

# Commercial Counsel

## HAPPY HOLIDAYS!

All of us at KMKSC wish our clients and readers a **merry holiday season and prosperous 2009.**

### A BOTTOM-LINE LESSON FROM 2008

2008 will hardly go down as a banner year for business, and many will not regret its passing. Certainly, when we warned in our January 08 issue of “*questions about the vitality of the US and global economies*” and “*about consumer confidence and the prospects for consumer-led growth in 2008,*” we did not foresee that the American economy had already entered the most profound recession in a generation.

Nevertheless, 2008 offers valuable lessons for businesses in 2009. We cautioned last January that business failures were more likely, and that therefore businesses would be wise to focus on protecting their accounts receivable. Our advice then, that companies should “*act early and act vigorously*” to enforce debtors obligations is even more apt. With perhaps the majority of business sectors seeing revenue contraction, many companies have extended payment periods to bolster working capital, paying promptly only when obliged to. Why allow others to bolster their financial position at the expense of your financing costs? Even more seriously, with companies failing at levels unknown in a quarter of a century, it is often only the first to act who will recover. A day or a week can be the difference between full recovery and total write off.

### SEVEN KMKSC SUPER LAWYERS

2008 was not all bad news: KMKSC achieved success on behalf of our clients in a number of areas, and doing so, brought recognition to seven KMKSC attorneys, KMKSC attorneys, Steve Kailas, Bob Gegios, Matt Gerdisch, Dave Chartier and Jordan Reich were named *Super Lawyers*. This marks the third year in succession that these attorneys have been judged as “in the top 5%” of Wisconsin attorneys by *Super Lawyer Magazine*. We congratulate them on their achievement, as well as Bill Fischer and Renee Mehl, who were named Rising Stars.

While KMKSC attorneys are currently involved in litigation in areas such as antitrust, RICO, real property and contract enforcement in both state and federal courts, we are also active on our clients’ behalf outside of the



Member,  
International  
Society of  
Primerus Law Firms

## General Discussion Relating to Business Legal Issues

The information contained herein is not provided as legal advice. Legal advice should be sought as to any factual and legal issue.

December 2008

court house. The following are recent examples of interesting disputes resolved out-of-court, one by direct advocacy to the opposing party, the other via arbitration:

### KMKSC NAVIGATES INTERNATIONAL JURISDICTION AND CHOICE OF LAW ISSUES TO RECOVER MIDDLE EASTERN DEBT.

Our client, a Midwestern manufacturer and exporter of technology, faced non-payment of over a million dollars by a purchaser based in the Middle East and without a U.S. presence. A dispute arose regarding the requirement to secure export approval from the U.S. government for the second shipment called for under the contract. The parties were at odds as to which bore the burden of securing approval.

To complicate matters, the debtor was asserting that documents exchanged by the parties rendered the venue and appropriate law that of the debtor’s country of origin. Under that law, the debtor had a colorable claim to assert that binding arbitration in its home country was mandated. Furthermore, the differences in the legal systems suggested the possibility of differing conclusions as to which party bore the burden of securing an export license based upon the materials that would likely be regarded as evidence of the terms of the agreement between the parties.

KMKSC instigated action in federal court; however, mail service was rejected. Resorting to the Hague convention, KMKSC secured court appointment of an international process server prepared to secure service in a potentially hostile environment. After service, the debtor responded by announcing the intent to file a motion to dismiss on jurisdictional grounds, or, in the alternative, on what it alleged was a binding requirement to arbitrate in its home country. While KMKSC believed that the minimum contacts necessary to support federal jurisdiction would be found, our attorneys were aware that there was a distinct possibility that successful procurement of a court order from a federal court might not lead to recovery. The concern was that the award would prove impossible to enforce in practice, at least in a practical timescale, due to the likelihood of a challenge in the country where the debtor had assets.

Recognizing this, our attorneys focused on the sensitive nature of the purchase in the country of destination, and the undesirability of public discussion of the transaction. After extensive discussions with opposing counsel, the debtor chose to settle,

concluding that it faced an extended and uncertain battle over jurisdiction and that this would be a potential public relations nightmare. Thus, KMKSC attorneys secured a financial settlement that was satisfactory to our creditor client and which avoided the significant delay, cost and risk that federal litigation and foreign enforcement actions would have entailed.

**KMKSC GUIDES CLIENT THROUGH CONTRACTUAL CONFUSION TO MULTI-MILLION DOLLAR AWARD**

Our client, a major medical supply company, had entered into a series of contracts for the distribution of testing devices and associated supplies. A dispute arose between the parties over the interpretation of the contract, which the distributor claimed invalidated several million dollars of invoices. A binding arbitration agreement existed, but the parties were unclear as to the terms.

KMKSC identified related evidence of the parties' intent at signature regarding the specified forum and rules for arbitration and secured an agreement on venue, Washington, D.C., which had not been specified. The rules that the parties had adopted were relatively unusual in commercial arbitrations in that each party had initially to submit findings of fact to the arbitrator, together with conclusions of law. The arbitrator was not permitted to alter either party's submission; rather she could only select one submission or the other in its entirety after presentation of evidence.

After a hearing, supported by post-hearing briefs from both sides, the arbitrator adopted the KMKSC submission and made an award of in excess of three million dollars to our client. She also exercised discretion to award attorney fees and costs, in whole or in part, awarding the full requested amount to our client as part of the final award.

**RECESSIONARY REALITIES**

- PROFIT: An archaic word no longer in use.
- FINANCIAL PLANNER: A person whose phone has been disconnected.
- MARKET CORRECTION: The day after you buy stocks.

**AN ADVANCE WARNING ON DATA PRIVACY LAWS**

2008 witnessed a wave of state legislation imposing heightened requirements on companies regarding the disclosure, safeguarding and disposal of non-public personal information within their possession. Indeed, this subject has thus far been seen as a win-win scenario with constituents by state legislators. Until recently, most laws were focused on businesses operating in the state in question. As such good, bad or indifferent, most of the companies likely to be affected had an opportunity to learn about the implications. Not so with Massachusetts. Due to come into effect in May 1, 2009, Business Regulation 201 CMR 17.00 potentially reaches any business anywhere in the country.

This regulation is significant in terms of its scope as well as its geographic reach. The regulation imposes significant obligations upon to, any company that, regardless of geographic location, maintains, stores, licenses or owns non-public information about an individual who is resident in Massachusetts (or becomes so). By May 1, 2009, such companies must develop and implement a comprehensive, written, personal information security program that includes a significant number of potentially expensive obligations. Outsourcers of data management are not spared, either. The regulation also requires businesses to take reasonable, and verifiable steps, including through contracts, to ensure that third-party service providers have the capacity to implement and maintain the same protections, and that they actually comply with the regulation.

In very truncated form, companies that hold even limited personal information are required to document risks to the security of such information and to draw up and implement policies, processes and security safeguards to prevent breaches of confidentiality. While the regulation may yet be challenged in court, it is also possible that legislators elsewhere will seek to follow the Massachusetts lead. If you would like to know more about the spread of data privacy laws, including that of Massachusetts and how your business may be impacted, contact Bob Gegios or Stephen Taylor on 414.962.5110.



*A Reputation for Success,  
A Tradition of Results*

If you would like another member of your organization to receive *Commercial Counsel*, or an article, please contact Vicki Miller at (414) 962 5110 or at [vmiller@kmksc.com](mailto:vmiller@kmksc.com).

Main Website: [www.kmksc.com](http://www.kmksc.com) Collections Division: [www.kmkcollections.com](http://www.kmkcollections.com) Foreclosure Division: [www.KMKForeclosure.com](http://www.KMKForeclosure.com)  
 Washington Building, Barnabas Business Center, 4650 N. Port Washington Road, Milwaukee, WI 53212  
 Telephone: 414-962-5110 Email [kmksc@kmksc.com](mailto:kmksc@kmksc.com) Facsimile: 414-962-8725