



# **STANDING FIRM: REPS DESERVE TO GET PAID**

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# Why Even Consider Pursuing My Unpaid Commissions?

- **Don't want a reputation of fighting w/ principals**
- **Contract doesn't provide for post-termination commissions**
- **Contract gives either party right to terminate (on 30-days notice)**
- **Might face counterclaim**
- **Principals have much deeper pockets**



# Consider William Stein

- Sales rep for Malden Mills, Inc.:
  - Entered into Oral Contract
  - Stein claims handshake deal was to pay 5% on all sales, and on all reorders for as long as customers purchased same styles
  - *No agreement* on how long relationship would last, or what happened upon termination



# **Stein's Relationship with Malden Mills**

- **After oral contract, Stein sells fabric over the next year to customers, and would then receive reorders for these goods**
- **Builds up Malden's upholstery business to multi-million dollars in annual sales**
- **The predictable result?**
- **Termination.**



# Stein v. Malden Mills, Inc.

## **MALDEN'S VERSION**

- Understood trade practice to require payment on reorders in the door at time of termination
- Agent who entered into oral agreement lacked authority to contract for reorder commissions after termination
- Contract is too vague, indefinite and uncertain to be enforceable
- Stein can't prove he procured post-termination reorders, and we paid others



# Stein v. Malden Mills

## **THE EVIDENCE AT TRIAL**

- Stein testified that same goods would typically be ordered for 3 years, so Malden stipulated to a 3-year period
- Malden exec testifies trade practice was to pay on sales made and orders received pre-termination
  - Cross-exam showed exec had no knowledge of industry
- Another Malden rep testified he had same arrangement as Stein



# Stein v. Malden Mills

## **THE JUDGMENT**

- **Court finds Malden's claim that contract did not include reorders is not credible**
- **Nothing unusual about paying on reorders, "esp in light of the fact that all selling costs fell upon plaintiff"**
- **And if reorders are in play, they are commissionable "based on the premise that they continued to flow from the original procuring cause"**



# **I. Overview of Commission Recovery Theories**

**A – Standard Contract  
Claims: Written and Oral**

**B – Procuring Cause  
Theory**

**C – Other Potential  
Avenues of Relief**



## **II. Actions Based on the Contract**

**Begin with Analysis of Rights of Parties under the Contract: What Obligations Are Imposed?**

- **Did Principal Commit a Material Breach?**
- **What Damages Were Suffered from the Breach?**
- **Is a Significant and Valid Counterclaim Likely?**



# **Oral Contracts Are Enforceable**

- **Proof of terms often difficult, and subject to different statute of limitations. Sometimes disfavored.**
- **Elements of proof are the same: offer, acceptance, consideration, breach, and damages.**
- **Although more evidentiary problems can arise, oral agreements are valid.**
- **Oral contract can prove better than a bad written contract.**



# Possible Extra-Contractual Remedies

- **Common Law Procuring Cause Theory**
- **Sales Rep Protection Statutes**
- **Implied Contract**
- **Unjust Enrichment/Quantum Meruit (if no contractual relationship)**
- **Other potential causes of action**



# **The Procuring Cause Doctrine**

## **WHAT IS IT?**

**Under the procuring cause doctrine, a party “may be entitled to commission on sales made after termination of a contract if that party procured the sales through its activities prior to termination.”**



# The Procuring Cause Doctrine

**Common Law Doctrine enabling reps to recover commissions unless contract specifically limits post-termination rights. Varies state to state.**

**An equitable doctrine designed to prevent opportunistic termination by a principal.**



# Termination Clause

## Termination

**This agreement shall commence on the date it is executed and shall continue until terminated by either party giving the other not less than 30 days prior written notice.**

**Upon termination, commissions shall be paid on purchase orders placed and shipments made up to the effective date of termination.**



# Manufacturers' Usual Arguments

- **The contract says nothing about paying the Rep post-termination commissions.**

**Response:**

**It is the default rule.**

**Doctrine applies if contract does *not* expressly provide when commissions will be paid.**



# Manufacturers' Usual Arguments

- **We didn't terminate, the rep did.**

**Response: Doesn't matter.**

- **Rep isn't procuring cause of post-termination sales. We continued calling on customer and providing services.**

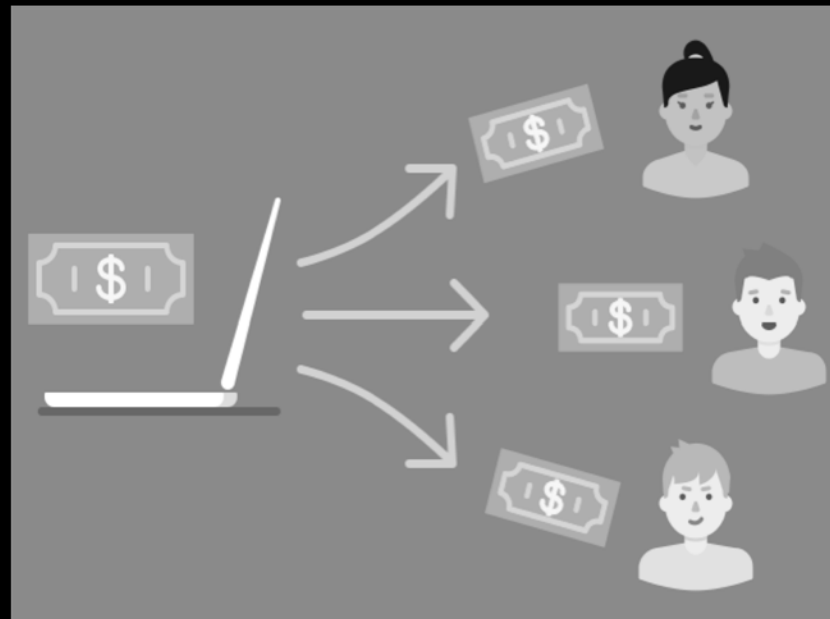
**Response: Rep did everything it was required to do. Besides, it's a jury question.**



# Manufacturers' Usual Arguments

- **We paid the new rep a commission on the sales.**

**Response: Doesn't affect the obligation to 1<sup>st</sup> rep (who procured the sale).**



# **The Procuring Cause Doctrine: Need Not Even Know of Sales**

- **“an agent who was the procuring cause of the transaction is entitled to his commission irrespective of the fact that it was consummated by the principal, that he was not personally present when it was entered into, that it was consummated without his knowledge, or that he did not personally see or talk to the other party entering into the transaction.”**

**--Calif. Court of Appeals, 1948**



# **Procuring Cause Recovery: How Long Does It Last?**

**Extent of possible recovery under doctrine is not well established in the law.**

**In 1985 case of *Scheduling Corp. of America v. Massello*, principal complained that under rep's procuring cause theory, he could receive commissions for extensions of his projects until the year 2000.**

**Court said to manufacturer:**

**Contract was freely-negotiated**



# Procuring Cause Recovery: How Long Does It Last?

- When a sales agent is the procuring cause of sales, it is entitled to receive payment for the value of its services for a reasonable period of time (per Calif. App. Ct. in *Watson v. Wood Dimension, Inc.* (1989))



# **Procuring Cause: Twists and Turns**

- **Some courts may require the rep to identify all sales for which it claims credit.**
- **Some courts say a rep can procure specific sales only; not accounts.**
- **Some courts have yet to apply the doctrine beyond real estate brokers.**



# **Sales Rep Protection Statutes**

**Most states have enacted laws to protect sales representatives who solicit orders for products.**

- **Typically, these statutes apply to principals who:**
  - **Do business in the state**
  - **Use sales representatives to solicit orders for products within the state**
  - **Compensate the sales representative in whole or in part by commission**



# **Sales Rep Protection Statutes (Cont'd)**

- **All cover reps who are due payments of commission upon termination.**
- **Many states impose punitive liability of 2-3 times unpaid commissions, attorney's fees and costs for failing to pay in a timely manner.**



# Implied Contracts

**Where parties perform as if a contract existed, courts may recognize an implied contract.**

- **Such as by continuing business as usual after a term contract expires.**
- **Or if both parties erroneously believe and rely upon the existence of a contract.**
- **Or if only one party performs as if the contract existed, but other party permits such reliance.**



# Unjust Enrichment/Quantum Meruit

- **Assuming No Contract Exists:**

a) Rep still procures sales for principal, and principal accepts and derives a benefit from such efforts, courts may find that permitting withholding of compensation (traditional commission) would be unjust

b) Similarly, courts might award rep “as much as he deserves” for his services



# Other Possible Recovery Theories

- **Specific facts may lead in other directions: anti-competitive behavior; theft; offset; fraud; negligent misrepresentation**
- **Nothing gets their attention like a pre-trial attachment of principal's assets**
- **Look for means to recover attorneys' fees in contract or in the law**



The background of the slide is a dense, overlapping collage of numerous small, rectangular sticky notes in various colors including yellow, pink, light blue, green, and white. Each sticky note features a large, dark grey question mark, creating a visual theme of inquiry and questions.

# **Discussion Questions and Answers**



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