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PERSPECTIVE

Breach of oral contract, treble damages

By Eric S. Engel and H. Kim Sim

It sounds like a plaintiff attorney's impossible dream: automatic treble damages and attorney fees for what some would call just a breach of an oral contract to pay sales commissions. But it is the law in California, as established for the first time in a published decision, *Reilly v. Inquest Technology, Inc.*, 2013 DJDAR 10164 (Cal. App. 4th Dist. July 31, 2013). *Reilly* is the first published decision to affirm a trial judgment imposing treble damages and attorney fees under a rarely cited statute called the Independent Wholesale Sales Representatives Contractual Relations Act of 1990, California Civil Code Section 1738.10 et seq.

The act requires California manufacturers, distributors and others to have written contracts with their commissioned independent wholesale sales representatives. The written contract must be signed, with a copy given to the sales representative. Although the contract terms are not set by statute, the written contract must specify the rate and method of calculation of commissions, the schedule for commission payment, the chargebacks that will be taken, the territory assigned and all exceptions to the territory. When commissions are paid, the manufacturer or distributor must give the sales representative a detailed accounting of the orders on which commissions were paid, the commission rate, and any chargebacks. The sales representative's rights under the act cannot be waived by agreement.

The act resulted from the Legislature's determination that "independent wholesale sales representatives are a key ingredient to the California economy," and there is a need to provide "wholesale sales representatives [who] spend many hours developing their

territory in order to properly market their products" with "unique protection from unjust termination of the territorial market areas." For these reasons, serious penalties are imposed under the act: A manufacturer or distributor "who willfully fails to enter into a written contract as required," or who "willfully fails to pay commissions as provided in the written contract shall be liable to the sales representative in a

2752, which had permitted treble damages against an employer who did not have a written contract with a commissioned employee. The repeal may have given manufacturers and distributors a false sense of relief: The *Reilly* decision should remind them that commissioned sales representatives can still receive treble damages, and attorney fees, if they were independent and not employees.

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civil action for treble the damages proved at trial." In addition, the act provides for attorney fees to the prevailing party, which means that a losing manufacturer or distributor must pay the sales representative's attorney fees. To prevail, of course, the sales representative must first establish that there was a contract to pay commissions which was breached, resulting in damages. Hence, although the violations of the act are statutory, the claim requires at its base that the sales representative show a basic breach of contract.

Employment lawyers may notice similarities between the act and Labor Code Section 2751, which requires that employers give commissioned employees a written contract stating the basis on which commissions will be paid. Compared with the act, Section 2751 applies to all employers but is less encompassing and less demanding, and says nothing about the accounting required with commission payments. But the biggest difference is that effective Jan. 1, 2013, the Legislature repealed the companion Labor Code Section

The act applies to California manufacturers, distributors, assemblers, jobbers, weavers, mining operators and even producers of intangible products. The act is powerful, but its application is limited to particular circumstances involving independent commissioned representatives making wholesale sales. The act presents a number of traps that can cause the sales representative to not only lose the claim, but also to be liable for the manufacturer or distributor's attorney fees. Prosecution or defense of claims under the act is not for the faint of heart and should be approached cautiously.

The act was successfully applied by Peter Reilly, a retired electronics industry executive who orally agreed to use his industry contacts to bring new business to a growing Orange County electronics manufacturing company, Inquest Technology, Inc. Reilly was paid only a small part of the commissions owed for sales made to contacts that he brought to Inquest. An Orange County jury unanimously found that Reilly had a contract and procured sales

for which he should have been paid past and future commissions totaling \$2.1 million. The jury also unanimously found that Inquest's violation of the act was willful. Following the verdict, the trial court was required by the act to treble the damages and award attorney fees to Reilly. Under the act, a \$2.1 million jury verdict became a \$6.2 million judgment, before attorney fees were added.

But that was not all. In a bench trial immediately following the verdict, the trial court also found that the individual owners of Inquest were subject to alter ego liability for the full amount of the \$6.2 million judgment and attorney fees. As a practical result, the individual owners became liable for all of the damages available under the act — treble damages and attorney fees — even though the owners were not themselves subject to the act.

The California Court of Appeal affirmed the judgment in full against Inquest and the individual owners of Inquest. As the first published decision to endorse the full remedies available under the act, *Reilly* should stand as a cautionary note to California manufacturers and distributors, just as it is a dream result for plaintiffs' lawyers.

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