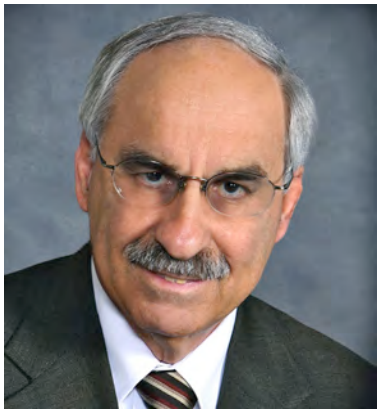
Clean sweep in commission action offers valuable lessons to industry



by Gerald M. Newman
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Adam Glazer

Raise your hand if this sounds familiar: A rep agreement plainly provides for a fixed commission rate. After the rep secures orders, the principal claims the parties orally agreed the rep would accept a lower commission rate on those orders. The rep disputes making any such agreement, but the commissions get paid at the lower rate.

Wow, that's a lot of hands!

What's a rep to do? Reject the lower rate, get terminated and wind up with nothing? Recognize that something is better than nothing, and meekly go along? Storm the office of the VP of Sales and overturn over his desk, while he is seated behind it?

After the rep secures orders, the principal claims the parties orally agreed the rep would accept a lower commission rate on those orders. The rep disputes making any such agreement, but the commissions get paid at the lower rate.

Meet independent rep Kathleen Brown

The owner of rep firm 181 Sales, Inc., Kathleen Brown, made her principal answer in court and even obtained exemplary damages. Here's how it went down.

181 Sales entered into a Manufacturer Representative Agreement (MRA) with Karcher North America, Inc., a manufacturer and distributor of pressure washers and other cleaning equipment. The MRA provided for a 4 percent commission on the net invoice amounts billed to two large customers, Menards and Fry's Electronics.

Try as she may, Ms. Brown was unable to sell Karcher's products to Fry's at several of its California locations. She did, however, land more than $1.5 million in sales to various Menards stores in Wisconsin, Illinois and Iowa.

After these Menards sales were secured, Karcher claims it called 181 Sales to insist upon a modification to the MRA lowering the commission to 1 percent because the products sold were part of a Menards "closeout sale." Karcher claims this was consistent with the industry standard, and that 181 Sales reluctantly went along.

"Karcher simply made that up," retorted Ms. Brown. Not only didn't 181 Sales accept the reduction, it objected each time Karcher brought it up. This was borne out by several emails from Ms. Brown reminding Karcher that the contractual 4 percent rate applied.

Oral modifications to rep agreements are not reliable

181 Sales brought suit in the San Francisco federal court charging Karcher with breaching its contract and violating California's independent sales representative statute. It then moved for summary judgment, urging the court to find that no trial was necessary because the evidence supported only a finding in favor of 181 Sales.

Responding to the motion, Karcher did not dispute that it failed to pay a 4 percent commission, but maintained the parties amended the MRA in their phone call. As noted, 181 Sales denied any such agreement was reached.

In a ruling just handed down in July, the federal trial judge concluded that resolving this dispute was unnecessary based on a standard clause contained in the MRA: "This Agreement shall not be amended, altered or qualified except by memorandum in writing signed by the Company and the Representative."

Karcher could not argue the alleged amendment was "in writing signed by the parties," and as a result, any modification purportedly reached by phone was insufficient to lower 181 Sales' commission rate. Similarly, the assertion that a lower commission rate applied to "closeout" items was also not considered where the MRA unambiguously provided that 181 Sales would receive 4 percent on all sales made to Menards. Evidence of industry custom and practice is generally not considered when the contract terms are unambiguous.

The solicitation of California sales, not their procurement, triggers its sales rep statute

The court also granted 181 Sales summary judgment on its claim under the California

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EXECUTIVE COMMENTARY: Accelerate with ERA

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- COLT training is scheduled for this Fall — a huge benefit to chapter leaders to help them lead and direct their local chapter activities.
- We increased membership by more than 100 NEW members in rep, manufacturer and distributor categories.
- 2017 Conference planning is well underway — this will be a "NOT TO MISS" event.
- We will participate in electronica 2017 in Munich in November — we have become truly global with membership in both EMEA and Asia.
- Consultants have been added to our "Kitchen Cabinet" team of industry experts who bring to ERA years of valuable experience in sales, engineering and channel management. Watch this space for further additions to this valuable team!

In summary, changes will continue. We need to manage the change and not let it manage us!

As always, I am open to your thoughts, comments and criticisms on what YOU see ERA needing to do — this is YOUR ERA, not mine. My email is **wtobin@era.org** and my phone (617-901-4088) is always on! ■

LEGALLY SPEAKING: Court overturns rep contract

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independent sales representative statute. California's rep statute — a version of which is also found in most other states — enables a sales rep who is not paid under a contract with its principal to collect three times the amount of unpaid or late paid commissions. To be eligible, the rep must "solicit wholesale orders at least partially within" California.

Karcher resisted application of the statute to the unpaid commissions on sales to Menards on the grounds that those sales were all made outside California. Judge Michael S. Tigar again refused to let Karcher wriggle off the hook, noting that 181 Sales qualified by soliciting orders in California, albeit unsuccessfully, to Fry's.

As he explained, "Karcher used the services of 181 Sales to solicit wholesale orders from Fry's Electronics (in California) as well as Menards (outside California)." This was sufficient to make Karcher liable for three times the amount of unpaid commissions on the Menards business.

The 'Choice of Law' provision must be specific

One other point from Judge Tigar's well-reasoned decision also deserves a mention. The strong California sales rep statute, under which 181 Sales collected exemplary damages, did not get invoked without a fight.

Karcher argued Delaware law should apply, relying on the MRA's formidable-sounding choice of law provision: "This Agreement shall be made and construed in accordance with the laws of the State of Delaware." Not surprisingly, Delaware is one of a handful of states without a sales rep statute.

181 Sales argued convincingly that the contract language pointing to Delaware law was limited to the making and construing of the contract, and did not include language (often found in other manufacturer-drafted contracts) specifying that any disputes related to the contract will be governed solely by Delaware law.

Accordingly, Judge Tigar concluded that "while the narrowly worded choice of law clause in the MRA is sufficient to govern interpretation of the contract, it does not bar non-contractual causes of action of another state, including 181 Sales' claim under" California's sales rep act. This key finding enabled 181 Sales to avail itself of California's statute rather than get mired in Delaware law.

With this triumph, it was a complete sweep for 181 Sales. Summary judgment was entered in its favor for the unpaid commissions, exemplary damages, attorney's fees, costs and prejudgment interest, and a trial was avoided. Perhaps more importantly, in racking up this impressive victory, the legal gains scored by 181 Sales are made available to the larger sales rep industry. Similarly mistreated reps may well be able to draw upon one or more of the pro-rep rulings found in this legally significant decision. ■

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