

# **DISCLAIMER:**

The information provided during the course of this seminar and in the written responses below are for informational purposes only and are not to be construed as legal advice. Attendance at the seminar or use and access of the information provided does not create an attorney-client relationship.

November 11, 2020

# RECOVERING COMMISSIONS

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# I. Overview of Commission Recovery Theories

- A. Standard Contract Claims: Written and Oral
- B. Procuring Cause Theory
- C. State Sales Rep Protection Statutes
- D. Other Potential Avenues of Relief

## II. Actions Based on the Contract

### Rep Claims Begin with Analysis of Rights under the Contract

- What Obligations Are Imposed?
- Did Principal Commit a Material Breach?
- What Damages Were Suffered from the Breach?
- If Suit Is Indicated, Consider whether a Significant Counterclaim Is Likely

# Contractual Relief

## REVIEW COMMISSION AND TERMINATION RIGHTS, INCLUDING:

- Commn obligations (payment due on order/shipment/payment)
- Factory discretion (to change commn rate, territory, house accts, splits, etc.)
- Automatic renewal
- Termination rights (with/without cause)
- Post- termination commn payments? For how long?
- Non-Competition/Non-Solicitation terms

# Oral Contracts Are Enforceable

- Proving the terms can be more difficult, and subject to different statute of limitations.
- Elements of proof are the same: offer, acceptance, consideration, breach, and damages.
- Oral contract can prove better than a bad written contract.

# The Procuring Cause Doctrine

Common Law Doctrine enabling reps to recover commissions *unless* contract specifically limits post-termination rights. Varies state to state.

Generally applies to enable the rep to recover on post-termination sales if rep's efforts procured the sales pre-termination.

An equitable doctrine designed to prevent opportunistic termination by a principal.

# The Procuring Cause Doctrine



## What Is It?

Under the procuring cause doctrine, a party “may be entitled to commission on sales made after termination of a contract if that party procured the sales through its activities prior to termination.”



# The Procuring Cause Rule Applies by Default

It is essentially a default rule:

- “The rule applies unless a contract between the parties expressly provides when commissions will be paid.”
- “In the absence of a contrary agreement, an agent is entitled to compensation from his principal for a transaction of which the agent is the procuring cause.”

# The Procuring Cause Doctrine: Need Not Even Know of Sales

- “an agent who was the procuring cause of the transaction is entitled to his commission irrespective of the fact that it was consummated by the principal, that he was not personally present when it was entered into, that it was consummated without his knowledge, or that he did not personally see or talk to the other party entering into the transaction.” --Calif. Court of Appeals, 1948

# EXAMPLE: Contractual Termination Clause

## 6. Termination

This agreement shall commence on the date it is executed and shall continue until terminated by either party giving the other not less than 30 days prior written notice.

Upon termination, commissions shall be paid on purchase orders placed and shipments made up to the effective date of termination.

# The Procuring Cause Doctrine: The Mfr.'s Usual Arguments

- The contract says nothing about paying the Rep post-termination commissions.
- Response: It is the default rule. Doctrine applies if contract does *not* expressly provide when commissions will be paid.

# The Procuring Cause Doctrine: The Mfr.'s Usual Arguments

- We didn't terminate, the rep did.
- Response: Doesn't matter.
  
- Rep isn't procuring cause of post-termination sales. We continued calling on customer and providing services.
- Response: Rep did everything it was required to do. Besides, it's a jury question.

# Sales Rep Protection Statutes

- Most states have enacted laws to protect sales representatives who solicit orders for products.
- Typically, these statutes apply to principals who:
  - Do business in the state.
  - Use sales representatives to solicit orders for products within the state.
  - Compensate the sales representative in whole or in part by commission.

# Sales Rep Protection Statutes (cont'd)

All cover reps who are due payments of commission upon termination.

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Many states impose punitive liability of 2-3 times unpaid commissions, attorney's fees and costs for failing to pay in a timely manner.

# Unjust Enrichment/Quantum Meruit

## Assuming No Contract Exists:

- a) Rep still procures sales for principal, and principal accepts and derives a benefit from such efforts, courts may find that permitting withholding of compensation (traditional commission) would be unjust
- b) Similarly, courts might award rep “as much as he deserves” for his services



# Questions and Answers



# Submitted Questions

- Do signed independent sales rep agreements hold up when voluntarily entered into between independent sales rep and independent factory?
- A line promised me monthly payments. We made the deal on a handshake and my foolish honesty in good faith. As I was dropping the line, I learned nine whole payments missed! Sales Mgr. claimed (correctly I'm afraid) that we never made out a written contract!

# Submitted Questions (Contract)

- A factory is refusing to commission me on one sale until I collect on another for them. How do I obtain the payment I am due?
- I was moved from a salary to a guaranteed comm in May. By July, the factory stopped shipping into my terr. b/c they took care of bigger dealers under owner and sales mgr. accts. Any recourse?
- Can a factory withhold commissions due if you get a PPP loan?
- Are commissioned reps paid severance?

# Submitted Questions (Legal)

- What is the statute of limitations when attempting to recover unpaid commns?
- Is my signed non-compete agreement enforceable? My contract says I cannot sell a particular category for 6 months after termination or quitting. Isn't this restricting me from making a living? Restraint of trade?

# Submitted Questions (Recourse)

- Do you have any recourse when terminated after increasing co's sales 400%?
- Is there any recourse when a company lets you go without giving you a reason?
- Florida factory went direct to retailers and trade customers, cutting out the reps. Never terminated us, just stopped paying. I tried to contact them, and even engaged a collection agency. Nothing worked. What is my recourse?

# One More Question:

Will I do better using an attorney, or is small claims court just as viable an option?

# Any More Questions?



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