

Justice Delayed Is Justice Denied

BY JOHN RICCIONE

This legal maxim essentially means that if a legal remedy is available to a party to redress an injury or wrong but is not acted upon in a reasonable timeframe, it is effectively the same as having no remedy at all. William Penn similarly stated: “To delay justice is injustice,” and Martin Luther King Jr. wrote in his *Letter From Birmingham Jail*: “Justice too long delayed is justice denied.”

Recently, a rep contacted me to request my assistance in recovering more than \$100,000 in commission she stated was owed to her by a principal. This is a substantial sum and I, therefore, suspected initially that it was generated as result of a major, recent sale by the rep for which the principal refused to pay what it perceived was too large of a commission. (This happens far more than I care to recall.) However, I quickly learned that this substantial sum had accumulated over a several-year period and did not only recently become due.

When I questioned the client as to why she had waited so long to seek “justice,” she disclosed a myriad of explanations, which included, (1) I had other lines to worry about and wasn’t paying close attention to what

was owed; (2) the principal told me it was going through cash-flow problems, so I didn’t want to add more hardship; (3) I would ask on occasion and the principal would tell me it would make it up in the next month; (4) other reps were getting terminated by the principal after they asked to be paid overdue commissions; (5) I didn’t want to bother and upset the principal; (6) the principal’s owner was a “nice guy;” (7) the principal stopped sending me commission statements; (8) business seemed to be slowing; (9) I hadn’t brought a large sale into the principal in a while; and (10) I was doing okay representing other lines.

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point of worrying its reps as to whether the principal would continue as a going concern. And it was at this moment that the rep decided to seek legal counsel to determine whether anything could be done to recover her long-overdue earned commissions.

Late Is Barely Better Than Never

Prior to seeking legal advice and requesting that we make a formal pre-suit demand, the rep had made her own written “demand”

for overdue and unpaid commissions. In response, the principal officially severed its relationship with the rep and offered to pay her about 20 percent of all that was outstanding over the course of 24 months without interest or personal guaranty. Now what?

Well, we put together an even scarier demand letter with threats of litigation and all manner of pestilence should the principal not pay all that was due. The principal, again, responded — with the same basic

factual response, but additional legal and practical defenses and explanations. It said that it would agree to pay what it thought the rep had previously accepted, which was about 20 percent of what was owed, over the course of 24 months without interest or guaranty. But my letter was really scary! Nonetheless, the principal was on the verge of bankruptcy, it had likely conveyed most of its profits over the years to the owner’s wife or purchased things like a summer house, boats, RVs and other personal

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assets. Sure, we could sue, force the principal into bankruptcy, try to unwind some of the alleged fraudulent transfers outside of the company, but even before getting that far, we would have to convince someone — a judge or jury, that there were legally justifiable reasons why our client did not previously demand payment of her earned commissions.

There are actual legal defenses to payment when a payee delays pursuing payment. In the law, these defenses have names like waiver, laches, abandonment, accord and satisfaction, and release (see opposite page for some definitions). Of course, it is possible for each one of these defenses to be overcome, but the practical and likely result of such delay is justice — in the form of a full recovery of each and every dollar earned and owed to this rep — **DENIED**.

Do Not Delay

Please do not wait to demand and require that your principal pay you completely and without delay or excuse. In my more than 30 years of practice, I have never heard of a good excuse to delay requesting payment. Unlike a good wine, commission disputes do not improve with age. All you are requesting each time that a sale is made by you for the benefit of your principal is the payment that both parties agreed to, and that the law requires you to be paid. And let's not forget to mention: You have earned it! Let any one of your MANA attorneys, who specialize in the areas of law unique to reps, achieve justice for you.

MANA welcomes your comments on this article. Write to us at mana@manaonline.org.



John M. Riccione is partner in Taft Stettinus & Hollister, LLP, Chicago, Illinois, and has been a business litigator for over 30 years. His practice involves the representation of businesses and entrepreneurs in a wide array of complex commercial disputes, including distribution and manufacturers' representation agreements, real estate, construction claims, trade secrets, computer fraud and abuse, UCC warranties and remedies, and labor and employment. He has been named an Illinois Super Lawyer since 2005 and nominated by a *Fortune* 1000 client to BTT's Client Service All-Star Team, an honor extended to only 70 lawyers nationwide. He is a frequent speaker on the topics of alternative fee arrangements, non-competitive agreements, commission disputes and Uniform Commercial Code warranties and remedies, to various trade and bar associations and client groups.

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Some Definitions

Waiver

Commonly defined as "the intentional relinquishment of a known right." *Ryder v. Bank of Hickory Hills*, 146 Ill.2d 98, 104, 165 Ill.Dec. 650, 585 N.E.2d 46 (1991). It may be made by an express agreement or it may be implied from the conduct of the party who is alleged to have waived his right. *Id.* at 105. *Hahn v. Cty. of Kane*, 2013 IL App (2d) 120660, ¶11, 991 N.E.2d 373, 378.

Laches

Generally, principles of laches are applied when a party's failure to timely assert a right has caused prejudice to the adverse party. (*Tully v. State* (1991), 143 Ill.2d 425, 432, 158 Ill.Dec. 546, 574 N.E.2d 659.) The two fundamental elements of laches are lack of due diligence by the party asserting the claim and prejudice to the opposing party. *Tully*, 143 Ill.2d at 432, 158 Ill.Dec. 546, 574 N.E.2d 659. *Van Milligan v. Bd. of Fire & Police Comm'rs of Vill. of Glenview*, 158 Ill. 2d 85, 89, 630 N.E.2d 830, 833 (1994).

Abandonment

Property is abandoned when the owner, intending to relinquish all rights to the property, leaves it free to be appropriated by any other person. (62 Ill.App.3d 534, 537, 19 Ill.Dec. 389, 378 N.E.2d 1264.) A finder of property acquires no rights in mislaid property, is entitled to possession of lost property against everyone except the true owner, and is entitled to keep abandoned property. 62 Ill.App.3d 534, 537, 19 Ill.Dec. 389, 378 N.E.2d 1264. *Michael v. First Chicago Corp.*, 139 Ill. App. 3d 374, 382, 487 N.E.2d 403, 409 (1985).

Accord

An accord is an agreement or settlement of an existing dispute, controversy **183 ***232 or demand which presupposes a disagreement as to *791 the amount due. *Hrubos v. Helfrick*, 220 Ill. App. 3d 787, 790-91, 581 N.E.2d 180, 182-83 (1991).

Release

Stacy's acceptance of the settlement agreement amounted to an implied release and would be an affirmative defense in any action to impose additional liability upon Dow. *Stacy v. Ametek, Inc.*, 205 Ill. App. 3d 58, 61, 562 N.E.2d 1180, 1182 (1990).

Legal Counseling

One of your benefits as a MANA member is a 30-minute consultation with an attorney known to us as being experienced and knowledgeable about the manufacturers' agency business and laws that govern rep-principal relationships.

The purpose of this short consultation is to enable you to get a quick answer to a general legal question. It is not intended for you to get specific legal advice or services such as a contract review or even a contract clause review.

The attorney you are speaking with will make the decision as to whether the consultation falls under the no-charge member benefit category or under a fee for service category. If the attorney believes the service is one you should be invoiced for, he should notify you and allow you to make the decision as to whether to proceed or not. Part of this notification would include the hourly rate and an estimate of the amount of time involved.