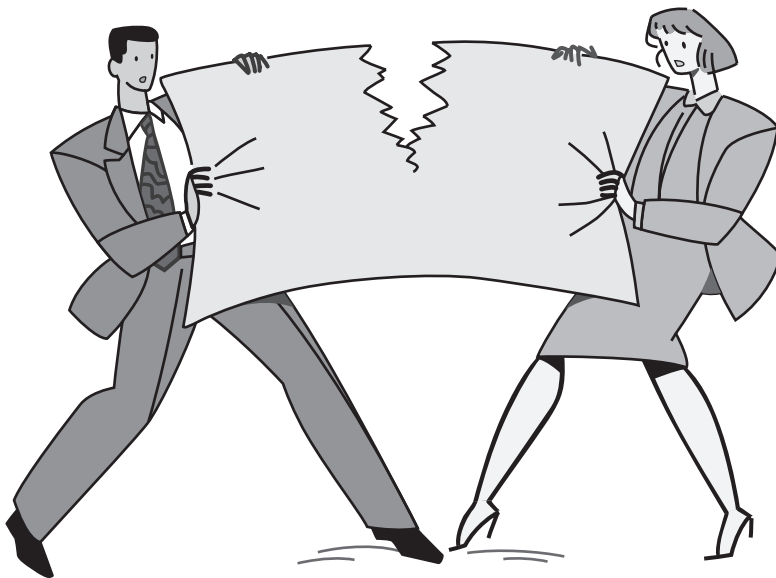

What Happens When Your Rep Contract Is Clearly Ambiguous?

by GERALD M. NEWMAN and DAN BEEDERMAN



Often when an attorney is asked to review a sales rep agreement — typically after the rep has been terminated — the attorney is amazed to find a contract whose terms are confusing and sometimes contradictory due to inherent ambiguities. When that happens, it can be difficult, if not altogether impossible, to decipher the parties' respective rights and obligations to each other, or to predict how a court may rule on an issue by looking solely at the "four corners" of the document itself.

When disputes occur that the parties are unable to resolve, determining how a contract should be interpreted ultimately will rest with a court or arbitrator, who will base its analysis and decision on a number of factors. These factors could include:

- Reviewing prior drafts of the contract.
- The parties' correspondence and memoranda regarding their negotiations.

- The manner in which they have conducted themselves in performing the contract.
- The customs and practices of the industry.
- Parol evidence from the rep, the principal and others about the intent of the parties.

Unfortunately, reliance on these various factors does not assure that a court's or arbitrator's interpretation of a contract will be consistent with what either, or perhaps both, of the contracting parties ever intended or expected. That is why attorneys strongly recommend that the rep thoroughly read and understand the contract before signing it. The time to address and clarify a contract whose provisions are confusing, inconsistent, or are subject to different interpretations is before it is signed; and not following its termination years later, or after a dispute arises.

This advice is equally true and beneficial for principals, as it is for representatives. Such was the realization of a principal in a case that was recently handled and successfully concluded for a Wisconsin sales rep, who had been terminated by his Minnesota principal — or at least that is what the principal thought.

Termination of the Relationship

In May 2002, the sales rep received a letter from its principal of eight years, advising of its “decision to terminate any and all business relationships with your firm.” The problem was (at least for the principal) that the rep agreement, which had been drafted by the principal, did not

permit the principal to terminate the contract at will or even on a 30 days' notice. Rather, the contract had a clause which provided that it would be renewed annually on its anniversary, stating:

“This contract is valid for one year from the date of signing and will be renewed annually, fifteen (15) days on either side of the anniversary date [October 1, 1994].”

Based upon this provision, the rep contended that the notice of termination was ineffective because it had not been given within 15 days of either side of the contract's anniversary date of October 1. The rep further asserted that the contract had been renewed automatically for a one-year period that did not end until its next anniversary date, October 1, 2002.

The principal's attorneys, however, claimed that another provision in the rep contract allowed it to be terminated on a 30-days' notice. That provision stated:

“In addition to any remedies either party may have at law or in equity, in the event of a breach of this Agreement by the other party, either party may terminate this Agreement at any time, by giving written notice of termination to the other party not less than thirty (30) days prior to the effective date of the termination ...”

However, the rep countered that termination under this provision only serves as a remedy in the event of a breach. In this instance, though, the rep had not been terminated for cause or for an alleged breach, but because the principal wanted to “go direct” (and in so doing avoid paying commissions on significant orders that the rep had recently procured). Based on this ambiguity,

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ity, legal counsel was confident that the court would find that the principal could not terminate the rep agreement on a 30 days' notice, but would have to wait until an anniversary date to do so. The problem for the principal was that by the time suit was filed, another anniversary date had come and gone, and the rep contended that the contract remained in existence for yet another year.

Vague Terms of Contract

Adding to the principal's concern was another provision in the contract which provided that commissions would “continue to be paid when due on all orders on the books, or which are received 90 days after the appointment is terminated ...”. Hence, determining when the contract ended was of paramount importance to the principal. Yet, the contract was vague about this issue.

The rep also had to deal with an ambiguity in the agreement which, depending on a court's interpretation, could have dramatically reduced the amount of recoverable commissions. Specifically, the agreement limited the principal's obligation to pay post-termination commissions only to

orders, “on the books, or which are received 90 days after the appointment is terminated, provided however, that the representative continues to represent our interests applicable to those orders.” However, what that exactly meant was debatable. Since the rep had not done any work for the principal since receiving the notice of termination in May, 2002, could the principal contend that the rep had not continued to represent its interests applicable to those orders? While legal counsel felt that it would be able to tender sufficient evidence to the court that the rep had been told by the principal not to call on customers or do any further work, this ambiguous provision nonetheless gave the rep some concern that could have been avoided had it raised this issue before signing the contract.

Submitting to Arbitration

While not an ambiguity, this strange and unusual contract had yet another provision which taxed

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the legal minds and the strategy of proceeding with this case. It provided that in the event of a controversy, “Manufacturers reserve the right to submit any controversy arising hereunder to the American Arbitration Association for settlement by arbitration to be held in Minnesota.” Note that this provision gave the principal the right to submit the controversy to arbitration, but did not give a similar right to the rep. Furthermore, while the principal had the right to submit the dispute to arbitration, for reasons only known to the principal, it did not do so. For over six months the principal attempted to stonewall the rep by refusing to instigate arbitration in Minnesota or file suit.

Accordingly, the rep “took the bull by the horns” and filed suit in Wisconsin (the rep’s home state), seeking an adjudication of the issue of termination and damages, along with double damages under the Wisconsin Sales Rep Protection Act. The Wisconsin court gave the principal a limited period of time to submit the controversy to arbitration. When the principal continued to procrastinate, the Wisconsin court ordered the case to proceed in litigation, much to the chagrin of the principal, who now had to engage new legal counsel in Wisconsin.

In the face of the confusing and contradictory terms its own attorney had drafted, and coupled with the potential assessment of additional damages under the Wisconsin Sales Representative Statute, the principal wisely determined that it was best to settle the case and pay the rep its rightful commissions for all orders that were entered through December 31, 2002, which equated to 90 days after the October 1 anniversary date, seven months after the principal thought it had terminated its obligation to do so.

While the litigation was eventually resolved to the rep’s benefit, the lesson to be learned is the importance of thoroughly reading, reviewing and understanding every rep contract before it is executed.

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