

BEWARE of Termination for Cause Language in Your Sales Representation Agreement

BY RANDALL J. GILLARY

My friends on MANA's staff tell me that most MANA representative members report that the vast majority of their principals treat them honorably and respectfully. Most of the time commissions are paid on a timely basis and according to the terms of the written representative agreement. However, there are enough exceptions to that rule that the primary focus of my law practice is the representation of sales representatives in commission disputes.

A significant part of my practice includes drafting and negotiating sales representative agreements for our clients. One of the major pitfalls in sales representative agreements is language inserted by a principal which provides for terminating the agreement "for cause." This is not a

major problem in and of itself but it can be if the principal wants to pay less in post-termination commissions in the event of a termination "for cause" than if the termination is "not for cause." Typical examples of reasons for a termination "for cause" are listed on the next page.

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Typical Examples of Reasons for a Termination “for Cause”

1. Change in control of the sales representative agency.
2. Bankruptcy of the sales representative.
3. Conviction of a crime or dishonest/unethical conduct.
4. Material breach of the contract and sometimes “any breach” of the contract.

I have been litigating sales commission cases for more than 30 years and have yet to see a sales representative agreement terminated for cause based on reasons one through three above. Almost all terminations for cause are grounded in reason four. I have litigated several sales commission disputes where the principal terminated the agreement allegedly “for cause.” In each case the primary objective of the principal was to reduce or eliminate the post-termination commissions. In each case there was no justifiable reason to avoid the payment of the post-termination commissions.

Eliminating Commissions

Typically the lawyers for the principal will want to insert language in the sales representation agreement that involves a substantial decrease and more often, the elimination of all post-termination commissions in the event of a termination for cause. *You should never sign such an agreement!* It is easy to think that you will never breach the sales rep agreement

or that any of the other reasons for a termination for cause will ever come into play, but that is fool’s gold. Principals ordinarily do not terminate for cause because there is cause. They typically terminate for cause because you are making too much money and they don’t want to pay you.

The typical rationale of the lawyer for the principal is that the sales representative should not be rewarded for breaching the contract. My response is that the principal can always sue the sales representative for breach and prove damages. I also point out that the sales representative should not lose out on hundreds of thousands of dollars in earned commissions because of a \$1,000 breach, even if one were to occur.

I should also point out here that sales representatives seldom breach their sales representative agreements. About the only time it happens is if the principal tries to include language in the agreement to try to micro-manage the day-to-day activities of the sales rep and the sales rep fails to perform some enumerated task.

My sales rep agreements have few specific duties for the sales rep other than to use commercially reasonable efforts to obtain new business for the principal. You should resist efforts by your principal to enumerate specific duties in your sales rep agreement. Aside from the IRS issues with too much control by the principal of the sales rep who is ordinarily an independent contractor, it is not good strategy for either party to allow the principal to control the details of your performance.

Terminating for Cause

I have litigated several cases where the principal claimed a termination for cause. In every case the primary goal of the principal/the principal’s attorneys, was the elimination or a substantial reduction of the post-termination commissions. Typically the principal uses the threat of the non-payment as a hammer to try to renegotiate (i.e., reduce) the amount of the commissions to be paid to the sales representative. Keep in mind that “It is not the money. It is the amount.”

It is also important to keep in mind that if the sales representative breaches, the sales representative is liable for damages incurred by the principal. In all of my years of practice I have yet to see something that a sales representative has done which damages his or her principal. As a general rule, a sales representative is a facilitator of the transfer of communications between the customer and the principal. Sales representatives generally do not prepare the quota-

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tions; design the product; or prepare the drawings. In fact, it is hard to envision something that a sales representative can do that can damage his or her principal. If there were to be something that the sales representative did to damage his or her principal then the principal would have a claim for breach of contract and the principal would be entitled to asset a claim for damages. *Make the principal prove its damages!*

Liquidated Damages

In effect, termination for cause language which substantially reduces or eliminates post-termination commissions is a “liquidated damages” clause. This means that the damages that the principal is entitled to are the non-payment of all or most post-termination commissions regardless of what damage, if any, has been suffered by the principal. *Never agree to this!*

Many sales representation agreements in the auto industry provide for a significant period of time for the payment of post-termination commissions including up to life of the part. This is in large part due to the fact that the sales representative may work for little or nothing until the sales occur, which can be years after the selling commences. There can be hundreds of thousands of dollars and

more in post-termination commissions. Why should the sales representative have to forfeit hundreds of thousands of dollars in commissions as compensation to the principal for a thousand-dollar breach?

The reality is that termination for cause language with reductions in post-termination commissions increases the risk that there will be a lawsuit to collect your termination commissions. You will be doing yourself a big favor by eliminating that language from the proposed agreement. If you need help in convincing your principal not to include that language in the agreement, contact one of the lawyers on the MANA list of lawyers for assistance. I can pretty much guarantee that your money will well spent.

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



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Legal Counseling

One of your benefits as a MANA member is a 30-minute consultation with an attorney known to us as being experienced and knowledgeable about the manufacturers’ agency business and laws that govern rep-principal relationships.

The purpose of this short consultation is to enable you to get a quick answer to a general legal question. It is not intended for you to get specific legal advice or services such as a contract review or even a contract clause review.

The attorney you are speaking with will make the decision as to whether the consultation falls under the no-charge member benefit category or under a fee for service category. If the attorney believes the service is one you should be invoiced for, he should notify you and allow you to make the decision as to whether to proceed or not. Part of this notification would include the hourly rate and an estimate of the amount of time involved.

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