



Recent Case Law Focuses on Drafting Considerations in Payments Contracts (part 3 of 3)

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A well-crafted contract will be concise, clear, and avoid internal conflicts. In this last article of our three-part series on payments contracts and drafting considerations, a recent case addressing conflicting contractual clauses is discussed.

In *Infinity Capital LLC v. Francis David Corp.*, No. 1:18-CV-2422, 2019 WL 2336579, (N.D. Ohio June 3, 2019) the court ruled that where a contract between a credit card processor and its sale agent had conflicting clauses, the clause should be read in favor of the sales agent, resulting in the credit card processor being liable for withholding residual payments.

Infinity Capital involved a contract dispute between a credit card processor, Electronic Merchant Services (“EMS”), and its sales agent, Choice, over whether Choice was entitled to residual payments after their relationship ended. *Id.* at *1 (processing companies typically pay their sales agents residuals, which are a percentage of the merchant’s processed transactions and will continue to pay these residuals for as long as the merchant continues credit processing with the processing company). At the heart of this dispute is whether the parties’ agreement required EMS to continue paying the residual sales commission for merchants that Choice brought to EMS. Choice argued that it did, and EMS argued the opposite. *Id.* For its part, EMS stated that Choice violated a non-solicitation provision in their 2010 agreement when Choice marketed other credit card processing services to merchants. EMS claimed that this was grounds to withhold further residual payments. Under the 2010 agreement, Choice agreed not:

- to solicit or attempt to solicit, directly or indirectly, any EMS Merchant for any purpose other than training, support, or other purposes approved in writing by EMS;
- to solicit or attempt to solicit, directly or indirectly, any EMS Merchant to terminate its relationship with EMS.

In 2016, Choice and EMS entered into an amendment to the above provision that provided that Choice not *knowingly*:

- solicit any EMS Merchants for any purpose other than training and support for EMS Merchant Processing Services [or]
- solicit or attempt to solicit any EMS Merchants to reduce or discontinue their Merchant Processing Services relationship with EMS.

Thus, the 2016 amendment changed the provision from a blanket prohibition against soliciting merchants (knowing or otherwise) to two somewhat contradictory provisions that disallowed Choice from (a) knowingly soliciting merchants for any purposes besides training or (b) knowingly soliciting merchants to reduce or discontinue their services with EMS. Central to this case is whether secondary offerings—where the sales agent offered ancillary or supplementary services not offered by EMS to its merchants—violated the terms of agreement as amended.

Given the textual ambiguity, the Court noted that ambiguities are construed against the drafter—EMS in this case—and then turned to evidence of the parties' intent. The Court first looked at communication between Choice and EMS. It determined that, on two separate occasions, Choice told EMS that it was considering providing secondary sourcing to three specific EMS merchants. EMS never responded, and never told Choice that secondary sourcing would violate the amended agreement. The Court noted that "Choice's repeated attempts at clarification were met with responses ranging from the non-existent, to the unhelpful, to the outright misleading. Contracting parties should work together, not play 'gotcha.'" *Id.* at *6.

In addition, the Court also looked at the surrounding contract language. It determined that the parties intended to forbid only business-reducing solicitation and, although Choice did solicit business, EMS could not show that it reduced their volume.

Based on the contractual ambiguity, deference to the non-drafting party, and analysis of the parties' course of dealing and communications, the Court determined that Choice was only prohibited from knowingly soliciting merchants where such

solicitation might result in reduce volume for EMS. The Court then determined the value of any reduction to EMS's portfolio caused by Choice and found it to be \$57,859.54, which was well short of the over \$5 million that EMS had withheld from Choice. *Id.* at *14. EMS relied upon its contractual damages provision, which it argued allowed EMS to stop paying residuals to Choice if Choice breached the non-solicitation provision. The Court reviewed the applicable provisions, stated "contract damages seek to compensate actual harm, not punish breaches or deter them from the looming guillotine of draconian damages," and found the residual termination clause to be an unenforceable contractual penalty. *Id.* Accordingly, the Court ordered EMS to pay all residuals withheld from Choice, net of \$57,859.54, which represented damages directly tied to Choice's breach of the 2016 amendment's non-solicitation provision, as interpreted by the Court.

This decision is a lesson in contract drafting and the need for clear, non-contradictory provisions, as well as enforceable damages clauses. If you are negotiating a sales agent agreement or need someone to review your existing agreements (for acquisition diligence purposes or otherwise), Frost Brown Todd has a full team of [payments professionals](#) that can assist you.

Written With Assistance by Blake Bars.[\[1\]](#)

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[\[1\]](#) Legal intern at Frost Brown Todd and not licensed as a lawyer in any jurisdiction.

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