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Masters Group Int'l, Inc. v. Comerica Bank: Big Bank Loans, the Economic Crisis, Choice-of-law, Impleader, Statute of Frauds, Parol Evidence, Collusion, and the Constitutionality of Montana's Punitive Damages Statute . . . All Bundled into One Case!

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**PRECAP: MASTERS GROUP INT'L, INC. V. COMERICA BANK:
BIG BANK LOANS, THE ECONOMIC CRISIS, CHOICE-OF-
LAW, IMPLEADER, STATUTE OF FRAUDS, PAROL
EVIDENCE, COLLUSION, AND THE CONSTITUTIONALITY
OF MONTANA'S PUNITIVE DAMAGES STATUTE . . . ALL
BUNDLED INTO ONE CASE!**

Paige Griffith

No. DA 14-0113

Montana Supreme Court

Oral Argument: Friday, September 26, 2014, from 8:15am to 10:15am, at the Huntley Convention Center in Big Sky, Montana, in conjunction with the annual meeting of the State Bar of Montana.

I. INTRODUCTION

Masters Group International, Inc. (Masters), Third-Party Plaintiff and Appellee, and Comerica Bank (Comerica), Third-Party Defendant and Appellant dispute over a contract. Comerica argues that a proposed forbearance agreement was not a valid contract and Comerica was not liable to Masters under the agreement. Masters urges the Court to adopt the district court's determination of a valid contract, and uphold all jury awards.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2006, Comerica, a Michigan bank, loaned Masters, a Delaware Corporation, \$9 million to purchase Masters UK, a United Kingdom office furniture and equipment supplier.¹ Masters made plans to move the company headquarters to Butte, Montana. Later that year, the Butte Local Development Corporation (BLDC) loaned Masters \$200,000 to build its facility. Masters was never able to begin business in Butte due to financial difficulties. In 2008, the economy crashed and Masters defaulted on the Comerica loan. Various forbearance proposals and

¹ The following facts presented here are drawn from various documents: (i) Appellant's Br., *Masters Group Int'l, Inc. v. Comerica Bank* (Mont. June 9, 2014) (No. DA 14-0113), available at <http://perma.cc/7LHT-YXEB>; (ii) Appellee's Br., *Masters Group Int'l, Inc. v. Comerica Bank* (Mont. July 10, 2014) (No. DA 14-0113), available at <http://perma.cc/P4GC-ZTLE>; (iii) Appellant's Reply Br., *Masters Group Int'l, Inc. v. Comerica Bank* (Mont. July 23, 2014) (No. DA 14-0113), available at <http://perma.cc/XDM9-FQD5>; and (iv) Br. of Amicus Curiae Am. Bankers Assn. in Support of Reversal, *Masters Group Int'l, Inc. v. Comerica Bank* (Mont. June 6, 2014) (No. DA 14-0113), available at <http://perma.cc/K2S8-FZPL>.

agreements ensued throughout the year between the parties. Masters also defaulted on its loan to BLDC.

During this time, the economic crisis hit American banks. Congress enacted the Troubled Asset Relief Program (TARP) in 2008 to strengthen the economy's financial sector.² Comerica received \$2.25 billion in TARP funds, and developed a Special Handling Group to help troubled companies like Masters. However, Masters never received relief and never emerged from its financial troubles.

BLDC initiated an action to collect on its loan made to Masters. Subsequently, BLDC and Masters entered an agreement whereby Masters admitted liability for its debt to BLDC and agreed that BLDC would be paid out of the proceeds of Masters' suit against Comerica. BLDC sued Masters in Montana for breach of contract. Based off their loan transactions, Masters impleaded Comerica as a third-party defendant alleging breach of contract, breach of the implied covenant, constructive fraud, deceit, wrongful offset, and interference with prospective economic opportunity. Masters also requested punitive damages. Comerica moved to sever the complaint, but the district court never ruled on the motion.³ Comerica petitioned twice for writ of supervisory control to the Montana Supreme Court to find error in the district court applying the substantive law of Montana rather than Michigan. The Court denied both writs, holding that "because the determination of the appropriate choice of law involves a weighing of the facts and contracts between and among the parties, it does not present a 'purely legal question.'"⁴

At trial, the district court found that Montana law governs for two reasons: Comerica waived its choice-of-law argument, and Montana has the most significant relationship to the Comerica/Masters dispute. The court further held that the December 12, 2008, forbearance proposal was a contract. The jury awarded BLDC its full amount, \$244,000, and awarded Masters \$5,433,910 for wrongful offset, \$19,603,683 lost future profits, \$16,500,000 for other consequential damages, and \$10,500,000 in punitive damages. In the post-verdict review of the punitive damages, the district court held the punitive damage statute unconstitutional,⁵ and upheld the punitive damage award.

² 12 U.S.C. §§ 5211–5241 (2014).

³ Pursuant to Montana Second Judicial District Rule 19, if a motion is not ruled upon within 45 days of the date the motion was filed, the motion is deemed denied. Second Jud. Dist. Rules Butte-Silverbow Co., courts.mt.gov, <http://perma.cc/5U68-ABV3> (last visited Sept. 22, 2014).

⁴ *Comerica Bank v. Mont. Second Jud. Dist. Ct.*, No. DV 2011-372 (Mont. Dec. 30, 2013), available at <http://perma.cc/F6MU-ZSUV> (holding that under Mont. R. App. P. 14(3), a writ of supervisory control is an extraordinary remedy which is sometimes justified when the case involves purely legal questions or other emergency factors exist making the normal appeal process inadequate).

⁵ Appellee's Br., *supra* n. 1, at 3. Mont. Code Ann. § 27-1-220(3)(2013) limits an award for punitive damages to the lesser of \$10 million or 3% of a defendant's net worth.

On February 19, 2014, Comerica appealed to the Montana Supreme Court.⁶ On April 7, 2014, Masters cross-appealed, challenging the punitive damages statute's constitutionality.⁷ On April 9, 2014, Comerica filed an Amended Notice of Appeal. The two parties fought over the amended notice of appeal.⁸ The Court called this "an inauspicious beginning to these appellate proceedings," and encouraged the parties to be civil.⁹ After all briefs were filed, including five amicus briefs, the Court set oral argument. The Court also ordered the parties to narrow the issues of the oral argument to the following:

1. Whether the judgment should be reversed because the District Court failed to grant Comerica's motion to sever the third party complaint.
2. Assuming for the sake of argument that Michigan law should have been applied to the contract claims, whether it also should have applied to the tort and implied covenant claims and what effect, if any, that would have had on resolution of those claims.
3. Whether Comerica was entitled to summary judgment on its claim that the forbearance agreement was not an enforceable contract.
4. Whether the cap on punitive damages imposed by § 27-1-220(3), MCA, is unconstitutional.¹⁰

III. ARGUMENTS FROM THE PARTIES' BRIEFS

A. Comerica's arguments on appeal¹¹

⁶ Not. of App., *Butte Local Dev. Corp. v. Masters Group Int'l, Inc.* (Feb. 19, 2014) (No. DA 14-0113), available at <http://perma.cc/DRP6-RJJA>.

⁷ Not. of Cross-App., *Masters Group Int'l, Inc. v. Comerica Bank* (Apr. 7, 2014) (No. DA 14-0113), available at <http://perma.cc/F2S5-MHUW>. This cross-appeal was later voluntarily dismissed.

⁸ Pursuant to Rule 4, Mont. R. App. P., if a Notice of Appeal is filed before disposition of such motions, the Notice shall be treated as filed on the date the district court enters an order relative to the motions or they are deemed denied. During the appellate process, Comerica tried to amend its appeal, but the Court, quite sternly, denied Comerica's notice to amend its appeal and concluded that Comerica's initial notice of appeal was viable and operative. The Court applied the district court judgment, entered on April 4, 2014, as the final date of appeal. See Or. Striking Amend. Not. of App. and Revising Caption, *Masters Group Int'l, Inc. v. Comerica Bank* (Mont. April 29, 2014) (No. DA 14-0113), available at <http://perma.cc/SXT6-J7WC>.

⁹ *Id.* at 2.

¹⁰ Or. Narrowing Oral Argument Issues, *Masters Group Int'l, Inc. v. Comerica Bank* (Mont. Aug. 27, 2014) (No. DA 14-0113), available at: <http://perma.cc/VV79-QMYW> This precap focuses only on those issues.

¹¹ All arguments come from the Appellant's Br. & Appellant's Reply Br., *supra* n. 1.

1. Severance

Comerica argues that BLDC and Masters colluded to implead Comerica as a third-party defendant. Comerica believes this collusion led to an unnecessary trial. It believes the district court should have granted its motion to sever the complaints. Severance would have allowed Comerica to pay BLDC for the loan without extensive litigation. Further, the BLDC/Masters contract had no language tying it to the Comerica loan. Comerica will try to convince the Court that the BLDC/Masters loan agreement was an unconditional guarantee of payment.

2. Choice-of-law

Comerica contends throughout its brief that the Comerica/Masters loan agreements specified Michigan as governing law. Comerica argues that it filed timely motions relating to the choice-of-law issue, and Masters misrepresents this timing in its brief. Thus, the choice-of-law issue is not time barred. The Court misapplied Montana's choice-of-law rule, which is the law of the state "chosen by the parties to govern."¹² Because Michigan law does not recognize the claim of breach of implied covenant of good faith and fair dealing, the outcome of this case would have been significantly different. Also, under Michigan law, punitive damages are not allowed for tortious interference.

3. Forbearance Agreement

The district court erred in denying Comerica's summary judgment motion. Comerica contends that the proposed forbearance agreement of December 2008 was conditional on signatures by Masters and all guarantors and other terms. That "contract" is invalid because these conditions were not fully met. Comerica believes the issue at trial should have been: "Was Comerica contractually obligated to forbear from calling its loan collateral?"¹³ Comerica's answer is no, because the agreement was in place merely to provide time for Masters to secure alternative financing.

4. Punitive Damages

This is an inappropriate case for punitive damages because it is a contracts case, not a torts case. Comerica had a legal and contractual right to foreclose on its collateral, and Masters did not adequately

¹² *Id.* at *12 (citing *Tenas v. Progressive Preferred Ins. Co.*, 197 P.3d 990, 995 (Mont. 2008); *San Diego Gas & Elec. Co. v. Gilbert*, 329 P.3d 1264, 1267–1268 (Mont. 2014); Restatement (Second) of Conflict of Laws § 187 (1971)).

¹³ *Id.* at **13–14.

demonstrate any actual fraud on behalf of Comerica. Also, Comerica is allowed to incorporate the Attorney General's amicus brief urging the Court to uphold the constitutionality of the punitive damage statute (see Attorney General's arguments below). The Attorney General argues for a rational basis test to apply.

*B. Masters' arguments on appeal*¹⁴

1. Severance

The district court properly denied Comerica's motion to sever. Even though the court did not rule on the motion, pursuant to Montana Second Judicial District Rule 19, after 45 days the motion is deemed denied. Further, because Comerica remained in contact with Masters and BLDC about Masters' efforts in Butte, the claims were connected.

2. Choice-of-law

Comerica failed to raise the issue of choice-of-law in a timely manner. Comerica did not plead choice-of-law as an affirmative defense. Comerica waited nearly two years to bring this issue up in a motion for summary judgment. Further, Comerica itself offered Montana jury instructions and never objected to any instructions based on choice-of-law. Also, Montana choice-of-law rules necessitated application of Montana law because Montana had a materially greater interest in the case, since Comerica knew Masters intended to move its headquarters to Butte. There was no specific choice-of-law provision in the agreement and the agreement was executed in various places throughout the U.S. and U.K.

3. Forbearance Agreement

Masters argues that Comerica breached its forbearance agreement and illegally seized more than \$10 million of Masters' assets, leading to its demise locally and globally. Comerica gave notice of intentions to Masters to renew and increase the loan to meet Masters' needs in expanding the business, which Masters relied upon in not pursuing other financing options. Comerica also knew that Masters would not be able to pay back the loan. Ultimately, Masters executed and substantially performed the agreement in reliance upon misrepresentations and non-disclosures by Comerica. Additionally, since the parties did not argue over the construction or interpretation of the forbearance agreement at trial, and rather were arguing over whether various conditions had been

¹⁴ All arguments come from the Appellee's Br., *supra* n. 1.

met, Comerica waived such conditions on appeal. Masters even quotes Comerica's counsel stating, "It's better argued to the jury whether or not there was a contract."¹⁵ Thus, the forbearance agreement was a valid contract, superseded all prior loan documents, and allowed Masters until mid-February 2009 to obtain another lender. Masters argues that the written contract does not fall under the statute of frauds, and Masters merely asked the jury to hold Comerica accountable to the agreement, which is not considered parol evidence. Finally, Comerica's counsel never objected to jury instructions on any contract issue.

4. Punitive Damages

Comerica waived the punitive damage cap because it violated the discovery rules, the court's order to compel, and the statutory requirement to prove its net worth. The verdict's \$500,000 in excess of the cap is the only amount at issue, not the entire verdict. Comerica acted contrary to reasonable commercial banking standards and should have used the TARP funds it received to assist Masters.¹⁶ This warrants punishment. The fundamental rights to a jury trial, equal protection, access to courts, and due process cannot be violated by arbitrary limitations unrelated to the facts of a case or financial situation of a defendant. The court should use a strict scrutiny test when reviewing challenges to punitive damages. Also, Comerica improperly incorporates the Attorney General's amicus brief, instead of presenting the constitutionality of the punitive damage statute in their own brief.

C. *The State of Montana's Amici Argument*

The Attorney General argues that because punitive damages are not meant to compensate the injured party, and are merely a form of punishment, the legislature may limit or restrict their availability.¹⁷ The Attorney General believes the legislature is the proper place for policy debates on punitive damages, not the judiciary. The appropriate standard of review for punitive damages is the rational basis test and that test is satisfied. The State of Montana will participate in oral argument.

¹⁵ *Id.* at 35.

¹⁶ Masters argues that Comerica received \$2.25 billion in TARP funds, that it formed a Special Handling Group to help troubled companies like Masters, that 98% of the troubled companies emerged from their troubles, and that Masters never knew of the opportunity.

¹⁷ Attorney General's *Amicus Curiae* Br., *Masters Group Int'l, Inc. v. Comerica Bank* (Mont. June 12, 2014) (No. DA 14-0113), available at <http://perma.cc/S5QN-9E4H>.

*D. Montana Trial Lawyers Association Amici Argument*¹⁸

MTLA supports Masters, and argues Mont. Code Ann. § 27-1-220(3) is unconstitutional because it violates the right to a jury trial under Mont. Const. art. II, § 26. MTLA urges that the framers of the United States Constitution, who adopted the Seventh Amendment, intended for the jury to be the sole assessor of punitive damages. The MTLA will participate at oral argument.

IV. ANALYSIS

If the Court agrees that there is a direct link from the BLDC/Masters loan to the Masters/Comerica loan, this issue of severance will likely be discussed quickly at oral argument. The choice-of-law issue might take up a significant portion of the argument, but it really should not. Since Comerica believes that the district court erred in applying Montana law, it will be Masters' burden to prove that Michigan law is improper. This will be a fact-intensive fight, but the Court will likely give deference to the lower court on the issue of choice-of-law. The contract issue in relation to the forbearance agreement will also not likely take up much time. It is clear that the agreement was a valid contract: offer, acceptance, and consideration are accounted for and both parties acted in furtherance of the agreement. For Comerica to argue that it is not—based off one unsigned guarantor—is a bit far-fetched.

The biggest issue for the Court is the punitive damages statute. With various amici briefs filed and stipulations for the State and MTLA to appear for oral argument, a large portion of the time will be spent arguing the constitutionality of the statute. Masters makes a good point about the constitutional issue: the right to jury trial, equal protection, and due process must be honored. Yet, the Attorney General and Comerica also offer engaging, contrary arguments: there is no constitutional right to punitive damages and the quasi-criminal nature of punitive damages allows the legislature to restrict these damages as it sees fit. Given that the Court allowed the State and MTLA to present at oral argument, the Court is likely wavering on the outcome. However, this author does not think the Court is willing to deem the entire statute unconstitutional here, especially when this case is dealing with a mere \$500,000 over the statute's limit.

Finally, both parties use colorful language in their briefs to jab at their adversary. Comerica states "Masters continues its jury tactics,

¹⁸ Mont. Tr. Lawyers Assn. *Amicus Curiae Br., Masters Group Int'l, Inc. v. Comerica Bank* (Mont. July 31, 2014) (No. DA 14-0113), available at <http://perma.cc/7AHP-8G43>.

peppering its brief with alleged ‘bad acts.’” Masters continually repeats that Comerica falsifies the facts and brings numerous new arguments up on appeal. Bearing this in mind, the Court should wrangle in these remarks at oral argument in effort to keep respect amongst the parties and keep the true legal issues at the forefront.

Lower Court: Montana Second Judicial District Court, Silver Bow County, Cause No. DV-2011-372; Honorable Kurt Krueger.

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