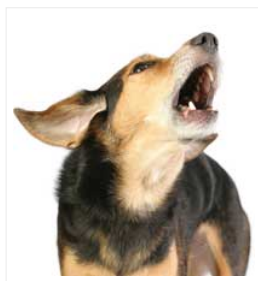


# Pet Product Rep Cleans Up After Manufacturer's Mess, and Court Won't Stop Barking About It

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In a sales rep contract drafted without attorneys and recently described by an appellate court as “doggone messy,” a pet supply manufacturer and its independent sales representative agreed the rep could be terminated “for cause” only under certain circumstances. As is so often the case, once the rep, Profit Pet, grew sales and the relationship was prospering, the principal, Dogswell, sought to tighten the contract terms and exercise more control. Not surprisingly, Profit Pet resisted, leading to its termination.

When Dogswell then attempted to classify the termination as “for cause,” Profit Pet sued to recover its commissions, and won without a trial by prevailing on a motion for summary judgment. Dogswell appealed, arguing it was Profit Pet who first breached the contract by selling competing products, and in any event, sales to “big box” merchants like Target were not covered under the contract. The ever witty federal court decided this contractual relationship had “gone to the dogs.”

## Cause to Fight Like Cats and Dogs

Profit Pet enjoyed the exclusive right under the contract to represent Dogswell's pet products at a seven percent commission rate in eleven states. The contract lacked the usual provision barring Profit Pet from representing competing lines, but did contain standard language establishing the relationship as one of principal and independent contractor, and permitting modifications only in a writing signed by the parties.

Only three scenarios in the contract made the rep eligible for termination for cause:

- If its sales fell below \$60,000 in a quarter.
- The commission of a felony in the course of performance.
- A failure to cure within fifteen days from a good faith written notice of a breach.

Otherwise, any termination was “without cause,” entitling Profit Pet to receive one year's worth of commissions upon termination.

About three years into the relationship, Dogswell e-mailed certain “key performance metrics” it suddenly expected Profit Pet to meet, including hiring more employees and filing sales reports, and also requested the commission rate be reduced to five percent. When Profit Pet rejected the suggestions to accept a lower commission and take on more staff in a subsequent exchange of e-mails, Dogswell terminated the contract, and indicated it would pay commissions only through month's end. As the court quipped, Profit Pet “howled” over this mistreatment, and unleashed by filing suit.

## Call Off the Dogs

Unable to dispute that Profit Pet met its quarterly sales numbers and had not turned felonious, Dogswell argued that its e-mails constituted written notice of a breach that went uncured. Calling this argument the parties' “first bone of contention,” the wordplaying court found that the e-mail discussion about hiring employees and filing reports of day-to-day operations hardly described a breach of the contract, which incidentally gave Profit Pet “sole control of the manner and means of performing.” Instead, these e-mails were merely evidence of an ongoing business dialogue, and actually showed “Dogswell hounding Profit Pet” to violate the contract.

After ruling the termination was without cause, the court turned to Dogswell's claim that Profit Pet breached the contract prior to termination by representing competitors' products, and was therefore barred from recovering for a later breach by Dogswell. Without a non-compete provision to rely upon, which could easily have been included in the parties' contract, Dogswell turned to the contract's boilerplate “best efforts” provision. This section only required Profit Pet to “use its best efforts to promote” Dogswell's products.

Even if the contract included a non-competition requirement, Dogswell failed to show Profit Pet had sold any competing products. The court unashamedly cracked how Dogswell's argument that Profit Pet was in breach, coming after it failed to prove a violation of a non-existent non-compete provision, “has no bite.”

## Boxers and Briefs

The case was not a *complete* victory for the sales rep, who urged in its legal briefs that it was entitled under the contract to commissions on sales to the big box stores in its territory, even though it never promoted Dogswell's products to the big boxes. To determine if Profit Pet was entitled to these commissions, the court returned to the “doggone messy” contract.

Starting out as a printed form, the contract contained cross outs and handwritten notes, had fill-in spaces that were left blank, and featured entire sections deleted by hand. Other sections were added by hand, squeezed into what little white space appeared between printed sections. Most importantly, it did not define or use terms consistently.

The key paragraph of the contract read: "Commissions are earned ... on all 'accepted orders' solicited within and/or delivered to the Territory, whether the orders are sent by the Agency, received by the Principal by the mails, taken at the Principal's place of business or otherwise."

This poorly drafted section lends itself to different readings, and led the court to deem it ambiguous. One reading, focusing on the language about when commissions "are earned," steered the court back to the contract's "best efforts" provision requiring Profit Pet to "diligently and faithfully work the Territory in an endeavor to secure business" for Dogswell, and "use its best efforts to promote" Dogswell's products. Under this reading, by not promoting to the big boxes, perhaps Profit Pet did not "earn" a commission on these sales.

Another plausible reading was that Profit Pet should receive commissions on all orders "delivered to the Territory," whether or not it affected those sales. This is the rep's preferred interpretation, of course, and most rep contracts should more clearly protect commissions on *all* sales into the assigned territory. The two alternative readings "dogged" the court, which ultimately ruled it could not be resolved on a motion for summary judgment. The jury would need to decide how best to view sales to big box customers, and whether these were commissionable under the contract.

### Every Dog Has Its Day

Vindicated by the court's findings that its termination was "without cause" and that it had not breached the contract, and no doubt appreciative that the court concluded Dogswell was "barking up the wrong tree," Profit Pet enjoyed considerable leverage, for settlement or trial, as the case headed back to court on the big box commissions issue. Meanwhile, for old-fashioned reps and principals who have been working on handshake deals or one-page contracts in this dog-eat-dog world, perhaps the case can help teach these old dogs some new tricks, such as to carefully preserve their rights in balanced and thoroughly negotiated written contracts.



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