CORPORATE & FINANCIAL

WEEKLY DIGEST

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CFTC

CFTC Grants Relief to CTAs and IAs from Swap Block Trade Aggregation Prohibition

The Commodity Futures Trading Commission's Division of Market Oversight has issued no-action relief from the prohibition in CFTC Regulation 43.6(h)(6) on the aggregation of orders for different accounts to satisfy minimum block size or cap size requirements. In order to qualify for such relief, which is applicable only to off-facility swaps, the person aggregating the orders must, among other things, (i) be a commodity trading advisor (CTA), investment advisor (IA) or foreign equivalent of a CTA or IA and (ii) have more than $25,000,000 in total assets under management (collectively, Eligible Advisers). In addition, the Eligible Adviser must execute the aggregated orders as one swap transaction and report the aggregated transaction pursuant to Parts 43 and 45 of CFTC Regulations.

Such relief is available for all swaps through October 1, 2013. Beginning October 2, 2013, such relief will only be available for swaps that are not listed or offered for trading on a swap execution facility or designated contract market.

CFTC Letter No. 13-48 is available here.

LITIGATION

Sixth Circuit Affirms Decision to Enforce Arbitration Provision in Retiree Benefit Dispute

The US Court of Appeals for the Sixth Circuit recently affirmed a district court's decision to grant defendant-appellee TRW Vehicle Safety Systems, Inc.'s (TRW) motion to compel arbitration, finding that TRW retirees were bound by an arbitration provision in a collective bargaining agreement (CBA) negotiated prior to their retirement. The lower court had held that plaintiffs Norman VanPamel and Thomas Slaght, former employees of TRW suing on behalf of a putative class, were required to arbitrate contract and Employee Retirement Income Security Act (ERISA) claims challenging changes TRW made to prescription drug benefits in their retiree health plans.

Plaintiff's union, Local 471 of the United Automobile, Aerospace, and Agriculture Implement Workers of America (Union) and TRW entered into a CBA effective December 1, 1993, that was scheduled to expire on December 1, 1996. The plant at which plaintiffs worked closed in 1997 and, in preparation for the closing, TRW and the Union entered into a termination agreement effective November 20, 1996 (Termination Agreement). The Termination Agreement extended the 1993 CBA through the plant's closure. Plaintiffs alleged that TRW terminated prescription drug coverage for Medicare-eligible retirees in violation of its contractual obligation under the CBA. In granting TRW's motion to compel arbitration, the district court applied a presumption of arbitrability based on a "clear and broad" arbitration provision in the Termination Agreement.

Plaintiffs argued that pursuant to Supreme Court precedent they could only agree to arbitrate their ERISA claims by expressly listing that specific statutory claim in the arbitration provision. The Supreme Court previously found that a provision in a CBA that "clearly and unmistakably" required a union member to arbitrate claims under the Age Discrimination in Employment Act (ADEA) was enforceable as a matter of law. The Sixth Circuit determined that plaintiffs applied this ruling too broadly. The court distinguished ERISA claims from ADEA claims on the basis that ERISA claims derive from rights conferred under the CBA while ADEA claims can arise regardless of the existence of the CBA.

The court rejected plaintiffs' argument that their right to health care benefits derived from the CBA only, and that the right vested prior to the date the Termination Agreement took effect. Plaintiffs retired after the November 1996 Termination Agreement which required all disputes to be arbitrated. According to the court, the CBA and the Termination Agreement must be read together, not separately as plaintiffs urged.

VanPamel et al. v. TRW Vehicle Safety Systems, Inc., et al., No 12-2173 (6th Cir. Jul. 23, 2013).

Third Circuit Holds that District Court Improperly Excluded Expert Testimony in Securities Fraud Case

The US Court of Appeals for the Third Circuit recently reversed a district court's decision to exclude expert testimony in a case involving allegations of securities fraud. The court distinguished the loss causation and damages analyses applicable in the Third Circuit to a "typical" § 10(b) case from those which are applicable to a "non-typical" § 10(b) case, and found that the district court improperly applied the more stringent "typical" § 10(b) analysis in finding the expert's report unreliable under Federal Rule of Evidence 702.

Gregory W. Call agreed to sell three companies under his control to Pure Earth, Inc.(Pure Earth) in exchange for Pure Earth stock pursuant to a Stock Purchase Agreement (SPA). According to the facts set forth by the court in its opinion, Call agreed to the exchange due in part to Pure Earth officers' false representation that there were no pending government investigations of Pure Earth or its subsidiaries. In November 2007, one of Pure Earth's largest subsidiaries effectively had its license to operate in the waste-management industry revoked as a result of such an investigation, and Pure Earth's stock price fell dramatically.

To establish the loss causation and damages elements necessary to prove his securities fraud claims, Call retained Steven Scherf as an expert. Scherf provided a report summarizing the terms of the SPA and highlighting the misrepresentations concerning the government investigation. The district court found Scherf's report unreliable under FRE 702 because it did not establish the elements of loss causation and damages. The district court held that the report was lacking in its loss causation analysis because it failed to show how much Pure Earth's stock was overvalued in March 2007 due to the misrepresentations of Pure Earth's officers. On damages, the district court held that Scherf failed to isolate the causal factors leading to the stock's depressed trading value, and therefore had presented no evidence that his damages assessment was accurate.

The court distinguished between the analyses necessary for loss causation and damages in the Third Circuit's "typical" and "non-typical" cases. A typical § 10(b) case involves a situation in which a plaintiff claims that a defendant affected a publicly traded stock price by making public misrepresentations or omissions. However, this was a "non-typical" § 10(b) case because it involved a specific misrepresentation made to Call to induce him to enter into a securities transaction. The district court erred because it used a typical § 10(b) analysis when it excluded the Scherf report as unreliable, requiring the Scherf report to show that Pure Earth's stock was "overvalued" and "that the subsequent declines [were] the consequence of dissemination to the market of information regarding the true valuation that caused the subsequent deflation of the stock price." The district court also erroneously inserted "typical" § 10(b) requirements in its damages analysis which are more stringent than those applied in "non-typical" cases. Scherf's report did not need to conduct a study ruling out other market factors that contributed to the decline in value of Pure Earth's stock as it would have in a "typical" § 10(b) case. The Third Circuit concluded that because Scherf's report could have assisted the trier of fact to determine loss causation and damages, it should therefore have been admitted as expert evidence on both elements.

Pure Earth, Inc. v. Call, No. 12-2130, 2013 WL 3776218 (3rd Cir. Jul. 19, 2013).

BANKING

Agencies Seek Comment on Dodd-Frank Act Stress Test Guidance for "Medium-sized" Banking Firms

On July 30, three federal bank regulatory agencies, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency (Agencies), sought comment on proposed guidance describing supervisory expectations for stress tests conducted by financial companies with total consolidated assets between $10 billion and $50 billion. These medium-sized companies are required to conduct annual company-run stress tests beginning this fall under rules the agencies issued in October 2012 to implement a provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act. To help these companies conduct stress tests appropriately scaled to their size, complexity, risk profile, business mix and market footprint, the Agencies are proposing guidance to provide additional details tailored to these companies.

The stress test rules "allow flexibility to accommodate different approaches by different companies" in the $10 billion to $50 billion asset range. Consistent with this flexibility, the proposed guidance describes general supervisory expectations for Dodd-Frank Act stress tests and, where appropriate, provides examples of practices that would be consistent with those expectations.

The public comment period on the proposed supervisory guidance will be open until September 25, 2013.

The proposed guidance is available here.

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