



Bad Contracting Can Leave a Bad Taste in Your Mouth

Client Advisories

08.11.2020

In 1879, Joseph Lawrence invented an antiseptic mouthwash that he called Listerine. This was so long ago that Louis Pasteur, the scientist who discovered that there were invisible germs, which Listerine was invented to protect against, was still alive. Two years after creating the formula, Lawrence sold it to Lambert Pharmaceutical Company.

Like many agreements for the sale of trade secrets, the contract between Lawrence and Lambert Pharmaceutical called for royalties to be paid to Lawrence based on the amount of Listerine manufactured or sold. But what makes this agreement different than others is that now, 141 years later, royalties are still required to be paid.

Why, you may ask, are royalties still due on a formula that was sold when Rutherford B. Hayes occupied the White House? More to the point, why are royalties due on a "secret" formula that was published in a major medical journal in 1931? The answer is simple: because that's what the contract says.

Specifically, the contract between Lawrence and Lambert Pharmaceutical stated that monthly royalties, based on a percentage of the amount of Listerine produced, would be due to Lawrence and "his heirs, executors or assigns [. . .] for each and every gross of said Listerine hereafter sold by [Lambert], [his] heirs, executors or assigns." *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655, 658 (S.D.N.Y. 1959). This plain language led a federal court in 1959 to conclude that neither the passage of time nor the fact that the formula had been published relieved the manufacturer of its obligation to pay royalties.

Thus, royalties are due for as long as Listerine is manufactured. And, since Listerine enjoys the highest global market share for mouthwash, it is likely that Johnson & Johnson, the current manufacturer of Listerine, will continue to pay royalties for the foreseeable future. This makes ownership in a piece of the royalties a steady source of income, which is why a share in the royalty recently went for \$561,000 at auction.

The moral of this story is that words in a contract have meaning, and every word matters, so it makes sense to pay an attorney to get it right, as an ounce of mouthwash is worth the proverbial pound of cure. Lawrence's contract said that he and his heirs were entitled to royalties for as long as the manufacturer continues to make

Listerine. To get out of that obligation, the manufacturer simply has to discontinue production of the mouthwash. Since Listerine is so popular, the chances of that happening are slim, so the royalties will have to continue to be paid. After 141 years, that may seem hard to swallow.

The key to avoiding an unfortunate consequence (like perpetual royalty payments) is to ensure that your contracts are drafted by and reviewed by counsel. And that's where Archer's Trade Secrets Protection and Noncompete or Business Counseling Practice Groups can help. If you have questions, please contact **Thomas A. Muccifori** at 856-354-3056 or tmuccifori@archerlaw.com or any member of Archer's **Trade Secrets Protection and Noncompete** or **Business Counseling Practice**.

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