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Planning Litigation for the Lender: Lender Can Sue Out-of-State Borrower's Counsel in Lender's Home Jurisdiction

The work of commercial transaction counsel who represent borrowers can involve making representations and authoring opinion letters. Loan transaction counsel often work with lenders, borrowers, or collateral in other states. This is inevitable given the free flow of capital that is a feature of American commerce.

It is also inevitable that some loan transactions will be unsuccessful in the sense that the borrower will not pay the debt and the lender will sue to collect that debt. Usually, loan contracts have litigation venue clauses that control litigation based on those contracts – but, what happens in other situations? [\[1\]](#)

A recent Ohio case demonstrates how an out-of-state commercial lawyer's work can subject that lawyer to litigation in the lender's home state court. In *MJH Holdings Inc. v. Sims et al.*, 2019 WL 612949 (Summit Cty. App. Feb. 13, 2019) an Ohio based lender made a loan to a Nevada based borrower with property located in Texas. The borrower and related parties were represented in the loan transaction by a lawyer in Texas, Thomas Dickinson, Esq. and his law firm. As part of that representation, Dickinson provided an opinion letter to the lender concerning the lender's lien on collateral.

When the loan was not repaid, the lender sued the borrower and others including Dickinson alleging fraud, negligent misrepresentation and other claims. In response, Dickinson moved to dismiss the lender's complaint asserting that the Ohio Common Pleas Court lacked personal jurisdiction over a Texas lawyer. The trial court agreed and dismissed the lender's allegations against Dickinson. On appeal, the Summit County Court of Appeals reversed that decision holding that the United States Constitution and Ohio's Long Arm Statute gave an Ohio Common Pleas Court personal jurisdiction over Dickinson.[\[2\]](#)

Ohio's long-arm statute sets forth nine specific acts by a defendant which give rise to personal jurisdiction in an Ohio court over an out-of-state defendant. Ohio Rev. Code Section 2307.382.^[3] Ohio's statute grants jurisdiction over an out-of-state entity that is "transacting any business" in Ohio. O.R.C. Section 2307.382(A). In the *MJH Holdings Inc.* case, the appellate court cited an Ohio Supreme Court stating that "transacting" business in Ohio includes "to prosecute negotiations; to carry on business; to have dealings."

The appellate court's description of the lender and Dickinson's arguments make the loan transaction, in this case, seem very ordinary. The *MJH Holdings Inc.* court summarized the factual assertions as follows:

MJM [Lender] argues that the Dickinson defendants transacted business in Ohio by sending the opinion letter containing false statements to MJM in Ohio, by communicating via email with MJM and its counsel in Ohio, and by negotiating the terms of several agreements governed by Ohio law involving MJM, [and the loan parties]. The Dickinson defendants respond that they did not conduct any business in Ohio because they only provided legal services to [the borrower] in Texas—based upon Texas law and the only business relationship was between MJM and [the borrower].

Concerning specifically the allegedly negligent (or fraudulent) opinion letter, the appellate court noted that "The opinion letter also contains statements that it was prepared at the request of and for the sole benefit of MJM [lender] in relation to the loan transaction. Further, the opinion letter is on letterhead from the Dickinson law firm in Texas and is addressed to MJM in Ohio." These facts are common in loan transaction opinion letters.

Examining the evidence, the appellate court made note of these very routine facts:

The emails reflect attorney Dickinson was engaged with MJM's counsel in drafting and revising the various loan documents and the opinion letter. The opinion letter specifies that the Dickinson defendants "participated in the preparation and negotiation of the [s]ecurity [a]greement and

the other Loan Documents” identified as the loan agreement and the promissory note. There is also an email from attorney Dickinson forwarding the executed agreements to MJM’s counsel in Ohio.

Loan transaction documents routinely state that both lender and borrower had counsel and that each had an opportunity to participate in the negotiation and drafting of the loan documents. Under the MJM Holdings Inc. case, that common statement is an important part in showing that out-of-state counsel was transacting business in Ohio.

In conclusion, the appellate court said this:

While the evidence supports the Dickinson defendants’ position that 1) they have no physical presence in Ohio, 2) they did not represent MJM, 3) the underlying loan transaction was between Mr. Sims and MJM, and 4) it was MJM who requested the opinion letter, there nonetheless was evidence that the Dickinson defendants transacted business in Ohio.

For instance, the Dickinson defendants communicated by email with MJM’s counsel, wherein they conducted negotiations, drafted and revised the agreements and the opinion letter, and forwarded the executed agreements and opinion letter to Ohio. See [*Diversa, Inc.*, 1996 WL 200629, at *4](#). Also, the agreements [loan documents] were all based upon Ohio law, which affected the forum state, and the Dickinson Defendants had continuing duties following the execution of the agreements which connected them to Ohio. See [*Russian Collections, Ltd.*, 2009 WL 4016493, at *3](#). Further, it was alleged that the opinion letter contained false statements relative to the validity of the yacht lien. See [*Goldstein*, 70 Ohio St.3d at 237, 638 N.E.2d 541](#) (“[A]lleged dissemination of misleading financial information to Ohio investors” by a Florida accountant and accounting firm supported finding of transacting business in Ohio.).

Representing lenders as we prepare for litigation, I have reviewed many files created as loan transactions were negotiated and documented. Many of those files have loan documents and communications that would permit lender’s counsel to offer the

evidence described in the *MJM Holdings Inc* case. This leads me to conclude that many out-of-state lender's counsel might be found to be conducting business in Ohio if the *MJM Holdings Inc.* decision is followed by other courts. This can be an important consideration of lender's counsel's litigation planning includes claims based on theories other than the loan documents (said documents regularly have litigation venue clauses that bind the parties to those contracts).

Finally, the appellate court addressed the minimum contacts requirement of the United States Constitution. The court held that the borrower's counsel's actions were sufficient to give Ohio "specific jurisdiction" over Dickinson and his law firm.^[4] Addressing the specific jurisdiction test, the appellate court said:

In order to establish that specific jurisdiction is consistent with due process, the Ohio Supreme Court has adopted the following three-part test concerning a defendant's contacts with Ohio:

First, the defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Kauffman Racing Equip, LLC at ¶ 48–50, quoting *S. Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir.1968).

The first two prongs of the test address whether a defendant has " 'minimum contacts' with the forum[.]" while the last prong examines whether the "exercise of jurisdiction over the defendant comports with the ideas of 'fair play and substantial justice.' " *State ex rel. DeWine v. 9150 Group, L.P.*, 9th Dist. Summit No. 25939, 2012–Ohio–3339, 977 N.E.2d 112, ¶ 19.

For purposes of this blog post, I want to discuss only the requirement that out-of-state borrower's counsel "purposefully

avail" themselves of the "privilege of acting" in the forum state. From this language arises the famous test that an entity should "reasonably anticipate" being sued in the forum jurisdiction. As explained by the *MJM Holdings Inc.* court:

Purposeful availment considers whether " 'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' " *Burger King Corp. at 474, 105 S. Ct. 2174, quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L.Ed.2d 490 (1980).* This analysis is designed to prevent a defendant from being "haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts," *Burger King Corp. at 475, 105 S. Ct. 2174, quoting Keeton at 774, 104 S. Ct. 1473, or as the result "of the 'unilateral activity of another party or a third person.' "* *Burger King Corp. at 475, 105 S. Ct. 2174, quoting Helicopteros Nacionales de Columbia, S.A. at 417, 104 S. Ct. 1868.*

I feel very confident in saying that few borrower-representing lawyers expect to be hauled into court in the home jurisdiction of an out-of-state lender based on ordinary loan transaction activities that occur in one isolated transaction. Responding to this very argument by Dickinson, the appellate court said:

Assuming that the statements made in the opinion letter sent to MJM's counsel in Ohio were false, as alleged by MJM, the Dickinson defendants should have reasonably anticipated having to defend their actions in Ohio. See Resolution Trust Corp. v. Farmer, 836 F. Supp. 1123, 1126-1129 (E.D. Pa.1993) (A Georgia law firm was found to have purposely availed itself to the laws of Pennsylvania when it represented clients in loan transactions and issued opinion letters containing fraudulent misrepresentation on behalf of its clients to financial institutions in Pennsylvania.).[\[5\]](#)

Frankly, the *MJM Holdings Inc.* appellate court seemed to eviscerate the "purposefully availed" requirement as a separate test that plaintiff's counsel must meet when asserting personal jurisdiction over an out-of-state defendant. That court said:

In the case at bar, many of the same facts analyzed with regard to whether the Dickinson defendants were “transacting any business” in Ohio are also relevant to whether the Dickinson defendants purposefully availed themselves of the privilege of acting in Ohio. “Courts must examine the quality and nature of all the contacts a nonresident defendant makes with the forum during the course of the parties’ contractual relationship.” (Emphasis deleted.) [Barnabus Consulting Ltd., 2008-Ohio-3287, at ¶ 22](#), citing [Burger King Corp. at 479, 105 S. Ct. 2174](#).

If, in fact, the United States Constitution does not provide any greater protection from being hailed into Ohio State court than Ohio’s Long Arm Statute, then that statute really does extend Ohio court’s personal jurisdiction to the maximum extent permitted. But see, *Kauffman Racing Equipment v. Roberts*, 126 Ohio St. 81, 87 (2010) (“Ohio’s long-arm statute is not coterminous with due process. [Goldstein, 70 Ohio St.3d at 238, 638 N.E.2d 541, fn. 1](#).”)

Therefore, although Ohio’s long-arm statute confers personal jurisdiction over Roberts, an Ohio court cannot exercise personal jurisdiction over Roberts if doing so would violate his constitutional right to due process.”)

Most of the cases on this topic involve borrower’s counsel’s opinion letters. But, that is not required. For other cases involving a court’s exercise of personal jurisdiction over an out-of-state attorney who represented a client in transactions where the contra-arty is in the forum state, see, 43 No. 1 *Professional Liability Reporter* art. 7 (Jan. 2018) and the cases cited therein.

The simple fact is that courts may conclude that borrower’s counsel should have anticipated it might be sued in the lender’s home jurisdiction if lender’s counsel can allege sufficient facts [assumed to be true for purposes of deciding the defendant’s motion to dismiss] to lead to the conclusion that borrower’s counsel acted wrongfully. This is just one more consideration for borrower’s counsel in commercial transaction work and for lender’s counsel as they plan litigation.

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[1] This is one of a series on posts concerning the planning and conducting of litigation by lender's counsel.

[2] A plaintiff must prove both these requirements before the trial court has jurisdiction over an out-of-state defendant.

[3] Ohio Rule of Civil Procedure 4.3(A) parallels the long-arm statute and is the complementary rule governing service of process upon a person who is outside of Ohio. See [*Kauffman Racing Equip., L.L.C.*, 126 Ohio St.3d 81, 930 N.E.2d 784, at ¶ 35.](#)

[4] Personal jurisdiction over an entity exists when that entity has sufficient "minimum contacts" with a particular jurisdiction and can be either "general" [for all matters caused by significant contacts] or "specific" [created by sufficient contacts related just to the matter that is the subject of the litigation].

[5] The *Resolution Trust Corp. v Farmer* case cited in the quotation includes this: "Assuming, as we must, that all of the DOA Defendants' factual allegations are true, the court finds that as a result of the opinion letters, one of which was directly presented to Horizon in Pittsburgh, Hurt Richardson maintained sufficient 'contacts' with this forum for the court to exert specific personal jurisdiction. Hurt Richardson voluntarily conducted business within this forum and availed itself of the laws of the Commonwealth. It knowingly made fraudulent misrepresentations to persons within this forum upon which those persons relied to their detriment. Therefore, Hurt Richardson should have reasonably anticipated being hauled into court in Pennsylvania as a result of those transactions. See [*Carteret Savings Bank, FA v. Shushan*, 954 F.2d 141, 146 \(3d Cir.\), cert. denied 506 U.S. 817, 113 S. Ct. 61, 121 L.Ed.2d 29 \(1992\)](#) (local counsel's alleged fraudulent conduct while in the forum state was constitutionally sufficient to exert personal jurisdiction). See, also, [*Reliance Steel Products Co.*, 675 F.2d at 588 \(3d Cir.1982\)](#);"

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