MANA Attorneys Gain Key Rep Victory In Circuit Court

BY JACK FOSTER

MANA and attorneys who work closely with the association achieved a notable court victory earlier this year that strengthened the rep's position in the face of termination by a principal.

Last year in a case before the Federal District Court of Massachusetts, the Court issued an opinion that the "Waiver of law prohibited" provision in the Georgia Commission Protection Act was invalid, and that Massachusetts law prevailed in a lawsuit of a Georgia-based representative against a Massachusetts-based manufacturer. The manufacturers' representative was represented by MANA Attorneys Kramer & Kramer, LLP, who alerted the association to the potentially devastating effect of this opinion on all commission protection acts throughout the country. Kramer and Kramer filed an appeal of this opinion with the First Circuit Court of Appeals, and asked MANA to file an Amicus Curiae Brief with the Court in support of the "no waiver of law" provisions in most if not all commission protection acts. At the MANA Attorney Forum in October of last year attorneys agreed to volunteer to contribute to the development of the Amicus Curiae Brief. Several attorneys offered their services and Randy Gillary and Kevin Albus, Law Offices of Randall J. Gillary, P.C., Troy, Michigan, volunteered to prepare and submit the brief on behalf of MANA. Barbara Kramer successfully argued the case in the First Circuit Court of Appeals earlier this year.

Mitchell A. Kramer and Barbara Kramer of Kramer & Kramer, LLP.

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In describing what took place, Mitchell A. Kramer, Kramer & Kramer, LLP, Rydal, Pennsylvania, explains, "In a case entitled 'Vertex v. Paradigm,' a federal judge in Massachusetts issued a decision which could have effectively nullified all of those laws. Vertex is our client, and Barbara Kramer and I handled the case in Massachusetts."

The facts in simplified form were as follows: "Vertex Surgical, Inc., was a Georgia rep selling medical devices manufactured by Massachusetts-based Paradigm Biodevices, Inc. They had a written contract that provided that disputes between the two companies would be litigated in Massachusetts and the contract was to be interpreted and enforced under the laws of Massachusetts. Paradigm terminated Vertex's contract and failed to pay commissions owed at the time of termination. When we filed suit, one of our claims was for commissions owed and multiple damages under the Georgia Wholesale Distribution Law. That law provided that commissions had to be paid within 30 days of termination or the rep was entitled to the amount of commissions plus exemplary damages double that amount, plus reasonable attorneys' fees and costs.

"Before the trial began, the trial judge, on his own motion, dismissed the Georgia Rep Act claim. The basis of his decision was that since the contract was governed by Massachusetts law, there could be no claim under the Georgia Rep Act even though the representative was a Georgia company engaged to sell products in Georgia as well as two surrounding states. While the decision of a federal court is not binding on state courts or on federal courts other than the one in which the decision was made, the opinions of federal judges are important since other courts often cite them and are persuaded by them. The problem with this decision was that it would allow a manufacturer to enter into contracts with its reps that provided that the laws of a state other than one that has a rep act would apply to their relationship. In that way manufacturers could effectively negate the laws designed to protect reps.

"We had to appeal that decision in order to protect manufacturers' reps throughout the United States. Our client, Sean Bitting, agreed that we could appeal and that we could focus the entire appeal on the Georgia Rep Act issue. We felt that by not raising other issues that occurred during the trial and concentrating all of our efforts and focus on the rep act issue, we would have a greater chance of reversing the judge's decision. The appeal went to the United States Court of Appeals for the First Circuit.

MANA's Involvement

"We prepared and filed the necessary motions and legal briefs to assert our position. We contacted

MANA—with whom we obviously have a relationship—to ask it to file what is called an *Amicus Curiae* brief. Amicus briefs are filed by people who are not parties to a litigation but who have a real interest in the litigation. Since MANA has, for decades, fostered rep acts, MANA agreed to and did file such a brief.

"The defendants opposed our position, filing a brief stating that the trial judge was correct. We then drafted and filed a reply brief. The case was argued by Barbara Kramer on behalf of Vertex to a three-judge panel of the First Circuit Court of Appeals. Barbara was her usual calm and superbly prepared advocate. She was somewhat in awe since one of three judges was the retired United States Supreme Court Justice David H. Souter. Justice Souter, who was appointed to the Supreme Court from the First Circuit Court of Appeals, still sits, on occasion, as a Circuit Court judge.

"The First Circuit, in an opinion written by Justice Souter, reversed the trial court's decision in the Vertex case on August 4, 2010. The Court said: 'The choice of law provision here does not bar application of the Georgia Statute and therefore does not constitute a contractual waiver by Vertex of its provision.'"

Further quoting from the Souter opinion: "This leaves open the question whether a Massachusetts court would, in the absence of a contractual waiver, recognize and enforce the Georgia statute, a question involving Massachusetts choice of law principles and the related questions of how it might construe and what effect it might give to the Georgia statute's anti-waiver provisions. Although technically we do not defer to a district court on the meaning of the law of the state in which it sits, we nevertheless think it would be helpful for the district court to consider this set of issues in the first instance, possibly aided by more complete briefing in light of our resolution of the main issue decided by the district court. To allow for that consideration, we vacate the order of summary judgment for Paradigm on the Georgia statutory claim and remand the case to the district court." Kramer adds: "Fortunately, the rep acts live to fight for reps another day."

The extent to which the rep acts that Mitchell Kramer refers to exist and work for reps was explained by the attorney when he said: "Thirty-six states and Puerto Rico have laws that were designed to assure that reps are paid their commissions when the rep-principal relationship ends. While the laws of each state differ, almost all of them provide that within a certain number of days after the end of the relationship, or after commissions are due per the contract, the rep must be paid all commissions that are owed. If those commissions are not paid, the rep is entitled to its commissions plus exemplary damages of some multiple (generally two or three times) of commissions due plus counsel fees and costs."

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He adds that PTRA's association manager, MANA, "has actively pressed for passage of such laws and modifications of those laws to make them more effective."

Danger of Nullification

As Kramer considers what transpired in the court case, he notes that "If the original decision stood, any manufacturer would have the ability to nullify rep acts anywhere. This case and the final decision were important to MANA because the association has been so dominant when it comes to supporting rep acts. This is uniquely a MANA issue and the association has historically devoted a great deal of time and resources to it."

Barbara Kramer, Ann Arbor, Michigan, who argued the case, adds that "This case was important because it undid something detrimental to reps that the court had done. Historically, there haven't been a great number of decisions in District Courts that dealt with how rep acts are going to be enforced where there is a multi-state situation." She continues that dealing in multi-state situations is hardly unusual for reps, and they are often forced to litigate in states different from those where they actually conduct business. Further compounding the rep's problem is the fact that "often if the state where the rep is forced to litigate does have a rep act, many times the rep may not be able to use it because it only applies to reps who conduct business in that state. That's what happened here."

She also notes the importance of Justice Souter's involvement in the case when she says: "Since by happenstance the opinion was written by Supreme Court

Justice Souter, that should mean that other courts will take the case seriously. You can hardly have a judge on your case with more gravitas."

Barbara Kramer continues that in addition to its importance to reps in general, this case was also important to MANA. "The fact that MANA was willing to step up to the plate and back our effort by supporting an Amicus Brief, goes a long way to show the association's commitment to reps. It also showed the courts that the issues involved affected more than just the litigants in the case. Statistically, the chances of getting a reversal of a case in circuit court are about two percent. Despite those odds, MANA was willing to step forward. All reps should feel good that MANA acted the way it did.

A Rep's View

The attorneys who worked so hard on this case are hardly the only ones who appreciate the importance of the favorable outcome. According to Greg Bruno, Midlantic Enterprises, Inc., Pennsauken, New Jersey, "Because I found it confusing, I'm not sure I fully understood the implications of the decision when I initially read the Appeals Court's decision. But as I reread it, my feelings shifted from confusion to a better understanding and elation with the decision; elation because if I understand the decision correctly, many of our existing contracts have just become a little more fair. We all search for fairness in our daily efforts, but finding fairness and anyone willing to help us is rare. All reps have experienced a 'take it or leave it' option within contract negotiations that frequently includes restrictions as to where we might choose to fight a legal battle if required. This may no longer be the situation thanks to the efforts of these law firms. Their work speaks volumes to their commitment to manufacturers' agents and their willingness to direct their firm's resources on our behalf. I am happy that the lower court's decision was overturned."

And, he's hardly done with his compliments when he continues: "As a MANA member, it's nice to know that someone — in this case our association and the dedicated attorneys — have our backs. Lately, most of us are feeling pressure from all directions. This time the pressure has been reduced by the good works of a few who serve our industry. I'm grateful that they chose to take up this fight on our behalf and suggest that any agent who finds himself needing legal counsel consider these individuals first." AS

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