

Determined Sales Rep Recovers Commissions Plus Exemplary Damages from Bullheaded Principal

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Most reps hunt for some valuable takeaways when a relationship with a principal ends badly. No hard searching was necessary after a recently completed rep-principal trial in Chicago, where the final count of useful “lessons learned” proved nearly as abundant as the sales rep’s recovery.

In *Electronics Sales Promoters (rep’s assumed name) v. Full of Bull Principal, Inc. (manufacturer’s assumed name)*, the principal failed to pay certain commissions to ESP before and upon termination, no matter its contractual obligation. When ESP filed suit to recover the unpaid commissions, plus exemplary damages and attorneys’ fees under the little-used Illinois Sales Rep statute, FoBP attempted every defense in the book. A few are worth sharing.

Post-Termination Commission Obligations Are Fully Enforceable

Through rep’ing FoBP for many years, ESP had earned the contractual right to receive six months of continuing commissions upon its termination without cause by FoBP. Yet, when FoBP terminated ESP without cause, it failed to pay *any* post-termination commissions. In defense of its non-payment, FoBP argued that it intended to pay these commissions, but ESP sued it too fast. Really.

FoBP’s president acknowledged that certain post-termination commissions were owed, but testified that because it disputed the amount ESP claimed, FoBP was justified in paying *no* commissions. The trial court recognized how unreasonable this position was, and ruled that FoBP should have at least paid the amounts it knew were due, disputing only the balance. Holding onto the *entire* compensation due the rep because the rep took legal action was entirely inappropriate.

“Best Efforts” Language Furnishes No Defense

Like many rep contracts, FoBP’s included a clause obliging ESP to use its “best efforts” to promote the FoBP product line. Such clauses generally serve as signals to the rep that it can’t sign the contract and then retire to Tahiti, expecting commission checks to roll in. Reps who sign up with FoBP (or any other principal utilizing such language) must act reasonably to promote FoBP’s products. Significantly, however, reps can and should act just as reasonably to promote their other lines.

The defense attempted by FoBP of claiming ESP failed to use its “best efforts” was a defense that could be used by any principal charged with failing to pay commissions due. No matter how many millions in sales the rep brought in, if only “best efforts” were used then so many millions more could have been realized. Read literally, any time the multi-line rep spent servicing Principal B could be construed as time spent away from Principal A, demonstrating the rep’s failure to use its best efforts for Principal A.

The trial judge recognized that asserting ESP failed to use its best efforts for FoBP was necessarily speculative and unprovable, and therefore invalid. While some jurisdictions will enforce this language, others do not favor such language unless the vague and immeasurable term “best efforts” is

defined in the contract. Illinois is one state where the term remains an aspirational but unenforceable and vague goal, much like acting with “commercial reasonableness” or in “good faith.”

Sales Reps Are Not Fiduciaries

Next, FoBP asserted that certain actions taken or not taken by ESP violated fiduciary duties owed to it under the law. Fiduciaries owe a high duty to act in the best interests of another. The hole in this argument, as the court recognized, was that independent sales reps generally owe no such duties.

Most states only recognize fiduciary duties in certain relationships, such as between an attorney and client or a physician and patient, or under special circumstances where one party places trust and confidence in another who thereby gains influence and superiority over him.

Sales rep contracts are usually entered into between two commercial entities where the rights and obligations of each are spelled out in some detail. Neither party can pretend to have placed trust and confidence in the other beyond the terms agreed to in the contract. Nor does the traditional role of a sales rep, promoting the principal’s products or services in the marketplace in exchange for an agreed upon commission, suggest the placement of any physician-patient like trust.

In ordinary business transactions, each party guards his own interests and no fiduciary duty arises. As the court recognized in rejecting FoBP’s attempt to impose a fiduciary duty on ESP, sales reps and principals generally follow this practice of looking out for their own interests, and no fiduciary relationship arises between them.

Windows to Protest Can and Do Slam Shut

Preventing ESP from recording a complete victory in the case, FoBP invoked the contract provision effectively requiring all complaints with commission payments to be brought within 30 days. As is common after a sales rep successfully procures sales, many orders from customers in ESP’s territory came into FoBP directly without notification to ESP. Accordingly, when ESP received its monthly commission check, it had no way to know if additional, unreported sales were made by FoBP and not commissioned.

Although ESP’s suit pleaded that FoBP not only failed to pay commissions during the contract term, but also failed to disclose the orders on which the commissionable were due, denying it a fair opportunity to complain about the non-payment, the court proved surprisingly unconcerned. Without disclosure by FoBP of the sales made, ESP literally needed ESP to discover and timely complain of the non-payment, yet the court still enforced the 30-day provision and denied this portion of ESP’s commission claim.

This adverse ruling could easily be viewed as a mistake by a busy Cook County trial judge. Plainly, the court should have construed the 30-day period as running from the time ESP discovered that uncommissioned sales were made, not 30 days from when the sales were made and concealed. Yet, the court may well have felt some sympathies for FoBP or its counsel, and elected to hand one piece of the dispute to the defense in order to deliver a more balanced outcome.

Exemplary Damages Awarded

After listening to all the evidence at trial, the judge applied the Illinois Sales Rep Act as written and awarded ESP exemplary damages on top of the commissions determined to be due. This was no small feat.

Many Illinois judges misread the mandatory language found in the statute providing that manufacturers who fail to timely pay commissions due “*shall* be liable in a civil action for exemplary damages in an amount which does not exceed 3 times the amount of the commissions owed to the sales representative” as optional. The author often encounters judges who erroneously refuse to award exemplary damages under this statute, reasoning that even though the withholding of commissions was unfair and in breach of the parties’ contract, the manufacturer did not act maliciously or near criminally, a standard not contained in the statute.

Fortunately for ESP, its assigned judge understood the statute to require an exemplary damages award once FoBP was shown to have failed to timely pay the commissions due, and entered an appropriate sanction for such failure on top of the commissions found owing.

Worth the Fight

Undoubtedly, FoBP believed that by forcing ESP to litigate every argument it could devise, regardless of the credibility, it would wear out ESP’s spirit or finances and prevent the suit from ever reaching trial. By seeing the fight through to the end, ESP enjoys not only the satisfaction of the trial victory, but a rare exemplary damages award as well. The inapplicable defense arguments attempted here should find no more success in other commission recovery actions, and ESP authorized this article in order to get that important message out.

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