

AS MOM ALWAYS SAID, BE SURE TO GET IT IN WRITING.

You're all set. You've signed a sales representative contract with a new principal, and are ready and raring to go. You know all the terms of the contract, so you think it's safe to file it away and forget about it unless some problem arises. Besides, it's not set to expire for two years, so no need to keep it lying around. In the drawer it goes, not to see the light of day unless the unthinkable happens. You and the principal embark on a fantastic relationship, and all goes well—for a while, at least.

After two and a half years, the unthinkable does happen. The principal is not paying your commissions in a timely manner. It wants to bring in a factory sales person or let another representative work in your exclusive territory. It wants to terminate your representation immediately, in violation of the contract's notice provision, and it refuses to pay commissions for a new customer you've been working on for several years. It's true your contract has technically expired, because it contains a provision that it must be renewed in writing and you and the principal have not done that. But for the last six months, you've been operating as you always have. It is obvious to you that the terms of the contract must still govern your relationship with the principal. Or do they?

In a recent case, the Court of Appeals of Michigan found that an expired contract does not necessarily continue to govern the relationship between a sales representative and its principal, even when they continue to work together after its expiration. In Mi-Tech Sales, Inc. v. Enhancements, Inc., 2003 Mich. App. Lexis 981 (Court of Appeals of Michigan, 2003), Mi-Tech, a sales representative specializing in electronics, and Ehancements, Inc., a computer and electronics manufacturer, entered into a sales representative contract designating Mi-Tech as Enhancements' exclusive sales agent for

a specified territory. The agreement became effective on September 23, 1996, but stated in Paragraph 8 that it would terminate one year from that date unless the parties renewed it in writing. The contract also provided that either party could terminate their agreement on sixty-days' written notice. September 23, 1997 came and went without the parties renewing the contract in writing. Mi-Tech, however, continued to act as Enhancements' sales representative after that date, and Enhancements continued to pay it commissions.

While the contract was still in force, Mi-Tech undertook unsuccessful efforts to enter an agreement with Office Max to sell Enhancements' products. In 1998, Enhancements began producing a product which interested Office Max. Enhancements, however, notified Mi-Tech in April, 1998 that it was terminating their relationship as of June 1, and immediately entered into a contract with another sales representative to exclusively service the territory covered by Mi-Tech. The new sales representative successfully reached an agreement with Office Max to sell Enhancements new product, but Enhancements refused to pay any commissions to Mi-Tech on the Office Max deal. Mi-Tech filed suit alleging that Enhancements breached the parties' contract and violated the Michigan sales representative's act.

Mi-Tech argued, among other things, that it had not received Enhancements' termination letter until April 30, 1998, and that, pursuant to the termination provision in the contract, their relationship therefore did not end until June 29, 1998. After a trial, the court found that because the parties did not at any time renew the 1996 agreement in writing, it terminated on September 23, 1997. It further found that the terms of the contract no longer governed the parties' relationship after that date, and that Mi-Tech was therefore no longer Enhancements' exclusive sales representative in the specified

territory; thus, Mi-Tech was not entitled to any commission from the agreement between Enhancements and Office Max. (The court also found that Mi-Tech was not entitled to a commission because it was not the "procuring cause" of the Office Max deal – that is, it had not participated in the negotiation of that particular sale - but that is a subject for another day.)

On appeal, the Court of Appeals of Michigan upheld the trial court's decision that Enhancements did not owe any commissions to Mi-Tech on the Office Max deal. It agreed that the parties' agreement expired by its terms on September 23, 1997 when they failed to renew it in writing. The Court also found that even though Mi-Tech continued to act as Enhancements' sales representative after the contract expired, and Enhancements continued to pay Mi-Tech commissions, the parties had never reached any agreement that Mi-Tech was to be the exclusive sales representative in that geographic region and it was not entitled to any commission on the Office Max sales.

In reaching this conclusion, the Court examined whether the parties' actions after September 23, 1997 had created what is known as a "contract implied in fact." A "contract implied in fact" is a contract between two parties that "arises when services were performed by a party who at the time expected compensation from another party who expected to pay for the services." However, a "meeting of the minds" must occur for such a contract to be formed; that is, the parties must reach an understanding regarding the terms of their relationship. In this case, the Court determined that there was no evidence to show that Mi-Tech and Enhancements had agreed that, after the contract had expired, Mi-Tech was to remain the exclusive sales representative in its geographical area.

The Court followed the general rule that in construing a contract, the intent of the parties must be determined by looking at the language of the contract. In this case, the language of the contract unambiguously showed the parties' intent that the agreement would terminate one year from its effective date unless it was renewed in writing. Because it was not renewed in writing, the contract expired on September 23, 1997. Although the parties continued their relationship after that date, with Mi-Tech acting as the sales representative for Enhancements and Enhancements paying commissions to Mi-Tech, the Court found that there was no evidence that they had reached a "meeting of the minds" that Mi-Tech was to remain the exclusive sales representative in that territory. Therefore, Enhancements had not breached the parties' contract by entering into a contract with another sales representative for the same territory, and Mi-Tech was not entitled to any commissions from the Office Max agreement.

This case illustrates the importance of ensuring that contracts are renewed according to their terms, and not allowed to lapse. Just because the parties continue their relationship after their contract expires does not mean that the terms of that contract will continue to govern their relationship. So before the unthinkable happens, take that contract out of the drawer every once in a while and review it so that you do not end up in Mi-Tech's position.

*Authors' note:*

*While the Michigan Court of Appeals found in favor of the principal, the legal concept of "Contracts Implied-in-Fact" are well established in the law of most states, particularly*

*when the principal and rep continue working with each other in the same manner following expiration of the contract as during the term of the contract, i.e., same commission rate, same territory, same customer base, commissions paid in accordance with the expired contract, sales literature and samples provided, orders accepted with acknowledgments, call reports provided to principal, etc. With slightly different facts, the court could have easily found in favor of the representative.*