Pepper Hamilton LLP
Attorneys at Law

Third Circuit Provides Manufacturers With Roadmap to Avoid Class Antitrust Claims Brought by Direct Purchasers

ALERT | September 19, 2019

Robin P. Sumner | sumnerr@pepperlaw.com
Lindsay D. Breedlove | breedlovel@pepperlaw.com
Connie Lee | leeco@pepperlaw.com

The Third Circuit recently held in *In re Remicade (Direct Purchaser) Antitrust Litigation* that a direct purchaser's antitrust suit alleging overpayment for a drug purchased pursuant to a distribution agreement with a pharmaceutical manufacturer was subject to a mandatory arbitration provision requiring that all claims "arising out of or relating to" the distribution contract proceed to arbitration.

The three-judge panel reversed the District Court for the Eastern District of Pennsylvania's denial of the defendant's motion to compel arbitration. In doing so, it concluded that (1) state law principles regarding contract formation and interpretation govern questions

regarding the scope of arbitration clauses, and (2) under New Jersey law, an agreement to arbitrate all claims "arising out of or relating to" a distribution agreement covers statutory antitrust claims associated with purchases made pursuant to that agreement.

For manufacturers interested in arbitrating antitrust claims and preventing resolution of those claims on a classwide basis, the key takeaways from the Third Circuit's decision are:

- Under state law principles that endorse a broad view of arbitration clauses and permit nonexplicit waiver of statutory claims, antitrust claims premised on the price of a product purchased pursuant to a contract that contains such a broad arbitration clause may very well be subject to mandatory arbitration.

- In light of the Supreme Court's recent jurisprudence regarding class arbitration, manufacturers may be able to avoid classwide antitrust claims brought by direct purchasers by ensuring that the arbitration clauses in their distribution agreements with those purchasers cover statutory antitrust claims and do not expressly permit class arbitration.

Background

Rochester Drug Co-Operative (RDC) is a direct purchaser and wholesaler of Remicade, a biologic infusion drug manufactured by Johnson & Johnson and Janssen Biotech (J&J). Remicade is used primarily to treat inflammatory conditions. RDC sued J&J under sections 1 and 2 of the Sherman Act, alleging that J&J sought to maintain Remicade's monopoly in the face of biosimilar competition by engaging in an anticompetitive scheme that included exclusion contracts with insurers and health care providers, as well as multiproduct bundling of J&J's products. As a result, RDC alleged that it paid artificially inflated prices for Remicade when it should have been able to purchase a less expensive biosimilar equivalent.

J&J moved to compel arbitration on the ground that RDC's claims "aris[e] out of or relat[e] to" a 2015 agreement pursuant to which RDC purchased Remicade from J&J. Specifically, the agreement made RDC an "Authorized Distributor of Record," provided that J&J sold its drugs to RDC at each drug's wholesale acquisition cost (WAC), and governed RDC's logistical obligations for the distribution of Remicade and other J&J drugs. The agreement also contained a "Dispute Resolution" clause that subjected "[a]ny controversy or claim arising out of or relating to th[e] agreement" to mandatory arbitration if mediation was unsuccessful.

The district court denied J&J's motion to compel arbitration on the ground that RDC's antitrust claims "are separate from, and cannot be resolved based on," the agreement itself. In doing so, the lower court relied heavily on the Third Circuit's decision in *CardioNet, Inc. v. Cigna Health Corp.*, 751 F.3d 165 (3d Cir. 2014), which held that an arbitration clause covering disputes "regarding the performance or interpretation" of a contract that required payment for medically necessary goods and services did not mandate arbitration of a dispute alleging that the defendant made deceptive and misleading changes to its policies regarding what goods and services qualified as medically necessary. The district court did not expressly grapple with the difference in language between the arbitration clause at issue in *CardioNet*, which required arbitration of disputes regarding the "performance and interpretation" of the contract, and the arbitration clause in the RDC-J&J agreement, which required arbitration of disputes "arising out of or relating to" the parties' distribution agreement. J&J appealed.

State Law Applies and Scope of Arbitration Clause

The Third Circuit first tackled whether it should apply federal or state law to determine the scope of the parties' arbitration clause. J&J argued that the federal presumption in favor of arbitration should apply, necessarily yielding the conclusion that RDC's claims fall within the scope of the parties' arbitration clause. The appellate court disagreed, and clarified that the Supreme Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), abrogated earlier Third Circuit precedent and generally requires a court to apply state law principles in evaluating an arbitration clause's scope. The Third Circuit explained that "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." Slip op. at 13-14 (citations omitted).

The parties agreed that New Jersey law applied to the scope question to the extent state law governed. The Third Circuit began its analysis under New Jersey law by noting that New Jersey courts view the phrases "arising out of" and "relating to" as evidence of an "extremely broad" agreement to arbitrate. Specifically, in the antitrust context, the New Jersey Appellate Division has held that a plaintiff's antitrust claims were subject to arbitration because they "not only 'arise out of,' but are undeniably intertwined with the contract . . . since it is the fact of [plaintiff's] entry into the contract containing the allegedly inflated price and other oppressive terms that gives rise to the claimed [antitrust] injury." *EPIX*

Holdings Corp. v. Marsh & McLennan Cos., 982 A.2d 1194, 1207 (N.J. Super. Ct. App. Div. 2009) (alterations in original). In *EPIX*, the court found it "difficult to conceive how plaintiff could maintain its claim for damages without reference to, and reliance upon, the underlying contract." Id.

The Third Circuit concluded that *EPIX* controlled: RDC primarily alleged that J&J's anticompetitive conduct "'enabled [J&J] to sell its branded Remicade infliximab product at artificially inflated prices' . . . and the only 'inflated price[]' that could have caused RDC's injury was the price it paid J&J for Remicade, i.e., the WAC or list price provided in the Agreement." Slip op. at 16. Thus, the court concluded that RDC's antitrust claims are "undeniably intertwined" with the distribution agreement and therefore "aris[e] out of" that agreement: "[I]t is the fact of [RDC's] entry into the [Agreement] containing the allegedly inflated price . . . that gives rise to the claimed injury." *Id.* Even if RDC need not have relied on the agreement to state an antitrust claim, the court explained that New Jersey courts read "related to" even more broadly than they read "arising out of." At a minimum, because RDC's claims have "some logical or causal connection" to the distribution agreement, those claims "relate to" the distribution agreement and are therefore subject to arbitration. *Id.* at 18.

Waiver of Statutory Rights

The court also rejected RDC's argument that it could not have waived its statutory right to pursue a civil claim against J&J for violating the Sherman Act without doing so explicitly. In general, New Jersey courts hold that waivers of constitutional or statutory rights must be stated "clearly and unambiguously." The Third Circuit held, however, that the explicit waiver rule does not extend to commercial contracts, where the signed agreement resulted from a lengthy negotiation between sophisticated parties. Parties to commercial contracts — like RDC and J&J — can express their intention to arbitrate their statutory disputes rather than litigate them in court without employing any special language. Slip op. at 19-20.

Implications

This case has substantial implications for all manufacturers that enter into distribution contracts with wholesalers or other direct purchasers. It provides important guideposts for manufacturers to reference as they evaluate whether and how to ensure that antitrust claims against them are subject to mandatory arbitration, rather than litigation in the federal or state courts. If arbitration of antitrust claims is the goal, manufacturers should incorporate broad arbitration provisions; explicit clauses mandating arbitration of con-

stitutional and statutory claims, including antitrust claims; and a choice of law provision requiring a court to use the most favorable state law possible. For arbitration clauses subject to interpretation under New Jersey law, "arising out of" and/or "relating to" language will suffice.

The Supreme Court's recent jurisprudence clarifying that class claims generally are not arbitrable unless "the relevant agreement expressly permits it" makes the Third Circuit's Remicade decision even more important. *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); see also *Lamps-Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (ambiguous agreement does not provide the necessary contractual basis for concluding that parties agreed to submit to class arbitration); *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) (class waiver applied to agreement that mandated arbitration of antitrust claims because the plaintiffs were not deprived of their right to pursue statutory antitrust remedies; the Federal Arbitration Act's "command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."). To be sure, the best practice is to include a specific clause barring class arbitrations, such as the one at issue in the *Italian Colors* case itself.

Manufacturers like J&J appear well-poised to avoid class action antitrust claims brought by direct purchasers with carefully crafted arbitration provisions.