

SO YOU WANT TO MOVE YOUR MERCHANTS

By Paul A. Rianda, Esq.

Sales agents often call me with a familiar story about how their residuals have been terminated by their ISO or processor. Sometimes there is a good reason the residuals were terminated and sometimes not. Invariably, in my conversations with these agents the issue of moving the merchants from the original ISO to a new ISO to allow the agent to recapture the residual payments is a topic of conversation. Below I will discuss the potential ramifications of moving merchants under such circumstances.

Residuals Terminated With Cause:

Residuals are often terminated with good reason by ISOs and processors. In my experience, in over 80% of those cases the agent's residuals are terminated because the agent moved merchants in violation of the agent agreement. In nearly every agent agreement there is a clause that states under no circumstances can the sales agent move a merchant from the ISO that the sales agent originally placed the merchant with to another competing ISO. Sales agents have difficulty abiding by these provisions especially when the merchant no longer wants to process with the original ISO due to bad customer service or some other similar reason. In this situation, sales agents move merchants and as a result their residuals are terminated. Once the residuals are terminated, the sale agent is faced with the decision of whether it should move as many of the merchants that it can in order to try and recoup some of the sales agent's residuals that have been terminated by the old ISO. In my experience this is usually a bad idea.

If you decide to move merchants, you open yourself up to substantial liability. Under the agent agreement, you will be in breach of the agreement's provisions that prohibit moving merchants. This could allow the ISO where you originally placed the merchants to sue you for the lost value of the merchants and in all likelihood it will try to get an injunction against you to keep you from moving any more merchants. Even if you have no written agent agreement with the ISO, there is still substantial exposure for moving merchants. Industry custom and practice is that you are not allowed to move the merchants from the original ISO and this type of evidence is admissible to try to impose an obligation on you not to move the merchants.

To the extent that it can be shown that the merchant list is a trade secret of the ISO, you would also be liable for any damages incurred by the ISO resulting from you moving merchants. In addition, there are tort claims the ISO can bring against you such as intentional interference with contractual relations (which means you knew the merchant was under contract to the old ISO and you got the merchant to breach that merchant agreement). Those trade secret and tort laws can be used against you even if you are not subject to any non-solicitation obligations under an agent agreement.

The damages that could be recovered against you for moving merchants can be substantial to the extent that you will be potentially liable for 100% of the residuals that were derived from the merchant by both you and the ISO. For example, if you were on a 50-50 profit split, for a merchant where you were paid \$50 per month, if you move the merchant that ISO has lost a merchant from which it was entitled to receive \$100 per month. If that merchant could be sold for a multiple of 30

times that monthly residual, you could owe damages to the ISO of \$3,000 for that one merchant. If there are many merchants like that one your exposure could be considerable.

Whether or not you are willing to take the risk of being sued for considerable damages and an injunction is usually a personal decision based on your tolerance for risk. Some people I speak with have a high tolerance for risk given their circumstance. For instance, a 24 year old unmarried sales agent with no house and no other assets is not going to be as worried about losing a judgment for tens of thousands of dollars. That sales agent can usually just declare bankruptcy or avoid paying the judgment in other ways. But, if instead you are a 35 year old parent of three children with a house that has equity in it, bank accounts and other assets to protect, the prospect of losing a considerable judgment means a lot more.

Another risk factor to analyze is the potential for getting sued for moving the merchants. Some ISOs shy away from litigation. If that is the case with your ISO, you may feel better about moving the merchants since you don't believe you will end up in a lawsuit as a result of your actions. In addition, the size of the residual stream is relevant. Most ISOs will not bother chasing a sales agent and suing that sales agent for moving merchants that generate only a few thousand dollars per month worth of residuals. However, the ISO may want to make an example of you for others. Overall, the balancing of these various risk factors given your personal circumstances, will lead you to a conclusion as to whether or not it is worth the risk to move the merchants.

Residuals Terminated Without Cause:

Believe it or not, just because an ISO cuts off your residuals without any good reason does not mean that you can move your merchants. Assuming there is a written agent agreement in place you could still be subject to the non-solicitation provisions in the agreement. The breach of the agreement by the ISO in not paying your residuals does not make the entire agreement void. Under one school of thought, all it means is that you are able to sue the ISO to recover damages for your lost residuals. Just because the residuals are terminated you are not allowed to use "self help" remedies and move your merchants to recover your damages. To do so could subject you to potential liability for considerable damages as was explained above.

In addition, the tort claims and trade secret issues still apply even if the ISO wrongfully ceases paying your residuals. There are laws in many states that hold you cannot cause the merchant to violate its merchant agreement that you know exists. As stated above, this is a separate way the ISO could proceed to sue you, and make you spend lots of money in attorneys fees, in order to protect your assets. I find that in many lawsuits, the ISO, even if it is in the wrong, will be able to outspend you in attorneys fee. By the end of the case, you are often willing to give up rather than continue to pay legal fees and be involved in the litigation process.

One way to ensure that you do not have this problem is to be certain that your agent agreement addresses the issue of what happens to your duty to not move the merchants if the ISO fails to pay the residuals. I make sure to try to get a provision inserted into the agent agreement that unequivocally states that if the ISO wrongfully ceases to make the residual payments that the sales agent is free to move the merchants to any ISO that the agent chooses in its sole and absolute discretion. With this

type of provision in your agent agreement, you are free to move the merchants if the ISO ceases paying you your residuals without any good cause.

My best advice to avoid these types of problems is partner with a reputable, preferably large well know company in our industry in the first place. That is no guarantee you will not run into these types of problems, but it sure helps minimize your potential for having to deal with these types of issues.

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