



News Release

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DRI Files Amicus Brief in Third Circuit Court of Appeals in *Southern Track and Pump, Inc. v. Terex Corp.*

Brief Cites Violation of the Right to Due Process and Unconstitutional Taking of Property

CHICAGO – (April 15, 2014)— DRI – The Voice of the Defense Bar has filed an amicus brief with the Third Circuit Court of Appeals in *Southern Track and Pump, Inc. v. Terex Corp. d/b/a Terex Construction Americas*. The brief maintains that a lower court ruling is a violation of the constitutional protections of the Fifth and Fourteenth Amendment.

Terex Corp., a manufacturer of heavy construction equipment, entered a distributorship agreement with Southern Track and Pump, Inc. (STP), a dealership that sells and rents new and used equipment. The agreement was governed by the Delaware Dealer Statute, which provides that when a distributorship agreement terminates, the supplier must repurchase the dealer's inventory unless the dealer chooses to keep the inventory, or be liable for the repurchase price in civil damages. STP sued Terex, claiming that Terex violated this provision.

The district court agreed, and limited the remaining proceedings to determining damages. Terex argued that damages should be minimal because STP had suffered little or no actual harm. Much of STP's equipment was used or damaged from being rented, and STP had mitigated most of its financial exposure through a foreclosure and auction procedure with its financier. Because of the auction, STP would be unable to return the equipment to Terex.

The district court rejected these arguments, holding that the Delaware Dealer Statute makes a supplier liable for the current net price of the inventory—defined as the supplier's list price for new equipment less applicable discounts—regardless of the dealer's actual economic loss. The court required Terex to pay over \$4 million in damages even though STP claimed it suffered at most \$1 million in damages, and STP's actual damages may have been closer to only \$50,000.

The DRI brief in support of Terex in the Third Circuit argued that the district court's interpretation of the Dealer Statute resulted in a violation of Terex's due process rights and a taking of property without compensation under the Fifth and Fourteenth Amendments. First, the statutory penalty was so unreasonable and arbitrary that it took property without due process of

law. Second, analyzed under the Supreme Court's recent punitive damages cases, the damages were unconstitutional because they were in no way proportional to either the nature of Terex's conduct or the extent of STP's harm. Third, the district court's order effected a taking of Terex's property without just compensation by conditioning doing business under Delaware law on exposure to liability for damages that lack any proportional relationship to the amount of the dealer's actual loss. Fourth, the order could be considered a *per se* taking of Terex's funds for a public use without compensation. DRI urged the Third Circuit to reverse the district court's order under any or all of these theories.

DRI's brief was co-authored by David M. Axelrad and Mark A. Kressel of Horvitz & Levy in Encino, California. Mr. Axelrad is vice chair of the Amicus Committee of DRI's Center for Law and Public Policy. The authors are available for interview or expert comment through DRI's communications department.

The full text of the brief is available [here](#).

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