

TERMINATING AGENT RESIDUALS

One of the most important and contentious issues in the bankcard industry is the circumstances under which an ISO can terminate a sales agent's residual payments. I have been on both sides of these types of disputes and know that there are sometimes good reasons to cancel a sales agent's residuals. However, I have also experienced a number of instances where a sales agent's residuals payments were terminated improperly. Below I will discuss why termination of residual payments is such an important issue in the industry, suggestions on how to resolve this dilemma and also tips for agents to minimize the potential for losing their residuals.

WHAT IS THE PROBLEM?

In our industry, sales agents are at the mercy of ISOs when it comes to the payment of residuals. There are very few industries like the bankcard industry where sales agents are wholly and utterly dependent upon their vendors. However, in our world, ISOs can and do terminate a sales agents livelihood sometimes without a valid reason and they usually get away with it.

The problem is exacerbated by the fact that most agent agreements, especially those that have not been reviewed by counsel for the sales agent, contain very vague language as to when the sales agent's residuals may be terminated. Many agreements state that a sales agent's residuals can be terminated upon a "material breach" of the agreement. The definition of a material breach is hard to define and varies from relationship to relationship based upon many factors, one of which, is how long the parties have been involved in the relationship. In addition, other contracts may contain a provision that state a sales agent's residuals maybe terminated for things as ill defined as "unsound business practices." These poorly defined termination provisions that favor the ISO can give it great latitude in terminating a sales agent's residuals.

The sales agent is also handicapped by other factors that make it difficult for a sales agent to prevail if indeed an ISO terminates a residual payment. Sales agents may be geographically located across the country from the ISO that they rely upon for their residual payments. If a sales agent's residual is terminated, it has to retain an attorney where the ISO is located, which is often an expensive process.

Even if the sales agent is receiving decent residual income it is time consuming and costly for it to hire an attorney across the country and pay that attorney, especially when it is not receiving any further residual payments. The sales agent must file a cross-country lawsuit, which could take one to three years to resolve with the hopes that it would eventually be able to prevail against the ISO. Given this state of affairs, most agents generally just prefer to walk away rather than go through the process of suing an ISO.

WHAT IS THE SOLUTION?

One way to resolve this issue would be to have an industry sponsored dispute resolution process that would allow the parties to quickly and cheaply resolve issues relating to residual termination. Either through one of the non-profit organizations in the industry or as a separate organization, there could be mediation or arbitration services provided to allow agents and ISOs to discuss the reasons for the termination of the residuals. Resolution of disputes could be accomplished by arbitration in front of a panel of industry experts that would allow for quick disposition of these types of cases, at a reasonable cost.

Agents must also empower themselves by protecting their own interests. Agents must ensure they do not enter into one-sided agent agreements with the ISO, and ensure that terms within the contract are as much as possible, to their advantage. One of the first things that should be in such a contract is that the agent gets its attorneys fees for pursuing the ISO if it is found that the residual payments were wrongfully terminated. If that provision is not in the agreement, the ISO has no incentive to settle the case since it will not have to pay the sales agent's legal fees. An ISO can prolong such a case for years in order to wear down the sales agent into accepting a minimal settlement.

Another way to try to minimize the potential for an agent to lose its residuals is to enter into an agreement with a local processor. If the processor is located in the same state, or at least the same geographic region as the sales agent, it is much easier for the sales agent to negotiate with the ISO and sue the ISO, if indeed the residuals are wrongfully terminated. A sales agent that can drive over to the ISO is more likely to be taken seriously by an ISO than one located on the other side of the country. As stated above, trying to litigate a case across country (including flying witnesses etc) can be very difficult and expensive. By contracting with a local ISO, the potential expenses in the event of litigation are minimized.

However, even if the sales agent, is not able to enter into a contract with a local ISO, it can still attempt to increase its chances of prevailing in any future litigation, by providing that any legal action under the contract will occur in a state that is close to the sales agent. While most ISO contracts call for any litigation to be held in the state where the ISO is located, the sales agent can request that the litigation commence in a neutral state that is closer to the sales agent and I have seen many times where it has been allowed. At least this minimizes some of the financial impact of litigating with a non-local ISO.

The easiest way for sales agents to minimize the potential for losing their residuals is to make sure they enter into contacts with reputable ISOs. In addition, it is up to the sales agent to ensure that the agent agreement is not one-sided and that the agent

has a reasonable basis to sue the ISO if indeed the ISO wrongfully terminates the residual payments. A sales agent cannot rid itself of the potential of losing its residuals but at least it can make it harder on the ISO to terminate the residual payments by following some simple steps.

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