Principal Lacking Good Faith Commits A Breach of The Peace (Bridge)

BY GERALD M. NEWMAN AND ADAM J. GLAZER

Ameron International produces fabricated steel products. Its sales rep in Western New York, West Empire Associates, learned that the Buffalo and Fort Erie Peace Bridge Authority, operator of the famed Peace Bridge (connecting the United States and Canada), was considering re-coating the entire bridge. West Empire quickly arranged a meeting between Ameron and the Authority.

The court noted that West Empire had done everything required to earn the commission prior to its termination. Under Ameron's interpretation of the contract, it could willfully injure West Empire by terminating after it had fully performed its obligations, but before Ameron was paid by the Authority.

West Empire then worked the phones for a few months with the Authority and Ameron, but did not otherwise assist in the preparation of Ameron's proposal for the Peace Bridge project. Shortly after participating in the initial testing of Ameron's bridge coating, Ameron terminated West Empire as its rep.

The coating test was then successfully completed, and a feasibility study regarding re-coating the entire bridge was commissioned. West Empire was not involved in this study. Months after West Empire's termination, Ameron formally presented its feasibility study, and the Authority then solicited bids for the project. West Empire did not participate in Ameron's bid submission.

The Authority opted to conduct a $2.5 million pilot project to further test the re-coating, and Ameron bid on this without the assistance of West Empire. This $2.5 million contract was awarded to Ameron, which later also received the contract for the remainder of the bridge, a deal worth more than $19.5 million. West Empire was not involved in the negotiations for the pilot project or the completion of the bridge re-coating.

West Empire's rep contract provided for payment of commissions on all sales of products into its territory out of funds actually received by Ameron. Yet, West Empire received *no* commission based on the Ameron policy that only those representing Ameron at the time the payment is due qualified for commissions. West Empire was terminated before even the pilot project deal was signed.

This led West Empire to file suit against Ameron in Buffalo federal court. The suit alleged a breach of contract for failing to pay the commissions, and added that West Empire was terminated in an effort to renege on its commission obligation in breach of the "implied covenant of good faith and fair dealing" that is written into virtually every contract.

While Ameron enjoyed the unlimited power to terminate West Empire as its manufacturer's rep, which termination was not challenged by West Empire, the law did not permit Ameron to use the termination as a means to deny the commission. Even when a principal's right to terminate a rep is unrestricted, it may not do so in bad faith as a mere excuse to avoid paying a commission.

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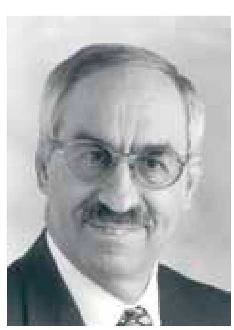
The court found "it is unreasonable to conclude that they intended to enter into an agreement whereby plaintiffs could fully perform all of their requirements to earn an incentive but that defendant could then unilaterally avoid paying such simply by terminating before the Authority's payment arrived. Payment was due when West Empire had performed its end of the bargain, and this right was only subject to divestment if Ameron was not ultimately awarded the bridge re-coating work.

West Empire also argued that it was entitled to its commission as the "procuring cause" of Ameron's contract with the Authority. The procuring cause doctrine varies state to state, and in New York generally entitles a sales rep retained by a manufacturer to get paid commissions on sales it makes "either directly, or as its efficient and producing cause." The doctrine ordinarily applies even after a contract has been terminated, unless the contract contains specific language limiting or excluding this right.

Ameron's contract did not contain such limiting language. Instead, Ameron argued that West Empire was not the procuring cause of the business because its involvement ended well before the Peace Bridge contract was signed. The court, however, recognized that a rep need not be involved in the completion of the sale or even be "the dominant force" to be the procuring cause. Under New York law, the rep need only establish a direct and proximate link between the bare introduction and the completion of the sale. Finding that West Empire helped bring the bridge project to Ameron's attention, "had some involvement in assisting Ameron to secure the project," and did everything Ameron asked of it, the court ruled that West Empire was the procuring cause of Ameron's Peace Bridge contract. Judgment was entered for West Empire.

One lesson learned is that where a principal breaches its contract, the attendant duty of good faith and fair dealing can potentially help protect the rep from an opportunistic termination. Another is the procuring cause doctrine can provide many reps with the opportunity to seek post-termination commissions based on their pre-termination efforts.



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