

KEEP YOUR RESIDUALS

By Paul A. Rianda, Esq.

Nearly all sales agents enter into a written agreement (“Agent Agreement”) that outlines the duties and responsibilities of the agent and the terms for payment of the residuals. Below I will discuss the different types of termination provisions prevalent in the industry and what changes to the Agent Agreement an agent should ask for to ensure it keeps its residuals for as long as possible.

Termination Provisions in the Industry:

The current standard in the industry is that the residuals do not necessarily terminate just because the Agent Agreement terminates or expires. There was a time not too long ago when Agent Agreements expired so would the residual payments. For instance, if the Agent Agreement was for a period of two years, an agent would only get paid its residuals for that two-year period. Once the agreement expired, then so would the right to be paid a continuing residual payment.

The vast majority of Agent Agreements now provide that at least under most circumstances, the residual payments continue for the life of the merchants, even if the Agent Agreement expires or is terminated. The reason for the continued residual is the fact that the sales agent is bringing a valuable asset to the credit card processor, namely a merchant. The merchant will continue to provide incoming revenue to this credit card processor for so long as the merchant stays with the credit card processor, which can be many years. Because of the longevity of the merchants’ relationship with the credit card processor, the sales agent expects and is provided with a continuing residual derived from the merchant. This residual continues even if the sales agent is no longer submitting new merchant applications to the credit card processor.

Generally, residual payments to an agent are terminated because of certain enumerated violations of the Agent Agreement or a material breach of the Agent Agreement. The types of terms that, if violated, generally cause the residual to be terminated include fraudulent conduct, causing a monetary loss to the credit card processor, violating the Visa or MasterCard rules or moving merchants placed with the credit card processor to another credit card processor.

The residual also continues after the death of the sales agent in most circumstances. One way of ensuring for the continuation of residual payments is for the sales agent to utilize a corporation or limited liability company or similar entity when entering into the Agent Agreement. If the owner of the company dies, in this case the sales agent, the company continues on because the ownership of the company is passed on to the heirs of the deceased. In addition, if an Agent Agreement does not specifically address the issue, my experience has been that every time I have requested the addition of a provision providing for a continued residual upon death of an agent it has been allowed by the credit card processor.

How To Protect Your Residuals:

One of the most important and often discussed terms in the negotiation of an Agent Agreement is under what circumstances the credit card processor can terminate payment of the sale agent's residual. The terms under which the sales agent's residual can be terminated vary but can generally be categorized as: 1) no termination of the agent's residuals under any circumstances; 2) termination upon certain enumerated items; and 3) termination upon material breach. I see these provisions as a kind of continuum starting with #1 above as the best provision from the perspective of a sales agent because it always gets to keep its residuals. Next best is #2 above because at least the sales agent knows exactly what type of conduct will cause it to lose its residuals. The least favorable provision to the agent is the material breach provision, since it provides the agent with the least amount of certainty. I will discuss each of these types of provision below.

The best provision for an agent is one that states the residual payments will never be cancelled. I usually insert a provision in my revisions to Agent Agreements that states "Agent will receive its residual payments under this Agreement for as long as ISO receives revenue attributable to Merchants in spite of any cancellation, expiration or termination of this Agreement." This is my starting point in revising Agent Agreements and some credit card processors allow this change, but only in rare circumstances. My next fallback position is to try to get the credit card processor to accept only certain limited circumstances under which it may cancel the agent's residuals.

The next best thing to the provision that the credit card processor can never cancel your residuals is that it can do so only under extremely limited circumstances. During the negotiation, I try to get the credit card processor to agree that it can only cancel the agent's residuals for certain things such as moving merchants or if the agent commits fraud. The credit card processor may seek to add other things to that list. An important second safeguard for the agent in adding such a provision is giving the sales agent the right to cure any breach. This can take the form of giving the sales agent a period of time, usually 30 days, to cure any such breach. I also like to insert a provision that states if the sales agent causes any monetary loss to the credit card processor, that the sales agent can pay off that loss, either by having the credit card processor use the agent's residuals or by the agent writing a check, and that once the loss is fully paid, then the residuals payments will resume.

The third type of termination provision and the least advantageous to the sales agent, is one that calls for termination of the residuals upon a material breach or default of the agreement. This type of provision is disadvantageous to the sales agent because it allows the credit card processor to terminate the agent's residuals for a breach of any terms of the agreement. Therefore, it is very important to make sure that the agent is given at least 30 days to cure any breach of the Agent Agreement. In addition, it is prudent to try to get a provision like I described above added to the Agent Agreement that allows the agent to pay off any monetary losses it causes and still continue to receive its residuals.

In these material breach provisions, it is also important to try to have any provisions removed that give the credit card processor too much discretion in deciding when a default or breach of the agreement has occurred. Many contracts have provisions that state the agent is breaching the Agent Agreement if it is acting in an "unsound manner" or doing anything to "damage the business reputation of the ISO in the ISO's opinion." These cancellation provisions can be interpreted to allow the credit card processor to cancel an agent's residuals for fairly trivial activities that have nothing to do with whether the agent should lose the right to continued residual payments.

Keep Your Residuals

Termination provisions are always the most important provisions in the Agent Agreement and the one area that is the most hotly negotiated. Every sales agent should take the time to carefully review the termination provisions and fight in any negotiations for the best provisions that it can get.

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