



Daily Journal Verdict & Settlements

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ECG Obtains Unanimous Jury Verdict Against U.S. Surgical in Federal Unfair Business Practices Action

USDC Central - Jun. 6, 2003

Hon. David O. Carter

Topic: Contracts

Sub topic: Breach of Contract

Sub-sub topic: Repudiation

Jury verdict

\$1,483,223

Attorneys

Plaintiff - Kelly Broedlow, Enterprise Counsel Group, Irvine

Plaintiff - David Z. Ribakoff, Law Offices of David Z. Ribakoff, Irvine

Defendant - L. Amy Blum, Reed, Smith, Crosby, Heafy, LLP, Los Angeles

Defendant - Charlotte Tang, Reed, Smith, Crosby, Heafy, LLP, Los Angeles

Technical Experts

Plaintiff - George Strong Jr. economist, Los Angeles

Defendant - Peter D. Wrobel economist, Los Angeles

Facts

The plaintiff, The Byran Company Inc., is a machine shop located in Huntington Beach. It manufactures metal components, including screws and hooks used in spinal implant surgeries. One of Byran's largest customers was a Connecticut company known as U.S. Surgical, a division of Tyco Healthcare, L.P. Prior to December 1999, Byran manufactured parts for U.S. Surgical's sister company Surgical Dynamics Inc. for its spinal implant products commonly known as SDRS, SR90D and Aline. In late 1999, U.S. Surgical instituted a Strategic Sourcing Initiative with the aim of driving down U.S. Surgical's overall costs for its metal components while forming stronger relationships with a fewer number of suppliers.

ACCORDING TO THE PLAINTIFF: After several discussions and letters between Byran and U.S. Surgical, Byran presented a formal offer to U.S. Surgical to be the exclusive manufacturer for a period of no less than 48 months for over 200 specified parts at specified prices. A month and a half later, U.S. Surgical accepted the offer in writing and began to immediately implement the new lower prices. The agreement reached was never set forth in a formal written contract. It was U.S. Surgical's responsibility to prepare such a formal contract, but the U.S. Surgical executive who had that responsibility had other priorities and never got around to it. Later that same year and into 2001, U.S. Surgical ordered almost \$1

million of parts covered by its agreement with Byran from a Byran competitor. A few months earlier, this competitor hired vice president of operations. When Byran discovered these purchases, it notified U.S. Surgical's corporate counsel and requested that U.S. Surgical provide Byran with adequate assurance of U.S. Surgical's continuing performance under the agreement. U.S. Surgical never did provide Byran with such assurance, maintaining instead that because there was never a formal contract with Byran, it had no contract with Byran. In approximately June 2002, U.S. Surgical sold all of its product lines covered by Byran's agreement to a company called Stryker Corporation. U.S. Surgical only notified Byran of this sale after its agreement with Stryker was already consummated. U.S. Surgical never provided Stryker with a copy of Byran's agreement with U.S. Surgical and since the sale to Stryker, Byran has been filling Stryker's orders on an ad-hoc basis. Byran contended that U.S. Surgical acted in bad faith in selling the business to Stryker.

FACTS ACCORDING TO THE DEFENDANT: After several discussions and letters between Byran and U.S. Surgical, Byran sent a letter with a proposal to U.S. Surgical to be the exclusive manufacturer for a period of no less than 48 months for over 200 specified parts at specified prices subject to execution of an agreement. A month and a half later, U.S. Surgical sent a letter to Byran indicating that the proposal was acceptable, but a formal written agreement would be negotiated. No formal written contract was ever negotiated or drafted. Byran never pursued or inquired about the formal contract and never told anyone at Byran that a contract existed. Later that same year and into 2001, U.S. Surgical ordered almost \$1 million of parts covered by the pricing schedule with Byran from an alternative supplier because Byran failed to deliver the required parts. When Byran discovered these purchases, it notified U.S. Surgical's corporate counsel and requested that U.S. Surgical provide Byran with adequate assurance of U.S. Surgical's continuing performance under the agreement. U.S. Surgical responded that it would have the business personnel look into the matter and U.S. Surgical continued to purchase all its requirement from Byran. In approximately June 2002, U.S. Surgical sold the SDI business, including SDRS, SR90D and product lines to a company called Stryker Corporation. Although

neither of the letters relied on by Byran as creating a contract contained any provision for notice in the event a sale of the business. Byran contended that the failure to give notice or obtain Byran's consent was wrongful. U.S. Surgical denied these allegations and sought future lost profits as a result of the sale to Stryker. However, since the sale to Stryker, Byran has sold at least \$55 million in former SDI products to Stryker.

Contentions

Byran contended that U.S. Surgical's ordering of parts covered by its exclusive agreement with Byran from Byran's competitor constituted a breach of contract. Byran further contended that U.S. Surgical's failure to provide Byran with adequate assurance of U.S. Surgical's continued performance under the agreement constituted a repudiation of the contract pursuant to California Commercial Code, section 2609. Defendant U.S. Surgical contended while it continued to do business with Byran, no long term exclusive contract was entered. Rather, U.S. Surgical contended that both Byran and U.S. Surgical contemplated a formal written agreement and that without such a document, it had no contract with Byran, but only an "agreement to agree." U.S. Surgical further contended that even if it did have a contract with Byran, it was entitled to purchase product from other suppliers to "cover" because Byran was late on its deliveries to U.S. Surgical. U.S. Surgical also contended that the sale of the business to Stryker was a good faith, arms length transaction, that had nothing to do with Byran and which terminated any obligation under the alleged requirements contract. Finally in its counterclaim, U.S. Surgical contended that if it had a contract with Byran, it overpaid Byran by approximately \$350,000.

Jury Trial

Length four days. Deliberation two days.

Settlement Discussions

The case was mediated in June 2002 with no settlement. Subsequently, two defendants settled out before trial in a confidential settlement agreement. According to the plaintiff: U.S. Surgical made no offer at mediation, asserting instead that the parties had already reached a settlement agreement. Following

mediation, U.S. Surgical moved, unsuccessfully, to summarily enforce the parties' alleged settlement. Just before trial, U.S. Surgical offered Byran \$475,000 to settle. According to the defendant: The plaintiff demanded \$8 million to settle the case at the June 2002 mediation and demanded \$3.75 million to settle the week before trial.

Result

Jury verdict in favor of the plaintiff on claims for breach of contract (\$234,839.82) and repudiation of contract (\$1,248,383.71) and against the defendant on its claim of offset



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