

Asset Sale Protection for Sales Representatives

Part Two

BY RANDALL J. GILLARY

This is the second part of a two part series on asset sale protection for sales representatives. I would strongly recommend that you read part one, published last month, either before or after reading this article.

What to do when your principal is in the process of selling its assets and your sales representation agreement has no asset sale protection language.

I would venture to say that most sales representative agreements do not have asset sale protection language in them. The only times that I have seen such language in a sales representative agreement is when either the sales representative used one of my agreements, or when the lawyer who drafted the agreement was familiar with my language. If your principal is already in the process of selling its assets, then there are still some steps that you can take to try to protect your commissions.

What to do if the purchaser is in the manufacturing business.

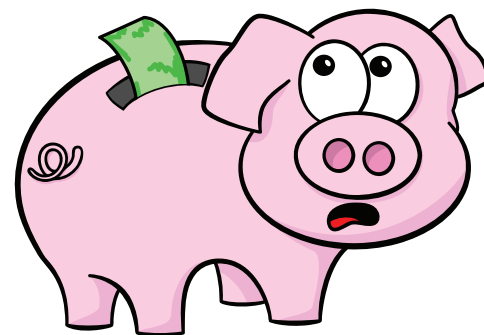
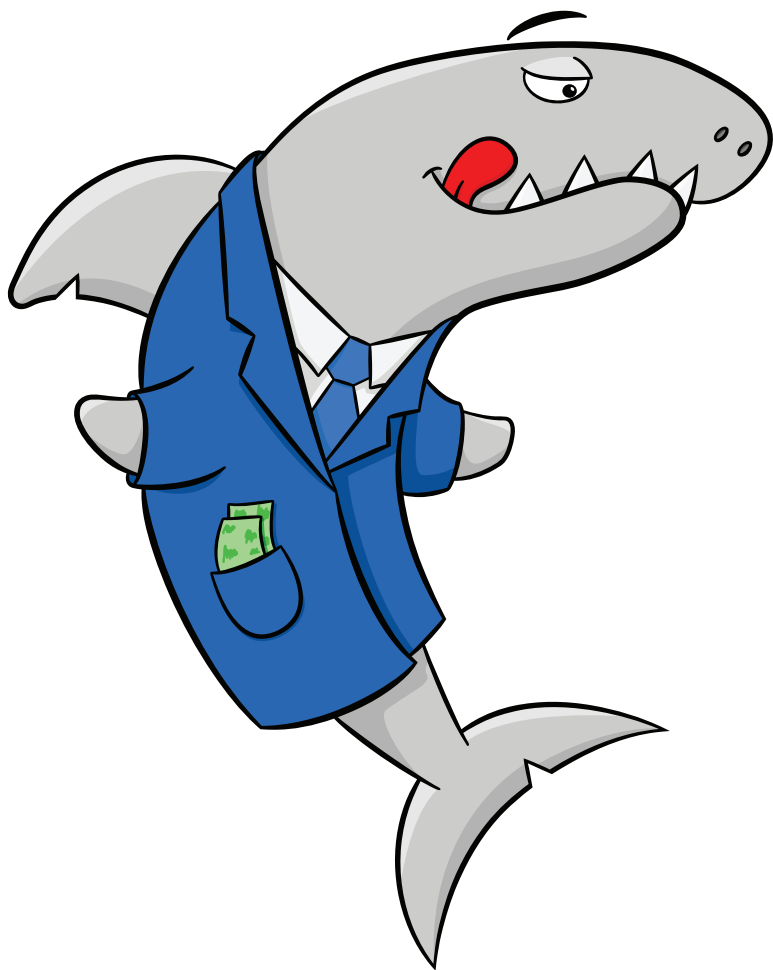
It often makes a difference if the purchaser is already in the business of manufacturing parts, such as if your principal sells its assets or business to a competitor. Often the sales commission savings of 3 percent to 5 percent is a driving factor in the

purchase. The purchaser can use its existing sales force and the commission savings go directly to the bottom line. Not much you can do under this circumstance other than try to make an agreement with the purchaser which may or may not be successful.

What to do if the purchaser is not in the manufacturing business.

I have had several cases where we litigated a claim for sales commissions in the event of an asset sale where the purchaser was a venture capital firm. We have been successful more times than not but there are certain steps that must be taken in order to try to insure that the sales representative gets paid at least something. These include the following:

- **Make yourself indispensable.** One thing about venture capital companies is that they are in the investment business and not typically in the sales business. They are buying the assets for an investment with the idea that they will sell the company in three to five years and



© antimartina | stock.adobe.com

If your principal is already in the process of selling its assets, then there are still some steps that you can take to try to protect your commissions.

cash out their profit on the increase in value of the company. Sometimes you can approach the buyer and offer your services. I can pretty much guarantee that you will not be able to negotiate a deal to include asset sale protection. You may, however, be able to negotiate a deal to get paid sales commissions for at least part of the time in exchange for staying on. If the venture capital company sees the value of your services, then there is a good chance you can make a deal.

- **Stay involved as long as you can.** We had one case where the venture capital company asked the sales representative to take the new owners around to the customers to convince the customers to issue new purchase orders in the name of the new company. The sales representative did this and was terminated shortly thereafter. We filed a lawsuit and were able to make the argument that the sales representative procured the new purchase orders for the new company. We were able to work out

a good settlement for the sales representative in that case.

There was another case we handled several years ago. A venture capital company purchased the principal and we filed a lawsuit immediately on behalf of the entire outside sales force of four sales representatives who were fired but offered jobs as employees. This put the new owner in a box because they could not afford to lose their entire sales force without jeopardizing all of the business and the relationships with the customers.

If the venture capital company sees the value of your services, then there is a good chance you can make a deal.

Before the principal filed responsive pleadings, I got a call from the attorney for the venture capital company saying that they would like to have a meeting. I said sure. They showed up in my conference room up with two lawyers, along with several other management personnel. I think that a big reason for the meeting was that they wanted to check me out to see if I knew what I was doing. I reveled in that. We negotiated long-term agreements with each of the sales representatives which got them the bulk of their commissions. It was truly a win-win. The company had no disruption and the sales representatives got paid.

In another case we handled recently, the new owners kept the sales representative on for a few months to make the transition run more smoothly. Fortunately for our client, the customer issued a new long-term blanket order about five months after the asset sale while my client was

still working. Shortly thereafter, the new owner terminated our client. We filed suit and were able to make a good argument that our client was responsible for procuring the new blanket order. We were able to negotiate a decent settlement for our client after two mediation sessions.

Conclusion

Obviously the best position to be in is to have a good asset sale protection provision in your sales representative agreement. That is not always possible. My main point here is that you should not give up. Many times where there is a will there is a way. Be creative and you may be able to work out a deal to at least get you some money for all of the time and effort you expended in procuring the new business.

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.