

Risk analysis leads court to overturn unfriendly reading of rep contract

Sales rep law articles do not only address recovering commissions. Primarily, yes, but not solely.

Before a commission claim can be brought, the contract language must favor the rep and prove enforceable. This was the obstacle independent sales rep William J. Burford confronted.

Burford agreed to market and promote the purchase and sale of accounting practices for a company called Accounting Practice Sales, Inc. or “APS” in Louisiana, Alabama, Mississippi, Tennessee and Kentucky. This was a new sales territory for APS, and the parties’ contract included a clause stating Burford would not compete in it for one year after termination.

APS later terminated Burford without cause, leading him to file a federal lawsuit in the small southern Illinois city of Benton, alleging his termination violated the parties’ contract.

Asserting its termination of Burford was proper under the contract, APS moved for summary judgment on his complaint, a common tactic designed to win a case based on legal briefs and thereby avoid a trial. The federal trial court granted the motion and Burford appealed.

The contract terms: avoiding no-fault divorce

The parties’ contract contained an “ever-green” clause, providing that “it renews automatically on each anniversary date of this agreement for another period of 12 months.” Such contracts that renew without either party taking action, and are for an indefinite term, are ordinarily viewed by courts as terminable at will by either party, “the business equivalent of no-fault divorce.”

Significantly, while the contract enabled Burford to terminate at any time by giving

30 days’ notice, no such right was conferred upon APS. The contract expressly stated: “APS cannot terminate this agreement unless it is violated by Burford.” Relying on this language, Burford argued the parties’ agreement overcame the presumption that APS could terminate the contract at will.

In a decision handed down last year, the federal appellate court in Chicago, unlike the trial court, agreed with Burford on this point. “By allowing APS to terminate only when Burford had breached, the contract made as clear as could be that APS could not terminate the contract at will.” No confusion existed either. The parties knew how to give a party the right to terminate at will as evidenced by the language allowing Burford to terminate at any time on 30 days’ notice. They made the decision to give Burford that right, but

not APS.

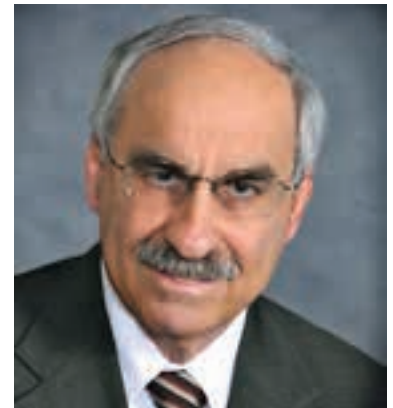
The appellate court went so far as to caution against the danger posed by APS’s interpretation of the contract, which “would threaten to deprive Burford of the economic basis for the bargain he struck.”

A staple in contracting: both sides can minimize risk

The appellate court went so far as to caution against the danger posed by APS’s interpretation of the contract, which “would threaten to deprive Burford of the economic basis for the bargain he struck.” With unusual clarity, the court noted how “the type of relationship found here — where a sales representative builds a territory on the other party’s behalf — poses significant risks to both sides if either party is free to walk away at any time without consequence.”

The parties’ allocation of this risk proved central to the court’s analysis. It recognized that Burford could spend his time at APS simply building goodwill in the territory, and then walk away to capitalize on the goodwill with another company or even for himself.

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LEGALLY SPEAKING: Court overturns rep contract

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APS was protected against this risk via the contract's one-year non-compete provision. As further protection to APS in case Burford underperformed, the contract provided that poor sales performance gave it good cause to terminate him.

Meanwhile, Burford needed protection against the risk that APS would allow him to spend time and resources developing the territory, only to then reassign it to a lower-paid rep. His risk was minimized by APS contractually agreeing not to terminate him unless he violated the agreement.

It was the parties' careful risk allocation in their agreement that gave the court comfort in reversing the trial court's order granting summary judgment, and concluding that APS breached the parties' agreement by terminating Burford at will. In claiming a right it did not possess under the parties' arrangement, APS upset the balancing of risk in the agreement, an action it could not sustain.

The practical lesson: preserve the taste of peanut butter

An important takeaway from this rep victory is the fundamental concept and benefit of holding principals to the terms of carefully negotiated rep agreements. What is gained at the pre-contract bargaining table ought not be snatched away by a short-sighted principal's greed or hotheadedness.

And a premise of protecting the "carefully negotiated rep agreement" is, of course, to ensure that pre-contract negotiations with the principal include a risk allocation that protects both parties. Burford would have been in no position to prevent the APS termination had he signed a one-sided contract rather than securing the right to be terminated only for breaching the rep contract.

One-sided rep contracts are almost as undesirable as one-sided love, and as Charlie Brown of "Peanuts" fame once remarked: "Nothing takes the taste out of peanut butter quite like unrequited love." ■

SALESWISE: Honeybees and rep firms

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reconcile strongly held diverse views into a single decision. Here is how to emulate the bee process:

- Have everyone share ideas in an open forum.
- Hold a friendly competition of ideas. Ask questions, clarify positions, and regularly go around the room to ask everyone for input.
- Once everything that needs to be said has been said, take a secret ballot vote. All members can express their true opinions, free of peer pressure and group think.

Bee lesson #5: keep the process short.

Scout bees debate the pros and cons of each site vigorously, but not endlessly.

Here are a few tips from the honeybees on how to speed up decision-making and ensure the best result:

- Take a secret ballot periodically to see how close the group is to consensus.
- If the vote is far from unanimous, continue to debate.
- If 80 percent agree on an option, ask the outliers if they can support the majority position.

Talk back: What do you think about applying honeybee democracy to your meetings? What will you do differently?

DVD: "Queen of the Sun: What Are the Bees Telling Us?" Directed by Taggart Siegel

This remarkable documentary is one of the most beautiful nature films I have seen. Director/photographer Taggart Siegel takes viewers inside hives and follows honeybees as they sip on flowers. We also meet beekeepers in gorgeous settings (Illinois, Germany, New Zealand, Italy) and even on rooftops in Manhattan.

Siegel explores the recent and catastrophic disappearance of bees, weaving the dramatic stories of beekeepers, scientists and philosophers from around the world as they struggle to understand and solve the mystery. Because the pollination work of honeybees is crucial to the production of one-third of the food we eat, their struggles will ultimately be our struggles. I recommend this film to everyone. ■

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