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Masters Group Int'l, Inc. v. Comerica Bank: Condition Precedent for Contract Formation or Waiver?

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**RECAP: MASTERS GROUP INT’L, INC. V. COMERICA BANK;
CONDITION PRECEDENT FOR CONTRACT FORMATION
OR WAIVER?**

Paige Griffith

No. DA 14-0113
Montana Supreme Court

Oral Argument: Friday, September 26, 2014, from 8:15a.m. to 10:15a.m., at the Huntley Convention Center in Big Sky, Montana, in conjunction with the annual meeting of the State Bar of Montana. The matter was taken under advisement at 10:29 a.m.

I. JAMES H. GOETZ FOR PETITIONER

Mr. Goetz started, and spent the majority of Comerica’s time, arguing that there was no enforceable contract because the forbearance agreement was conditional upon all guarantors’ signatures, and one guarantor, Dr. Michael Vlahos, did not sign the agreement.

¹ Further, Mr. Goetz argued that Comerica never waived this condition because the agreement specifically stated that a waiver must be reduced to writing. Questions from the Justices seemed to indicate that the Court believed Comerica’s implementation on part of the forbearance agreement was enough to constitute waiver of the condition. Mr. Goetz argued otherwise, highlighting that under the statute of frauds principle there is absolutely no waiver absent express agreement.

Justice McKinnon then asked, “If you assume that the forbearance agreement was not binding, then what are you left with?” Mr. Goetz answered the question using Michigan choice of law. He agreed with Justice McKinnon that without the contract claims the only claims left would be the tort claims of constructive fraud, deceit, and interference with economic advantage. However, under Michigan law, these tort claims are unavailable. Justice Baker then chimed in. She did her homework and brought up two Michigan cases: one that barred tort claims, and another that did not. Hence, Michigan law was unsettled on this area and to Justice Baker, and potentially the entire Court, it is very possible that there would have been no substantially different outcome if the case was under Michigan law. Moreover, under Michigan law, the statute of limitations (SOL) for the tort claims was 6 years, versus Montana’s two years. Mr. Goetz argued that Masters certainly knew by

¹ Oral Argument Audiofile, *Masters Group Int’l, Inc. v. Comerica*, (link to audio file) (Mont. September 26, 2014) (No. DA 14-0113).

the time of the financial sweep on December 31, 2008, that it was injured. Thus, this operative discovery event started the time clock for the SOL and under Montana law this tort claim was time barred. Interestingly, not only was Mr. Goetz bouncing between Montana and Michigan law, but Justice McKinnon also asked if his SOL argument was even brought up at trial. Based on the Justices' questions, the Court seemed skeptical on Comerica's preservation of the SOL argument.

II. WARD TALEFF FOR RESPONDENT

Mr. Taleff began stating the three faulty theories of Comerica: (1) Comerica believes it was inappropriate to try the case in Montana, but never challenged this venue issue at the district level; (2) the vast majority of Comerica's arguments on appeal were never adequately raised in district court, were untimely, or were on a different basis; and (3) Comerica was trying to turn the burden of proof on its head and make Masters re-prove all the issues of fact that the 12 person jury unanimously found in favor of Masters. Mr. Taleff argued that Comerica was deceptively changing the undisputed facts. In the words of Senator Daniel Patrick Moynihan, Mr. Taleff quoted, "Everyone is entitled to his own opinion, but not his own facts." Since the purpose of trial is for the jury to establish the facts of the case, Masters urged the Court to defer to the trial court's determination of the facts.

Mr. Taleff also turned to the issue of choice of law, stressing that it is Comerica's burden to show that Michigan law would have had a substantially different outcome, which Comerica never proved. Justice Baker took issue with Masters' use of the four-prong-most-significant-relationship test to determine choice of law. Unfortunately, Mr. Taleff was unable to answer the question thoroughly. He explained that various Montana contracts were unable to be negotiated and this created an economic loss, but he went off topic on a jurisdictional/change of venue tangent. Nonetheless, Mr. Taleff made valid arguments on the nonissue with choice of law—Michigan law and Montana law are essentially the same with the exception of deceit. Even more to his favor, Mr. Taleff pointed out that Michigan law allows punitive damages without a cap.

Mr. Taleff eloquently summed up his argument by quoting Justice Rice, "If it looks like a duck, walks like a duck, and quacks like a duck, it is a duck, even if it holds a paper saying 'I'm a chicken.'" Thus, the forbearance agreement should be held as a viable contract under the law.

III. PUNITIVE DAMAGES

Mr. Mattioli, for the State of Montana, argued that punitive damages are not meant to vindicate any personal right of a plaintiff. Instead, punitives serve broader societal interests in punishing wrongdoers and deterring future misconduct. Mr. Mattioli also argued that the Court must affirm its prior decisions and continue to uphold the punitive cap. He specifically referred to *Meech v. Hillhaven West, Inc.*, where the Court upheld the statute's constitutionality by declaring it rationally related to a legitimate state interest. However, Lawrence Anderson, arguing for the Montana Trial Lawyers Association, asked the Court to revisit *Meech*, and interpret the punitive cap as jury nullification in violation of the Seventh Amendment. Mr. Anderson stressed to the Court the importance of a trial by jury and advocated that the post-verdict review of punitive damages—without the need for an arbitrary legislative cap—sufficiently met due process standards.

IV. PREDICTION

The majority of the court seemed receptive to Masters' argument that Comerica waived issues addressed on appeal that were not brought up at trial. So, if the Court defers to the facts of the case decided at trial court, thus not allowing Comerica to raise new issues on appeal, and agrees that no substantially different outcome would have occurred under Michigan law, the decision will tip in favor of Masters.

While the punitive damages issue was a hot topic pre-oral argument, Masters and Comerica both passed the issue to the Amicus presenters. But the Court did not seem particularly interested in their arguments. In fact, only 14 minutes of the oral argument was spent on the punitive damages issue, while the remainder of the 90 minutes was spent on the contract and choice of law issues. Chief Justice McGrath's question on major, highly profitable corporations and the minimal punishment a \$10 million punitive cap will have on these corporations, seems to point this constitutional punitive issue at another up-and-coming appellate case to the Montana Supreme Court, *Olson v. Hyundai Motor Co.*, involving a jury award of \$240 million.² It is very possible the Court may wait until this case comes up on its docket before making any definite holding on the constitutionality of the punitive damages statute.

² *Olsen v. Hyundai Motor Co.*, No. DV 11-304, 2014 WL____, (Mont. Dist. Sept. 19, 2014).

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

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Attorney for Amicus, the State of Montana: Mark Mattioli, Chief Deputy Attorney General.

Attorney for Amicus, Montana Trial Lawyers Association: Lawrence A. Anderson, Attorney at Law, P.C., Great Falls, MT.