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Alternative Dispute Resolution

ARTICLES

A Sleeper from the Third Circuit?

By Robert E. Bartkus – February 5, 2020

A September precedential opinion in the Third Circuit, *In re: Remicade (Direct Purchaser) Antitrust Litigation*, 938 F.3d 515 (3d Cir. 2019), has received virtually no notice despite three interesting arbitration rulings in the opinion.

1. The Holding of the Case

In reversing a district court order denying a motion to compel arbitration, the circuit took an expansive view of what it means to apply a "broad" arbitration clause in a distribution agreement. The plaintiff alleged that defendant engaged in anti-competitive conduct to protect its alleged monopoly in Remicade, an anti-inflammatory drug (used to treat rheumatoid arthritis and Crohn's disease). According to the plaintiff, once the FDA approved competing treatments, the defendant entered into contracts with insurers to exclude the competing products, bundled other defendant's products with Remicade, and entered into various exclusionary contracts with health care providers. The district court found that none of these actions directly involved the plaintiff—which remained bound by its distribution agreement with defendant and was not part of the anti-competitive plan.

The arbitration clause in the distribution agreement required arbitration involving "[a]ny controversy or claim arising out of or relating to this agreement (including without limitation) any controversy or claim involving the parent company, subsidiaries, or affiliates under common control of the Company or the Distributor. . . ."

Plaintiff's claims were under sections 1 and 2 of the Sherman Act, not for breach of contract. The district court held that the statutory claims did not arise out of or relate to the distribution agreement; "whether [defendant] performed its obligations under the Agreement has no bearing on whether it harmed [plaintiff]."

Not so fast, said the Third Circuit. Under applicable New Jersey contract law, the clause in the distribution agreement was deemed "extremely broad." In fact, a state appellate division case had held in 2010 that an "arising out of" or "relating to" clause should cover any dispute "connected in any way with [the litigants'] contract." *Curtis v. Cellco Partnership*, 413 N.J. Super. 26 (App. Div. 2010). In another case, the appellate division looked at antitrust claims challenging anti-competitive conduct and held they were sufficiently "intertwined" with the parties' contract. *EPIX Holdings Corp. v. Marsh & McLennan Cos.*, 410 N.J. Super. 453 (App. Div. 2009). In an unpublished (and therefore not precedential) New Jersey case, the court held that "arising out of" language could encompass state statutory and federal RICO claims. *POP Test CORTISOL, LLC v. Merck & Co., Inc.*, A-5403-12T4, 2014 N.J. Super. Unpub. LEXIS 958, 2014 WL 1660605 (N.J. Super. Ct. App. Div. Apr. 28, 2014).

Relying on New Jersey law, the Third Circuit held that the claims in *Remicade* were arbitrable because the prices charged under the plaintiff's distribution agreement allegedly were inflated by the defendant's anticompetitive scheme, and this injury was "related to" the contract. Quoting

from a Second Circuit case, the court stated that "the central factual allegations of the complaint' involve 'a core issue of the contracts between the parties—allegations that the price terms set forth in those contracts have been artificially inflated as a result of the [alleged anti-competitive conduct] of the defendants.'" The damage claims could not be "adjudicated" without reference to the contract.

2. The Lack of Reliance on "Presumption"

Note that this holding did not rely on any "presumption" of arbitrability under the Federal Arbitration Act (FAA). Although, as the Circuit Court noted, its prior opinions had referenced the FAA as important to arbitrability decisions, other decisions had made clear that state interpretive principles must govern the contract questions presented on a motion to compel including: (1) whether there is an enforceable contract with an arbitration clause; and (2) whether that contract clause requires arbitration of the issues at hand. Not only had other Third Circuit cases at least hinted at the issue, before deciding it in *Moon v. Breathless Inc.*, 868 F.3d 209 (3d Cir. 2017), but the Supreme Court required that "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

In other words, state contract law governs not only whether a contract *exists*, but also what the contract *means*. What then is the role of federal law, the FAA, and oft-cited "presumptions" favoring arbitration other than saying that federal law must be given "due regard"? The Third Circuit now says the role of federal law may be "clarified" by reference to a three-part framework:

> In sum, while federal law may tip the scales in favor of arbitration where state interpretive principles do not dictate a clear outcome, may displace state law through preemption, or may inform the interpretive analysis in other ways, applicable state law governs the scope of an arbitration clause—as it would any other contractual provision—in the first instance.

In *Remicade*, no reference to federal law was necessary, because the applicable state law was clear. Much *dictum* and overly-general statements regarding the importance of federal law must now be excised when considering a motion to compel arbitration.

3. The Consumer Fraud Contract Requirement

As part of its analysis of state law, the Third Circuit was asked to find that the arbitration clause in this distribution contract did not satisfy the New Jersey requirement that parties to a consumer fraud contract must "clearly and unequivocally" waive the right to have the dispute resolved in a court by a jury, as set out in *Atalese v. U.S. Legal Servs. Grp.*, 219 N.J. 430 (2014). According to this line of cases, the contract-formation element of "mutual assent" requires the parties to understand the nature of arbitration and how it differs from resolution of their disputes in a court of law.

As the court noted, though, the distribution agreement dispute in *Remicade* was not a consumer fraud case, as in *Atalese*; it was a commercial dispute between relatively sophisticated parties. And a number of New Jersey federal district court as well as state cases apply *Atalese* only to cases involving ordinary consumer and employment claims, not negotiated contracts. With the understanding that the role of a federal court is to predict state law rather than establish it, the circuit held that *Atalese* should not be applied outside the factual context in which it had been decided by most New Jersey courts.

This may have significant—though possibly unrealized—consequences for litigants in the New Jersey courts. Federal district courts now must follow *Remicade*, even though some state courts had held that *Atalese* applied to commercial disputes, negotiated contracts, and sophisticated individuals. Parties without jury waivers in their commercial arbitration clauses, seeking to avoid *Atalese,* may now have an additional reason to file their disputes in federal court if there is subject matter jurisdiction there. Parties on the other side may do what they can to avoid federal court, even though it might otherwise have seemed acceptable.

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