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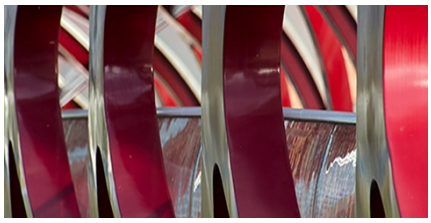

News & Types: Commercial, Competition & Trade Update

Third Time's a Charm – Buyer's Persistence in Pursuing Claim Finally Pays Off

12/9/2020

Practices: Commercial, Competition & Trade, Litigation

Executive Summary

In both 2015 and in 2018 we reported on litigation between BRC Rubber & Plastics, Inc. ("BRC") and Continental Carbon Company ("Continental"). On November 25, 2020, the Seventh Circuit Court of Appeals issued its third opinion in this litigation. Judge Hamilton, the author of the opinion, expressed the hope that this opinion would be the final opinion. Certainly, the case has taken some head-snapping twists and turns.

In our December 7, 2015 update, we reported that BRC had claimed that Continental breached a written supply agreement that BRC alleged was a requirements agreement. In this first Seventh Circuit opinion, Judge Williams disagreed, concluding the written agreement was not a requirements contract. The result was that a nearly $1 million judgment in BRC's favor was reversed. Our December 7, 2015 update can be found at (link).

On remand back to the trial court, BRC changed its position. It argued that Continental had breached the supply agreement and the supply agreement was for a fixed quantity. At the trial level, BRC lost on summary judgment. BRC appealed. It got a better result in an August 16, 2018 opinion written by Judge Ripple, as we reported in an October 2, 2018 update found at (link). In that opinion, Judge Ripple concluded that the supply agreement could be interpreted as a supply agreement for a fixed quantity and that BRC's complaint could "plausibly allege that Continental repudiated the Agreement by failing to provide adequate assurances of performance." We speculated that the damages may not justify the additional effort but that "BRC's persistence may yet pay off."

Indeed, BRC's persistence did pay off, resulting in the affirmation of a damages award in its favor of $843,000 and prejudgment interest of $400,000. (*BRC Rubber & Plastics, Incorporated v. Continental Carbon Company*, 7th Circuit Court of Appeals, No. 20-1011, November 25, 2020)

Judge Hamilton, author of the 2020 opinion, gave more information about the case than either of the previous two opinions. This information put Continental in an unfavorable light.

A summary of some of the key facts and background as follows:

- BRC designs and manufactures rubber and plastic products, primarily for the automotive industry. Continental manufactures carbon black, an essential ingredient in some of BRC's products. Continental supplied carbon black to BRC prior to 2010, but without a long-term agreement. In late 2009, BRC and Continental signed a five-year contract to run from January 1, 2010 to December 31, 2014. Continental agreed to supply "approximately 1.8 million pounds of prime furnace black annually" in approximately equal monthly quantities.
- In 2010, BRC purchased 2.6 million pounds of carbon black from Continental, but problems arose in 2011. In the first four months of 2011, BRC bought around 1.3 million pounds of carbon black, an annual pace of 3.9 million pounds, far above the 1.8 million pounds provided in the contract.
- In addition, supplies of carbon black became generally tight. Continental used the situation to attempt to raise the price to BRC, which (for purposes of Continental's appeal) Continental conceded gave BRC reasonable grounds for insecurity under UCC Section 2-609. Judge Hamilton explained in detail the terms and history of UCC Section 2-609. In summary, UCC Section 2-609 gives a contract party the right to demand "adequate assurance of performance" when "reasonable grounds for insecurity arise." Whether grounds for insecurity are reasonable, or assurances are adequate, are based on commercial standards and are questions of fact. As Judge Hamilton noted multiple times in the opinion, the trial court's findings of fact will stand, absent "clear error."
- In April 2011, Thomas Muccia, Continental's Vice President of Marketing and Development, instructed Thomas Nunley, Continental's Sales Representative for BRC, to raise BRC's prices. Nunley objected because he thought it violated the contract, but Moccia instructed him to demand the increase anyway, because BRC had limited alternative sources for carbon black.
- Nunley emailed Michael Cornwell, Vice President of Materials at BRC, to announce a unilateral price increase. Cornwell, as Nunley anticipated, responded that the increase would violate the five-year contract. But Continental refused to rescind the increase and Moccia instructed Nunley to withhold shipment to BRC unless it agreed to the increase.
- Between April 15 and 27, 2011, BRC continued to order carbon black from Continental at the contract price. Continental failed to acknowledge the orders, until April 29 when Nunley told Cornwell that Nunley was no longer authorized to communicate with BRC. BRC became very concerned because of the potential devastating impact on BRC's business.
- On May 11, 2011, Continental missed a shipment to BRC. Continental refused to assure BRC that it would resume shipments. On May 13, BRC started to look for alternative suppliers, finding one but at a higher price than the contract price with Continental.
- On May 16, 2011, BRC's outside lawyer formally invoked UCC Section 2-609, demanding adequate assurance of performance. Again, for purposes of the appeal Continental conceded BRC had reasonable grounds for insecurity.
- Continental's inconsistent responses were virtually a comedy of errors. On May 20, 2011, Continental's outside lawyer communicated to BRC's lawyer Continental's assurance of performance. But during the next two weeks, Continental's other communications were inconsistent with this assurance. For example, also on May 20, Continental's Linda Nelson wrote to BRC that it would fulfill one of BRC's purchase orders, but with the disputed price increase. BRC objected again and Continental's Moccia said BRC should look for

another supplier and refused to confirm the assurance provided by Continental's lawyer. What Judge Hamilton called "the last straw" occurred on May 28, 2011 when Continental sent BRC prices for June reflecting the price increase. Noted Judge Hamilton,

> "Applying the standard of commercial reasonableness to all of the circumstances of the case, the district court reasonably found that Continental's assurance was inadequate. Continental did not follow its lawyer's assurance with consistent expressions of its readiness to perform under the contract. It did the opposite."
>
> "Continental's failure to provide adequate assurance meant that BRC was entitled to treat Continental as having repudiated the contract... That's what BRC did on June 2, 2011 notifying Continental that it was terminating the parties' contract and had filed this lawsuit. BRC then proceeded to "cover" by starting to buy carbon black from another supplier at higher prices, which it did for the rest of the contract term."

- As noted, on June 2, 2011, BRC terminated the contract with Continental and filed the lawsuit that started this prolonged litigation. BRC and Continental also tried to negotiate a new contract but were unsuccessful. Instead BRC reached an agreement with a competitor of Continental for the supply of carbon black, but at a higher price. BRC sought the price difference of $843,000 as damages, as well as prejudgment interest.
- The second trial resulted in a judgment in BRC's favor for $843,000 in damages and prejudgment interest of $400,000. This is the judgment affirmed by Judge Hamilton in the November 25, 2020 opinion.

It was a long and winding road, but BRC's persistence has paid off for it (and possibly its legal counsel). It's a lesson in not giving up, as well as being creative and flexible in pursuing litigation.