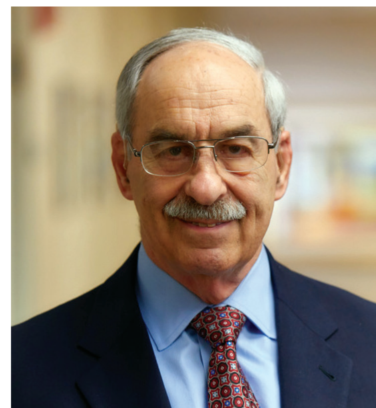
Changing a commission plan is no shoo-in



by Gerald M. Newman
ERA General Counsel

In the novel "Insurgent," second of the popular "Divergent" trilogy of novels by Veronica Roth, the narrator Tris observes: "The truth has a way of changing a person's plans."

As most sales reps already know, manufacturers' profit margins often work a lot like truth.

Unscrupulous principals might originally plan to pay the agreed-upon commissions to their reps, and will perhaps honor the contract terms for a while, or at least until the orders start coming in reliably. When the prospect of keeping the business while shedding the commission obligation crystallizes, however, the agreed-upon plans can change significantly.

Unscrupulous principals might originally plan to pay the agreed-upon commissions to their reps, and will perhaps honor the contract terms for a while, or at least until the orders start coming in reliably.

A change of plans

So learned Iris Topletz, a Dallas manufacturers' rep. Topletz attended a Las Vegas trade show where she met Dominique Barteet, the owner of Quick Change Artist, LLC (QCA). Under the trade name "Onesole," QCA manufactures women's shoes and accessories. The Onesole products are shoe soles to which various tops can be fastened.

Topletz soon began representing Onesole shoes and accessories pursuant to an oral agreement with Barteet. That agreement called for QCA to pay Topletz a 15 percent commission on all sales to customers she procured. This included the initial orders, reorders and orders placed directly with QCA.

For the first few years, the agreement's terms were honored and the business was built up. Then, plans changed.

QCA unilaterally designated shoe orders received directly from Topletz's customers as "house accounts" and stopped paying commissions on those orders. Not one to be walked all over, Topletz filed suit for breach of contract in the Dallas County court.

Custom and practice and past practices

The dispute proceeded to trial where QCA acknowledged the original oral agreement to pay 15 percent on all sales. Central to the court's ruling was whether the agreement encompassed orders placed directly with the company.

To familiarize the court with the relevant industry customs, Topletz called an expert witness who explained that paying on all orders, including direct orders, was entirely consistent with custom and practice in the sales rep industry. Topletz also introduced documentary evidence showing that, for the last three years, QCA paid her on all orders, specifically including direct orders.

Rounding out her trial presentation, Topletz sought to prove her lost profits for the period when QCA did not pay on direct sales by offering evidence of the volume of sales and commissions over the prior three years.

In response, Barteet and another QCA witness testified in an attempt to convince the judge that earning a commission requires continuously servicing a customer, a standard Topletz presumably could not meet. QCA also argued that offering evidence of past sales did not serve as proof of the sales period at issue.

The court considered the proof and the credibility of the witnesses, and found "the testimony of Iris [Topletz] to be more credible than the testimony of QCA." The evidence offered by the plaintiff that Barteet agreed to pay 15 percent on all orders was deemed more compelling, and the past sales history was accepted as admissible evidence.

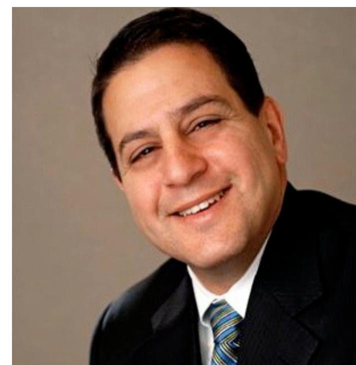
Judgment was entered in favor of Topletz,

(continued on next page)

Gerald M. Newman, partner in the law firm of Schoenberg, Finkel, Newman & Rosenberg, LLC, serves as general counsel to ERA and is a regular contributor to The Representor. *He participates in Expert Access, the program that offers telephone consultations to ERA members.*

Gerry co-authored this article with his partner, Adam Glazer.

You can call Gerry Newman or Adam Glazer at 312-648-2300 or send email to gerald.newman@sfnr.com or adam.glazer@sfnr.com.



Adam Glazer

(continued from previous page)

and she was awarded nearly $250,000, comprising her lost profits, some $80,000 in attorney's fees, and sanctions against QCA. Not surprisingly, QCA appealed.

The strong appeal of the rep's damages

The Court of Appeals of Texas readily upheld the finding that the parties' contract called for a 15 percent commission on all orders procured by Topletz without exception. Respecting how the trial court was in the best position to judge the credibility of the witnesses, the appellate court refused to second guess its favoring Topletz's evidence, and upheld the finding that QCA improperly withheld commissions on direct orders procured by Topletz.

With the liability issue settled, the appellate review turned to consideration of the three categories of damages awarded at trial: lost profits, attorney's fees and sanctions.

1. Lost Profits: QCA challenged the calculation of damages in the trial court, arguing that the best means to perform the calculation was by using its Quick Books file, and Topletz failed to do so.

The record revealed, however, that Topletz's efforts to obtain QCA's Quick Books file in discovery were met with stiff resistance. Two motions to compel and a court order were necessary for the data to be produced, and then a software issue prevented Topletz from accessing the data.

Confronted with a party who obstructed the discovery process, and then had the nerve to complain its opponent did not rely on the data it produced belatedly and with impediments, neither the trial nor the appellate court was concerned that Topletz chose to present alternative damages models.

As the appellate court recognized, the law does not require lost profits to be proved with exact precision. It is necessary only that a plaintiff "show the amount of the loss by competent evidence with reasonable certainty." And proof of lost damages can satisfactorily be accomplished with evidence of the profit history.

The most recent three-year sales history established that QCA paid Topletz an average commission of more than $128,000 per year. This evidence enabled the trial and appellate courts, after finding that Topletz would have continued earning comparable dollars had QCA not breached their agreement by refusing to pay commissions on orders placed directly, to conclude that relying on the earnings history was an acceptable means to award lost profits.

2. Attorney's Fees: Although Topletz's attorneys were engaged on a contingency fee basis, she was still entitled to receive reimbursement for their professional services calculated at their regular hourly rates. Interestingly, rather than see Topletz's net recovery diminished by the agreement to pay her attorneys 40 percent of the recovery, the trial court decided to assess fees against QCA by applying a multiplier of 1.5 percent to the total hourly fees to compensate the attorneys, and the appellate court upheld this assessment.

3. Discovery Sanctions: The final component of Topletz's recovery came in the form of monetary sanctions entered against QCA for its conduct in discovery. In addition to the difficulties QCA caused with the Quick Books file, Barteet failed to appear for his properly set deposition. The court had no difficulty finding QCA's delay tactics in discovery merited the imposition of sanctions.

Reps need not always turn the other cheek

As Topletz demonstrated by defying her principal's attempt to change the commission rules all the way up to the Texas Appellate Court, sales reps victimized by attempts to rewrite their contracts after they have already performed are not powerless. Reps like Iris Topletz with agreed upon contract terms, even oral agreements, under which both sides operated for years, can generally get the terms enforced by courts.

While the truth may indeed change a person's or manufacturer's plans, agreed upon contract terms comprise the greatest truth, with the potential to change those plans right back. ■

ERA MEMBERS SAVE UP TO 34% ON UPS® SHIPPING!

CALL:
1-800-MEMBERS
(1-800-636-2377)