

Asset Sale Protection for Sales Representatives

Part One

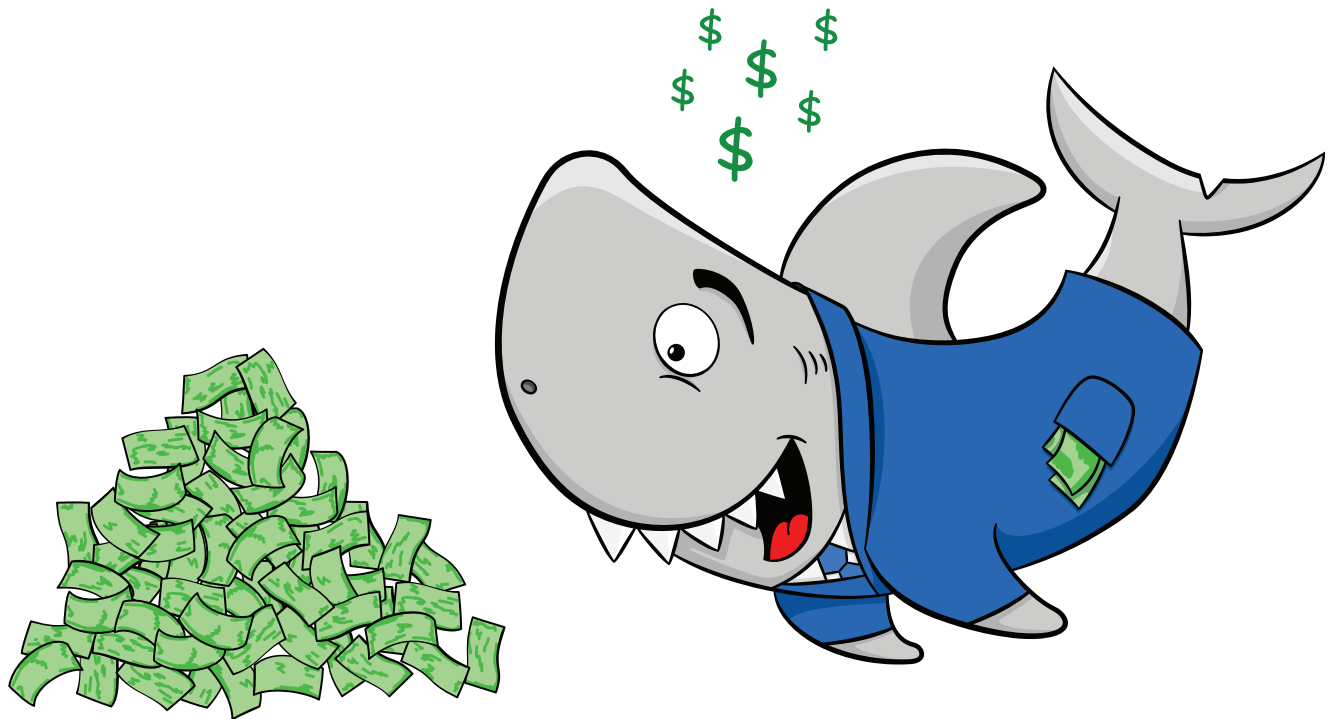
BY RANDALL J. GILLARY

This is the first part of a two-part series about asset sale protection for sales representatives. When I refer to asset sale protection I am referring to protecting your sales commissions in the event that your principal sells its assets to a third-party purchaser. This can be a very serious problem for sales representatives. The general rule is that the asset purchaser is typically only liable for the specific liabilities that it chooses to be responsible for or to “assume” as part of the Asset Purchase Agreement. Unfortunately for sales representatives, the sales representation agreement and the responsibility to pay continuing sales commissions is almost never assumed by the purchaser.

This article is not intended to address the situation where the purchaser buys the stock of the principal. Generally a sale of stock does not affect the existing contractual obligations of the principal. This means that your sales representation should carry over to the new owners. The problem is that you may not know if the transaction involves a sale of stock or a sales of assets. The safe course of action is to have asset sale protection in your sales representation agreement.

The Problem

The problem for many sales representatives is that their sales representation agreement does not have asset sale protection. One of my cardinal rules for sales representatives is that the sales representation agreement should be structured to ensure that the sales representative gets paid for the sales that he or she is responsible for procuring as well as for the sales to his or her exclusive customers. The need to have asset sale protection language in a sales representation agree-



© antimartina | stock.adobe.com

The need to have asset sale protection language in a sales representation agreement is more of an acute problem for those sales representatives who solicit blanket purchase orders

ment is more of an acute problem for those sales representatives who solicit blanket purchase orders for parts which will remain in production for an extended period of time.

As those of you who have read some of my articles for *Agency Sales* magazine in the past may already know, I live and work in Michigan where the dominant industry is the automotive industry. The standard in the automotive industry is that sales commissions are paid for the life of the part unless the parties agree in writing to a lesser period. An example that I use to explain why life of part commissions is the standard, is as follows. Let's assume

that a sales representative procures a blanket purchase order for his or her principal for a production part used to assemble a new vehicle platform. The typical life of the platform for a new vehicle is from 3 to 5 years. The automotive customer could order the 3 to 5 years' worth of parts all at once to be shipped to the customer's warehouse for use as needed. There is no doubt that under this scenario the principal would be responsible to pay a sales commission for the total sale. The reality in the automotive industry is that parts are ordered and shipped as needed typically for "just-in-time delivery." This generally means that the principal will

make and ship parts pursuant to "releases" or "shipping schedules" as determined by the Original Equipment Manufacturer (OEM such as Ford, GM and Chrysler/FCA).

What difference should it make regarding the principal's obligation to pay sales commissions if the customer orders all of the parts at once or orders them over time? This same concept applies to other industries such as off-road and construction equipment, consumer products, certain types of computer software, and any other products that are manufactured and sold over an extended period of time.

One of the realities of the business

What is the point in having an iron-clad sales representation agreement that provides for life of part commissions in the event of a termination, if the principal can sell the assets ... ?

world is that sometimes companies get sold. This can happen for many reasons. The typical type of situation that I end up getting involved in is when the sales representative over-performs and obtains a substantial amount of new business that will be in production for a period of years. All of sudden the principal is now worth more money due to the new business and purchase orders in hand. Sometimes the owners of the companies decide that this is a good time to sell the company and cash out. This can be a big problem for the sales representative if the sales representation agreement does not have asset sale protection. What is the point in having an iron-clad sales representation agreement that provides for life of part commissions in the event of a termination, if the principal can sell the assets and the sales representative gets zero dollars for products shipped after the closing?

The big problem with an asset sale

is that the making and selling of a part is the trigger to the payment of a sales commission. If the principal is no longer making and selling parts then there are no commissions to be paid.

My Solution

There is a solution to this problem that I have come up with over time which I include in all of the sales representation agreements that I draft for my clients. It is a rather simple solution and I am not aware of any situations where it has not worked. My solution to the problem is as follows:

- I instruct my clients during the negotiation process that the entity who will be issued the purchaser must sign the sales representation agreement. Many companies, especially those based in foreign countries, have American subsidiaries. Both the parent company and the subsidiary should sign the sales representation agreement. This prevents

Both the parent company and the subsidiary should sign the sales representation agreement.

the principal from assigning the purchase order to a subsidiary or having the customer issue the purchase order to an affiliated entity which could result in no commissions being paid to the sales representative.

- I include a provision in the sales representation agreement that makes the agreement binding upon the parties as well as on all subsidiaries, divisions, affiliated entities, successors, assigns, asset purchasers, and joint ventures. This can be a little bit of belt and suspenders protection to the earlier bullet point but it is still important on its own.

- Now for the most important provision: I include a provision in the sales representation agreement that contractually obligates the principal to include a provision in the agreement for the sale of the assets or business that requires the purchaser to agree in writing to an assignment of the sales representation agreement. If done correctly, this should make the assignment of the sales representation agreement a binding contractual obligation of the principal.

- I also include a provision which states that if the principal fails to require the purchaser to agree to an assignment of the sales representation agreement in writing, then the principal remains liable to pay the sales commissions to the same extent that it would be if the assets or business had not been sold.

- An alternative provision is for the parties to agree to have an in-

dependent third party establish a cash value for the future commission obligation so that the commissions could be paid in a lump sum at the time of the sale. This recognizes the reality that a major part of the purchase price is the value of the new business procured by the sales representative.

It is important to keep in mind that this is something that can generally only be done at the commencement of the relationship when no business has yet been procured. No principal in his right mind would agree to this after the business has been procured because the asset sale protection language takes money out of the pocket of the principal at the time of the sale. This is because the purchaser will generally pay less for the assets if the purchaser retains the liability to pay sales commissions after the sale.

Conclusion

Obviously this is something that no sales representative should attempt to do on his own. Further, I would state that there is no guaran-

tee that this will work. Each individual case has its own nuances and unique circumstances. My view is that the sales representative is in a much better position to get paid for commissions after the asset sale if the principal has a contractual obligation to ensure that your sales representation agreement is assumed by the purchaser. Also, keep in mind that you get what you pay for. The purpose of this article is to provide my ideas on how to protect yourself in the event that your principal sells its assets or business. I would highly recommend that you use a lawyer skilled in negotiating and writing sales commission agreements for production parts. As part of this process you should ask your lawyer what his or her suggested language is for protecting your commissions in the event of an asset sale. If the lawyer gives you a dazed look, I would suggest that you show him or her this article.

MANA welcomes your comments on this article. Write to us at mana@manaonline.org.



Randy J. Gillary is an attorney and has been a member of MANA since 1991. He concentrates his practice in representing manufacturers' representatives in sales commission disputes. Gillary has been litigating sales commission disputes for more than 38 years. He is also the author of the definitive book for manufacturers' representatives entitled *Protecting Your Commissions—A Sales Representatives' Guide*. The book is available on Amazon.com or through his website at www.gillarylaw.com or by calling his office at (238) 528-0440.

Reprinted from *Agency Sales* magazine © 2018 | www.MANAonline.org | e-mail: MANA@MANAonline.org | 949.859.4040

Legally Speaking is a regular department in *Agency Sales* magazine. This column features articles from a variety of legal professionals and is intended to showcase their individual opinions only. The contents of this column should not be construed as personal legal advice; the opinions expressed herein are not the opinions of MANA, its management, or its directors.