Sound Agreement Allows Telecommunications Agent to Avoid Getting Disconnected From Commissions

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Most agents properly focus on generating sales after signing with a new principal. Even as corporations constantly merge or get "restructured," consideration of the potential impact on the agent is rare. Yet several important questions are usually presented:

- Is the independent representative's commission stream adequately protected?
- What happens if the acquiring party purchases only some of the principal's assets?
- And could the principal and the new purchaser orchestrate a sale enabling the purchaser to avoid paying commissions due?

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These issues were front and center in a case recently decided by a Kentucky federal court after certain assets of a principal were acquired by a company with whom the rep/plaintiff had no contractual or other relationship. This fact pattern, while alarming, is hardly isolated.

Independent sales representative Telecom Decision Makers, Inc. ("TDMI") contracted with Navigator Telecommunications, LLC in 2005 to solicit local and long distance accounts for its telecommunications business. The lucrative agreement called for Navigator to pay continuing commissions on accounts TDMI generated until the customers' contracts with Navigator terminated.

A common term in the agreement made it binding on "the successors and assigns of Navigator in connection with and in contemplation of any reorganization, bankruptcy, merger, consolidation, or sales of all or substantially all of the ownership interest or assets of Navigator." In the event of such a "Change of Control," the contract would be "deemed assigned to Navigator's successor."

Notice of Termination Given

Birch Communications, Inc. entered into an asset purchase agreement to purchase certain business and residential lines from Navigator in 2008. Before that agreement was signed, Navigator gave notice of termination to TDMI. Birch also notified TDMI that it was purchasing substantially all the residential and business accounts of Navigator.

After the agreement was executed, Birch informed TDMI that it did not assume responsibility for, and would not pay, the continuing or "residual"

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commissions due under Navigator's contract with TDMI. Accordingly, TDMI brought suit, asserting that Birch's purchase of Navigator's residential and business local and long distance accounts comprised a "Change of Control" that obliged Birch to pay commissions to TDMI under its contract with Navigator.

Birch disputed that its purchase amounted to a Change of Control, contending that Navigator retained significant other assets. Birch sought summary judgment, raising three central arguments.

Did Birch's Asset Purchase Change Control of Navigator?

Because TDMI had no contract with Birch to enforce, the court quickly determined that "Telecom's rights rise or fall" on the interpretation of "Change of Control" from its contract with Navigator.

Urging that no "Change of Control" took place, Birch pointed to certain persuasive facts:

- It purchased only limited Navigator assets.
- Navigator had 50 employees prior to the asset purchase, and now has 39.
- Navigator remained an operating company after the asset purchase.
- Navigator continued earning revenue of about $2.35M/mo. after the sale, down from $3.4M/mo. before.
- Navigator sold only 15-17% of its 104,000 telephone lines to Birch, retaining 85% of the lines and 78.8% of its revenue.
- Navigator's EBITDA (calculation of earnings before interest, taxes, depreciation, and amortization) increased by 96.2%.

Recognizing these facts were compelling, TDMI relied on the legal standard to defeat a summary judgment motion requiring only that it show certain material facts were disputed. To demonstrate disputed facts, TDMI effectively relied on an expert economic analysis concluding the asset purchases did affect a "Change of Control." Economic factors such as the allocation of value based on gross margin showed "diametrically opposed expert testimony concerning the nature and characteristics of the asset sale and its impact on Navigator," and convinced the court to deny summary judgment.

A trial would prove necessary to decide whether there was a "Change of Control" of Navigator.

Do the Contractual Payment Obligations Survive Termination?

Navigator provided its 30-day notice of termination on June 20, 2008, enabling Birch to contend that as of the November 2008 asset purchase agreement, no agreement with TDMI was in existence so no assignment could have been made.

The court deemed this argument "a red herring." Birch ignored other language in the representative agreement expressly providing that the obligation to pay the residual commissions survived its term. The agreement also provided that Navigator would owe residual commissions even under a "Change of Control," and for assignment of

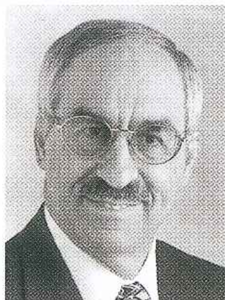
"the ongoing obligation to pay residual commissions" to Birch. The court ruled the effectiveness or viability of the agreement after July 2008 was irrelevant.

Does the Absence of Revenue Collection by Navigator Matter?

Birch then cherry-picked other language in the Navigator-TDMI agreement stating: "payment of residual commissions will survive... and will be paid...so long as... Navigator is collecting revenue... under this Agreement." Reasoning that it, not Navigator, was collecting revenue for services under the Navigator-TDMI agreement, Birch claimed no residual commissions were owed TDMI.

The court again found Birch inappropriately zeroed in on the date the asset purchase agreement was signed. The proper focus was instead whether the agreement with the agency effectively assigned the obligation to pay commissions upon an asset purchase. Finding that it did, the court denied Birch's summary judgment motion on this basis as well.

TDMI survived summary judgment chiefly because its agreement with Navigator contained several important provisions for its benefit. A lesser agreement could have yielded significantly different results. Particularly where commissions were contractually due to continue even after the agreement's termination, it was essential that the agency ensured the value carefully provided by one contract term was not undermined by another, less-thought-out provision.



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