

CABLE ME FROM FLORENCE:

Standing Up to an Int'l Mfr. and Refusing to Settle on the Cheap Nets Seven-Figure Payoff for Sales Rep

Opposing lawyers interpret sales rep agreements just like any other contract, that is to say, differently. So when a principled, but budget-conscious, suburban sales representative tangles with an international conglomerate over commission payments due on a multi-million dollar sale, the desire to avoid the vagaries of the litigation process, where the rep is likely to be badly outspent, is strong, particularly where the manufacturer is a recurrent source of business. In such cases, the rep frequently wants to be assured that both the facts and the law favor her by a considerable margin. Alas, the present economy seems to be squeezing margins as much in law as in business.

PROSPER AT YOUR OWN RISK:

When Sub-rep Success Cannot Be Restrained

Your doggedness and proficiency on behalf of a national manufacturer have finally paid off. After thirteen years of steadily increasing sales up and down your Eastern seaboard territory, the manufacturer's General Sales Manager recognizes your dedication and pays you your due by expanding your sales territory to include "everything East of the Mississippi." Before long, you learn of his plans to develop the business in some of his projected growth spots in *your* new territory.

FROM THE JAWS OF DEFEAT:

Faced with Termination, United Reps Score Multi-Million Dollar Settlement

After five years of intensive demand-creation work for the latest and greatest sweetener to reach the Midwest, the Michigan-based sales rep firm known as Mich-sugah was on the verge of reaping the benefits of its labor. Criss-crossing its six-state territory for the last half-decade, on its own nickel, to demonstrate the utility and safety of both the sweetener product itself and the manufacturing system used to bring it to market, while carefully cultivating the customer base, represented the full realization of Mich-sugah's potential. It was then that the Mich-sugah reps began to hear rumors of . . . imminent termination.

BE CAREFUL WHAT YOU WISH FOR:

A Rep's 'Expectation' Is Met, But Disappointment Follows

Working from an oral agreement, a sales rep firm, began representing a metal products manufacturer. When the relationship was starting to tarnish, and the rep exercised its undisputed right to resign. In its somewhat hasty letter of resignation, it stated that its "only expectation" as to commissions is for payment of "commissions on the jobs that have been awarded to the manufacturer to date." Construing the demand as a gift horse it couldn't possibly look in the mouth, the manufacturer quickly cut commission checks to the rep. When the rep brought suit under Michigan's Sales Representative Commission Act for commissions on the purchase orders awarded after it resigned, the trial court found that the rep was the procuring cause, but the Court of Appeals overturned the trial court's decision.

SALES REP IN TOTAL CONTROL

After years of mutual success building and servicing a product market, some rep-principal relationships dissolve amicably, with each party evolving toward other pursuits. Some such relationships are allowed to die natural deaths as the contract termination date approaches. And some explode in a ball of litigation fury, generating years of brawling and counter-punching through the court system. Welcome to just such a furious battle.

WHAT HAPPENS WHEN YOUR PRINCIPAL FILES FOR BANKRUPTCY

All too often attorneys get inquiries from sales reps who have just received notice that one of their principals has filed for bankruptcy. Invariably, their first question is whether they will get paid the back commissions owed to them. Before an attorney can answer that or any other of the rep's questions, counsel first will need to ascertain some initial information, including whether the principal (referred to in the Code as the "Debtor") has filed a Chapter 7 or Chapter 11 bankruptcy action. This distinction will likely impact how much commission, if any, a rep may be able to recover.

WHAT YOU NEED TO KNOW ABOUT SELLING YOUR REP FIRM

Many business owners selling a business for the first time find the experience to be overwhelming. For the sales rep looking to retire, the sale is often the consummation of his life's work. In order to maximize the value of your firm, and minimize your stress, here are the basics which you need to know.

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.

INDEPENDENT CONTRACTOR OR EMPLOYEE?

Issues regarding the status of a rep agency or the status of individuals working for it is crucial to most independent sales rep organizations. The question arises in two of situations involving the operation of a rep agency. The first has to do with the rep agency and the manufacturer. Almost all written contracts between principals/manufacturers and the rep agency include a statement to the effect that the representative is engaged in his/its capacity as an independent contractor and is not an employee or agent of the manufacturer. The issue also arises in characterizing or defining the status of individuals who work for rep organizations.

NON-DISCLOSURE AND NON-COMPETITION PROVISIONS IN SALES AGREEMENTS

You have the opportunity to obtain a lucrative line. All you have to do to get it is resign your existing, competing line. Your existing agreement allows you to resign the line on thirty days' prior written notice. Simple, right? Maybe not. Your existing sales agreement may contain a provision regarding the non-disclosure of the principal's confidential information, and it may also contain a provision that says you may not compete against the principal for a certain period of time after the termination of the agreement.

REP ENTITLED TO COMMISSIONS ON ORDERS SHIPPED AFTER TERMINATION PLUS ATTORNEYS' FEES

Issues regarding post-termination commissions are predominant in the sales rep industry. While reps are accustomed to asserting their right to commissions due during representation of principals, upon termination some principals take the position that because the rep is no longer serving the principal, no further commissions are due notwithstanding its uninterrupted revenue stream derived solely from the discharged rep's efforts.

COMPENSATING KEY EMPLOYEES WITH STOCK OPTIONS AND DEFERRED COMPENSATION PLANS

A stock option gives an employee the right to acquire company stock at an agreed-upon price (the "strike price") for a certain period of time. The receipt of a stock option of a closely held company by an employee as compensation for services *is not* taxable to the employee. A stock option in a closely held company can be useful because it allows the employee to acquire the stock, and pay any associated tax liability, at the option of the employee at such times as the plan allows. For example, the Stock Option Plan could provide that an employee can exercise the stock only upon the employee's retirement, or only if the company is sold.

WHAT BUYERS NEED TO KNOW ABOUT LETTERS OF CREDIT

You are an electronics distributor located in Chicago. You wish to place a substantial order with a new vendor located in Hong Kong, but he is unwilling to ship goods to the United States without first being paid. You, of course, are unwilling to pay the vendor up front in reliance on his promise to ship the goods. In one form or another, the documentary or commercial letter of credit has been around for some 700 years. It allows parties located far away from one another to do business efficiently by reducing certain -- *but by no means all* -- of the risks.

THE MECHANICS OF BUYING OR SELLING A REP FIRM

You can't pick up a copy of any industry publication without reading about the acquisition, merger or consolidation of one rep firm by or with another rep firm. Clearly,

logistical, marketing or just plain survival planning often leads reps to enter into strategic acquisitions of other reps or related businesses. Although the purchase or sale of a rep firm may not be as complex as the purchase or sale of other types of businesses, there are a number of steps involved in doing the deal.

STOCK AND STOCK OPTIONS - AN ALTERNATE FORM OF COMPENSATION FOR SALES REPS

You are approached by a new principal to represent its line in the territory which you already cover. The only problem is that the principal not only has no established sales in your territory, but has no established sales *anywhere*. If you are like most sales reps, you will have signed a contract with the principal which allows the principal to terminate the agreement or take a customer in-house despite - or, perhaps, because of - your hard work. But rather than invest perhaps years of time in the hope of generating commissions, it is possible to receive stock options for the principals' stock in addition to commissions.

COMPENSATING KEY EMPLOYEES WITH STOCK

For the owner of a closely-held business like a rep firm, it seems only natural to seek to retain key employees by offering them some stock in the company. Not only does it offer the employee some "pride of ownership," but it also provides the current owners with a group of potential buyers for their stock when it's finally time to retire. But as with most things in life, there are some downsides as well. It is not an entirely win-win situation.

WHAT HAPPENS WHEN YOUR REP CONTRACT IS CLEARLY AMBIGUOUS?

Often when an attorney is asked to review a sales rep agreement – typically after the rep has been terminated – the attorney is amazed to find a contract whose terms are confusing and sometimes contradictory due to inherent ambiguities. When that happens, it can be difficult, if not altogether impossible, to decipher the parties' respective rights and obligations to each other, or to predict how a court may rule on an issue by looking solely at the "four corners" of the document itself.

PLANNING FOR THE FUTURE

According to the U.S. Small Business Administration, only about forty percent of businesses survive past their first five years of operation. If you have defeated the odds, you have likely invested a lot of hard work, time and personal sacrifices into your business. As the most significant alternative investment you own, a closely-held business is a key asset in your overall financial plan. That's why a sound business succession plan can help you ensure that your wishes for the future of your business assets are realized.

HOW DO I KNOW I WILL GET PAID? SECURING THE PURCHASE PRICE WHEN SELLING YOUR REP AGENCY

In almost every purchase and sale of a rep agency that we have been involved in, all or a substantial part of the purchase price is to be paid to the seller over time. Not surprisingly, then, the seller's most typical concern is how to make sure he gets paid. We often hear things from sellers like "I need to be in control until I get all of my money" or "If they don't pay me, I get to take the company back."

LEGAL ASPECTS OF BUYING OR SELLING A REP FIRM

This article is intended to provide a brief roadmap of the issues and mechanics involved in the purchase and sale of a sales representative agency. Its purpose is to help the reader recognize and address the issues which arise in almost every transaction.

ASSOCIATION VOLUNTEERS PROTECTED UNDER NEW LAW

Until relatively recently, association volunteers have been subject to being sued. The fear of lawsuits has often adversely affected recruitment of volunteers. Also, volunteer liability has adversely affected many worthwhile volunteer programs for lack of affordable insurance to protect members. After many years of effort by various trade associations, a bill first introduced by Representative John Porter (R-Il.) in 1987 was signed into law several years ago and is now known as the Volunteer Protection Act.

CHOICE OF LAW AND CHOICE OF FORUM PROVISIONS IN REP CONTRACTS

Two of the most important, but often overlooked, provisions in rep contracts are terms identifying the choice of law and the choice of forum. These two contract provisions can have great impact on the outcome of disputes between a principal and a representative.

FIVE REPS SETTLE CLAIM AGAINST INTERNATIONAL RECTIFIER CORPORATION

Five sales rep organizations filed suit against International Rectifier Corporation ("IR") for commissions owed and promises made (and subsequently broken) following IR's termination of the reps in the spring of 1999. The five rep plaintiffs had served IR for terms ranging as high as 23 years to a low of 8 years. The controversy started in May 1997, when, according to the reps, IR, in violation of the terms of its written Sales Rep Contracts, decided to unilaterally reduce the commissions to be paid to its independent sales representatives by approximately 40%.

RECOVERY OF COMMISSIONS OUTSIDE OF THE REP CONTRACT

In many situations, even though a manufacturer's conduct may cause extreme hardship and damage to a rep and can only be characterized as being grossly unfair and utterly lacking in "good faith," there is no literal breach of the contract because the manufacturer has complied with the actual stated terms of the document. Fortunately, there are a number of legal theories of recovery which have a basis *outside* of the contract.

WHEN SHOULD THE MANUFACTURER BE ENTITLED TO A PORTION OF THE SALES REPRESENTATIVE'S SPLIT COMMISSION? ALMOST NEVER

In this world of multi-territorial sales forces and highly complex products, it is not uncommon for a sales representative to be a party to a transaction in which more than one sales representative is involved. As a result, many rep agreements contain language providing for the splitting of commissions in the discretion of the manufacturer. The question has arisen, however, as to how far the manufacturer can take the language of a split commission clause. Can the manufacturer reduce a sales representative's commission because of the manufacturer's involvement in a transaction, regardless of whether any other sales representatives were involved? Regardless of what a manufacturer may claim, the correct answer should be "NO!"