

**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. Because of the complexity of such sales and the use of numerous sales representatives, many rep agreements contain language providing for the splitting of commissions. While the language of these "split commission clauses" may vary, the effect of this type of clause is the same: the manufacturer, at its sole discretion, or in accordance with an agreed-upon formula, may split the commission amongst the numerous sales representatives involved in the transaction.

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!". However, no court has yet to ultimately rule on the issue.

Mills-Winfield Engineering Sales, Inc. was a party to a rep agreement with Pneumapress Filter Corporation, Inc. as an exclusive independent sales representative for the sale of filtration products. Included in the rep agreement was the following split commission clause:

"The parties recognize that sometimes the design, specification, justification and/or approval, purchase and installation of the products may be in different territories. In such cases, the Manufacturer [Pneumapress] reserves the right to split the commission . . ."

Over a two and one-half year period of time, Mills-Winfield negotiated the sale of filters to a multinational purchaser. At various points during the process, Pneumapress was also involved in the transaction. No sales representative other than Mills-Winfield was involved. The total

commission due to Mills-Winfield was almost \$60,000. However, a portion of the commission was based on a sales and engineering credit, which permitted Pneumapress to split the commission. Based upon the split commission clause, Pneumapress claimed that its involvement in the sale and engineering allowed it to reduce the commission, and thus, only agreed to pay a commission of approximately \$12,000.

As a result of the dispute concerning the allocation of the commission, Mills-Winfield filed a claim for arbitration. Soon after the filing of the arbitration, Pneumapress agreed that Mills-Winfield was entitled to the entire portion of the commissions based on the sales and engineering credit. As a result, the parties were able to resolve the dispute with Mills-Winfield collecting the entire amount of the commission which it claimed was due.

In a similar matter, BEKA Electronics GMBH, a sales representative in Germany, was a party to a rep agreement with The DSP Group, Inc., which had its principal office in the U.S. The rep agreement contained the following split commission clause:

“Should [BEKA] be involved in only a portion of a transaction involving a Sale of Products, [BEKA] shall be entitled to a partial commission on any such Sale in accordance with the provisions of Appendix D. The fraction of a commission represented by such a partial involvement shall be determined solely by [DSP]. All such determinations by [DSP] shall be final. [BEKA] understands that [DSP’s] determination may be based on any number of factors.”

As it related to the issue of split commissions, Appendix D to the agreement provided:

“In the event [BEKA] is involved in only a portion of the transactions leading to a Sale of products, [BEKA] shall receive a split commission as determined solely by [DSP] according to the level of effort required and put forth by each of the participating REPRESENTATIVES, which determination by [DSP] will be final.”

During the term of the agreement, BEKA was involved in a portion of a sale where there had been no other sales representative involved. BEKA claimed it was entitled to the full commission. DSP took the position that BEKA was only entitled to a partial commission under the split commission clause. When DSP refused to pay BEKA the full amount of the commission, BEKA filed suit against DSP.

During the litigation, DSP and BEKA sought a ruling from the court regarding their respective positions. DSP argued that the agreement did not require that another sales representative other than BEKA be involved as a condition to payment of a partial commission. DSP also argued that the contract provided that BEKA was only entitled to a partial commission if it was involved in only a portion of the transaction. In response, BEKA submitted evidence that DSP had never paid a split commission that did not involve at least two sales representatives. BEKA also argued that industry custom and practice requires that the entire commission be paid to the representative where both the representative and the manufacturer complete the work on the transaction but there is no other representative involved.

Upon summary consideration of the issue, the court ruled that the language of the DSP contract was ambiguous. In other words, either interpretation was reasonable. The court in an unpublished decision stated:

“In summary, the court concludes that the Agreement is ambiguous as a matter of law and is reasonably susceptible to both party’s interpretation. The parol evidence introduced by the parties fails to clear this ambiguity, and the admissible extrinsic evidence is in conflict. . . Given this conflict in the admissible extrinsic evidence, the contract provision at issue cannot be interpreted as a matter of law. . . .” (Beka Electronics GmbH v. The DSP Group, order denying Case No. C97-20133 EAI, order dated February 9, 1999).

Once the ruling was entered and DSP realized it would have a difficult time prevailing, the parties soon thereafter settled the lawsuit.

The rationale behind the positions taken by each manufacturer was that they should be compensated for their efforts in procuring a sale by reducing the total amount of commission due to the sales representative so as to account for their own efforts. We suggest that the manufacturers' interpretations of the clauses were absolutely against the intent of the split commission clauses. Originally, split commission clauses were added to rep agreements to fairly compensate all sales representatives involved in bringing the product to market. Additionally, split commission clauses were included to protect a manufacturer from competing claims of sales representatives involved in the same transaction. In any one transaction, there is only one total amount of commission that is due; in effect, one pie. However, without a split commission clause, each sales representative involved in a transaction could claim that they were due the entire amount of the commission, causing the manufacturer to pay out many full commissions; many pies. The split commission clause allows for an equitable result for the representative: the commission is to be divided amongst the sales representatives based upon their involvement in the transaction; the entire pie is divided into slices and distributed amongst the sales representatives.

The interpretation of the split commission clause asserted by the manufacturers in the Mills-Winfield and BEKA cases would unjustly reduce the size of the pie. Instead of using the split commission clause to distribute the pieces of the pie amongst the sales representatives, the manufacturers tried to use the clause to keep some of the slices for themselves. This was never the purpose for split commission clauses. Any manufacturer that has retained a sales representative to sell its product understands that he or she will not be entirely removed from the sales process. Just

because the manufacturer has assisted in the sale of the product does not mean that the manufacturer is entitled to any of the commission. To the contrary, the commission is intended for the sales rep only. If a split commission clause allowed for the manufacturer to retain some of the commission for itself, manufacturers would rely on such clauses in every transaction in which they had any involvement at all. Sales representatives would never receive a full commission.

What can a sales representative do to protect against a dispute over a split commission clause? While there is no way to guarantee that such a clause will be interpreted and applied appropriately all the time, a sales representative can reduce the exposure by making sure that the split commission clause is written so specifically that its intent may not be misconstrued. Where a sales representative agreement contains a split commission clause, language similar to the following should be added to clarify the intent of the clause:

“This split commission clause is intended solely for the payment of a full commission to the sales representatives involved in a sale. In no event shall Manufacturer pay less than 100% of the total commission due on the sale. ”

Manufacturers and sales representatives have had disputes since the first commission was earned and will continue to do so until the last commission is paid. Including the above language in a sales representative agreement will not guarantee the end of future disputes over commissions. But, hopefully, it will reduce the likelihood of a dispute in the possible area of contention of split commissions.