

Not so fast!

Rep's statutory rights are protected from getting contracted away

Just when independent reps seem to have grown familiar with the sales rep protection statutes enacted in most states to help level the playing field with their principals, more and more of their contracts seem to get drafted with the aim of stripping those protections away. But are provisions inserted into rep contracts limiting sales rep statutes enforceable?

Before answering, a quick refresher is in order.

State legislatures who have passed these statutes recognize the important function sales reps play in their economies and have taken thoughtful steps to protect their commission streams upon termination.

California's statute, for example, expressly notes "that independent whole-sale sales representatives are a key ingredient to the California economy." Because sales reps "spend many hours developing their territory in order to properly market their products," the California legislature recognizes that they "should be provided unique protection from unjust termination of the territorial market areas."

A common theme among the states with sales rep protection acts is incentivizing their principals to timely pay commissions due. More accurately, the state statutes that have "teeth" disincentivize principals from withholding commissions after termination by enabling such principals to be found liable for double or triple the amount of withheld commissions, plus attorneys' fees.

Perhaps to get around these protections, manufacturers often insert language into rep contracts making them subject to the laws of a different state, which is often a state with no sales rep protection act, a weaker act or one that is not applicable. A Massachusetts rep,

for example, expecting to be protected by her home state's strong rep statute when a dispute erupts, can end up sorely disappointed should her rep contract be governed by the laws of Delaware, which has no rep statute.

Efforts to protect the sales rep protection statutes

Fortunately, many legislatures have grown wise to this maneuver, and have taken measures to prevent reps from losing the protections contained in their home state statutes upon signing a principal's heavy-handed contract. While sales rep protection statutes vary state to state, most contain a provision invalidating any contract term that would negate or limit the rights provided or would make the contract subject to the laws of a different state.

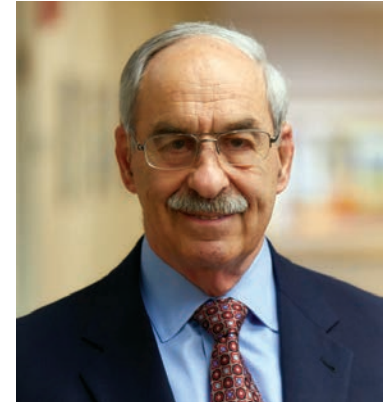
The New Jersey rep statute employs language

similar to many others: "A provision in any contract between a sales representative and a principal purporting to waive any provision of this act, whether by express waiver or by a provision stipulating that the contract is subject to the laws of another state, shall be void." Clauses like this ensure that what a state legislature giveth, a manufacturer cannot readily taketh away.

The facts presented in Hedding vs. The Pneu Fast Co.

The importance of these provisions was highlighted in a dispute decided earlier this year after Minnesota sales rep Curt Hedding, the owner of Hedding Sales & Service, contracted with The Pneu Fast Company, an

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Illinois manufacturer of nails and staples used in power tools. Hedding's nine-state sales territory included Minnesota and Ohio, and his rep contract called for Ohio law to govern.

Hedding was to receive a 10 percent commission for the first year on new accounts, and 5 percent thereafter. This meant that when Hedding brought in the major home improvement chain Menards as a new Pneu Fast account, it was entitled to receive 10 percent of the first-year sales, and then 5 percent of continuing sales.

Although Pneu Fast never paid more than 4 percent, Hedding continued growing the account, and expanded it into additional states. In a not uncommon response to a rep's hugely successful efforts, Pneu Fast terminated Hedding effective immediately — without explanation or a chance to cure.

Hedding responded by filing a one-count complaint in Minneapolis federal court alleging his termination violated the Minnesota sales rep statute. Pneu Fast moved to dismiss, pointing to the rep contract language calling for Ohio law to govern.

Unique among sales rep laws, the Minnesota statute is aimed at limiting the circumstances under which rep agreements can be terminated. Under the act, a manufacturer needs good cause to terminate a rep, and must give the rep at least 90 days' notice before the expiration of the agreement or 60 days in which to correct the stated reason for termination. A manufacturer lacking good cause to terminate must either renew the rep agreement or notify the rep at least 90 days before it expires of its intent not to renew.

Hedding's complaint alleged Pneu Fast violated the Minnesota rep statute by lacking good cause to terminate, failing to notify Hedding in advance of termination and withholding commissions upon termination.

The Minnesota statute was modified in 2014 to add language stating that its protections cannot be "circumvented" by subjecting a Minnesota rep to the laws of another state or by requiring the rep to waive any of its provisions. Any such attempt "is void and unenforceable."

After quickly determining that Pneu Fast's termination of Hedding did not comply with Minnesota's sales rep statute, the court had to consider whether to apply that statute or the Ohio statute, as Pneu Fast argued. Ohio's rep statute offered no comparable protections so a determination that Ohio law applied would end Hedding's suit.

Courts traditionally honor contractual choice-of-law provisions, but parties do not enjoy "unchecked power" to select the governing law, particularly where the legislature "expressed an intent to protect its citizens with its own laws by voiding" such choice-of-law provisions. The court explained that the state law chosen by the parties must give way where it is contrary to a fundamental policy of a state, and that state has a significantly greater interest in the issue.

Such was the case here. The court found that the Minnesota legislature clearly expressed its intent to "prioritize the statute's protections over parties' choice-of-law," and that Minnesota had "a clearly-defined policy of protecting its sales representatives from agreements purporting to waive the protections" of its rep statute.

Any other finding "would allow Pneu Fast to accomplish precisely what the Minnesota Legislature intended to prohibit when it enacted the 2014 Anti-Waiver provision. That is, it would allow Pneu Fast to circumvent the requirements of" Minnesota's rep statute "by discarding Minnesota law altogether in favor of the laws of another state."

Based on Minnesota's strong interest in protecting its sales reps, the court concluded that "the parties' Ohio choice-of-law provision is null and void," and the Minnesota rep statute would apply. Finding that Hedding adequately alleged a claim for breach of that statute, the court denied Pneu Fast's motion to dismiss.

Accordingly, Hedding's case continued, and he would have the opportunity to take discovery and seek to hold Pneu Fast accountable for the commission underpayment. The court's ruling applying the Minnesota statute to protect a Minnesota rep meant Hedding would get his day in court. ■