



# Sweating Out The Pursuit of A Cool Commission

Though this court case seemed like an easy win for the principal, this rep firm managed to get reimbursed for lost commission.

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BY GERALD M. NEWMAN & ADAM J. GLAZER

Consider these brutal but undisputed facts in the case of an independent rep seeking to recover, in court, a commission on the sale of a product (a cooling tower used in the beverage processing industry):

- The rep, MAK Automation, Inc., had an *oral contract* with its principal, GC Evans Sales and Manufacturing

Co., Inc., that was non-exclusive, and did not furnish a specific geographical territory. The only undisputed contract term was that MAK had to generate or procure the sale to earn a commission.

- MAK participated in no sales meetings with the customer, did not e-mail or otherwise communicate with

the customer about the tower, obtained no specifications for the cooling tower, did not participate in its installation, and did not inspect the tower.

- More generally, MAK was not involved in the negotiation, sale or distribution of the tower, and did not even know it had been sold to the customer until after its rep relationship with GC Evans was terminated.

- The “undisputed evidence” established how the rep “was not directly involved in any aspect” of the cooling tower sale, according to the judge.

This real-life scenario, which recently played out before the federal court in St. Louis, is not exactly favorable for MAK or any sales rep. Yet when the principal, GC Evans, predictably moved for summary judgment on MAK’s claim, the motion was *denied*. Under these challeng-

ing facts, even longtime MANA loyalists must wonder: don’t these undisputed facts demonstrate that a trial is unnecessary? How could a rep case like this ever reach a jury?

As tempting as it is to simply credit good lawyering, attention must be paid to both the rep’s history with its principal, and the venerable procuring cause doctrine. More on MAK’s claim in a moment.

For the independent rep firm wrongfully denied a sales commission, it is difficult enough deciding to file suit to protect its rights. Once the rep makes the decision to invest in an action against a deep-pocketed manufacturer, the last thing the rep wants to see is a judge tossing the case before it reaches trial on the principal’s inevitable summary judgment motion. Because too many

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manufacturers today will only consider a fair settlement of the case if their summary judgment motion is denied and the suit is headed for an unpredictable jury determination, justice for the rep often depends upon defeating such a motion.

Recognizing how daunting it can be for the typical rep firm to file and sustain a commission claim against a principal who is often a publically traded corporation or international conglomerate, many states have sought to level the playing field. Legislatures have attempted to aid reps by enacting certain statutes offering reps the potential to recover attorneys' fees and costs, or even punitive damages if they show a commission was wrongfully withheld. Many courts follow the *procuring cause doctrine*, which, while varying from state to state, often

provides that, in the absence of a contractual agreement to the contrary, the rep can be entitled to commissions on all sales made after termination of a contract, if it generated those sales prior to termination.

So how did the federal court in St. Louis allow MAK Automation's commission claim to proceed? It turns out that, although MAK played no role in the sale of the subject cooling tower, it previously received a commission for procuring the sale of a cooling tunnel to the same customer. GC Evans contended the cooling tower was a completely separate transaction, but MAK credibly argued that the tower was a component of the cooling tunnel sale made earlier that same year, and the customer's purchase of the tower sprang from MAK's securing the purchase of the tunnel.



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The court ruled that “the mere proximity of the sales” may be sufficient to establish MAK’s entitlement to a commission. Although the rep was not directly involved in the sale of the cooling tower, it would be up to the jury to determine whether MAK’s acknowledged prior representation of GC Evans for the sale of the cooling tunnel was also the procuring cause of the tower sale to the same customer. This was not an issue the court would remove from the jury’s consideration on summary judgment.

It was hardly surprising that once the court denied the principal’s motion and set the case for trial, the parties promptly reached a settlement agreement. MANA member reps may wish to take a page from MAK’s playbook by evaluating their potential impact on the principal’s sales, even sales occurring without their knowledge or after their termination, if a credible claim can be maintained that their efforts helped secure these sales. 

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