

## **IS NOTHING BETTER THAN SOMETHING?**

By Paul A. Rianda, Esq.

A number of agents or ISOs have contacted me for advice about the fate of their residuals when they have never entered into a binding written Agent Agreement with their upstream ISO or processor. They are worried that their residuals can be terminated given the lack of any formal written contract that provides for the residuals to be paid forever. As will be explained below, the fact is that in some cases you may be better off without a written agreement than you would be if you had entered into a signed contract.

### **Oral Agreement:**

The first thing to understanding the rights of agent and ISOs in these circumstances is that contracts do not have to be written to be enforceable. An oral agreement is generally just as enforceable as a written agreement. An oral contract is a contract that is formed based upon the terms and conditions that are discussed by the parties, documented by e-mails and other written evidence of those terms and conditions, which could also include an unsigned Agent Agreement also. In most cases that I have seen, a written Agent Agreement was sent to the ISO or agent but either it was just never signed or the parties negotiated the terms of the agreement but could never agree on the final contract. Meanwhile, the agent or ISO started submitting merchants to the processor and as a result was paid residuals, all the while without a signed written contract between the parties.

The next question usually is what are the terms of the oral agreement? This becomes a more tricky part of the analysis. The first main part of the agreement would be any terms that were actually agreed upon by the parties. For instance, the parties could have agreed the oral Agent Agreement was non-exclusive. They could have documented this in an e-mail where the agent stated it wanted the Agent Agreement to be non-exclusive and the processor e-mailed back that yes, that was what it wanted also. But, some terms may not have been so clearly discussed or may not have even been discussed at all. So what happens then?

### **What Are the Terms Of the Agreement?**

The written Agent Agreement if it was provided to the agent or ISO usually will be viewed as the framework for the oral contract of the parties. It allows the court or the jury to use the written agreement as a starting point to determine the terms and conditions of the oral contract. But, there is a big difference in the way that contract is viewed under the law if it is not signed.

Almost all written contracts contain an “integration clause” that states that the written document is the entire agreement between the parties and it can only be changed by another writing signed by all the parties. However, when that written contract is not signed, the integration clause is not binding on the parties. So, the parties to the oral agreement are free to bring in other evidence to prove that the terms and conditions of the oral contract are different from those in the unsigned written Agent Agreement. So, if the written agreement states that the agent or ISO must submit three approved merchant accounts per month or its residuals are terminated, the agent or ISO can bring in

evidence to prove that term was not part of the terms and conditions that the agent or ISO agreed would be part of the oral Agent Agreement.

So, as you can see the agent may be in a better position if there is no written contract than it would be if the agent had signed an onerous Agent Agreement. Since the ISO or agent did not sign the written Agent Agreement, the agent is free to bring in outside information to prove that certain terms and conditions of the written Agent Agreement are not part of the oral agreement that is binding upon the parties. This gives the agent the right to exclude terms and conditions that are very one-sided like minimum production requirements, exclusivity provisions, non-compete provisions and other similar provisions that can be used to terminate residuals and keep the agent or ISO from making a living. But what if there is not clear cut evidence on whether or not the parties agreed to a particular provision? Something called “custom and practice in the industry” comes into play.

### **Custom and Practice:**

“Custom and practice in the industry” can be explained as the terms and conditions contained in the typical Agent Agreement in our industry. Custom and practice in the industry can change over time. For instance, when I started in the business, it was more likely than not that an Agent Agreement contained an exclusivity provision. Most agents signed exclusive agreements back then without a second thought. Today, over 95% of the signed Agent Agreements that I see are non-exclusive agreements. So, as times change so do the terms and conditions of the typical written Agent Agreement.

There are some terms and conditions that are standard in our business that enable the bankcard industry to operate in an efficient and rational fashion. The two main provisions that are standard in the vast majority of Agent Agreements are: a) that residuals are paid forever, as long as the sales agent does not commit a material breach of the terms and conditions of the Agent Agreement; and b) the sales agent should never take a merchant it has placed with a processor and move that merchant to a competitor of that processor. Other important provisions that are customary in our industry are things like the parties must comply with the card association rules and that the agent can sell its right to continued residual payments, subject to the right of first refusal by the processor.

Remember though, that in the vast majority of cases, a sales agent will be required to enter into a signed written Agent Agreement. However, the good news is that if you are a sales agent and do not have a written Agent Agreement with your processor, all is not lost. You are still entitled to be paid your residuals under an oral agreement. And the better news is that in our industry the custom and practice is that you are supposed to get paid those residuals forever, assuming you do not do anything like moving merchants to a competitor of the processor. So, you can protect your residuals in this fashion and even bring a lawsuit based on such an oral agreement if necessary to protect your right to your continued residual payments.

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