ANTITRUST
AND
TRADE REGULATION
BRIEFING

By
Robert K. Taylor

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HIGHLIGHT

Arbitration Clause May Not Prohibit Antitrust Class Actions Or Treble Damages; Limits On Discovery Allowed

Many businesses hoping to control their exposure to litigation have inserted arbitration clauses in their customer contracts. While it is well-established that parties may agree to arbitrate statutory claims under the antitrust laws, it is less clear whether and to what extent an arbitration agreement may put limits on those claims. The First Circuit Court of Appeals, the federal appeals court with jurisdiction over the New England states, recently held that an arbitration agreement may not prohibit class action type proceedings or mandatory treble damage awards based on state or federal antitrust law. *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006). However, restrictions on discovery and shortened claim filing periods may be enforceable.

In *Comcast*, cable television subscribers filed suit alleging that they were paying inflated prices for services as a result of an anticompetitive market allocation scheme. The plaintiffs sought class certification. Comcast moved to compel arbitration and the plaintiffs objected, arguing among other things that the arbitration clause in the service contract violated public policy and was unenforceable because it (1) prohibited class arbitration; (2) barred recovery of treble damages; (3) prevented recovery of attorney's fees; (4) provided for limited discovery; and (5) established a shortened statute of limitations period. Comcast contended that all of these provisions could be enforced by the arbitrator. The plaintiffs countered that these provisions prevented them from vindicating their statutory rights.

The court held that Comcast could not prevent its customers from pursuing class action type antitrust claims before an arbitrator. The court reasoned that enforcing the class mechanism prohibition would mean that Comcast would be "shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law." Further, the court concluded that the social goals of federal and state antitrust laws would be frustrated by the "enforcement gap" created by a *de facto* liability shield.

The court also held that the arbitration agreement could not prohibit an award of treble damages mandated by federal antitrust law, or an award of attorney's fees and costs. It concluded that "these provisions, if applied in the arbitral forum, would prevent the vindication of statutory rights."

On the other hand, the court rejected the plaintiffs' argument that the arbitration clause would impermissibly block them from securing discovery they would be able to pursue if they were litigating their antitrust claims in court. The court also declined to hold the one year statute of limitations in the arbitration agreement unenforceable. Although shorter than the four year statute of limitations governing federal antitrust claims, the court held that applying the limitations period would require examining the merits of the dispute, and thus was an issue for the arbitrator to decide.

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Author
Robert K. Taylor

Lawsuit Over Driving Up Rivals' Costs Goes To Supreme Court

The U.S. Supreme Court will hear arguments this term in a case involving allegations of predatory bidding. In *Weyerhauser v. Ross-Simmons Hardware Lumber*, a sawmill operator alleged that Weyerhauser succeeded in driving it out of business and monopolizing the relevant market by overbidding for lumber in timber auctions, increasing its competitors' costs. Weyerhauser argued that alleged predatory bidding by a buyer should be analyzed in the same way as predatory pricing by a seller: by examining whether the practice caused it to lose money and the probability that it would be able to recover its losses in the future. The district court instructed the jury that it could find predatory bidding if it found that Weyerhauser paid a higher price for lumber than necessary, and forced its competitor to pay more than a "fair price." The jury awarded Ross-Simmons over $26 million, which was then trebled by statute, and the Ninth Circuit Court of Appeals affirmed. The Supreme Court will decide whether preventing competitors from buying at a "fair price" can be actionable under the Sherman Act, or whether the heightened standard of liability for predatory pricing applies to predatory bidding as well.

Supreme Court To Consider Stricter Antitrust Pleading Requirements

In *Bell Atlantic v. Twombly*, the Supreme Court will decide how much detail a plaintiff alleging an antitrust conspiracy must plead in order to avoid having the complaint dismissed. The district court dismissed Twombly's complaint, which alleged that a group of local telephone service providers had conspired to stay out of each other's geographic markets, on the grounds that the complaint did not allege sufficient facts evidencing an agreement. The appeals court reinstated the complaint, holding that under the lenient pleading standards of the Federal Rules of Civil Procedure, an allegation of parallel conduct by the defendants was enough. The defendants, supported by the Department of Justice, assert that the appeals court erred by not requiring the plaintiff to allege "plus factors" or other facts establishing that the parallel conduct is the result of an agreement. The Supreme Court's decision could create a significant new barrier for antitrust plaintiffs to overcome.

Medical Center Must Defend Essential Facilities Claim

In *Wood v. Archbold Medical Center,* the former director of the medical center's dialysis unit attempted to establish a competing dialysis facility. The medical center allegedly responded by refusing his patients certain necessary services available only at the medical center and using its peer review power to harass him and eventually revoke his hospital privileges. The plaintiff filed suit, claiming in part that the medical center's conduct amounted to a refusal to deal that deprived his business of an essential facility. The federal district court denied the medical center's motion to dismiss, concluding that "[u]nder the essential facility test, a company that has exclusive control over a facility essential to effective competition may not deny potential competitors access to that facility on reasonable terms and conditions if to do so would create or maintain monopoly power in the relevant market." The court held that the complaint identified the medical center as a facility essential to effective competition in the area, and specifically alleged multiple examples of refusal to allow access to the hospital under reasonable conditions, resulting in an increase in monopoly power.

Robert K. Taylor is a Partner at Partridge Snow & Hahn LLP and practices in the areas of civil litigation, antitrust and legal ethics. He can be reached for comment by email at rkt@psh.com.

Partridge Snow & Hahn LLP
180 South Main Street
Providence, Rhode Island 02903
401-861-8200