

Court awards rep post-termination damages with a nod to ERA

Is an independent rep really entitled to continue receiving commissions after getting terminated for as long as the manufacturer continues receiving orders from the customer? Even though the parties never discussed, much less agreed upon, any post-termination payments, can a manufacturer who refuses to pay these commissions find them tripled by a court? Plus, can a manufacturer be made to pay the rep's attorneys' fees, and interest on top? Finally, can the language in the Electronic Representatives Association (ERA) contract form affect a court's consideration of any of this?

These questions proved far from rhetorical in one of the most astute rep decisions ever issued, *LindyManufacturing Co. v. TwentiethCentury Marketing, Inc.* The Supreme Court of Alabama answered "yes" to each question en route to affirming a jury's \$2.2 million award to the terminated sales rep.

Electronics components manufacturer LindyManufacturing Co. and independent sales representative TwentiethCentury Marketing, Inc., both out of Huntsville, Ala., (where court opinions consolidate parties' names ForNoApparentReason), entered into an oral rep agreement that did not address termination or commissions to be paid upon termination.

TwentiethCentury was to promote Lindy's products to a Huntsville division of Chrysler in exchange for a 5 percent commission on the resulting Chrysler orders. For the initial six years of the relationship, Lindy paid the commissions due on orders arising from TwentiethCentury's successful efforts.

When Chrysler required all suppliers to maintain a "Just In Time" inventory maintenance and delivery system (JIT), TwentiethCentury installed a JIT at its facility at its own expense for Lindy to use. Chrysler later requested Lindy to install a JIT at its plant. In response, Lindy took the all-too-common step of reducing TwentiethCentury's commissions to cover the expense of adding the JIT system, only to later inform TwentiethCentury it wanted to move the Chrysler account in-house.

TwentiethCentury then asserted its rights to receive commissions on Chrysler business, even if Lindy terminated their oral contract, and the rep warned that the failure to pay commissions would also violate the Alabama Sales Representative's Commissions Contracts Act. Like in many other states, Alabama's statute provides that a principal who fails to pay commissions when

due is liable to the sales rep for three times the unpaid commissions, plus attorneys' fees.

Not surprisingly, Lindy then sent TwentiethCentury, a termination notice, and it also sent along a summons and complaint. Forewarned of TwentiethCentury's belief that it was entitled to continue receiving commissions post-termination, Lindy sued first, bringing a "declaratory judgment" action that asked the court to declare the rights of the parties.

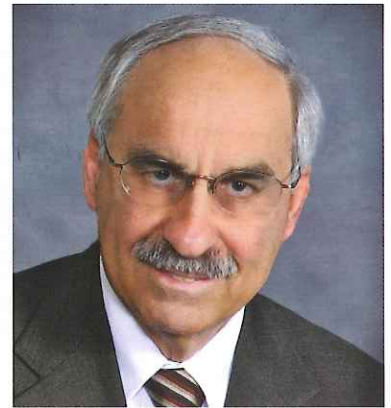
Lindy asked the court to declare that TwentiethCentury had no right to receive post-termination commissions and that the Alabama sales rep statute did not apply. TwentiethCentury filed a counterclaim asserting the converse: Because it obtained the Chrysler account for Lindy, it was "continually due" the commissions, even after termination, and Lindy's failure to pay those commissions subjected it to liability for three times the amount under the Alabama rep statute.

At trial, TwentiethCentury called a Chrysler witness to testify that its business was projected to reach \$16 million over the next five years, and Lindy knew this at termination. The witness further testified that, as a Chrysler "partner" who stayed off its "no bid list" by promptly supplying a quality product, Lindy can expect to receive future orders. Even if a Chrysler vehicle requiring the Lindy part is discontinued, Lindy parts would still be needed as "service" parts.

The jury accepted TwentiethCentury's argument that once Lindy was assured of the \$16 million business level, it decided to cut out the rep to save the commission obligation in breach of the parties' contract. The trial court further determined the rep statute did apply, trebled the amount of unpaid, post-termination commissions awarded by the jury, and added interest and some \$300,000 in attorneys' fees on top. The total jury verdict came to \$2.2 million.

On appeal, Alabama's highest court took a hard look at Lindy's important arguments. Buying into TwentiethCentury's claim forces the parties into "an interminable contractual relationship contrary to public policy and the law of the State of Alabama," Lindy argued, particularly when no evidence suggested it agreed to pay post-termination commissions. The Supreme Court wouldn't have it, pointing to evidence that TwentiethCentury brought the Chrysler account to Lindy with the understanding it "would receive a 5 percent commission on all the Chrysler

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business” it generated for Lindy.

Once liability for post-termination commissions is established, the question becomes “for how long?” Here, TwentiethCentury didn’t claim the parties agreed commissions would be paid “indefinitely,” merely that a 5 percent commission would be paid as long as Lindy enjoyed the Chrysler business that TwentiethCentury procured. Lindy responded by contending the industry standard was 30 days.

As “evidence,” Lindy relied on its in-house rep who took over the Chrysler account. He testified at trial that the 30-day post-termination commission limit in his written contract was “typical.” However, on cross-examination, the Lindy employee admitted that his negotiations with Lindy began by his handing them “a standard contract form developed by the Electronics Representatives Association.”

The ERA form contract provided for compensation “for representative’s efforts in developing customers in its territory, which because of representative’s efforts, would be likely to continue to purchase products from the manufacturer after termination.” Lindy’s direct rep also acknowledged that when he signed on with Lindy, the company had never heard of a 30-day limit on post-termination commissions.

Meanwhile, another independent rep for Lindy testified it was his expectation while working with Lindy that he would receive post-termination commissions on any business he procured. The testimony of TwentiethCentury’s owner echoed the view that post-termination commissions were expected. Unknowingly, the owner accurately defined the “procuring cause doctrine” applied by many courts when he testified: “unless the parties agree otherwise, a manufacturer’s representative should be paid commissions on all business generated by the efforts of the representative.”

Because no other agreement was reached here, commissions were owed on all sales attributable to TwentiethCentury’s efforts. The court found the custom and usage evidence favored TwentiethCentury. However, it noted such evidence cannot be considered if it conflicts with a statute, so it turned to analyze the Alabama Sales Representative’s Commissions Contracts Act.

That statute requires not only that commissions due at the time of termination be paid within 30 days, but also that commissions yet to accrue be paid within 30 days of the date when they become due. Thus, the statute contemplates payment of commissions that accrue on accounts post-termination due to the rep’s pre-termination efforts. Lindy’s failure to timely commission TwentiethCentury post-termination required trebling of the amount due under the statute.

On appeal, Lindy also contended the jury award was excessive, and that at most, TwentiethCentury could collect gross commissions, deducting its expenses and overhead. Alabama’s Supreme Court quickly dispensed with this claim on the basis that sales reps don’t incur expenses or overhead post-termination.

Lindy also claimed the jury’s award of future commissions was improperly speculative when “too many contingencies” could plague its relationship with Chrysler. The Court rejected this argument as well in light of the Chrysler testimony about five years of projected business if Lindy simply stayed off its “no bid list.” This rendered non-speculative the jury’s conclusion that “TwentiethCentury’s efforts on behalf of Lindy reasonably resulted in Chrysler’s five-year projection for its business with Lindy.”

In seeing its \$2.2 million recovery of post-termination commissions, treble damages, attorneys’ fees and interest affirmed by Alabama’s highest court, TwentiethCentury scored an important victory that could well aid similarly situated independent reps shorted by their principals in the 21st century. ■

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