PERSONAL JURISDICTION IN THE SIXTH CIRCUIT: IS *CALPHALON v. ROWLETTE* NON-STICK PRECEDENT?

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On its face, the Sixth Circuit's 2-1 decision in *Calphalon v. Rowlette*, 228 F.3d 718 (2000), presents the "go-to" case for a defendant contesting personal jurisdiction. It has been cited by courts 506 times since it was decided and again, on its face, moves to restate the established requirements for personal jurisdiction. In *Calphalon*, the defendant, Rowlette had worked as an exclusive sales representative for the Ohio-based Calphalon for seventeen years. He corresponded frequently by letter, phone and fax to Calphalon's Ohio offices. He had travelled to Ohio several times for training and to take a potential customer on a factory tour. He had signed and renewed contracts with Calphalon in Ohio and was paid in sales commissions from Ohio, for products made in and shipped from, Ohio. Looking at just those superficial facts, Rowlette would seem to have a substantial relationship connection with Ohio. Yet the majority found that Rowlette's contacts with Ohio were merely random and fortuitous and arose only because Ohio was where Calphalon happened to be located.

Such a holding on these facts would understandably lend encouragement to defendants seeking to avoid being haled into a federal court in Ohio. But closer examination shows that its holding relies on the peculiar facts of the case and that the majority elevated the significance of certain facts over others. In addition, Judge Hillman dissented in Calphalon, writing a lengthy and sometimes caustic opinion in which he argued that the majority's decision conflicts with the U.S. Supreme Court's decision in *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985).

Subsequent courts confronted with Calphalon, have either distinguished the cases before them from its unusual facts, or, in some cases, followed the dissent's lead, noting that the majority's holding is difficult to reconcile with the holding in *Burger King*.

Therein lies the danger in *Calphalon*. For a defendant contesting personal jurisdiction, it looks like a dispositive-slam-dunk case, which may result in the defendant overplaying its hand. Likewise, a plaintiff confronted with a motion to dismiss based on *Calphalon* who does not dig deeper into the factual and procedural peculiarities of that case risks an adverse ruling on what would otherwise be a winnable motion. The lawyer who cites the case simply for a boiler plate exposition of the law of personal jurisdiction without regard to its peculiarities may inadvertently complicate his or her case. As a result, applying Calphalon's holding is often as slippery as the namesake plaintiff's products.

Personal Jurisdiction Basics

In discussing why *Calphalon* is problematic, a review of the basics of personal jurisdiction is helpful. Establishing personal jurisdiction in Ohio, whether in state or federal court is a two-step process. First, the court determines whether the state's 'long-arm' statute, R.C. 2307.382, confers personal jurisdiction. Because the statute is expansively written and broadly construed, this question is usually answered in the affirmative. The Ohio Long Arm Statute states, as it pertains

to non-tort claims:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
>
> (1) Transacting any business in this state;
>
> *(2)* Contracting to supply services or goods in this state;[i]

Ohio courts have construed the "transacting any business" clause broadly to encompass any "carrying on" business or "having dealings" within Ohio. [ii] Indeed, Ohio courts have held that the word "transact" "embraces in *its meaning the carrying on or prosecution of business negotiations* but it is a *broader term than the word 'contract' and may involve business negotiations* which have been either wholly or partly brought to a conclusion …."[iii] Applying this broad interpretation, almost any type of business activity or attempt to do business, in Ohio or with an entity in Ohio would likely qualify.

Second, the court decides whether granting jurisdiction under the statute would deprive the defendant of its Fourteenth Amendment right to due process.[iv] The seminal case there is *Burger King*.[v] The *Burger King* court, expanding on the rules laid out in *International Shoe and World Wide Volkswagen*, held that "the constitutional touchstone" in determining personal jurisdiction is "whether the defendant purposefully established 'minimum contracts in the forum state."[vi] This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person,"[vii]

Conversely, "Jurisdiction is proper,[] where the contacts proximately result from actions by the defendant himself that create a "substantial connection" with the forum State. Thus where the defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws, it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well. [viii] [1]

The leading 6th Circuit case on purposeful availment, which the Burger King decision informs and amplifies, is *Southern Machine Company v. Mohasco Industries, Inc.,* 401 F.2d 374 (6th Cir.1968). The *Mohasco* case provides the basic rubric for personal jurisdiction. Under *Mohasco,* first, the defendant must purposefully 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.[ix]

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[1] Note that this article deals only with "specific personal jurisdiction," where the plaintiff asserts jurisdiction based on the defendant's specific contacts with the forum state, rather than "general personal jurisdiction" where jurisdiction flows from the defendant's general presence in the forum.

The Facts in Calphalon

Calphalon evokes the cliché that "bad facts make bad law," or in this case, at least unclear law. Calphalon is an Ohio based company that manufactures non-stick cookware. Rowlette was Calphalon's exclusive sales representative for the states of Minnesota, Iowa, North Dakota, South Dakota, and Nebraska. This exclusive representative relationship between Rowlette and Calphalon lasted over seventeen years.

Rowlette did not sell products in Ohio. Nor did Rowlette directly order products from Ohio on behalf of customers. Instead, Rowlette—product catalog in hand—approached potential customers in the four upper Midwest states that comprised his territory and extolled the virtues of Calphalon's pots and pans. Those customers then placed product orders directly with Calphalon. Calphalon shipped the products from Ohio to the customers in Rowlette's territory and cut a check to Rowlette for his commission. Thus, Rowlette was never involved in a transaction in Ohio—saving, of course, his sales representative agreement with Calphalon. Strangely, although the fact that customers placed their orders directly—independent of Rowlette —seems to be a dispositive fact, the majority does not highlight in its factual summary and mentions it only obliquely in its discussion.

From 1980 to 1996, the parties' relationship was governed by a letter agreement. In 1996 and 1997, however, Rowlette executed a more formal one-year manufacturer's representative agreement with Calphalon. During the term of the formal agreements alone, Rowlette corresponded with Calphalon in Ohio via telephone, fax, and mail. Rowlette also made two physical visits to Ohio in 1996: one for a mandatory sales meeting and another to accompany a client on a tour of the Calphalon facilities. The 1996 agreement also provided that Ohio law applied to its interpretation. The parties renewed their agreement in 1997. At the end of 1997, however, Calphalon told Rowlette that it was not going to renew the agreement again.

In early May 1998, Rowlette's counsel wrote to Calphalon threatening suit for breach of contract and unpaid commissions. On May 27, Calphalon preemptively filed suit in the United States District Court for the Northern District of Ohio, seeking a declaratory judgment that: Ohio law controls the agreement; Calphalon's termination of Rowlette was lawful; and Calphalon does not owe additional commissions to Rowlette. Rowlette, in turn, filed suit in Minnesota state court, and moved to dismiss the Ohio federal court action for lack of personal jurisdiction. Subsequently, Rowlette filed suit in Minnesota state court, claiming Calphalon breached the manufacturer's representative agreement and seeking payment of earned commissions. Rowlette then filed a special appearance in the Ohio federal case and moved for dismissal of the Ohio action under Federal Rule 12(b)(2), alleging lack of personal jurisdiction.

The district court granted Rowlette's motion to dismiss, finding that it lacked specific personal jurisdiction over Rowlette. The court gave some thought to the idea that Rowlette was subject to the Ohio long-arm statute, Ohio Rev.Code § 2307.382, but held that even under the long-arm statute, Rowlette lacked sufficient minimum contacts with Ohio to meet due process requirements.[x]

The Calphalon Holding

The Sixth Circuit, applying the *Mohasco* analysis and significantly relying on *Burger King*, affirmed the district court in a 2-1 decision, holding that Rowlette did not purposefully avail himself of the privilege of conducting activities in Ohio and that the *quality* of its relationship to Calphalon in Ohio can reasonably be viewed as "random," "fortuitous," or "attenuated."[xi] But in reaching this conclusion, the majority highlighted certain facts and procedural aspects of the case while downplaying others. For example, the majority held that "the mere existence of a contract between Rowlette[xii] and an Ohio citizen for ***seventeen months*** is insufficient to confer personal jurisdiction over Rowlette." For reasons not explained in the opinion, the majority focused only on the parties' relationship after the formal agreement was signed in 1996, to the exclusion of their sixteen-year history of dealings from 1980 to 1996.

This focus on the final seventeen months of the relationship—and the majority's silence as to the reason for it—creates confusion as to what *Calphalon* really means. A hurried reader who merely scans the facts and the majority's holding may well come away with the misimpression that the majority found the seventeen-year relationship to be merely fortuitous.[2]

The other peculiarity that makes *Calphalon* a poor choice as the "go-to" case for personal jurisdiction is that it is arises out of a declaratory judgment action, not a breach of contract suit. Because *Burger King* and *Mahasco*, were breach of contract cases, the personal jurisdiction analysis naturally includes an inquiry into where the breach occurred. The *Calphalon* majority treated the case as a breach of contract action and looked at whether the "operative facts of the controversy arise from the defendant's contacts with the state."[xiii] Looking at where the "operative facts " arise, however, presents a problem in declaratory judgment actions, which typically involve purely legal questions of contract interpretation. In declaratory judgment action, the only operative facts would seem to be that the parties entered into a contract to be governed by Ohio law, with performance to take place both in Ohio and the Rowlette territory, and that Calphalon sought a declaration as to its rights under the contract.

Yet the majority treated the case as a breach of contract action rather than a declaratory judgment:

> In this case, the facts at issue did not occur in the forum state nor were the ***consequences of the breach*** substantially connected to the forum state. Rowlette's performance of the terms of the agreement and any earning of commissions occurred in the states of Rowlette's sales territory, not Ohio.[xiv]

Beginning from the proposition that personal jurisdiction arises out of a party's purposeful availment of doing business in that state, it would seem incongruous that the breach of a contract would confer jurisdiction, while performance of the same contract would not. Surely, in his

[2] The inspiration for this article was an opposing counsel who argued (incorrectly) that *Calphalon* must be read as holding that a seventeen- year contractual relationship does not amount to "substantial contacts" and that the majority's reference to "seventeen months" was a merely scrivener's error that should be read as "seventeen years."

seventeen years as Calphalon's exclusive representative in the upper mid-west, Rowlette generated revenue for Calphalon that it received in Ohio. Applying the majority's rationale, had the procedural posture been different, with Rowlette somehow breaching his contract with Calphalon, Calphalon would have realized the harm in Ohio, and would have had a far stronger case. As it happened, though, Calphalon's declaratory judgment action did not allege any actual damages in Ohio, nor any specific action in Ohio (beyond entering into the contract) that would give rise to a cause of action.

Lastly, the *Calphalon* majority highlighted the importance of the "quality" of the defendant's contacts with the forum state. Certainly, the quality of a defendant's contacts speaks to the reasonableness of it being haled into the forum state. But the majority seemed to find high quality contacts only where a defendant intentionally sought to do business in the forum state and that the performance of the contract did not occur in the forum state.[x3] Beyond that, however, the majority provided little guidance as to how to evaluate the quality of a defendant's contacts. As the dissent, and later courts have noted, this focus on whether the defendant was seeking to exploit the Ohio market seems at odds with the Supreme Court's *Burger King* decision, where a Michigan franchisee contracted with Burger King Florida, but all product sales occurred in Michigan.

The Calphalon Dissent

Judge Hillman dissented vigorously in *Calphalon*, raising the issues noted above. His dissent pulled no punches, criticizing the majority for over-emphasizing some facts while disregarding others:

> "the majority goes to great lengths to minimize the seventeen-year continuing business relationship between these parties and to broaden the notion of "fortuitous" contacts so as to expand the concept beyond all recognition. While citing the relevant controlling language from the cases, the majority distorts and distinguishes the facts of this case in ways that render those controlling decisions meaningless. In the end, the instant decision is almost unrecognizable under modern notions of personal jurisdiction, harking back to the days of *725 *Pennoyer v. Neff,* 95 U.S."

> More specifically, the dissent charged that the majority's decision runs afoul of the Supreme Court's Burger King decision, a criticism that has been echoed by later courts:

> "Despite citing language from *Burger King,* the majority appears to disregard its fundamental import. The majority arrives at its finding of no personal jurisdiction by breaking the argument and evidence into discrete and distorted portions and addressing them seriatim, rather than viewing the relationship in its entirety."

> And

[3] Of course, Calphalon's performance--the payment of commissions pursuant to the contract—and the subject on which it sought declaratory judgment, occurred in Ohio.

> the majority repeatedly observes that Rowlette did not sell products in Ohio to Ohio citizens, suggesting that to establish jurisdiction, the defendant must exploit the end market in the forum state. Such a suggestion makes no sense at all and, with all due respect, is patently absurd. In *Burger King,* the franchisee sold no hamburgers in Florida. The Supreme Court did not consider the identity of Rudzewicz's ultimate customers; it considered the identity and relationship with the relevant Florida resident—Burger King, Inc.

Later treatment of Calphalon

The dissent's concern about a conflict with Burger King has manifested itself in numerous Sixth Circuit decisions. In *Frankenmuth Mutual Ins. Co. v. Appalachian Underwriters, Inc.,* No. 03–10193, 2004 WL 1406121 (E.D. Mich. 2004), the defendant was a Tennessee insurance provider that contracted with a Michigan insurance agency to sell workers' compensation policies in a number of states, not including Michigan. Frankenmuth sued Appalachian in the Eastern District of Michigan for various breaches of contract. Appalachian relied heavily on *Calphalon* and moved to dismiss for lack of personal jurisdiction. Frankenmuth responded that *Burger King* controlled, and that its case was factually more akin to Burger King. The court noted the apparent conflict:

> The Court finds it difficult to reconcile the holding in *Calphalon* with the Supreme Court's pronouncements in *Burger King.* In both cases, a national organization entered into an affiliation relationship with a representative in another state. There were no unique or geographically significant features that were apparent from the manufacturer's or franchisor's choice of the forum state as business headquarters in either case. The representatives in each case entered into a contractual relationship that contemplated regular dealings with the main organization at its headquarters over an extended period of time. Both contracts contained choice-of-law provisions denominating the law of the forum state as the rules of decision governing disputes. Nonetheless, the *Calphalon* court found that the defendant's contacts with Ohio were fortuitous and attenuated, while the Court in *Burger King* held exactly the opposite.[xvi]

The *Frankenmuth* court avoided the uncomfortable position of holding that Calphalon was entirely incompatible with Burger King by offering that, "If there is a distinction to be made between the critical facts in *Calphalon* and *Burger King,* it perhaps can be derived from the absence of any activity by Rowlette himself directed into the forum state." The court also took a subtle swipe at the *Calphalon* majority's limited discussion of the facts, stating, "[f]or all that can be determined from the opinion in that case, it appears that Rowlette simply arranged sales in other states and reported on market conditions there." And on that basis, the *Frankenmuth* court found that the facts before it were far closer to those in *Burger King*, and rejected *Calphalon*. Similarly, in the recent case of Bettcher v. Cutting Edge Services Limited 2018 WL 3549845, the Northern District of Ohio specifically requested briefing and held oral argument regarding whether Calphalon and Burger King could coexist. After oral argument, the court issued an order noting that while "this Court finds it difficult to reconcile the Sixth Circuit decision in *Calphalon* with the Supreme Court ruling in *Burger King*," the court held that *Calphalon* was distinguishable on its unusual facts.

In another recent case, *Knowledge Based Sols., Inc. v. Dijk*, 2017 WL 3913129, *7 (Sept. 7, 2017), the Eastern District of Michigan seemed to take an even harder line stating, "[a]s for *Calphalon*, that case has often been criticized as irreconcilable with controlling Supreme Court precedent." In that case, the court, like many others, avoided the apparent conflict by finding *Calphalon* factually distinguishable.

Other courts have relied on *Calphalon's* procedural posture as a declaratory judgment action to distinguish its holding from *Burger King*. For example, in *Functional Pathways of Tenn., LLC v. Wilson Senior Care, Inc.,* 866 F.Supp.2d 918, 925 (E.D.Tenn.2012), the court noted that "[s]everal courts have distinguished *Calphalon* from the majority of breach of interstate contract claims, because in *Calphalon,* the plaintiff company sought declaratory judgment that it owed nothing to a former sales representative [whereas] [i]n this case, like most others for breach of contract, Plaintiff seeks economic damage for an alleged breach of contract that threate[ne]d or otherwise adversely affected Plaintiff's ability to conduct business." Again, it seems unusual for courts to rely on a distinction that the *Calphalon* majority itself did not seem to consider, but the unusual nature of the case and the need to harmonize it with Supreme Court precedent invites such an approach.

Conclusion

The first lesson of *Calphalon*, of course, is when possible, include a venue clause. The contract at issue in *Calphalon* included a choice of law provision (Ohio), but no forum selection clause. And while a contractual choice of law adds to the contacts and reasonableness of being haled into court, standing by itself, it is not dispositive. Even better, is a contract that includes a forum selection clause and recitations that the parties acknowledge that performance will occur within the desired forum and that the agreement to litigate in a particular forum forms part of the consideration for the agreement.

Second, documenting contacts with a contractual party in another jurisdiction will help build a factual record that can be used to distinguish a case.

Third, because the distinguishing facts in *Calphalon* are not readily apparent from the decision, it reminds us to dig for the actual facts of the case, turning to the underlying briefs or other court documents where necessary.

Finally, *Calphalon* teaches that no matter how many times a case has been cited, its precedential value is not always clear, and some precedents are more likely to stick than others.

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[i] *Id*

[ii] *Kentucky Oaks Mall Company v. Mitchell's Formal Wear,* Inc., 53 Ohio St.3d 73, 559 N.E.2d 477, 480 (Ohio 1990), cert. denied, 499 U.S. 975,
111 S.Ct. 1619, 113 L.Ed.2d 717 (1991); *Ricker v. Fraza/Forklifts of Detroit,* 160 Ohio App.3d 634, 828 N.E.2d 205, 209 (2005).

[iii] *Kentucky Oaks Mall Company,* 53 Ohio St.3d at 75; *Ohlman Farm & Greenhouse, Inc. v. Kanakry*, 6th Dist. Lucas No. L-13-1264, 2014-Ohio- 4731, ¶¶ 20-22. (Emphasis added.)

[iv] *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K.'s Foods, Inc.,* 68 Ohio St.3d 181, 183–184, 624 N.E.2d 1048 (1994).
[v] *Burger King Corp*, 471 U.S. at 462, 475.
[vi] 471 U.S. at 462, 475–76 (internal citations omitted).
[vii] *Id.*
[viiI] *Id.*
[xi] *Southern Machine Company,* 401 F.2d at 381.
[x] *Calphalon Corp.*, 228 F.3d at 718, 720–21.
[xi] 228 F.3d at 718, 724
[xii] *Id.* (emphasis added).
[xiii] *Id.* at 723.
[xiv] *Id.* at 718, 724.
[vx] *Id.* at 722.
[xvi] *Frankenmuth Mut. Ins. Co,* 2004 WL 1406121, *9.
[xvii] Id., citing, *August v. Manley Toys, Ltd.,* 68 F. Supp. 3d 722, 731 (E.D. Mich. 2014).
[xviii] Cf. *Thompson v. Citizens Nat. Bank*, N.D.Ohio No. 1:14 CV 01197, 2015 WL 5017019, *5; *Alloy Bellows & Precision Welding, Inc. v. Cole*, N.D.Ohio No. 1:15CV494, 2015 WL 6964579, *5.

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