



The Voice

And The Defense Wins

Published 1-13-16 by DRI

Henry D. Fellows, Jr.



DRI member [Henry D. Fellows, Jr.](#), partner in the Atlanta, Georgia, law firm of **Fellows LaBriola LLP**, obtained a summary judgment in the U.S. District Court for the Northern District of Georgia, Atlanta Division, on behalf of Medline Industries, Inc. (“Medline”) in *Chemence Medical Products, Inc. v. Medline Industries, Inc.*, 2015 WL 630400, ___ F.Supp.3d ___ (N.D. Ga. 2015). Medline is the largest distributor of healthcare products and supplies in the United States. Chemence Medical Products, Inc., is a manufacturer of surgical medical adhesives. Chemence sought damages in excess of \$300 million for alleged breach of contract by Medline.

On August 1, 2010, the parties entered into a Supply Agreement (“the Agreement”) pursuant to which Chemence would supply a surgical closure adhesive to Medline. The Agreement provided that Chemence would supply “a 2-octyl cyanoacrylate surgical closure adhesive with the exact specifications, or substantially similar specifications” as those set forth in the Agreement. Chemence sold that product to Medline under the trade name Octylseal, but also manufactured the same product under two other names-Derma+Flex QS and Sure+Close II-consistent with the Agreement.

The Agreement’s terms required Medline to pay Chemence certain amounts upon FDA approval of the product and upon execution of the Agreement. Medline was required to purchase a minimum annual amount of the product and, as long as Medline met that requirement, Chemence was required to supply the product for a fixed transfer price of \$5.50 through December 31, 2012. After that date, Chemence could increase the transfer price annually to reflect changes in raw material, labor costs, and manufacturing, provided that it gave Medline thirty days’ notice. The Agreement then gave Medline the right to reject price increases and terminate the contract upon thirty days’ notice.

In late November, 2012, Chemence notified Medline that sales of Octylseal could be subject to a 2.3% federal excise tax on medical devices under the Affordable Care Act, and Chemence informed Medline in December, 2012, that it would add 13 cents per unit to the cost of Octylseal as a charge for the excise tax. Medline responded that it did not believe that the Agreement permitted the excise tax to be passed on to it, and Medline rejected the increase in price as an impermissible increase in cost under the Agreement.

On February 13, 2013, Chemence filed a declaratory judgment action against Medline seeking a declaratory judgment as to whether the tax was a federally mandated payment or a permissible price increase. On February 19, 2013, Medline notified Chemence that it would terminate the Agreement in thirty days. Chemence responded by amending its civil action to assert a breach of contract claim against Medline.

By order entered in *Chemence Medical Products, Inc. v. Medline Industries, Inc.*, 989 F.Supp. 1349 (N.D. Ga. Dec. 2013), the U.S. District Court for the Northern District of Georgia granted Medline’s motion for partial judgment on the pleadings and established the legal precedent that the medical device excise tax contained in the Affordable Care Act applies only to manufacturers of medical products and not distributors of medical products. The court reasoned that the excise tax did not qualify either as a permissible price increase under the Agreement or a federally mandated payment.

Following substantial document and deposition discovery, both parties moved for summary judgment on Chemence’s remaining breach of contract claim. The court granted Medline’s motion for summary judgment and denied Chemence’s motion for summary judgment.

To learn more about DRI, an international membership organization of attorneys defending the interests of business and individuals in civil litigation, visit www.dri.org.