



Tales From the Front *(Of the Courtroom)*

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**Takin' It
To The Streets**

SUCCEEDING IN A DYNAMIC MARKET



**2020
EIP
CONFERENCE**
Feb. 23-25, 2020
AT&T Conference Center
Austin, TX

First: Make Sure It Is A Courtroom



Court v. Arbitration

Most contracts call for principal's location to serve as venue for any dispute between the parties;

This presents the risk for rep of getting "hometowned";

Arbitrators are often senior lawyers or retired judges;

Not the same rights to subpoena records or witnesses;

Very limited appellate review rights;

Rules of Evidence do not apply;

Paying your lawyer isn't enough? Now you gotta pay the Arbitrator(s) too!



Risk of Arbitration



“convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was 'arguably construing' the contract—which this one was—a court may not correct his mistakes [under the Federal Arbitration Act]. The potential for those mistakes is the price of agreeing to arbitration.”

--U.S. Supreme Court
(unanimously) in *Oxford Health
Plans v. Sutter*, 6/10/13



Scorched Earth Defense: Kelly v. McGraw-Hill



- Kelly sues for unpaid commissions on textbook sales in Chi federal court;
- MGH responds with barrage of motions;
- Eventually, MGH forced to answer Complaint and proceed w/discovery;
- Discovery motions prove necessary to obtain relevant sales records;
- Next tactic: document dump;
- Depositions taken on both coasts;
- Motions for sanctions;
- Cross-Motions for summary judgment with mixed results: Kelly recovers unpaid commissions and fees, but not exemplary damages under IL Rep Statute;
- MGH ordered to pay commissions, interest, costs, and **atty fees**;
- More briefing on atty fees.



Kelly v. McGraw-Hill (cont'd)

MGH tried to slash fee award because Kelly not successful on *all* claims.
U.S. District Judge Milton Shadur:



“Kelly’s counsel has been meticulous in identifying the fees applicable to those unpaid commissions in this multicount, multiclaim case in which each party has been partially successful and partially unsuccessful.”



Kelly v. McGraw-Hill (cont'd)

“By contrast, McGraw-Hill has put forth a series of untenable arguments reminiscent of the Russian defense of Stalingrad in World War II, reluctantly retreating one figurative street at a time as its successive arguments have been exposed as meritless. It is of course important to recognize that in major litigation such as this case involving numerous issues, the precise allocation of time in an exercise of hindsight is necessarily imprecise. But McGraw-Hill’s efforts to slice and dice the individual entries to generate a minimalist figure does it no credit.”



Alternative IL Sales Rep Statute Result

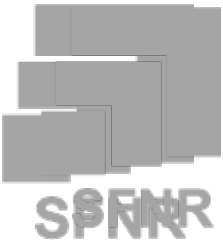
SENR
SPNR

Language of statute:

Sec. 3. A principal who fails to comply with the provisions of Section 2 concerning timely payment or with any contractual provision concerning timely payment of commissions due upon the termination of the contract with the sales representative, ***shall be liable in a civil action for exemplary damages in an amount which does not exceed 3 times the amount of the commissions owed to the sales representative.*** Additionally, such principal shall pay the sales representative's reasonable attorney's fees and court costs.

Separate action brought for unpaid commissions, atty fees, and exemplary damages in state court. Same arguments made against recovery of treble damages. Judge awards commission damages + exemplary damages

The California Sales Rep Statute



1738.10.

The Legislature finds and declares that independent ***wholesale sales representatives are a key ingredient to the California economy.*** The Legislature further finds and declares the wholesale sales representatives spend many hours developing their territory in order to properly market their products, ***and therefore should be provided unique protection from unjust termination*** of the territorial market areas.

1738.15.

A manufacturer, jobber, or distributor who . . . ***willfully fails to pay commissions*** as provided in the written contract ***shall be liable to the sales representative in a civil action for treble the damages proved at trial.***

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

MED TECH/MED CARE, LLC

Petitioner,

vs.

HEMOSURE, INC.

Respondent.

CASE NO. 19PSCP00279

Petition Filed: June 21, 2019

Assigned to Hon. Gloria White-Brown

**JUDGEMENT CONFIRMING
ARBITRATION AWARD**

Hearing Date: August 2, 2019

Time: 8:30 a.m.

Dept: J

The Arbitrator finds specifically that the words and actions of Hemosure's president, Dr. Wan, were unambiguously willful (I'm not going to fucking pay those guys"), thereby triggering the trebling provisions of the Independent Wholesale Representative Act, as briefed thoroughly and persuasively by Claimant's counsel. The Arbitrator further finds that Claimant is entitled to 10% annual prejudgment interest on the outstanding commissions pursuant to Cal. Civ. Code Section 3289(b).

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IT IS ORDERED that the award of the arbitrator dated May 20, 2019, attached hereto as Exhibit "A", be, and the same is, hereby confirmed.

Med Tech/Med Care, LLC shall recover attorney's fees and costs of suit herein.

Dated: August 2, 2019

Honorable Gloria White-Brown

A handwritten signature in black ink, appearing to read 'Gloria White-Brown', is written over a horizontal line.

Judge of the Supreme Court



Venue: My Place or Yours?



Rep is from Massachusetts, home of strong rep statute:

Section 9. A principal who willfully or knowingly fails to comply with provisions relating to the prompt payment of commissions set forth in section eight ***shall be liable to the sales representative in a civil action for the principal amount of the commissions owed and for an additional sum up to three times the amount of commissions and for reasonable attorney's fees and court costs.*** A principal who is not a resident of the commonwealth and who enters into a contract subject to the provisions of sections seven to nine shall be deemed to be doing business in the commonwealth for purposes of the exercise of personal jurisdiction over such principal. No provision of sections seven to nine may be waived, whether by express waiver or by an attempt to make a contract or agreement subject to the laws of another jurisdiction. A waiver of any provision of sections seven to nine shall be void.



Venue (cont'd)



Principal is from Delaware, home of no rep statute:



Venue (cont'd)



Rep contract calls for Minnesota law to apply:

Subd. 4. Rights upon termination.

If a sales representative is paid by commission under a sales representative agreement and the agreement is terminated, the ***representative is entitled to be paid for all sales as to which the representative would have been entitled to commissions pursuant to the provisions of the sales representative agreement***, made prior to the date of termination of the agreement or the end of the notification period, whichever is later, regardless of whether the goods have been actually shipped. Payment of commissions due the sales representative shall be paid in accordance with the terms of the sales representative agreement or, if not specified in the agreement, payments of commissions due the sales representative shall be paid in accordance with section 181.145.

Venue (cont'd)



How Resolved?

Recall this language from The Mass. Statute:

“No provision of sections seven to nine may be waived, whether by express waiver or by an attempt to make a contract or agreement subject to the laws of another jurisdiction. A waiver of any provision of sections seven to nine shall be void.”



With Venue Set, Next Task Is Knowing Your Judge



- Principal runs into financial trouble; withholds comms.
- Contract provides for venue in Ohio.
- Accordingly, federal lawsuit for unpaid commissions filed in Cleveland federal court
- Notice of initial status conference received (routine);
- Counsel and parties must attend (not routine)



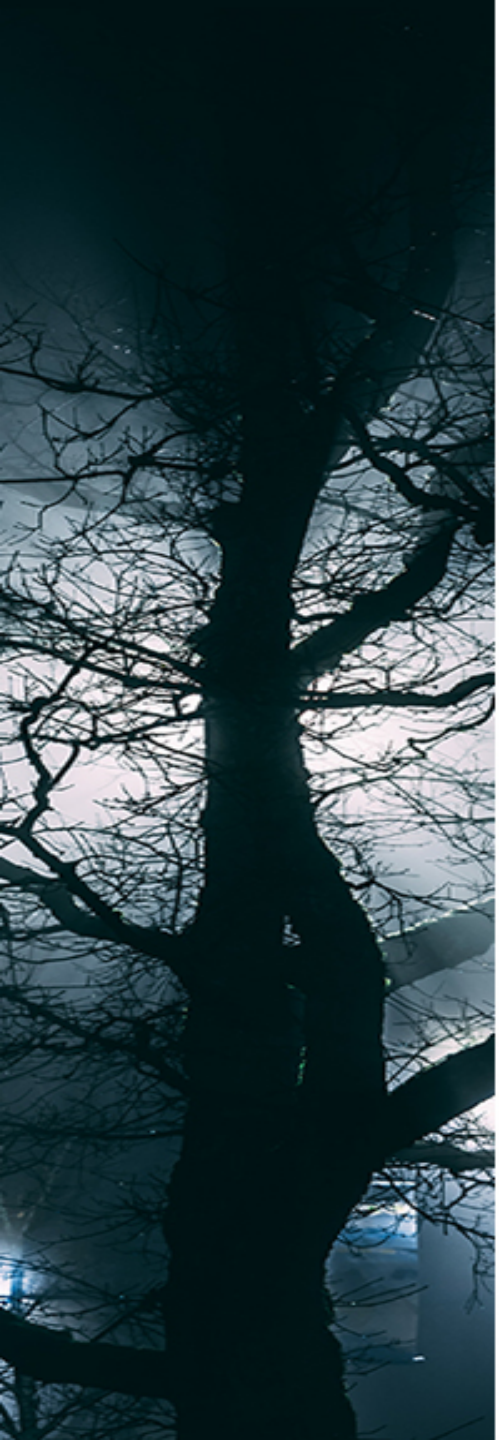
U.S. District Judge Dan Aaron Polster





Known as the “**Opioids Judge**”

- Assigned to “the biggest civil lawsuit in U.S. history” and “the most complex civil litigation in U.S. history” -- worth at least tens of billions
- Over 2,000 suits by cities, counties, towns, and tribes against major drug companies arising from spike in addiction and over 200,000 fatal overdoses from prescription opioids (incl. OxyContin) over last 20 years
- Before any evidence was produced, Judge Polster commented to lawyers:
“150 Americans are going to die today, just today, while we’re meeting.”
- He also indicated that he wanted to “do something meaningful to abate this crisis”
- Enabled any city, county or other municipal entity to participate in a settlement, even if they had not filed suit

- 
- Defendants understandably upset. Viewed him as pre-judging the evidence. Motion to recuse:

“There can be no doubt that a reasonable person would question whether the court can fairly and impartially conduct this . . . Litigation”

Why? What's His Game Plan?

- “Polster has long had a reputation as a judge who prefers to see lawyers settle a case rather than go to trial.” -- *The Washington Post* (9/15/19)

Back to the Rep Case Assigned to Polster



- The Notice of a status conference required counsel and parties to attend
- Upon appearing in his Cleveland courtroom, Judge Polster stages an impromptu settlement conference
- Alternately pushes, prods, charms, cajoles, & threatens
- Demands explanations of litigations strategies and issues “rulings” on positions not yet briefed based on his 1st impressions
- Result: Quick SETTLEMENT (no deps or mos.)

The Opposite Approach: On the Courthouse Steps



- Parties' rep contract between a Florida rep and a Japanese mfr. called for NJ law to apply
 - Many states' rep statutes call for their own law to apply, often providing a choice; not Florida.
- Action filed in Tampa federal court, invoking the NJ statute
- The NJ rep statute was amended after the parties' agreement was signed, but before any of the relevant conduct occurred.
 - Big issue in litigation was whether to the NJ statute applied
 - On initial motion, court deferred
 - Over ensuing months, parties forced to take discovery, file for summary judgment and prepare for trial
- One week before trial, Court issues its ruling: amended statute does apply
- Within minutes, phone rings:
 - “Adam, give me a number!”

One More: International Arbitration



- Contract calls for arbitration under rules of International Chamber of Commerce
- After filing, lawyers agree to proceed under AAA's International Centre for Dispute Resolution instead -- in Chicago
- Retired Cook County Judge selected as Arbitrator
- In the arb proceedings, full written and oral discovery taken, incl. depositions in Canada, along with discovery motions, motions to dismiss, motions for summary judgment, and post-hearing motions
- Arguing against application of the IL Sales Rep Act, defendant claims it doesn't apply to non-IL reps; it violates the Commerce Clause of the U.S. Constitution; and it is unavailable only in court, not in an arbitration
- Major issue involved split commission provision in mfr's form contract: Defendant kept portions of the rep's commission for itself when it didn't have another rep in an affected territory. This required bringing in the big gun.

International Arbitration (cont'd)



- Our expert witness on industry standards: Bob Terwall.
- From the Arbitrator's decision:

Mr. Terwall testified extensively and

persuasively that all contracts for independent sales representatives contain a section dealing with the sharing of commissions in situations where two competing representatives claim the commission.

by contract and industry practice, the manufacturer has the obligation to resolve these disputes in its sole discretion. The reason for this makes sense. The manufacturer obviously wants its product sold.

Being fair to one's sales force encourages sales efforts. Split commissions are always between

competing or cooperating reps. The industry never splits commissions with the manufacturer. There



The End.

(Questions???)

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