

Beware of the Difference Between “Expiration” and “Termination”

In Your Sales Representation Agreement

BY RANDALL J. GILLARY

This article addresses the important distinction between “termination” and “expiration” of a sales representation agreement. I had a case several years ago where this was a central issue.

The Problem

My client in that case was initially represented by an attorney who happened to be a golfing buddy of mine from Detroit Golf Club. Unfortunately, he was a general practitioner and was not very experienced in sales commissions disputes. My friend drafted a notice on behalf of the sales representative to inform the principal of the intention by the sales representative to “terminate” the sales representation agreement. That was the correct action to take because the principal was in breach of the agreement. The principal shortly thereafter acknowledged in writing that the agreement would “expire” in ac-

cordance with the paragraph in the agreement addressing the term of the agreement. Unfortunately, my friend should have objected to the characterization of the “termination” as an “expiration,” but he did not.

The sales representation agreement in that case required the principal to pay full commissions for one year after termination and for a second year at 50 percent of the applicable commission rate — effectively a year and a half of post-termination commissions. Not great but not bad. Shortly after the lawsuit was filed, the attorney for the principal filed a motion for summary judgment arguing that no post-termination sales com-



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missions were owed because the sales representation agreement “expired” and was therefore not “terminated.”

The sales representation agreement did not contain a provision for “post-expiration” commissions. The trial judge agreed with the attorney for the principal and dismissed the claim for post-termination sales commissions. We went to trial on the issue of the underpaid pre-termination sales commissions plus the penalty damages under the Michigan Sales Representative Commission Act. We won the trial and received

full payment of the pre-termination sales commissions plus penalty damages. We then appealed the granting of the motion for summary judgment on the issue of the post-termination sales commissions to the Michigan Court of Appeals.

Our position on appeal was that termination, cancellation and expiration are essentially synonymous. We argued that the terms all mean the same thing: The agreement has ended. Our contention on appeal was that the agreement was at the very least ambiguous and that there was

an issue of fact as to whether termination, cancellation and expiration were synonymous under the agreement. The court of appeals agreed with us and over-ruled the trial court and sent the case back. Unfortunately, this was years later and the principal had since gone out of business.

The reason for this article is that I continue to see provisions in sales representation agreements where the attorney for the principal is making a distinction between termination and expiration. I view this as a way to avoid the payment of post-termi-

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nation commissions. If a sales representation agreement distinguishes between termination and expiration, then the principal may be able to allow the agreement to expire at the end of the current term and arguably avoid the payment of post-termination commissions. If the provision for post-termination commissions specifically refers to “termination” then the principal would have the ability to argue that the agreement “expired,” i.e., it was not “terminated.” This is a problem which should always be avoided.

The Solution

My solution to this problem is essentially two-fold:

- First, I never use the term “expire” or “expiration” in a sales representation agreement. If there is a need to refer to the end of the agreement, then I use the term “terminate” or “termination.” Termination is sufficient to describe any end to the agreement.
- Second, never sign a sales representation agreement that has a fixed term (i.e., one that does not automatically renew). Contracts with automatic renewal provisions are often referred to as “Evergreen” con-

tracts because they never expire. The agreement continues until one of the parties takes action to terminate it. Typically, this would be by a written notice of termination. An agreement that requires action to terminate it is always preferable for the sales representative. The problem with the difference between expiration and termination generally will not exist if the contract cannot expire.

There is one other key reason why a sales representative should not sign a sales representation agreement with a fixed term. Once a sales representation agreement is signed it usually gets stuck in a drawer somewhere and no one ever looks at it again until there is a problem. That could be several years down the road. It is preferable not to be in a situation where the sales representation agreement ends by its terms. Otherwise, there is a big question as to what the terms and conditions of the sales representation agreement are after it ends, and the parties continue their relationship. This is a problem which should be avoided. As stated above, there is a simple fix for that.

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not my purpose to try to convince you to hire an attorney to keep my brethren in the legal field working. In fact, I will digress here for a moment. I recently received an award from my local bar association celebrating the fact that I had been a member for 40 years. I used to think that would be a big deal, but I was underwhelmed when I received the award. I just realized that I had just received the ultimate participation award. I almost never attended most bar association functions because to me they were mostly focused on helping lawyers. I have always believed that the primary responsibility of a lawyer was helping clients.

Anyway, one key reason to get some help from an attorney is that chances are that you do not know what you do not know. It has been my experience that lawyers representing the other side will often plant what I call “land mines” in the sales

representation agreement. Making a distinction between expiration and termination is an example of this. As noted above, even lawyers do not always recognize that this can be a significant problem.

Further, you should not seek help from just any attorney. The practice of law is like the practice of medicine in many respects. You do not want to go to a general practitioner for brain surgery. By the same token, you should try to find an attorney who is experienced and familiar with the specific area of the law involved and understands your business. I would recommend that you contact one of the rep-savvy attorneys listed in the member area of the MANA website (www.MANAonline.org). That would be a good place to start.

MANA welcomes your comments on this article. Write to us at mana@manaonline.org.

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