

NOTHING FUNNY ABOUT THIS VALENTINE:
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 rights 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 the uninterrupted revenue stream it derives solely from the discharged rep's efforts.

The South Carolina Court of Appeals recently addressed both the issue of post-termination commissions, and the rep's entitlement to attorneys' fees in the matter of *Sherman vs. W & B Enterprises, Inc.* (South Carolina Court of Appeals No. 3701, filed November 24, 2003), a decision worth exploring in some detail.

The Facts: Getting Stiffed on Even a Modest Commission

Paul Sherman joined W & B as a sales representative in the early 1990's. Initially, Sherman represented two accounts, Southern States and Wal-Mart. In his Agreement with W & B, Sherman was entitled to receive a 10% commission on all sales made to Southern States and a 5% commission on all sales made to Wal-Mart.

In September 1993, Sherman contacted the then President and CEO of K-Mart (a college fraternity brother of Sherman's own brother). By virtue of this contact, Sherman

developed a business relationship with K-Mart leading to \$5 Million to \$6 Million in sales of W & B merchandise in 1995, on which he earned a commission of only 3%.

When K-Mart's purchasing slowed in the late 90's, Sherman began to spend more time on the Wal-Mart account, and successfully increased sales to Wal-Mart. The son of W & B's owner then stepped in and took an increased role in the sales relationship with K-Mart. In January 1999, Sherman discovered that his commission on K-Mart orders had been unilaterally reduced by W & B from 3% to 2% in violation of their oral agreement.

When Sherman brought the reduction to W & B's attention, he was assured that W & B would make up the difference. Instead, W & B terminated Sherman in short order, and failed to pay commissions on a large Valentine's Day 2000 sale to K-Mart that was booked before, but not shipped until after, W & B terminated Sherman. Sherman would have earned a \$19,000 commission on that sale alone based on the contractual 3% commission rate. W & B did make payment on some lesser post-termination sales shipped to Wal-Mart.

The Trial: Determining Industry Practice Without Proof

Inasmuch as the parties' oral contract did not include terms that would enable the trial judge (sitting without a jury) to determine whether they intended Sherman to be paid on goods shipped after termination, it became necessary for the court to consider the practice in the sales rep industry. While examining the greater industry practice is a common resort of courts confronted with a contract, oral or written, that is silent on a material term, industry practices are generally proved by submitting significant and

extensive evidence, which often includes calling expert witnesses. Unfortunately for Sherman, the trial court found against him on this point, but oddly cited to no specific evidence in concluding:

“It is standard practice in the industry to only pay commissions when goods are shipped, as quite often orders are changed, sometimes cancelled, and the transaction is effectively not completed until shipment.”

As a result of the lower court’s finding, Sherman’s commission claim on the Valentine’s Day 2000 order shipped after Sherman left W & B was rejected. The court further ruled that it had discretion under South Carolina law to weigh Sherman’s request for attorneys’ fees, and exercised that discretion by denying such relief.

Sherman was awarded the full 3% commission he sought on pre-termination sales shipped to K-Mart, but the trial otherwise ended in W & B’s favor. Sherman then appealed, and not surprisingly, W & B cross-appealed, challenging the determination that the parties entered into a binding oral contract.

The Appeal: Be My Commissioned Valentine

Sherman argued on appeal that the trial court’s finding that industry practice supported paying no commission on goods shipped after termination was without evidentiary support. The South Carolina Court of Appeals found W & B’s treatment of the Wal-Mart shipments to be significant, observing:

“In fact, the record indicates that W & B’s practice was just the opposite, since W & B undisputedly paid Sherman commissions on Wal-Mart

accounts for sales he made before he was terminated that were not delivered until after his termination.”

Because this evidence was essentially uncontradicted by any evidence supporting the trial court’s interpretation of industry practice, the appeals court reversed, and awarded Sherman commissions on the Valentine’s Day order to Wal-Mart.

The Court also agreed with Sherman’s contention that an award of reasonable attorneys’ fees to the prevailing party was mandatory under the South Carolina Payment of Post-Termination Claims to Sales Representatives Act. This statute, a version of which is found in many other states, provides for the payment of commissions to sales representatives who are terminated by a principal for any reason. The South Carolina Act expressly provides that a principal who fails to pay earned post-termination commissions “is liable to the sales representative” for attorneys’ fees actually and reasonably incurred by the sales representative.

The Appeals Court explained how the “cardinal rule” of interpreting a statute is to “ascertain and effectuate the actual intent of the Legislature.” Applying the “plain and ordinary meaning” of the South Carolina Act, the Court determined that the statute’s use of the term “is liable” instead of “may be liable” reflects a mandate directing the court to allow reasonable attorneys’ fees. The lower court’s discretionary denial of fees to Sherman was therefore also reversed.

The final issue considered on appeal was W & B’s argument that Sherman failed to prove an oral contract with W & B. Handing a complete victory to the sales rep, the

Court pointed to Sherman's testimony that he and W & B's principal orally agreed on a full 3% commission on K-Mart orders. Further, Sherman was, in fact, paid 3% commission on certain of the K-Mart orders. With such evidence appearing in the record to support the lower court's finding that W & B agreed to compensate Sherman at a 3% commission rate on sales to K-Mart, the appellate court was not about to step in and overturn the finding of the court that actually conducted the trial, observed the witnesses and weighed all the evidence.

The Upshot: Know Your Own Industry

In the final analysis, Sherman was successful in his challenges for post-termination commissions because the principal failed to demonstrate that the industry standards supported denying payments on post-termination shipments. While the trial court found persuasive W & B's attempt to suggest how the frequent changing or canceling of orders renders transactions incomplete until shipment, the appellate court noted that no competent proof of such a standard was ever introduced. Ample rationale supports the appellate court's rejection of this view, including an interest in eliminating any manufacturer's incentive to delay shipment until post-termination solely to avoid paying the commission.

The ruling by the South Carolina appellate court was not difficult in view of W & B's failure of proof, but oftentimes a court will be presented with conflicting evidence of industry standards, and the case can hinge on the quality of presentations made by credentialed and expensive expert witnesses. Insisting upon proceeding consistent with

standard practices in the sales representative industry *during* the relationship will usually prove to be in the best interests of all concerned. While the holdings in this case are partially based on the particular South Carolina statute, similar holdings could be expected in other cases with similar facts in other jurisdictions.

F:\NEAM\articles\rep entitled to commissions 2.wpd