



NY Bankruptcy Court Trumps Insurers Seeking to Compel Arbitration

By: Jonathan Bank and Matthew Murphy

The United States Bankruptcy Court for the Southern District of New York recently held a group of insurers in contempt for violating a temporary restraining order (“TRO”) aimed at preventing the insurers from using a Bermuda Court to block litigation in the U.S. regarding settlement payments in connection with the collapse of MF Global.

Last summer, the Bankruptcy Court entered an order approving a global settlement in MF Global’s chapter 11 cases. Pursuant to the global settlement, the MF Global Entities¹ became assignees to the rights to payment under certain E&O policies. Also pursuant to the global settlement, the MF Global Entities commenced an adversarial action against the E&O insurers in the Bankruptcy Court to obtain proceeds under those policies. The global settlement contained a **Bar Order** that enjoined the insurers from asserting any claims arising out of or related to the MF Global actions.

The E&O policies required mandatory arbitration to be held in Bermuda. In November 2016, the insurers obtained, *ex parte*, orders from a Bermuda Court effectively enjoining the MF Global Entities from litigating the adversarial action. The MF Global Entities notified the Bankruptcy Court, which entered a show cause order raising the issue of whether the filings in the Bermuda Court and the Injunctive Orders violated the Bar Order in the global settlement or the doctrine set forth in *Barton v. Barbour*, 104 U.S. 126 (1881), which prohibits lawsuits against a bankruptcy estate’s representative in its official capacity unless prior permission is first obtained from a bankruptcy court.

The insurers filed briefs arguing that they were not prevented from filing the injunction in Bermuda. Two of the insurers also filed motions to compel arbitration. The MF Global Entities, constrained by the Injunctive Orders, did not respond.

Concerned with the asynchronous nature of the briefing, in December 2016, the Bankruptcy Court issued a TRO enjoining the insurers from taking action to enforce the Injunctive Orders.

The day after the TRO was issued, the insurers appeared in the Bermuda Court requesting an order requiring that the MF Global Entities terminate the adversary proceeding. On December 22, the Bermuda Court issued an Order that permitted the MF Global Entities only to address the limited issue of whether Bar Order had been breached, and otherwise enjoined the MF Global Entities from litigating in the Bankruptcy Court. The December 22 Order also required the MF Global Entities to dismiss the adversary proceedings within 28 days.

Following a hearing on a second show cause order, the Bankruptcy Court, clearly perturbed², held the insurers **in contempt**, finding that their efforts to secure enforcement of the Injunctive Orders undermined the Bankruptcy Court’s ability to adjudicate the issues properly before it.

The Bankruptcy Court gave the insurers a week to vacate the various Bermuda Court orders, and failing to do so, threatened to strike the insurers’ pleadings in the adversary proceeding, enter a default in favor of the MF Global Entities and proceed with an inquest to determine and impose

¹ MF Global Assigned Assets LLC and MF Global Holding Ltd. (the Plan Administrator under the confirmed liquidation plan, collectively the “MF Global Entities”)

² But it didn’t issue a Tweet



damages. The Bankruptcy Court warned that, on proper showing, it would also impose monetary sanctions to compensate the MF Global Entities for any harm resulting from the contempt.

The Contempt Order highlights the tension between the Bankruptcy Code and a debtor's agreement to arbitrate. Underlying this tension is the Federal Arbitration Act's policy that generally favors the enforceability of arbitration clauses. The Contempt Order reflects the Bankruptcy Court's concern that the insurers petitioned the Bermuda Court to order the MF Global Entities to dismiss the adversary proceeding *the day after* the TRO had been issued. Clearly, the Bankruptcy Court did not appreciate the insurers attempt to circumvent the Bar Order by going to Bermuda in an attempt to wrest the issue from the Bankruptcy Court. Thus, the Contempt Order provides a warning to insurers attempting to enforce an arbitration provision against a bankruptcy estate's representatives without the prior consent of a bankruptcy court.

A copy of the Contempt Order can be found [here](#).

Jonathan Bank | 213-687-6700 | jbank@lockelord.com

Matthew Murphy | 401-276-6497 | matthew.murphy@lockelord.com



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