

## SALES REP IN TOTAL CONTROL

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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.

### **The Rep Agreement**

In 1986, Total Control, Inc. was appointed the exclusive sales agent of Danaher Corp., a group of interlocking companies that manufactures digital equipment and controls, in an Eastern seaboard sales territory. The term of the parties' self-renewing Sales Rep Agreement (the "Agreement") was 12 months, with either party given the right to cancel without cause on 30 days' notice, and reserved to Danaher "the right to handle directly any account in the agent's assigned territory."

Danaher modified the Agreement from time to time, including by extending the 30-day cancellation period to 120 days, conditional upon Total Control increasing sales by 10% over prior year sales. As Danaher acquired other companies' product lines, the representation of these products was added to Total Control's duties. Although Danaher also manufactured other products, the Agreement expressly appointed Total Control as a sales agent of all its "name brand digital equipment and controls."

### **The Commission Claim**

In connection with Danaher's announced "restructuring," Total Control received 30 days' notice of cancellation, effective December 31, 2001. At the time of termination, Total Controls had increased its sales by more than 10% over the prior year sales. Accordingly, Danaher owed commissions upon termination for sales made into Total Control's exclusive territory, not only during the operation of the Agreement, but for the additional 90 days following.

When Danaher refused to pay such commissions, Total Control filed suit in February 2002 for breach of contract, and under the Pennsylvania Commissioned Sales Representative Act ("PCSR"). Danaher disputed breaching the Agreement, and moved for summary judgment (a tactic that avoids a full hearing or trial) on the PCSRA claim. Grueling, motion-intensive litigation played out in federal court in Philadelphia, including heated discovery disputes, motions for sanctions, and motions for reconsideration before the case went to trial on Total Control's breach of contract claim for the failure to pay commissions.

## **The Statute of Limitations Argument**

Seeking to duck potential seven-figure liability, Danaher first argued that Total Control waited too long to bring suit when it did not file its commission claims until 2002, even though it knew not later than 1997 of Danaher's view that no commissions were due. Pointing to Pennsylvania's four-year statute of limitations for contract actions, Danaher cried "too late."

The district court rejected this defense, finding under Pennsylvania law that where a contract calls for periodic or installment payments (such as commissions), the four-year statute accrues with each failure to make payment. Thus, Total Control's suit, seeking to recover only commissions due within four years of suit (and still comprising a tidy sum) was not time-barred.

## **The Entire Product Line Claim**

Meanwhile, Total Control sought to expand the reach of its commission claim, contending that a February 1991 amendment to the Agreement appointed it to represent *all* Danaher products, regardless of whether they were digital. This amendment augmented the products Total Control represented to include "all products currently sold by" a company Danaher was acquiring "which shall be merged with [Danaher's] product line." Total Control urged that "all products currently sold" served to expand the original Agreement to encompass non-digital products, but the Court found that because the existing product line was exclusively digital, the amendment also limited Total Control to commissions only on the acquired company's digital equipment and controls.

## **The Sales Rep Act Cause of Action**

Anxious to avoid the punitive damages liability that sales rep statutes afford, Danaher also moved for summary judgment on the PCSRA claim. Like most sales rep statutes, Pennsylvania's features the prospect of a punitive damages award if a principal willfully fails to pay commissions upon termination. For this reason, sales rep statutes in most states remain a powerful equalizer in the unequal bargaining position traditionally prevailing in rep-principal relations. After originally denying the motion, the Court reconsidered its ruling less than one month before trial, and left the jury no opportunity to consider Total Control's PCSRA claim.

Unlike virtually all other state statutes, the PCSRA limits its scope to sales representatives who "solicit wholesale orders from retailers rather than consumers." The statute does not, however, define "retailer." Total Control therefore argued that the distributors and manufacturers it placed orders with served the same function as retailers.

Disagreeing, the Court noted that of the 28 states with similar sales rep statutes, only Arizona also uses the word "retailer" in its definition of "sales representative." From this, it found the term "retailer" was not a mere semantical turn, but served an important and intentional limitation on the reach of this statute by the Pennsylvania legislature. The Federal District Court determined that Pennsylvania courts do not construe "retailer" to include a manufacturer making use of component parts. Instead, to be eligible under the PCSRA, Total Control "must solicit orders from persons engaged in making sales to retail customers."

When Total Control's proof was insufficient on this point, summary judgment was entered on the PCSRA count for Danaher.

### **The Remaining Trial Issues**

Rather than dispute that commissions due under the Agreement were unpaid, Danaher argued to the jury that certain unpaid commissions were actually "house accounts" that it had the right to handle directly under the Agreement, and that, properly measured, Total Control had not raised sales 10% over the prior year so as to trigger the longer notice requirement prior to termination. Unimpressed with Danaher's defenses, the jury returned a verdict for Total Control on the breach of contract count, awarding \$1.5 million in unpaid commissions.

Pulling out all the stops, Danaher argued post-trial that Total Control's expert witness should have been barred at trial, and that the Court improperly precluded certain of its evidence as a discovery sanction. The Court rejected each of Danaher's post-trial challenges, and entered judgment on the \$1.5 million verdict. As significant as this award was, Total Control was still stinging from the Court's reconsidering the denial of summary judgment on the PCSRA claim, effectively precluding a punitive damages remedy. So Total Control tried again on the eve of trial.

### **One More Shot**

Unwilling to let the treble damages and attorney's fees potential slip away so easily, Total Control filed a *second* complaint against Danaher, just three business days before trial was scheduled on its first. Suddenly aware that the Agreement called for it to be governed by Illinois law, Total Control this time invoked the Illinois Sales Rep Act ("ISRA"), which contains no "retailer" limitation. Not surprisingly, Danaher moved to dismiss, arguing Total Sales does not get a second bite at the proverbial apple, known legally as "*res judicata*."

The Court made short work of this claim, finding that by consciously choosing to pursue a claim under the PCSRA rather than the ISRA for strategic reasons, it had waived any right to rely upon the Illinois statute. Basic *res judicata* principles bar a litigant from seeking in a later action all or part of the claim which was the subject, or could have been the subject, of a former adjudication. Essentially, one apple bite per customer. For failing to invoke the more advantageous sales rep statute earlier, Total Control would have to "make do" with its non-trebled \$1.5 mil.