

WORKING WITHOUT A CONTRACT, WILL I EVER GET PAID?

Reps often provide their valuable professional services without the benefit of a formal written contract, or even a less formal, but equally enforceable, oral contract. In such situations, many times a rep is told by its principal that it is not going to be paid, despite the fact that the rep has just brought in significant business, because the principal contends that the sale was "outside" of an existing contract or because no contract exists between the parties. This could be the result of the expiration of a prior contract, the rep calling on a customer outside of its assigned territory or to a house account, or selling a product not assigned to it, but with the consent of the principal, or for other reasons. Typically, with a great deal of resignation, the rep wonders whether it will ever be paid? However, all is not lost, because as discussed below, the absence of a contract does not necessarily mean a rep will not be able to recover reasonable compensation for its successful efforts for a principal.

Under certain circumstances, a court still can award damages to remedy an inequitable situation, such as when someone knowingly receives the benefits of another's labors, without there being a contractual obligation to compensate that person. The technical name for this legal doctrine is "*quantum meruit*," a Latin phrase which literally means "as much as he delivered." Often used interchangeably with terms like "unjust enrichment" and "implied contract at law" (although there are slight differences), the doctrine of *quantum meruit* allows a court to award just compensation for valuable services rendered for the benefit of another party, when the recipient who accepted the benefit either knew or reasonably should have known that the other party expected to be paid. In many cases, courts have utilized this doctrine to compensate sales reps who have been denied commissions for orders it procured.

In one such case, a sales representative with its principal's knowledge and encouragement, solicited and procured orders from customers located outside of its assigned exclusive territory. However, the principal then refused to pay any commission because their written agreement provided that the rep would receive a commission only on orders that originated from customers in its territory. The court ultimately awarded commissions to the rep for the extra-territorial sales on the theory of *quantum meruit*, which, as the court indicated, implies a promise that a person will "pay a reasonable and just compensation for valuable services or materials provided at that person's request or with that person's approval." As the court further recognized, "[r]ecovery is permitted under *quantum meruit* if it is proved that services were provided at the request or with the acquiescence of defendant (the principal), that those services had a certain reasonable value, and that defendant, despite demands of plaintiff (the rep) has failed and refused to pay the reasonable value of plaintiff's labor." To determine the value of those services, the court utilized the very terms of the parties' existing contract, finding it to be persuasive evidence as to the reasonable value of the representative's services.

A similar result occurred in another case where a rep continued to provide its services following the expiration of an initial 6-month "trial contract." Under that contract the rep could not call upon and would not receive a commission for sales to a customer that was identified as being a "house account." Subsequent to the expiration of the 6-month written contract, the rep continued to provide its services for four years without the benefit of a written or oral contract. During that time, with the principal's knowledge, the rep called upon and procured orders from the customer that the initial contract had identified as being a "house account." After the rep requested payment of commissions for such sales, it received a letter from its principal terminating "all written and/or verbal agreements" between them. However, because there was

no express contract between the parties following the expiration of the initial trial contract, the court ruled that the rep was entitled to reasonable compensation for such sales on the theory of *quantum meruit*. Specifically, the court found that, "it was not reasonable for [the principal] to believe that the [representative] would perform months of services on the [customer account] in an effort to generate sales and not expect to be compensated. Recovery in *quantum meruit* is proper when it would result in unjust enrichment to the party for whom the services were performed."

This is not to say that *quantum meruit* is available in all circumstances or that it is a perfect remedy, for it is not. In the absence of a prior contract between the parties establishing a reasonable basis for valuing the rep's services, a court likely will have to rely upon the testimony of expensive competing expert witnesses at the trial to determine the value of the rep's services and the resulting amount of damages to be awarded, if any. This can result in the representative being awarded damages at a far lesser rate than what it otherwise would have received under the terms of a freely negotiated contract. Perhaps more important from a strategic sense, it is likely that in the absence of a written contract, the representative may be denied a basis to recover statutory damages as provided in Sales Representative Protection Acts passed in many states. Many of these acts would otherwise have permitted the rep to recover two or three times its actual damages, plus attorneys' fees. This is because remedies under most sales rep statutes are based on a claim for breach of a written or oral contract and not for recovery under *quantum meruit*, which remedy depends on the absence of a contract.

In the end, rather than relying on the possible application of the doctrine of *quantum meruit*, a rep would be better served to negotiate a sound contract, know its terms, review it on an annual basis and

make sure that any deviation from the contract is properly memorialized. In so doing, it will stand a better chance of being fully compensated for the services it renders on behalf of its principal.