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ANTITRUST AND TRADE REGULATION CLASS ACTION ALERT

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Despite Delay, Failure to Plead, and Participation in Litigation, Federal Court Enforces Arbitration Clause

By Ira Neil Richards, Carl J. Schaerf, and Nicole M. Acchione

Mandatory arbitration clauses have proven to be very powerful weapons employed by businesses to avoid the duration, expense, and often times negative publicity associated with protracted litigation in both federal and state courts across the country. Carefully drafted arbitration clauses have also protected businesses from class actions which, when certified, can frequently mean the difference between a $100 versus a $100 million verdict. Over the past few decades, there has been a clear judicial penchant towards the enforcement of arbitration clauses, particularly given the strong pro-arbitration policy under the Federal Arbitration Act. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). When an arbitration clause might apply, it is important to raise it as soon as possible in response to litigation to avoid a finding that the right to compel arbitration has been waived.

In a recent two-part decision in *In re Polyurethane Foam Antitrust Litig.*, 2014 U.S. Dist. LEXIS 26191 (N.D. Ohio 2014), the district court addressed whether a defendant had waived its right to compel arbitration by participating in the litigation. The court rejected arguments that the defendant could not compel arbitration even after participating in a federal court case, and also allowed the defendant to assert arbitration as an affirmative defense to potential absent class members.

In *Polyurethane Foam Antitrust Litigation*, the plaintiffs alleged that defendant Mohawk Industries and other sellers of polyurethane foam conspired to fix the prices of flexible polyurethane foam products. Class action and direct action antitrust cases were filed across the country and eventually consolidated as part of the multidistrict litigation (MDL) transferred to the Northern District of Ohio. Mohawk was a named defendant to the individual and class litigation as early as December 2010, and named as a defendant conspirator in the amended consolidated complaint filed in 2011. Intensive discovery was ongoing since 2011 and Mohawk was an active participant, producing documents and even deposing class representatives and direct action plaintiffs, providing witnesses for plaintiffs' depositions, briefing and moving the court on discovery matters and submitting an expert report.

In 2013, following the conclusion of fact discovery and prior to the resolution of a pending and fully briefed class certification motion, Mohawk filed a motion seeking to amend its answer to the consolidated amended complaint to assert an affirmative defense of arbitration against some putative class members. Mohawk also filed a separate motion to enforce a 1994 arbitration clause as to one of the direct action Plaintiffs, CAP Carpet. Notwithstanding the passage of time, nor Mohawk's active involvement defending against the MDL putative class litigation, the Court granted both motions.

First, the Court granted Mohawk's motion to compel arbitration and stay the claims of the direct action (non-class) plaintiff CAP Carpet. The Court rejected CAP Carpet's arguments that Mohawk had waived its right to assert arbitration by waiting until such a late stage of the litigation, particularly after having actively participated in the MDL proceedings. Citing to the Sixth Circuit's two-prong, abbreviated standard for resolving waiver challenges — namely, that the party took actions completely inconsistent with any reliance on an arbitration agreement *and* actual prejudice to the opposing party — the Court found that CAP Carpet could not satisfy both prongs. The Court first found that while Mohawk actively participated in the MDL putative class proceedings, it had not actively participated in this litigation citing to only three docket entries. Thus, the Court could not "say this limited amount of activity constitutes 'actions that are completely inconsistent with any reliance on an arbitration agreement.'" 2014 U.S. Dist.

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LEXIS 26191, * 24. Next the Court found no "actual prejudice" to Plaintiff, despite acknowledging the fact Plaintiff would have to litigate in two different forums. "[A]n MDL's efficient qualities cannot alone override a party's agreement to arbitrate. This Court does not doubt that, as a practical matter … CAP Carpet [will] incur additional litigation expenses. But that portion of CAP Carpet's expenses is not due to the manner in which Mohawk seeks to assert the arbitration clause; the added expenses is due to the fact that CAP Carpet has entered into an arbitration agreement with some Defendants but not with all, yet seeks recovery against all." *Id*. at 28.

In the second motion, the Court allowed Mohawk to amend its answer to the Direct Purchaser Plaintiffs' Consolidated Amended Complaint to assert an affirmative defense of arbitration with respect to the *absent* class members' claims, and not those of the class representatives. The Direct Purchaser Plaintiffs objected, arguing that Mohawk had waived this defense by virtue of its active participation in the litigation for three years. Plaintiffs also argued substantial prejudice in many forms. Although recognizing that problems and inherent unfairness could result, the Court permitted the amendment. The Court noted that it need not reach the issue of unfairness because the standard in determining waiver is conjunctive — requiring "a showing of litigation activity inconsistent with an intent to rely on an arbitration defense *and* a finding that the party opposing invocation of the arbitration clause has suffered actual prejudice from the delay." The direct purchaser plaintiffs opposing arbitration as a defense to absent class members' claims could not cite to any specific litigation event that would not have occurred even if Mohawk had asserted its right to arbitration earlier. *Id*. at 51. Indeed, the Court was persuaded by the fact that the plaintiffs would still benefit from a judgment against Mohawk, stemming from the purchases of the class representatives. "They gain the possibility of judgment being entered against another member of the alleged conspiracy; who is jointly and severally liable for the antitrust harm of the entire conspiracy…" *Id*. at 52.

Despite the fact that the court in this case did not find a waiver, and permitted the defendant to assert its right to arbitration, the right to compel arbitration should be asserted at the earliest possibility. Raising the issue as early as possible can avoid litigation costs, minimize the risk of motion practice, and minimize the risk of waiver. ◆

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