 can obtain the benefits of the tolling statute.

22 QUESTION: But if you can have physical presence
23 by an office, why can't you have physical presence by
24 somebody that you name as an agent?

25 MR. BORNSTEIN: Because under -- the only way

1 you can appoint an agent though is under the statutory
2 scheme. You can have it under an agent but the agents have
3 to be appointed under the Ohio Foreign Corporation Act.

4 QUESTION: How do you know that?

5 MR. BORNSTEIN: Because looking at the Ohio
6 statutory scheme, that is the only way, that is the only
7 provision anywhere that it is stated how a foreign
8 corporation engaged in interstate commerce can appoint
9 an agent.

10 QUESTION: You can't have any agents, foreign
11 corporations can't have any agents in that state unless
12 they are appointed under that provision? I can't imagine
13 that. There are a lot of --

14 MR. BORNSTEIN: If they are going to transact
15 business within the State of Ohio. If they are going to
16 transact business.

17 QUESTION: But this was not a company that was
18 transact business. Precisely. I mean, this is a company
19 that doesn't want to transact business. It just wants to
20 have an agent there. I can't believe that the only way
21 to get an agent in the State of Ohio is to use that
22 provision.

23 MR. BORNSTEIN: If you are a foreign corporation
24 I believe that that is the only way. I have not seen any
25 other means or mode, and there hasn't been any other which

1 has been suggested by Bendix in this case.

2 QUESTION: Mr. Bornstein, it is essential for
3 you to prevail here, isn't it, to show that Midwesco was
4 engaged exclusively in interstate commerce in its dealings
5 in Ohio.

6 MR. BORNSTEIN: That's correct.

7 QUESTION: And what, it sold and installed
8 a boiler to Bendix, where, in Fostoria, was it?

9 MR. BORNSTEIN: Fostoria, Ohio.

10 QUESTION: And what did that -- what did the
11 installation efforts consist of?

12 MR. BORNSTEIN: It consisted of installing a
13 boiler, having people there and literally constructing
14 a boiler.

15 QUESTION: Shipping it in or --

16 MR. BORNSTEIN: Shipping it in from Illinois to
17 Ohio, and, Your Honor, there is a statute, Section
18 1703.02 of the Ohio Code which says that a foreign
19 corporation engaged in interstate commerce which comes into
20 the state to construct any type of machinery or equipment
21 is still considered to be engaged in interstate commerce
22 and is not subject to the qualification provisions of the
23 statutory scheme, and there is no doubt under the
24 statutory scheme that Midwesco was still engaged
25 exclusively in interstate commerce.

1 QUESTION: And wasn't subject to qualification.

2 MR. BORNSTEIN: And would not otherwise have been
3 subject to qualification. By becoming registered -- if, as
4 our position is that you must become registered and you
5 must have an agent, a statutory agent, and by doing that
6 under the Ohio law in essence a party such as Midwesco is
7 being forced to give up its due process and its defenses
8 based on personal jurisdiction, because once there is
9 someone there then they have submitted themselves to the
10 Ohio courts, and not just -- I mean, the effects on
11 interstate commerce are just tremendous if one thinks about
12 that, because if various states forced these types of
13 requirements upon a corporation, then they could become
14 subject to lawsuits throughout the United States despite the
15 fact that the interstate corporation has no contact with the
16 forum state. Merely because of the fact that they have
17 appointed an agent in order to comply, they could be
18 defending lawsuit throughout the whole 50 United States, and
19 not just states like Ohio.

20 Midwesco has done jobs in Alaska. They could
21 be sued in Alaska for auto accidents. They could be sued
22 in Puerto Rico. They could be -- throughout the country,
23 and they would be forced to incur the cost of defending
24 cases throughout this country all because of this.

25 QUESTION: Would you say that -- would this case

1 come out differently from your point of view if Ohio had
2 a provision that allowed a foreign corporation to appoint
3 an agent for service of process without requiring them
4 to qualify?

5 MR. BORNSTEIN: No, I believe it would still
6 end up being the same thing.

7 QUESTION: Anybody -- any foreign corporation that
8 wants the benefit of the statute of limitations in our
9 state may file a piece of paper appointing an agent for
10 service of process, and he can appoint the Secretary of
11 State.

12 MR. BORNSTEIN: But the problem is that under
13 the Ohio statutory scheme Ohio case law said that by
14 appointing an agent within the state, an agent gives
15 you presence, and therefore you are submitting to general
16 jurisdiction. Therefore even if they did this Midwesco
17 would in essence be submitting to the general jurisdiction
18 to the courts of Ohio. It is not just because of the
19 qualification. It is because of the fact that if they
20 were still required to appoint an agent, that agent would
21 subject them to jurisdiction for any and all actions.
22 It wouldn't just be for this particular action, and therefore
23 the effect, the burden on interstate commerce would still be
24 the same.

25 QUESTION: Well, what about the office

1 that Justice Scalia asked you about?

2 MR. BORNSTEIN: That is because in fact the
3 corporation has agreed, has gone in and established
4 a physical --

5 QUESTION: But that wouldn't be a valid service,
6 I take it. Just having an office there doesn't mean that
7 the service would be valid. It would just mean there would
8 be presence and you could get the benefit of the statute.

9 MR. BORNSTEIN: That's correct. That's correct.
10 Now, as far as these forced licensure provisions,
11 this Court has long held these provisions to be
12 unconstitutional, and unlike what counsel for Bendix has
13 said, this Court has not focused on the sanctions. This
14 Court has focused on the conditions. In fact, recently in
15 Eli Lilly versus Savon Drugs this Court pointed out that
16 it was the conditions, the regulatory conditions that were
17 being looked at, and it was not the sanctions at the end,
18 and in fact in that case the Court stated that it is well
19 established that New Jersey cannot require Lilly to get a
20 certificate of authority to do business in the state if its
21 participation in this trade is limited to its wholly
22 interstate sales to New Jersey.

23 There is no limitation or qualification on the
24 sanction.

25 This Court has long held, going back to 1914,

1 quite some time ago, long before the interstate trade
2 developed it the way it is right now, in Sioux Remedy versus
3 Cope, that a provision such as this was unconstitutional.
4 Sioux Remedy, the Court focused on the condition, and
5 interestingly enough, 70 years ago, in excess of 70 years
6 ago the conditions were exactly the same. The condition was
7 that the corporation has to become qualified to transact
8 business, had to appoint a statutory agent and became
9 subject to the general jurisdiction of the Court, and this
10 Court looked at that and said that the conditions being
11 imposed were much too great, and Justice Vander Vanter,
12 with a tremendous amount of prescience, kind of foretold
13 the future in that case.

14 He stated that if one state can impose such a
15 condition, others can, and in that way corporations engaged
16 in interstate commerce can be subjected to great em-
17 barrassment and serious hazards, and that was in 1914.
18 Here we are in 1988. Trade is not only interestate, it is
19 international, and those burdens, those hazards, that
20 embarrassment has only disproportionately increased over
21 the years.

22 It is also necessary to keep in mind the entire
23 purpose and idea behind the commerce clause, this idea of
24 preventing economic Balkanization, that the states are not
25 separate economic units, and that you cannot keep

1 corporations out of states and prevent them from
2 transacting business. As the Court stated in International
3 Textbook versus Pigg, the Court said that one cannot impose
4 a condition upon a corporation of another state seeking to
5 do business in the State of Kansas, which is a case of
6 interstate business, and which is a regulation of inter-
7 state commerce, and directly burdens on such commerce.

8 Again, it is the conditions that are being focused
9 on. It is not the sanctions. It is not the fact that one is
10 being barred from the courthouse door. It is the fact that
11 one is being conditioned to become registered, become
12 licensed within the state in order to transact that inter-
13 state business.

14 And even though the courts found, and we believe
15 rightfully found, that there is a per se violation here,
16 even if one were to apply the test, the balancing test of
17 Pike versus Bruce Church, it is our belief, as we have
18 already set out, that that test clearly indicates that there
19 has been a burden upon interstate commerce, because of
20 the fact that one must weigh the consequences, and the only
21 effect as far as the state goes, the state interest that has
22 been established here, is that which this Court found in
23 Searle, which is the fact that there is a certain interest
24 in having one served or be able to be served within the
25 state.

1 However, some of which I have already touched upon,
2 the effect upon interstate commerce here is great, because
3 of the fact it will subject a corporation to the juris-
4 diction of potentially lawsuits within all 50 states if all
5 50 states should choose to enact similar statutes such as
6 the State of Ohio has done.

7 And the effects on interstate commerce that we
8 noted in our brief, this case is a construction of --

9 QUESTION: Well, it doesn't subject you to suit.
10 It just means that you can be served in a state. You
11 haven't got the --

12 MR. BORNSTEIN: It could submit you to juris-
13 diction within the state if someone should choose to sue
14 you there.

15 QUESTION: Yes, well, if they can find you there.

16 MR. BORNSTEIN: But if you have been forced to
17 become registered and have an agent there then obviously --

18 QUESTION: Well, yes, but you haven't been
19 forced to do that. The only thing that requires you to
20 register here is, you want the benefit of the statute of
21 limitations.

22 MR. BORNSTEIN: That is correct, but what they've
23 done is, they've taken --

24 QUESTION: Well, suppose you don't register.

25 MR. BORNSTEIN: If you don't register --

1 QUESTION: If nobody can sue, if nobody can get
2 service on you, why, you are not really at much risk.

3 MR. BORNSTEIN: Well, except the problem is, the
4 statute as drafted allows you to remain liable in perpetuity,
5 and if you are a corporation engaged in interstate
6 commerce, the odds are that they eventually will find
7 you, and they could find you in 50 years or just choose to
8 wait 50 years to find you, or to serve you, and then you
9 would become subject to the jurisdiction of that court
10 because there is no type of time limitation set forth in
11 this at all. This statute is as broad as could be.

12 QUESTION: And I suppose if they find out they
13 could use the longarm statute against you you couldn't get
14 the statute of limitations either.

15 MR. BORNSTEIN: Unfortunately, you don't have the
16 benefit of that, and therefore even though they could serve
17 you under longarm they could choose to wait 10, 20, 30, or
18 40 years, and the effects, as we point out, this is a
19 construction case. I mean there are bonding companies,
20 surety bonding companies, insurance companies that are
21 involved in cases such as this, and what would the effect
22 be if this statute were to be upheld and the principles were
23 to be liable in perpetuity? You wouldn't find surety
24 companies or bonding companies that are willing to
25 undertake that kind of liability if their principal could be

1 sued in 50 years. Who is going to even be around to know
2 that the case was about? What kind of witnesses will they
3 have? And how could these companies go ahead and undertake
4 this kind of liability when --

5 QUESTION: The plaintiff might be pretty old,
6 too.

7 MR. BORNSTEIN: Definitely. If they -- if the
8 insurance companies or bonding companies themselves would be
9 forced to be defending these cases potentially in myriad
10 states throughout the country, they wouldn't be willing to
11 bond these and these interstate corporations would be unable
12 to come within states such as Ohio and engage in their
13 interstate business.

14 And the other, the last part of the Pike versus
15 Bruce Church test is the fact that the statute has to be
16 narrow, it has to be as narrow as could be, and in fact
17 this statute is the exact opposite. It is as broad as
18 possible. It states that it is tolled forever. There is no
19 time limitation. There is no rational relationship at all
20 between the tolling and how long it takes to find a
21 defendant.

22 So that if it only takes a year they can wait
23 50 years, as we said, and in fact even if they know where
24 the defendant is because of this anachronistic
25 interpretation in Ohio, as Justice White pointed out,

1 knowing that longarm jurisdiction will not give a company
2 the protection of the statute of limitations, they can choose
3 to wait. Even though they have the address and they know
4 where they are, they can just choose to wait.

5 QUESTION: Is there any practical motive that
6 might impel them to wait, as you point out?

7 MR. BORNSTEIN: Well, it could very possibly be,
8 if there is a younger plaintiff possibly, but it is often
9 times more difficult for a defendant to defend if there is
10 not someone there directly on point that can testify to what
11 happened, and because of the fact that the burden is more on
12 the defendant in that kind of suit than it is on the
13 plaintiff from the standpoint of trying to have someone
14 there who is physically, you know, in existence at that
15 time, and it might be the type of thing almost like a choice
16 of forum, where depending on the situation there might be in
17 particular instances particular reasons. It might be that
18 the foreman on the job is an older person, and there might be
19 a personal injury type case or something, and they are hoping
20 that the person might not be around if they wait a long
21 period of time.

22 QUESTION: But what usually happens is just the
23 opposite. It is usually the defendant who is hiding, not
24 the plaintiff who is waiting 50 years. It is usually just the
25 opposite. And this is a statute to meet that problem.

1 Now, it applies evenhandedly, and we can't under the
2 constitution grant an exemption to the citizens of Ohio,
3 for example, if a citizen of Ohio, even if he is reachable
4 by longarm, but he takes off, and he is not there, and
5 can't be served, the statute will be tolled.

6 You are asking us to give special benefits to
7 interstate companies, even though citizens in Ohio can be
8 subjected to this dog in the manger process of somebody
9 waiting 50 years, we have to give interstate companies an
10 exemption from it. Why should we do that?

11 MR. BORNSTEIN: I disagree that it's evenhanded.
12 I think that it's grossly discriminatory, because of the
13 fact that it's only interstate corporations, which under
14 the statute are compelled in order to obtain this benefit
15 to appoint a statutory agent and become subject to the
16 general jurisdiction of the courts of the State of Ohio,

17 QUESTION: Don't you want to just reverse the
18 discrimination? You would not be striking down this
19 statute for Ohio residents. It would continue to apply
20 to them, wouldn't it?

21 MR. BORNSTEIN: But it would not require them to
22 become subject to the general jurisdiction of the courts
23 of Ohio to appoint an agent in order to do that. A person --
24 this is part of the distinction between the fact a person
25 has physical presence. A corporation is a legal fiction.

1 It doesn't have physical presence. It does business.
2 That's why most states except for Ohio state that if you are
3 subject to longarm jurisdiction you get the benefit of a
4 statute such as this. Interstate corporations are unique
5 in this aspect, because of the fact the only way they can
6 do it is to appoint a statutory agent and therefore become
7 subject to the general jurisdiction, and a person, an Ohio
8 resident does not have that problem, is not forced into that
9 dilemma or that Hobson's choice.

10 As far as the letters from the Ohio Secretary of
11 State which were referenced by Mr. Crowley, quite to the
12 contrary, as far as the issue of whether or not there could
13 have just been some type of designation with the Secretary
14 of State, the letters are not different. The bottom line
15 of both letters is exactly the same, and that's because
16 of the fact the second letter, the December letter, Patricia
17 Mell stated that in the general course of business the Ohio
18 Secretary of State would not, would not recognize nor accept
19 a designation of agents from an unlicensed foreign
20 corporation, which also indicates as far as the previous
21 questions, is there any indication that a corporation can
22 somehow otherwise appoint an agent, this indicates, no, it
23 can't, because the Ohio Secretary of State themselves
24 has come out and said that you can't, we won't recognize it,
25 we won't even allow it to be filed.

1 The only way for a company to file this with us
2 is to first become licensed, and the previous letter, from
3 September of 1983 came right out and stated that they will
4 not accept for filing a designation of statutory agent
5 for an unlicensed foreign corporation, and therefore there
6 really is not any distinction between the letters except
7 for some speculative language that then followed in that
8 letter about what happened if there might be, might be some
9 investigation.

10 There's no guidelines for the investigation, no
11 type of format to do it, what the parameters of it were,
12 and in fact, looking at the bottom line, there was not even
13 a statement that if somehow they would comply with the
14 investigation that the Secretary of State would even ever
15 allow or recognize that registration or that designation.

16 And in fact the Court of Appeals looking at it
17 came out and correctly stated that the argument was highly
18 speculative and devoid of any statutory support. There was
19 no statutory support at all. Even that of the letters
20 which they relied upon which were not even filed in this
21 case but instead in the companion case of Copley versus
22 Heil-Quaker.

23 As far as the question of retroactivity, I
24 haven't heard any real valid excuses here today nor have I
25 at any point in time as to why this wasn't raised. They

1 claim that they know that they could have raised it at any
2 point in time. As we have stated all along, retroactivity
3 is not a new or unique issue. It is something that the
4 issue has been around for years and years and years. I
5 made a choice. They looked at it, and they decided, they
6 claimed, based upon the initial Coons case, that they
7 couldn't win, and therefore they chose not to raise it.
8 They didn't raise it in the District Court. They didn't
9 raise it in the Sixth Circuit Court of Appeals.

10 They only raised it after the Coons court in a
11 rehearing before the Supreme Court found that it would only
12 be applied prospectively. The Sixth Circuit Court of Appeals
13 found that -- they waived it. It was not even raised, in
14 fact, in their opening brief in the Sixth Circuit. It was
15 only in their reply brief, and the same excuse they gave
16 then is the same one they gave now, which is simply the
17 fact, we made a choice, but Coons II came along and we
18 realized now that we might have another argument.

19 Coons II, as we set forth in our brief, I believe,
20 is a poorly rationalized decision. I believe that under the
21 cases that we've cited that it would be patently unfair,
22 besides the fact that they've waived it, to deny Midwesco
23 the fruit of its labor. I believe that it would have a
24 tremendous impact upon the legal profession if one could not
25 obtain the benefits of their own work, and if the clients

1 could not do that, and in fact I haven't seen any cases
2 cited by Bendix indicating, except the Coons II case, that
3 one is not entitled to the application in their own case
4 of a decision of unconstitutionality.

5 First of all, it would render the decision
6 basically moot, which this Court has held it can't do on a
7 constitutional issue, and more importantly is the fact that
8 in all the cases, including Chevron, which they are so
9 fond of citing, Chevron involved the application of the
10 holding in another case, in the Rodrigue versus Aetna
11 Casualty, and interestingly enough, in that case, in
12 Rodrigue, the Court held that the plaintiffs in that case
13 would get the benefit of the holding. The case was
14 remanded back down, and there are no cases cited where a
15 party is not entitled to the fruits of its work, and I
16 believe it would be inequitable, to say the least, to deny
17 Midwesco the benefits, and the benefits which I believe
18 it has conferred upon the people of the State of Ohio
19 as well as interstate corporations, who are always the
20 beneficiaries of constitutional holdings.

21 I believe that we have established that this is
22 a forced licensure provision, and that it is the conditions
23 which this Court has to look at. It has to look at that
24 because of the whole theory behind the commerce clause,
25 the theory behind the fact that the states are not separate

1 economic unit, the fact that you cannot stop interstate
2 corporations from going into and engaging in business in
3 the various states, and I believe for that reason that this
4 Court must affirm the holding of the Court of Appeals.

5 Thank you.
6 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
7 Bornstein.

8 Mr. Crowley, you have two minutes remaining.

9 ORAL ARGUMENT OF NOEL C. CROWLEY, ESQUIRE

10 ON BEHALF OF THE APPELLANT - REBUTTAL

11 MR. CROWLEY: Thank you.

12 In describing the unthinkability of open-ended
13 liabilities that last in perpetuity, let's not forget the
14 defense of laches, and in that regard we acknowledge that
15 Midwesco cites certain cases to the effect that the doctrine
16 doesn't apply or doesn't apply in its normal way in the
17 State of Ohio.

18 He cites cases, and we will concede that the
19 cases are supportive of what he says. He is just as clear
20 that the cases are demonstrably wrong. The true state of law
21 in the State of Ohio is in the cases we site on Page 20 of
22 our brief, and they are more recent cases. They are more
23 authoritative because they come from the Supreme Court of
24 Ohio, and they make it clear that the doctrine of laches
25 does obtain.

1 Even if it were open ended and permanent, if the
2 company is engaged entirely in interstate commerce, has no
3 minimal contacts with the state, why should that be
4 unsatisfactory to them? They are never going to be
5 vulnerable to suit anywhere in the State of Ohio. There is
6 nothing parochial about this state. There is nothing
7 protectionist about it. It provides for evenhanded
8 treatment.

9 What if it be the fact that there is no statute
10 in Ohio that provides for an alternative method of service?
11 Shouldn't it be just as relevant that if under the practice,
12 as the Secretary of State in Ohio says is the case, there are
13 circumstances under which they would take, and the whole
14 message is on Page 28 of our brief, the relevant message from
15 that office, what does it matter that there may not be a
16 statute if it is the practice of the State of Ohio to
17 accept designations of agency apart from the licensure
18 process?

19 That letter does not --

20 QUESTION: (Inaudible) suit at any time.

21 MR. CROWLEY: Not necessarily. The letter
22 doesn't -- there are lots of questions one could think of
23 that we wish were answered by the letter. Our only --

24 QUESTION: Well, an agent -- he is saying you
25 can appoint an agent for service of process.

1 MR. CROWLEY: Nothing in the letter to suggest
2 that it couldn't be a limited designation, couldn't identify
3 the class or category of claims and of people in whose
4 favor it might operate.

5 QUESTION: Among the questions you wish he had
6 answered is whether he would accept it. All he said is
7 that he could.

8 MR. CROWLEY: No, he said -- I understand --

9 QUESTION: I think that's the bottom line, that
10 he could.

11 MR. CROWLEY: I understand that they said on Page
12 28, on our Page 28 that there is a situation in which they
13 would do it. This office -- well, this office could
14 accept without requiring the corporation to obtain a license.
15 That implies to me that there are circumstances in which
16 they would do it. We wish we knew more about the
17 circumstances. It should have been enough to withstand
18 summary judgment and it wasn't.

19 QUESTION: Thank you, Mr. Crowley.

20 The case is submitted.

21 (Whereupon, at 2:45 o'clock p.m., the case in
22 the above-entitled matter was submitted.)
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DOCKET NUMBER: 87-367
CASE TITLE: Bendix v. Midwesco
HEARING DATE: March 23, 1988
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States.

Date: 3/29/88

Margaret Daly

Official Reporter

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