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IN RE COTTON YARN ANTITRUST LITIGATION

In *In re Cotton Yarn Antitrust Litigation*,¹ the United States Court of Appeals for the Fourth Circuit held that arbitration is a usage of the trade in the textile industry and that consequently it is automatically included in parties' oral purchase agreements.² The court also concluded that the Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,³ which held that antitrust claims arising out of international transactions are subject to arbitration,⁴ is applicable to domestic antitrust claims.⁵ The sharply divided three-judge panel⁶ further determined that the arbitration clause at issue in *Cotton Yarn* was enforceable even though it prevented the plaintiff purchasers from suing multiple manufacturers in a single proceeding and provided a one year limitations period for bringing claims.⁷

Purchasers of cotton and poly-cotton yarn brought a multistate class action suit against a group of North Carolina yarn manufacturers, alleging that the manufacturers violated the Sherman Act by engaging in a price-fixing conspiracy.⁸ The manufacturers, Avondale, Inc. and Avondale Mills, Inc. (collectively, Avondale) and Frontier Spinning Mills, Inc. (Frontier), moved to dismiss the suit as to certain plaintiffs arguing that the plaintiffs were bound by arbitration provisions broad enough to include their antitrust claims.⁹ The district court denied the motion, holding that some of the purchase contracts with Frontier did not include binding arbitration provisions¹⁰ because the parties formed the contracts orally over the phone and the arbitration provisions were not part of the oral agreements.¹¹ Under North Carolina's Uniform Commercial Code (UCC) "battle of the forms" provision, "additional terms contained in a confirmation of a contract between merchants become part of the contract unless the terms materially alter the contract."¹² Frontier had included an arbitration provision in the written confirmations it sent to the purchasers, but the district

1. 505 F.3d 274 (4th Cir. 2007).

2. *Id.* at 280.

3. 473 U.S. 614 (1985).

4. *Id.* at 629.

5. *Cotton Yarn*, 505 F.3d at 282 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (noting that claims under the Sherman Act are appropriate for arbitration); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 232, 239 (1987) (noting that arbitration panels have the capabilities to handle the complexities of antitrust claims); *Kotam Elec., Inc. v. JBL Consumer Prods.*, 93 F.3d 724, 728 (11th Cir. 1996) (en banc) (holding that domestic antitrust claims are arbitrable)).

6. Judge Johnston concurred with Judge Traxler's opinion for the court on the issue of whether the parties' agreements included binding arbitration provisions, *id.* at 298, while Judge Williams concurred with Judge Traxler's analysis of the enforceability of the arbitration clauses, *id.* at 293.

7. *Id.* at 293.

8. *Id.* at 277.

9. *Id.* at 277-78.

10. *Id.*

11. *Id.*

12. *Id.* at 278-79 (citing N.C. GEN. STAT. § 25-2-207(2)(b) (2007)).

court found that North Carolina case law had created a per se rule that arbitration clauses constitute material alterations;¹³ consequently, the arbitration provisions had not become part of the Frontier contracts.¹⁴ The district court concluded that the contracts including binding arbitration provisions could not be enforced because they would prevent the purchasers “from effectively vindicating their statutory antitrust claims.”¹⁵ As a result, none of the plaintiffs was forced to submit their claims to arbitration.¹⁶

On appeal, the Fourth Circuit considered whether the contracts contained binding arbitration provisions,¹⁷ concluding that Frontier had proven that arbitration was a usage of the trade and therefore the parties’ contracts included an arbitration agreement even though it had not been discussed in the telephone conversations.¹⁸ The Fourth Circuit distinguished *Cotton Yarn* from the two

13. The district court relied on two cases from the 1970s. In the first case, *Frances Hosiery Mills, Inc. v. Burlington Industries, Inc.*, 204 S.E.2d 834 (N.C. 1974), a North Carolina corporation sued in North Carolina for damages stemming from its purchase of defective yarn. *Id.* at 835–36. The purchases involved an oral contract, but the defendants argued that a provision on the invoices sent with the product stipulated that the parties were required to submit the dispute to arbitration in New York. *Id.* at 836. The plaintiff contended that the arbitration panel’s judgment was invalid, even though a New York court had affirmed it. *Id.* at 837. The North Carolina court held that the arbitration provision constituted a material alteration and was therefore not incorporated into the contract. *Id.* at 842. Thus, the plaintiff never contractually agreed to submit to the jurisdiction of a New York court, and its judgment was not entitled to full faith and credit in North Carolina. *Id.* at 843.

In the second case, *Supak & Sons Manufacturing Co. v. Purvel Industries, Inc.*, 593 F.2d 135 (4th Cir. 1979), which also involved a dispute over defective textiles, the Fourth Circuit concluded that the holding in *Frances Hosiery Mills* created a per se rule that “the addition of an arbitration clause constitutes a per se material alteration of the contract.” *Id.* at 136 (citing *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 380 N.E.2d 239, 242 (N.Y. 1978); *Frances Hosiery Mills*, 204 S.E.2d at 842). Consequently, the arbitration clause at issue in that case also did not become part of the contract. *Id.*

14. *Cotton Yarn*, 505 F.3d at 278–79 (citing *Frances Hosiery Mills*, 204 S.E.2d at 842–43).

15. *Id.* at 277.

16. *Id.*

17. *Id.* at 278.

18. *Id.* at 280. The parties to the Frontier contracts conducted their transactions in a substantially consistent fashion. The purchasers first arranged the transactions over the phone, discussing price and quantity. *Id.* at 278. Frontier then sent written contracts to the purchasers confirming the details discussed and including additional terms such as the arbitration clause. *Id.* These contracts stated that they were subject to “The Yarn Rules of 1989” and that the arbitration provision would govern all further transactions unless the parties agreed otherwise in the future. *Id.* No copies of the contracts containing the purchasers’ signatures were entered into the trial court record. *Id.* However, the contracts stated that acceptance of the goods constituted acceptance of the contract. *Id.* Frontier did not send new contracts with each yarn shipment, but they included an order number on the invoices sent with each shipment which referenced the contract number. *Id.*

These facts were similar to an earlier Fourth Circuit case, *Stedor Enterprises, Ltd. v. Armtex, Inc.*, 947 F.2d 727 (4th Cir. 1991) (applying South Carolina law), in which the court held that a binding arbitration agreement existed between a North Carolina fabric manufacturer (seller) and a South Carolina textile manufacturer (buyer) when the buyer placed orders over the phone, and the seller sent a written sales contract, including an arbitration clause, to the buyer prior to the shipment of each order. *Id.* at 728–29, 733 (“Where, as here, a manufacturer has a well established custom of

cases relied on by the district court, *Frances Hosiery Mills, Inc. v. Burlington Industries, Inc.*¹⁹ and *Supak & Sons Manufacturing Co. v. Purvel Industries, Inc.*,²⁰ by focusing on a different section of the UCC which defined the scope of an agreement as “including course of performance, course of dealing, or usage of trade.”²¹ The court pointed to Frontier’s incorporation of “The Yarn Rules of 1989” (Yarn Rules) into its sales confirmations as strong evidence that arbitration was a trade usage.²² The Yarn Rules were a collection of “‘industry rules regarding contract terms and conditions and industry norms’ that [had] been gathered and reported by the American Yarn Spinners Association for more than 50 years.”²³ The Yarn Rules indicated that arbitration provisions were now standard in textile contracts and accorded with “customs and practices of the trade.”²⁴

In addition to the Yarn Rules, the court referenced numerous cases noting that arbitration was standard in the textile industry.²⁵ As a result, the court

sending purchase order confirmations containing an arbitration clause, a buyer who has made numerous purchases over a period of time, receiving in each instance a standard confirmation form which it either signed and returned or retained without objection, is bound by the arbitration provision. This is particularly true in industries such as fabrics and textiles where the specialized nature of the product has led to the widespread use of arbitration clauses and knowledgeable arbitrators.” (quoting *Pervel Indus., Inc. v. T M Wallcovering, Inc.*, 871 F.2d 7, 8 (2d Cir. 1989)). However, the district court noted that in *Stedor Enterprises* the seller sent a written contract containing the arbitration clause prior to the shipment of *each order* while in the case at hand Frontier only sent a written contract initially and then included invoices with each subsequent order. *In re Cotton Yarn Antitrust Litig.*, 406 F. Supp. 2d 585, 598 n.12 (M.D.N.C. 2005), *vacated*, 505 F.3d 274 (4th Cir. 2007).

19. 204 S.E.2d 834 (N.C. 1974).

20. 593 F.2d 135 (4th Cir. 1979).

21. *Cotton Yarn*, 505 F.3d at 279 (quoting N.C. GEN. STAT. § 25-1-201(a)(3) (2007)).

22. *Id.* at 280.

23. *Id.*

24. *Id.*

25. *Id.* (citing *Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co.*, 189 F.3d 289, 296 (2d Cir. 1999) (“We believe that a textile buyer is generally on notice that an agreement to purchase textiles is not only likely, but almost certain, to contain a provision mandating arbitration in the event of disputes, and must object to such a provision if it seeks to avoid arbitration.”); *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 733 (4th Cir. 1991) (holding that a binding arbitration agreement existed on the basis of course of dealing between the parties and the widespread use of arbitration in the textile industry); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987) (“[T]he widespread use of arbitration clauses in the textile industry puts a contracting party . . . on notice that its agreement probably contains such a clause.”); *Helen Whiting, Inc. v. Trojan Textile Corp.*, 121 N.E.2d 367, 370 (N.Y. 1954) (“[W]e can almost take judicial notice that arbitration clauses are commonly used in the textile industry . . .”); *see also Avedon Eng’g, Inc. v. Seatex*, 126 F.3d 1279, 1285 n.15 (10th Cir. 1997) (considering the following issues in determining whether arbitration is a usage of the trade: (1) whether sufficient evidence is offered to show that arbitration is general textile practice; (2) whether an apparel merchant should be subject to a trade usage of the textile industry; and (3) whether the terms of the arbitration clause in question are consistent with trade usage); *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995) (finding a binding arbitration agreement based on evidence of the widespread use of arbitration in the textile industry and the inclusion of an arbitration provision in approximately one hundred forms exchanged between the parties); *Pervel Indus., Inc. v. T M Wallcovering, Inc.*,

concluded that because the oral agreement between the parties incorporated all trade usages, including the obligation to submit to arbitration, it was not necessary for the court to consider whether the arbitration provision contained in the written confirmation constituted an additional term or whether it was material.²⁶ The Fourth Circuit noted that the established trade usage was only the general obligation to arbitrate—further stipulations about how the arbitration would proceed were additional terms subject to the district court’s materiality analysis.²⁷ Because there was an obligation to arbitrate, the details of the proceedings were not material alterations and the written confirmations satisfied the Federal Arbitration Act’s requirement that an agreement to arbitrate must be in writing.²⁸

Having determined that the contracts included an obligation to arbitrate, the Fourth Circuit then analyzed whether the terms of the arbitration clause were enforceable.²⁹ The court noted that the Federal Arbitration Act³⁰ reflects “a liberal federal policy favoring arbitration agreements”³¹ and found that the United States Supreme Court’s holding in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*³² was controlling.³³ In *Mitsubishi*, the Supreme Court held that antitrust claims arising out of international transactions were subject to arbitration,³⁴ reasoning that “[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”³⁵ Even though *Mitsubishi* involved antitrust claims arising out of international transactions, the Fourth Circuit found its analysis equally applicable to the domestic antitrust claims in *Cotton Yarn*.³⁶ However, even if an arbitration provision is broad enough to include a statutory claim for which Congress has not prohibited arbitration, the Fourth Circuit concluded that a court should not compel arbitration if a litigant would be unable to effectively assert his statutory rights in the arbitral forum.³⁷ The burden of establishing that an individual’s statutory rights cannot be vindicated effectively in the arbitral forum lies with the party

871 F.2d 7, 8 (2d Cir. 1989) (“[I]n industries such as fabrics and textiles . . . the specialized nature of the product has led to the widespread use of arbitration clauses and knowledgeable arbitrators.”).

26. *Cotton Yarn*, 505 F.3d at 280–81 & n.4.

27. *Id.* at 281.

28. *Id.* at 281 & n.5 (citing 9 U.S.C. § 2 (2006)).

29. *Id.* at 281.

30. 9 U.S.C. §§ 1–16 (2006).

31. *Cotton Yarn*, 505 F.3d at 281 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (internal quotation marks omitted).

32. 473 U.S. 614 (1984).

33. *Cotton Yarn*, 505 F.3d at 282.

34. *Mitsubishi*, 473 U.S. at 629.

35. *Id.* at 628.

36. *Cotton Yarn*, 505 F.3d at 282 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 232, 239 (1987); *Kotam Elecs., Inc. v. JBL Consumer Prods., Inc.*, 93 F.3d 724, 728 (11th Cir. 1996) (en banc)).

37. *Id.* at 282–83 (citing *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).

seeking to avoid arbitration³⁸ and is not carried by “[m]ere speculation about how the terms of the arbitration agreement might be construed by the arbitrator or how the agreement might affect the prospective litigant.”³⁹

With these standards in mind, the Fourth Circuit considered whether the provision in the arbitration agreements that proscribed the joinder of additional parties prevented the litigants from effectively vindicating their antitrust claims.⁴⁰ The court held that the plaintiffs’ inability to sue the two remaining defendants in a single proceeding did not prevent them from proving the existence of a price-fixing conspiracy.⁴¹ The court noted that co-conspirators were not necessary parties because a plaintiff can prove a conspiracy without including all of the conspirators in a single action.⁴² Furthermore, because only two defendants remained, the plaintiffs would only have to pursue two arbitration proceedings instead of one lawsuit, and since the defendants would be jointly and severally liable, the plaintiffs could seek to hold just one defendant responsible.⁴³ In addition, the defendants were seeking to compel arbitration of all the issues relating to the existence of a conspiracy rather than seeking to arbitrate only part of a larger conspiracy claim,⁴⁴ and none of the precedent relied on by the district court suggested that a comprehensive view of the conspiracy could only be made if all of the defendants were joined in a single proceeding.⁴⁵ Nothing in the arbitration agreements prevented the plaintiffs from presenting evidence relating to the actions of a non-party defendant in order to establish the existence of a conspiracy.⁴⁶ Finally, regarding the additional expense involved in separate proceedings, the court noted that it had previously

38. *Id.* at 283 (citing *Green Tree*, 531 U.S. at 92; *Booker v. Robert Half Int’l Inc.*, 413 F.3d 77, 81 (D.C. Cir. 2005)).

39. *Id.* (citing *Green Tree*, 531 U.S. at 90–91 & n.6).

40. *Id.* The provision also disallowed joinder of multiple plaintiffs against a single defendant. *Id.* at 283. The plaintiffs did not specifically address the issue, and the court concluded that there was nothing in the record that indicated that a prohibition on joinder would prevent the plaintiffs from vindicating their statutory rights. *Id.* at 284 n.6. The court reasoned that the plaintiffs’ behavior suggested that they did not believe joinder was necessary to pursue their claims because they did not initially pursue a class action or jointly file complaints. *Id.*

41. *Id.* at 283.

42. *Id.* at 284 (citing FED. R. CIV. P. 23; FED. R. CIV. P. 20; *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 463 (1945) (“In a suit to enjoin a conspiracy not all the conspirators are necessary parties defendant.”); *Wilson P. Abraham Constr. Corp. v. Tex. Indus., Inc.*, 604 F.2d 897, 904 n.15 (5th Cir. 1979) (“Antitrust coconspirators are jointly and severally liable for all damages caused by the conspiracy to which they were a party. A private plaintiff need not sue all coconspirators but may choose to proceed against any one or more of them.”)).

43. *Id.* at 284.

44. *Id.* (citing *Jung v. Ass’n of Am. Med. Colls.*, 300 F. Supp. 2d 119, 155 (D.D.C. 2004) (rejecting attempt to compel arbitration of one aspect of a larger conspiracy claim)).

45. *Id.* at 284–85 (citing *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (holding that when looking at one defendant’s conduct, a court must be able to consider the entire conspiracy but suggesting nowhere that this can only be accomplished if all of the participants are parties to the action)).

46. *Id.* at 285.

acknowledged that a court might invalidate an arbitration agreement if its terms make such proceedings “prohibitively expensive.”⁴⁷ But the plaintiffs had developed no evidentiary record of the potential costs that would be involved and therefore did not meet their burden of proving that the costs of proceeding individually against the defendants would be prohibitive.⁴⁸

The Fourth Circuit also considered the issue of the no-joinder provision in light of the restricted discovery available in arbitration.⁴⁹ The court noted that limited discovery was “one aspect of the trade-off between the ‘procedures and opportunity for review of the courtroom [and] the simplicity, informality, and expedition of arbitration’ that is inherent in every agreement to arbitrate.”⁵⁰ Limited discovery alone cannot invalidate an arbitration agreement, and even if it could, the plaintiffs fell far short of proving it did in this case.⁵¹ The plaintiffs would still be able to obtain discovery from each defendant in separate arbitration proceedings,⁵² and the plaintiffs presented no arbitration rule that would prevent them from introducing information garnered from one defendant in a proceeding against the other defendant.⁵³

Finally, the court turned to the question of whether the contractual limitations period prevented the plaintiffs from effectively vindicating their statutory rights.⁵⁴ The arbitration clause included a provision that provided for a one-year period in which claims had to be brought, as opposed to the Clayton Act, which sets a four-year limitations period for claims of violations of the Sherman Act.⁵⁵ The Fourth Circuit noted that generally statutory limitations periods may be limited contractually as long as they are not unreasonably

47. *Id.* (citing *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502–03 (4th Cir. 2002)).

48. *Id.* (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90–91 (2000) (holding that the risk of being burdened with prohibitive costs was too speculative to support invalidating the arbitration agreement); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 558 (4th Cir. 2001) (compelling arbitration where plaintiff offered no evidence regarding his inability to pay an amount billed by the American Arbitration Association or the deterrent effect of the fee-splitting provision on his ability or the ability of others similarly situated to pursue claims)).

49. *Id.* at 285–86.

50. *Id.* at 286 (alteration in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 289–90 (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000); *Mitsubishi*, 473 U.S. at 636–37).

55. *Id.* at 287; see Clayton Act, 15 U.S.C. § 15b (2006); Sherman Act, 15 U.S.C. § 1 (2006). The Fourth Circuit noted that South Carolina statutorily prohibited contractual shortening of statutes of limitation. *Id.* at 287 n.8 (citing S.C. CODE ANN. § 15-3-140 (1976)). Although it did not decide the issue, the court stated that the shortened limitations period might not be enforced against the South Carolina plaintiffs if the statute applied to their contracts with the defendants. *Id.*

short.⁵⁶ Furthermore, courts have frequently found as reasonable contractual limitation periods that were one year or less.⁵⁷

The plaintiffs made two arguments as to why the limitations period was unreasonable: first, that the limitations period might significantly reduce the amount of recoverable damages, and second, that their claims might be found untimely under the limitations period.⁵⁸ Addressing the first argument, the court rejected the plaintiffs' argument that the limitations period was unreasonable because it might greatly reduce the amount of recoverable damages, reasoning that a plaintiff could make the same argument anytime a contract established a shorter limitations period.⁵⁹ Of course, even though a contractual limitations period might be reasonable, a court still must consider its consistency with any substantive rights provided by the antitrust laws,⁶⁰ but the Fourth Circuit concluded that the Clayton Act does not create substantive rights because it was not added to the antitrust statutes until forty years after the underlying liabilities were established.⁶¹

With regard to the second argument, the court considered whether, if the plaintiffs' claims were held untimely under the arbitration agreements, it would

56. *Id.* at 287 (citing *Mo., Kan., & Tex. Ry. Co. v. Harriman Bros.*, 227 U.S. 657, 672 (1913); *Atl. Coast Line R.R. Co. v. Pope*, 119 F.2d 39, 44 (4th Cir. 1941)).

57. *Id.* (citing *Thurman v. DaimlerChrysler, Inc.* 397 F.3d 352, 358 (6th Cir. 2004) (concluding that a six-month limitations period contained in an employment application was reasonable in a discrimination claim against an employer); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 673 n.16 (6th Cir. 2003) (finding a one-year limitations period in an arbitration agreement reasonable); *Northlake Reg'l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan*, 160 F.3d 1301, 1303-04 (11th Cir. 1998) (holding that a ninety-day limitations period in an employee benefits plan was reasonable)). In addition, North Carolina statutorily deemed that one-year limitations periods were reasonable in contracts, and although this was not controlling because the case involved the shortening of a federal statute of limitations, the Fourth Circuit found it did provide strong support for the reasonableness of the contractual limitations period at issue. *Id.* at 287-88 (citing N.C. GEN. STAT. § 25-2-725(1) (2007)).

58. *Id.* at 290.

59. *Id.* at 288.

60. *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1984) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.")).

61. *Id.* at 289 (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 558 n.29 (1974)). Two other circuits had previously indicated that the limitations period was procedural rather than substantive. *Id.* (citing *Kristian v. Comcast Corp.*, 446 F.3d 25, 43 (1st Cir. 2006) ("[A] dispute over a statute of limitations 'is the sort of procedural prerequisite that is presumed to be for the arbitrator.'"); *Kan. City, Mo. v. Fed. Pac. Elec. Co.*, 310 F.2d 271, 283 (8th Cir. 1962) (holding that the limitations period is procedural in a non-arbitration case)). Furthermore, prior to the passage of the Clayton Act in 1955, analogous state statutes of limitations controlled private antitrust actions. *Id.* Consequently, if Congress was content to allow state statutes of limitations to govern for so long, the court reasoned that it was difficult to conceive that Congress intended to confer a substantive right when it later established a uniform limitations period. *Id.*

prevent the plaintiffs from effectively vindicating their statutory rights.⁶² The court stated that it did not need to make a determination at this point in the proceedings because the plaintiffs failed to demonstrate that they could not vindicate their statutory rights with a showing that their claims were in fact untimely under the one-year limitations period.⁶³ In discussing the issue, the court noted that, in general, an antitrust claim arises and the statute of limitations “begins to run when a defendant commits an act that injures a plaintiff’s business.”⁶⁴ Thus, in a case like this, each overt act that injured the plaintiff started the statutory period running again.⁶⁵ Although the complaint consolidating the various individual actions was filed in January 2005, the plaintiffs filed their individual complaints during the period from March through August 2004 and evidence in the record showed that for at least some of the plaintiffs sales occurred as late as November 2003 and January 2004, well within the limitations period.⁶⁶ Furthermore, the plaintiffs made no effort to show that they had made no purchases during the year prior to when the complaints were filed and failed to take into account the doctrine of fraudulent concealment.⁶⁷ If the plaintiffs’ allegations were found to be true—that the defendants fraudulently concealed their activities until February 2004—then the fraudulent concealment doctrine applied and the plaintiffs’ claims likely would be deemed timely filed.⁶⁸

In conclusion, the Fourth Circuit reiterated that the arbitration agreement provided that issues relating to statutes of limitations would be decided by the court, and thus on remand the district court should consider the “timeliness of the action and the applicability of the doctrine of fraudulent concealment.”⁶⁹ If the district court determined that the claims were not timely, then it must decide “whether that fact renders the contractual limitations period unenforceable.”⁷⁰ If it is unenforceable, then it must decide whether severance of the limitations period or dissolution of the arbitration agreements would be appropriate.⁷¹

62. *Id.*

63. *Id.* at 290–91.

64. *Id.* at 290 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)).

65. *Id.* at 290–91 (citing *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997)).

66. *Id.* at 291.

67. *Id.* The doctrine of fraudulent concealment is read into every federal statute of limitations. *Id.* (citing *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946); *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995)). The doctrine states that “when the fraud has been concealed or is of such a character as to conceal itself, and the plaintiff is not negligent or guilty of laches, the limitations period does not begin to run until the plaintiff discovers the fraud.” *Id.* (quoting *Meadow Gold Dairies*, 71 F.3d at 122) (internal quotation marks omitted).

68. *Id.*

69. *Id.* at 292.

70. *Id.*

71. *Id.* On remand, the plaintiffs argued and the defendants conceded that the doctrine of fraudulent concealment applied. *In re Cotton Yarn Antitrust Litigation*, 2009 WL 618252, *4 (M.D.N.C. 2009). The plaintiffs alleged that the antitrust violations dated as far back as January 1999, and the district court held that because the doctrine of fraudulent concealment applied, the

Chief Judge Williams dissented in part from the majority opinion.⁷² She concurred with the second part of the majority opinion regarding the enforceability of the arbitration provisions but disagreed with the majority's decision that all of the parties had contracts with binding arbitration agreements because arbitration was a trade usage, which rendered moot the issue of whether the obligation to arbitrate was a material term.⁷³ Chief Judge Williams stated that *Frances Hosiery* and *Supak* were indistinguishable from the current case because *Supak* created a *per se* rule that an arbitration clause was a material alteration that should be applied without inquiring into the facts of individual cases.⁷⁴ In addition, the Chief Judge wrote that *Supak* cannot be distinguished by arguing that, because arbitration was a trade usage in the textile industry, the part of the arbitration clause compelling arbitration was not an additional term. Such an argument fails, Chief Judge Williams reasoned, because terms consistent with a trade usage could nevertheless constitute additional terms and "the existence of a trade usage [was] a question of fact" not yet resolved by the district court.⁷⁵ Chief Judge Williams also disagreed with how the majority split its materiality analysis by independently analyzing the terms under which the arbitration would proceed as additional terms while not treating the obligation to arbitrate in the same fashion.⁷⁶ Chief Judge Williams further argued that the Federal Arbitration Act requires an arbitration provision to be in writing and that this requirement was only satisfied by the plaintiffs who signed and returned Frontier's confirmation forms or who otherwise had contracts controlled by South Carolina law.⁷⁷

statute of limitations for those violations was tolled until February 11, 2004. *Id.* As a result, the plaintiffs' complaint was timely when it was filed on January 7, 2005, and the court ordered the parties to proceed to arbitration. *Id.* at *4–5.

72. *Id.* at 293 (Williams, C.J., dissenting in part).

73. *Id.*

74. *Id.* at 293–95.

75. *Id.* at 295. *But see* Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 893, 935 (1991) ("A term that simply makes explicit what would otherwise be imported into the contract through course of dealing or usage in the trade is not a material alteration; in fact, it is no alteration at all." (citing *Ore & Chem. Corp. v. Howard Butcher Trading Corp.*, 455 F. Supp. 1150, 1152 (E.D. Pa. 1978) (usage of trade); *Oskey Gasoline & Oil Co. v. OKC Ref., Inc.*, 364 F. Supp. 1137, 1145 (D. Minn. 1973) (course of dealing)).

76. *Id.* at 296 ("I am aware of no other case in which the reviewing court has fragmented an arbitration clause in order to treat the portion governing the obligation to arbitrate differently than the portion setting forth the terms and conditions under which arbitration would proceed.").

77. *Id.* at 298. Based on the Fourth Circuit's application of South Carolina law in *Stedor Enterprises*, the district court assumed, without deciding, that under South Carolina law the arbitration clause was not "a *per se* material change to a textile contract" and therefore the sales confirmations became part of the contracts. *In re Cotton Yarn Antitrust Litig.*, 406 F. Supp. 2d 585, 599 (M.D.N.C. 2005) (citing S.C. CODE ANN. § 36-2-207(1976)), *vacated*, 505 F.3d 274 (4th Cir. 2007). As for the required writing, at least two courts have noted that it is not a mandate under the Federal Arbitration Act that the writing be *signed*. *See Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d

The third member of the three-judge panel, Judge Johnston, also dissented in part, agreeing with the first part of the majority opinion that there were binding arbitration agreements and disagreeing with aspects of the second part regarding the enforceability of the provisions.⁷⁸ While the court concluded that the four-year statutory period was not a substantive right, Judge Johnston argued that the ability to recover treble damages for the entire four-year period was a substantive right based on indications by the Supreme Court that it would be willing to “strike down arbitration agreements that have the effect of depriving litigants of remedies prescribed by antitrust statutes.”⁷⁹ In support of his position, Judge Johnston noted that other circuits had struck down arbitration agreements that “proscribe the arbitral award of damages guaranteed by statute.”⁸⁰ In this case, Judge Johnston suggested that enforcing the one-year contractual limitations period would prevent the plaintiffs from recovering “treble damages for the injury sustained over the course of the statutory four-year period.”⁸¹ In essence, he argued that enforcing the limitations period would reduce the plaintiffs’ damages by seventy-five percent and “would defeat the statute’s remedial and deterrent purposes.”⁸² Consequently, Judge Johnston concluded, the offending limitations provisions should be severed and the case remanded to the district court with instructions to send it to arbitration.⁸³

The most striking feature of the Fourth Circuit’s decision is the conclusion that arbitration is a usage of trade in the textile industry and thus was automatically included in the purchase contracts.⁸⁴ Not only were the parties compelled to arbitrate, but the procedural terms of the arbitration clauses also were incorporated as nonmaterial terms contained in a sales confirmation.⁸⁵ Those nonmaterial terms included two particularly significant provisions—a

840, 846 (2d Cir. 1987); *Med. Dev. Corp. v. Indus. Molding Corp.*, 479 F.2d 345, 348 (10th Cir. 1973).

78. *Cotton Yarn*, 505 F.3d at 298 (Johnston, J., dissenting in part).

79. *Id.* at 300 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (noting that the Court would strike down an arbitration agreement’s choice-of-forum and choice-of-law provisions if they operated to deprive a party of the ability to seek statutory remedies for antitrust violations)).

80. *Id.* (citing *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006) (“[T]he award of treble damages under the federal antitrust statutes cannot be waived.”); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 & n.14 (5th Cir. 2003) (upholding the severability of a punitive damages clause in a Title VII racial discrimination claim where Title VII statutorily provided for punitive damages); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1061–62 (11th Cir. 1998) (upholding a refusal to compel arbitration in a Title VII gender discrimination case where the arbitrator was proscribed from awarding Title VII damages)).

81. *Id.* at 301 (citing 15 U.S.C. § 15(a) (2006)).

82. *Id.* (citing *Paladino*, 134 F.3d at 1062).

83. *Id.*

84. *Id.* at 280.

85. *Id.* at 281. Based on this holding, the district court, on remand, ordered two other plaintiffs to submit their individual claims to arbitration even though they were not part of the earlier proceeding and did not purchase cotton yarn directly from Avondale or Frontier during the class period. *In re Cotton Yarn Antitrust Litigation*, 2009 WL 618252, *5 (M.D.N.C. 2009).

one-year limitations period instead of a four-year statutory period and a prohibition against joinder of defendants.⁸⁶ This obligation to arbitrate resulted from oral agreements made over the telephone that, to the plaintiffs' surprise, included an agreement to submit their rights to an arbitral forum rather than attempt to vindicate them in court. The fractionalized panel gives an indication of the controversial nature of the decision. As Judge Williams points out in her dissent, determinations of trade usage are normally very fact intensive inquiries.⁸⁷ The opinion for the court is largely based on the Yarn Rules and prior case law, but the court could have remanded the issue to enable the parties to present further evidence on the matter.⁸⁸ Furthermore, as it becomes more common, it remains to be seen whether arbitration will be deemed a trade usage in other industries.⁸⁹ As a result, one consequence of the decision is that, in the future, negotiating parties should be aware that an oral agreement to purchase an item over the phone might also include an obligation to arbitrate.

The one-year limitations period was one of the nonmaterial terms incorporated into the contract after the establishment of the general obligation to arbitrate.⁹⁰ This serves as an example of how arbitration can substantially affect a party's rights: the plaintiffs could suffer a seventy-five percent reduction in damages as a result of only being able to recover for one year rather than the statutory four years.⁹¹ In reaching its decision that the shortened limitations period was not a non-waivable substantive right, the court relied almost exclusively on the fact that Congress waited forty years after it created the underlying liability to enact a uniform statutory period,⁹² but such a conclusion appears open to debate because, as Judge Johnston pointed out in his dissent, there is case law supporting the opposite conclusion.⁹³ Arguably, Congress would not have added the uniform period if they were content with how the states were handling the situation. Furthermore, punishing the defendants for only one year of anti-competitive activity would not have the same deterrent

86. *Id.*

87. *Id.* at 297 (Williams, C.J., dissenting in part). *See also* N.C. GEN. STAT. § 25-1-303(c) (2007) ("The existence and scope of [a trade usage] must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.").

88. *Cotton Yarn*, 505 F.3d at 280.

89. Textiles are not the only industry where courts have considered whether arbitration constitutes a trade usage. *See, e.g.*, *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 102 (2d Cir. 2002) (considering evidence that arbitration was a standard practice in the steel industry in deciding whether an arbitration clause was a material alteration); *Otto Wolff Handelsgesellschaft, mbH v. Sheridan Transp. Co.*, 800 F. Supp. 1353, 1358 (E.D. Va. 1992) (declining to find the existence of a binding arbitration clause based on course of dealing or usage of trade in a dispute over damaged rebar even though arbitration provisions might be common in the industry).

90. *Cotton Yarn*, 505 F.3d at 293.

91. *Id.* at 301 (Johnston, J., dissenting in part).

92. *Id.* at 289.

93. *See supra* note 80 and accompanying text.

effect as holding them accountable for the entire four year statutory period and likely would not fully compensate the plaintiffs.⁹⁴

Another questionable aspect of the Fourth Circuit's opinion is the case law that the court cites to support its holding that arbitration is a trade usage. The *Cotton Yarn* court relied heavily on case law from the Second Circuit,⁹⁵ particularly *Helen Whiting, Inc. v. Trojan Textile Corp.*,⁹⁶ where the Court of Appeals of New York had held that that they could "almost take judicial notice that arbitration clauses are commonly used in the textile industry."⁹⁷ However, in *Marlene Industries Corp. v. Carnac Textiles Inc.*,⁹⁸ a case decided after *Helen Whiting*, New York's highest court did not find arbitration to be a trade usage in the textile industry because of the significant waiver of procedural and substantive rights involved in the use of an arbitral forum.⁹⁹ Instead, the court articulated a "New York Rule" that arbitration agreements "'must be clear and direct, and must not depend upon implication, inveiglement or subtlety. . . . [Their] existence . . . should not depend solely upon the conflicting fine print of commercial forms which cross one another but never meet.'"¹⁰⁰ Thus, in the view of the Court of Appeals of New York, arbitration agreements are material alterations to which both parties must expressly assent. While the court has since revised this per se New York Rule,¹⁰¹ where there is a dispute between merchants over whether a party agrees to arbitrate in a battle of the forms situation, *Marlene* remains good law in that New York courts still apply the

94. *Cotton Yarn*, 505 F.3d at 301 (Johnston, J., dissenting in part).

95. *Id.* at 280 (citing *Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co.*, 189 F.3d 289, 296 (2d Cir. 1999); *Pervel Indus., Inc. v. T M Wallcovering, Inc.*, 871 F.2d 7, 8 (2d Cir. 1989); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987); *Helen Whiting, Inc. v. Trojan Textile Corp.*, 121 N.E.2d 367, 370 (1954)).

96. 121 N.E.2d 367 (N.Y. 1954).

97. *Helen Whiting*, 121 N.E.2d at 370 (emphasis added), *quoted with approval in Chelsea Square Textiles*, 189 F.3d at 296–97; *Pervel Indus.*, 871 F.2d at 8.

98. 380 N.E.2d 239 (N.Y. 1978).

99. *Id.* at 241.

100. *Id.* (quoting *Application of Doughboy Indus., Inc.*, 233 N.Y.S.2d 488, 493 (N.Y. App. Div. 1962)).

101. A year after *Marlene* the Court of Appeals of New York partially withdrew from this per se rule by stating that an arbitration provision "could in a proper case be implied from a course of past conduct or the custom and practice in the industry." *Schubtex, Inc. v. Allen Snyder, Inc.*, 399 N.E.2d 1154, 1156 (N.Y. 1979). But the court still insisted "such a determination must be supported by evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes." *Id.*; *see also Diskin v. J.P. Stevens & Co.*, 836 F.2d 47, 51 (1st Cir. 1987) (applying New York law) (refusing to imply a consent to arbitrate on the basis of a vague showing of prior dealings).

More recently, the Second Circuit found that the Federal Arbitration Act preempted the "express, unequivocal" standard that the New York Rule required for showing an agreement to arbitrate. *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993) (quoting *Marlene*, 380 N.E.2d at 242); *see also Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("A court may not, . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.").

UCC in considering trade usage and course of dealing as factors in determining if an arbitration provision constitutes a material alteration under the given circumstances in each case.¹⁰²

The case law regarding the materiality of arbitration clauses developed somewhat differently in North Carolina, but there are similarities. For example, *Frances Hosiery* is similar to *Marlene* in its holding that the arbitration agreement at issue was a material alteration, although the North Carolina Supreme Court stopped short of announcing a per se rule that arbitration provisions were material alterations.¹⁰³ But the Fourth Circuit did take that step in *Supak*, meaning that *Marlene* is more similar to *Supak* in the sense that it created a per se rule. Furthermore, the *Supak* court cites *Marlene* in support of this rule.¹⁰⁴ In *Supak*, the Fourth Circuit also rejected an argument that the policy favoring arbitration contained in the Federal Arbitration Act affected its decision.¹⁰⁵

Thus, in North Carolina there was no trimming back of the per se rule as there had been in New York in cases subsequent to *Marlene*.¹⁰⁶ The *Cotton Yarn* court avoided expressly overruling the decision in *Supak*, but its declaration that arbitration is a trade usage in the textile industry essentially accomplishes this feat through operation.¹⁰⁷ The North Carolina Commercial Code defines a material alteration as one that would “result in surprise or hardship if incorporated without express awareness by the other party.”¹⁰⁸ It is difficult to argue that one is shocked or will suffer hardship because of a trade usage that, by

102. See *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 99–102 (2d Cir. 2002) (applying New York law); *I.K. Bery, Inc. v. Irving R. Boody & Co.*, 2000 WL 218398, at *5 (S.D.N.Y. 2000) (applying New York law). Courts in other circuits have also followed this line of analysis. See *Schulze & Burch Co. v. Tree Top, Inc.*, 831 F.2d 709, 715 (7th Cir. 1987) (holding that an arbitration clause was not a material alteration based on course of dealing between two parties involved in a dispute over allegedly defective apple powder); *N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722, 726 (8th Cir. 1976) (“[T]he better reasoned position is that the question whether an additional term in a written confirmation constitutes a ‘material alteration’ is a question of fact to be resolved by the circumstances of each particular case.”); *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1169 (6th Cir. 1972) (“We believe that the question of whether the arbitration provision materially altered the oral offer . . . is one which can be resolved only by the District Court on further findings of fact in the present case.”); *Dixie Aluminum Prods. Co. v. Mitsubishi Int’l Corp.*, 785 F. Supp. 157, 160 (N.D. Ga. 1992) (holding that a binding arbitration clause was not a material alteration based on course of dealing between a buyer and seller of steel coils).

103. *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 204 S.E.2d 834, 842 (N.C. 1974).

104. *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135, 136 (4th Cir. 1979) (citing *Marlene*, 380 N.E.2d at 242; *Frances Hosiery*, 204 S.E.2d at 842).

105. *Id.* at 137. In a subsequent case dealing with a Virginia statute, the Fourth Circuit held that the Federal Arbitration Act preempted “state rules of contract formation which single out arbitration clauses and unreasonably burden the ability to form arbitration agreements.” *Saturn Distribution Corp. v. Williams*, 905 F.2d 719, 723 (4th Cir. 1990).

106. See *Progressive*, 991 F.2d at 46; *Schubtex, Inc. v. Allen Snyder, Inc.*, 399 N.E.2d 1154, 1156 (N.Y. 1979).

107. *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 280 (4th Cir. 2007).

108. N.C. GEN. STAT. § 25-2-207 cmt. 4 (2007).

definition, can be incorporated into every textile contract.¹⁰⁹ Indeed, the consequence of the Fourth Circuit's holding is that, in the future, parties to contracts in the textile industry must now expressly state that the contract is *not* subject to arbitration if they wish to avoid seeing the dispute submitted to an arbitral forum. Where an oral contract is formed over the phone, this could mean that one party must say that the contract is not subject to arbitration. If the parties do not make this stipulation over the phone and one party includes a provision in its sales confirmation that the transaction is not subject to arbitration while the other party states that it is, then the situation once again becomes a battle of the forms governed by the UCC.

Similar to what occurred in New York and in line with the Federal Arbitration Act's policy favoring arbitration, the Fourth Circuit could have avoided such far-reaching consequences by narrowing the *per se* rule created in *Supak* and holding that trade usage and course of dealing were simply factors to consider in determining whether an arbitration provision is a material alteration in a given situation.¹¹⁰ Instead, the Fourth Circuit has simply replaced one *per se* rule with another.

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109. See N.C. Gen. Stat. § 25-1-201(b)(3) (2007) (defining an "agreement" as "including course of performance, course of dealing, or usage of trade"); see also N.C. Gen. Stat. § 25-1-303(c) (2007) ("A 'usage of trade' is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question."); 12 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 34:3 (4th ed. 1999) ("Generally, absent an express statement or implication to the contrary, the rule is that when parties undertake to conclude a contract, the formation of which is governed by a general usage, the implication is that they intend to proceed according to the usage in question.").

110. See *Bergquist Co. v. Sunroc Corp.*, 777 F. Supp. 1236, 1245 (E.D. Pa. 1991) ("[A] *per se* rule is absolutely contrary to the UCC's special emphasis on the particular circumstances surrounding each contractual relationship. The New York Rule cases do not leave room for an examination of the parties' course of dealing, trade usage, or for that matter, any other facts which would shed light on the materiality question. A *per se* rule cannot be justified under the UCC.").