

# A horseshirt case: Equine clothing maker can't avoid trial with reps

A written rep contract is circulated, unsigned and quickly forgotten. Meanwhile, the parties perform for about eight years. When a dispute then arises, does the contract control?

Both the principal and its reps long ignore certain key contract terms like sales quotas and non-compete provisions. Does this lack of enforcement support the principal also selling direct to the rep's accounts and converting large customers to house accounts?

The principal underpays its independent reps for years, yet the reps continue to perform. Are they suckers who have waived their claims?

## The jockeys

These issues came before the Federal Court in Harrisburg, Pa., earlier this year when two independent sales reps, Joe Pete Wells and Les Krutoff, brought suit for breach of contract against JPC Equestrian, Inc., and its president, Varun Sharma. JPC, a supplier of equestrian clothing and equipment to retailers, including through sales reps, was established in Drums, Pa., in 2002. *(SPOILER ALERT: Answers to the opening questions are suggested, but not definitively provided in this case.)*

2002 was when Wells and Krutoff met with Sharma at a trade show. They discussed how JPC would operate and how they would market its products and get paid for sales. Soon after, Wells and Krutoff began promoting the JPC line. Sharma obtained a form "Sales Representation Agreement" from a lawyer and inserted each of their names and addresses into the template. Each rep later testified to signing and returning the Agreement, but Wells' own copy of the Agreement did not bear his signature, while Krutoff could not locate his Agreement, though he recalled it was never signed by Sharma or anyone else at JPC.

At their depositions, Wells and Krutoff further testified that they regarded the Agreement as a "formality," which was "unnecessary" and largely "forgotten about." Urging the Court to find no contract controlled, Sharma attempted to de-emphasize the Agreement by referring to it merely as "the Document." He claimed he never received signed copies from Wells or Krutoff, and "never intended for the purported terms of the Document to govern JPC Equestrian's relationship with the plaintiffs." This testimony left unexplained, of course, just why Sharma ever prepared the Agreement or sent it out to Wells and Krutoff for signature.

The essential contents of the Sales Representation Agreement itself were undisputed. Wells and Krutoff agreed to represent JPC in distinct territories along the Atlantic seaboard and were to receive a 10 percent commission on all sales resulting from their efforts without exception. Other standard terms, such as that the reps would bear their own expenses and could not accept competing lines, were also included. The Agreement also provided that the reps would meet reasonable sales targets as assigned by JPC, yet no such targets were ever established.

## The horse race

Wells and Krutoff accused JPC of breaching the Agreement by paying only 5 percent commissions on certain accounts. The plaintiffs also charged JPC with converting certain large accounts to "house accounts," on which no commissions were paid in violation of the Agreement, and with selling directly to their customers to avoid paying a commission.

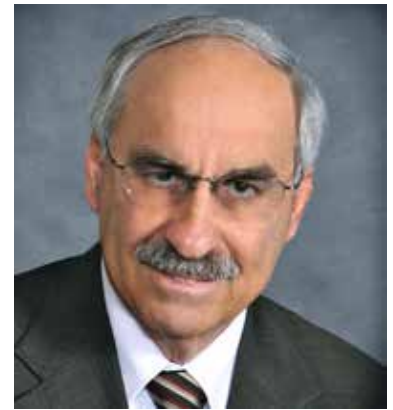
The defendants did not bother denying these allegations. Instead, Sharma asserted payment at the 5 percent rate was JPC's standard practice, never mind what the Agreement says. The defense mounted by JPC and Sharma focused on whether their relationship with the plaintiffs was governed by any contract.

While acknowledging Sharma tendered the Agreement to Wells and Krutoff in 2002, the defendants asserted the parties never even negotiated, let alone accepted or agreed to be bound by that "Document." Absent a signed copy, they claimed the Document never ripened into an enforceable contract, even though Sharma furnished it. Sharma and JPC specifically pointed to the plaintiffs' testimony that the Agreement was "unnecessary" and a mere "formality."

Many of the Agreement's terms may have been dutifully followed, JPC and Sharma conceded, but other important terms were readily ignored. The Agreement provided that plaintiffs would receive 10 percent commissions on all sales resulting from their efforts, but it was undisputed that for eight years they were often paid less than 10 percent on certain categories of sales. By continuing to represent JPC during this time nonetheless, defendants claimed Wells and Krutoff waived any claims of underpayment.

Additionally, the defendants noted that JPC never applied the requirement to assign reasonable sales quotas, and the reps never collected

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by Gerald M. Newman  
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## ASSOCIATION ROUND TABLE: Work-life balance

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and it will be okay to allow similar flexibility into the scheduling of other facets of your life. Accept that fluidity is required, but take pleasure in making at least half of your children's games, concerts or plays if that is an improvement from having missed most of them.

It's been two months since the CEO group first heard of this approach, and we've taken to updating each other on our progress. I'm pleased to report that most are seeing some meaningful improvement in their level of satisfaction in achieving a work-life balance as a direct result of deploying these tactics.

I'm certain that the demands of our professional lives will not diminish, especially since all the drivers and technology enablers that make this a 24/7 business aren't going away. So, let's deal with it by deciding what's important in the overall scheme of things and dedicating some time to those things that matter. It really is up to each of us to decide how and where we spend our most precious resource — time. ■

## LEGALLY SPEAKING: A horseshirt case

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payments from customers, as the Agreement also provided. Although the Agreement prohibited the reps from selling competitive products, the judge later found, "There is evidence to show that Krutoff did, and that Wells may have, sold products that competed with JPC during the time they worked on JPC's behalf, but JPC did not invoke the non-compete provision."

Based upon the absence of a fully-executed contract and this eight-year history of uneven compliance with it, JPC and Sharma moved for summary judgment in the case, arguing that the evidence so overwhelmingly demonstrated their non-liability that a trial could only end in its favor, and empaneling a jury to decide the case was unwarranted and a waste of time.

### The finish line

Rather than construe JPC's failure to consistently pay a 10 percent commission and adhere to other terms of the Agreement as a waiver of plaintiffs' rights, Wells and Krutoff countered that these practices were evidence of JPC's breach of contract. Further, they argued, the party attempting to show a waiver in Pennsylvania must demonstrate "that he was misled and prejudiced thereby." Wells and Krutoff argued in opposition to summary judgment that defendants could show neither.

The court first found that, under Pennsylvania law, a contract signed by only one party may be enforceable as long as both parties accept the contract and act under its terms. Evidence was presented that at least one party had signed the Agreement, and the court noted that "Sharma prepared and provided the Agreement to the plaintiffs," and that "in many respects the parties seem to have followed fundamentally material aspects of the Agreement." The parties' level of acceptance of its terms, if any, was surrounded by disputed issues, and their divergent interpretations of the facts show that a full trial was necessary to resolve them.

The court also declined to summarily conclude that the plaintiffs waived their rights by failing to legally enforce them over the eight years they continued to represent JPC. Defendants were unable to convincingly show they were actually misled by the conduct of Wells and Krutoff or that they suffered actual prejudice by the plaintiffs' decision not to enforce their legal rights during this time, as Pennsylvania law requires.

Brandished with just a touch of legalese, the court summarized its rationale for denying summary judgment: "We find that there remain disputed issues of material fact with respect to whether the parties had entered into an enforceable sales representation contract; about whether the defendants breached that contract; about which terms of that contract, if any, may have been breached; and about whether the plaintiffs may have waived their rights to enforce any aspect of that Agreement by waiting to bring suit until 2010."

The standard to prevail on summary judgment is generally much higher than at trial, and the evidence did not so clearly favor either party (Wells and Krutoff appear to have also made a token run at summary judgment) to merit such an award. In light of the conflicting evidence, no early exit from the suit was available, and a trial, or a settlement, remained the parties' only viable option.

A factual scenario that appeared at first to offer a sprint to the finish for the principal — given the unsigned contract, the eight years of accepting underpayments without complaint and the parties' spotty record of following the contract provisions — instead generated a muddy track filled with hurdles. Although Wells and Krutoff dodged summary judgment here, reps are still well-advised to carefully examine their contracts, and take steps to preserve or promptly enforce their legal rights. ■

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