

CAN YOU ASSIGN YOUR RESIDUALS?

By Paul A. Rianda, Esq.

I have received many inquiries from agents about whether they can sell their residual stream under an Agent Agreement and also about what would happen to their residual payments if they meet an untimely end. Below, I will discuss the impact of the assignment provision on an agent's right to sell their residuals and the impact of an agent's death on their right to receive residual payments.

Was Is An Assignment Provision?

In the legal boilerplate at the end of most Agent Agreements, there is a provision titled "Assignment" that is a very important part of the contract. The assignment provision often governs what will happen to your residual if you try to sell your right to receive residual payments to a third party, or if you were to pass away. The general assignment provisions in most agreements provide that the agent can only assign its rights or obligations under the agreement if the credit card processor provides its prior written consent. This puts the agent in a situation where it may be unable to assign its rights to the residual payments. Consequently, it is in the agent's best interest to ask for some exceptions to the general rule that it cannot assign its residual payments when negotiating the Agent Agreement.

Assigning Your Residuals:

One exception that an agent should request when negotiating an Agent Agreement is to allow it to sell its right to receive residual payments under the Agent Agreement to a third party purchaser. Many agents (because they are seeking to retire or have a need for an immediate need for cash) decide to sell their residual streams to a third party purchaser. This usually takes the form of a third party buyer offering to pay the agent a certain multiple of the agent's monthly residual payment. The buyer then obtains the right to collect the residual payments for so long as they continue to be made by the credit card processor. This allows the sales agent to collect a large one-time cash payment without having to wait for the monthly residual payments due under the typical Agent Agreement.

An agent is well advised to have a provision inserted in an Agent Agreement that allows for such a third party purchase of the agent's residual stream. This is not a purchase of the merchant agreements or the merchants themselves, but merely allows the agent to sell its right to the continuing monthly residual stream payments. In effect, the credit card processor merely has to cease paying the agent that originated the merchants and instead pay the third party that agrees to purchase the residual stream.

Such an assignment provision typically provides that the credit card processor is allowed the "right of first refusal." What that means is that the agent must inform the credit card processor when it receives any offer to purchase the agent's residual stream. The credit card processor then has a stated period of time, usually 30 days, to match the third party's offer to purchase the agent's residual stream. If the credit card processor chooses to match the offer, the agent has to sell the residual stream to the credit card processor and not the third party that originally offered to purchase the agent's residual stream. Some credit card processors will ask, in conjunction with the right of first refusal that they

also be granted the right to refuse to allow the sale of the agent's residual stream to a competitor of the credit card processor.

Assigning Your Residual Stream Upon Death:

Many agents are unsure as to whether they will be able to pass on their residual stream to their family or loved ones when they die. The answer to this question depends upon how the agent has structured its business from the perspective of the type of entity that the agent uses to operate its business. The typical types of entities an agent could use for its business are a sole proprietorship, general partnership, limited liability company or corporation. Below, I will discuss the impact of each of these types of entities on an agent's ability to assign its residual upon the agent's death.

A sole proprietorship is one of the more common forms of business organization that agents use in the bankcard industry. A sole proprietorship is nothing more than the agent doing business in his or her own name without going through the formality of filing as a corporation, limited liability company, or other more formal type of organization. A general partnership is when two or more persons come together to run a business, again without utilizing any of the more formal entity types. In such circumstances, the sole proprietor or the partners in the partnership are liable for the debts and obligations of the business. In addition, if a sole proprietor or one of the partners in the general partnership dies, the entity is immediately dissolved and ceases to exist.

As a sole proprietorship and general partnership only last as long as the life of the owners, it is very important to make sure that there is a provision in the Agent Agreement that provides for the continuation of residual payments upon his or her death. The typical assignment provision does not allow for the assignment of residuals when a sales agent dies. Consequently, the sales agent must make certain that the assignment provision is modified to allow for a sales agent to assign his or her residuals to a spouse or other person that will be the beneficiary of the estate. Without such a provision, the residual payments could be terminated upon the agent's death.

As to agents that operate under a limited liability company or corporation, the issue of planning for the owners' demise is not as important. A corporation or limited liability company is a separate and distinct entity that will continue to exist even if its owners die. Upon the death of a owner, the ownership interest in a limited liability company or corporation passes on to owner's heirs without the limited liability company or corporation ceasing to exist. Consequently, if an agent puts the Agent Agreement in the name of the corporation, the agent's death has no effect on the ability of the agent's heirs collect the residual stream derived under the Agent Agreement. For that reason, it is often prudent for sales agents to form a limited liability company or corporation in order to make sure that on their death, their loved ones will continue to be paid through a residual stream that they worked so hard to develop.

The assignment clause, although small, is an important provision in an Agent Agreement. An agent needs to make sure that the assignment provision allows it to sell its residual stream and assign the residual stream to the agent's heirs upon agent's death.

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