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Legislature bolsters sales rep termination act

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Manufacturers and suppliers who use sales representatives who either are located in Minnesota or who rep products in Minnesota must be aware of the Minnesota Termination of Sales Representatives Act (MTSRA), Minn. Stat. § 325E.37, as it could have drastic consequences for their businesses. And the MTSRA's representative-friendly provisions recently became even harder to avoid thanks to an amendment that went into effect last August.

Despite being a Minnesota statute, the MTSRA often ensnares unwitting out-of-state suppliers. Imagine a situation in which your client, an Illinois manufacturer, enters a five-year contract with a Minnesota-based sales representative. The parties meet to negotiate the contract in Illinois. And they further agree to include an Illinois choice-of-law provision and make the contract terminable by either party with 30 days' written notice. The sales representative's territory is the entire Midwest, including Minnesota.

During the first year, the sales representative underperforms and the manufacturer, in turn, sends written notice to the sales representative that it intends to terminate the agreement in 30 days, per the contract's notice requirements.

While the manufacturer is not surprised that the sales representative is disappointed with this decision, the manufacturer *is* surprised to receive a letter from the sales representative's attorney asserting that the termination is improper and that, under the MTSRA, the sales rep is owed commissions for orders received up to *60 days* following termination. Your client-manufacturer calls you and says, among other colorful commentary, "I need you to write these guys back and tell them they're crazy. Our contract clearly provides that we have a right to terminate upon 30 days' notice. And Minnesota law doesn't apply; Illinois law does!"

At which point you, as trusted counsel, have the unenviable task of informing your client that — despite the clear language of the contract — (1) the sales rep and his attorney are not crazy; (2) Minnesota's MTSRA does apply; and (3) your client likely owes more than just the 30 days of commission he thinks he owes. Oh — and if your client refuses to comply, he could be liable for the sales rep's attorney's fees and, if the commission terms are not specified in the contract, potentially even double the commissions owed under the Minnesota Prompt Payment Act, Minn. Stat. § 181.145.

What is the MTSRA and why should suppliers be familiar with it?

The MTSRA provides some of the country's strongest protections to independent sales representatives — and it recently got stronger. In August 2014, an amendment to the MTSRA went into effect which limits a manufacturer's ability to contract around it.

The MTSRA already had a broad reach, applying to any "sales representative who, during some part of the period of the sales representative agreement: (1) is a resident of Minnesota or maintains [its] principal place of business in Minnesota; or (2) whose geographical territory specified in the sales representative agreement includes part or all of Minnesota." The MTSRA's definition of "sales representative" generally includes any non-employee that agrees to solicit wholesale orders on behalf of a "principal," typically a manufacturer or other supplier,[1] who is compensated, in whole or in part, by commission. (Other examples of principals listed in the MTSRA include wholesalers, assemblers, and importers. For ease, this article will refer only to manufacturers or suppliers.) Thus, even if the sales representative in the above scenario had also been based in Illinois instead of Minnesota, the MTSRA could still apply if the sale rep's territory included Minnesota.

The teeth of the MTSRA are its restrictions on a manufacturer's ability to terminate or refuse to renew its agreements with sales representatives. For instance, the MTSRA restricts a manufacturer's right to terminate a sales representative agreement by requiring good cause and 90 days' written notice,

Grounds for a supplier to terminate a sales representative agreement under MTSRA

(1) the bankruptcy or insolvency of the sales representative; (2) assignment for the benefit of creditors or similar disposition of the assets of the sales representative's business; (3) the voluntary abandonment of the business by the sales representative as determined by a totality of the circumstances; (4) conviction or a plea of guilty or no contest to a charge of violating any law relating to the sales representative's business; (5) any act of the sales representative which materially impairs the good will associated with the manufacturer's, wholesaler's, assembler's, or importer's trademark, trade name, service mark, logotype, or other commercial symbol; or (6) failure to forward customer payments to the manufacturer, wholesaler, assembler, or importer.

which includes a 60-day cure period. A supplier can terminate immediately only under a discrete list of events. (See sidebar.) These categories of events are very narrow, however, and do not include breaches that many suppliers would consider immediately terminable offenses. For example, taking action that is detrimental to the supplier by agreeing to terms with a retailer that the sales rep had no authority to agree to could reasonably be viewed as a non-curable breach of trust that would justify immediate termination, but the MTSRA does not see it that way.

What if the contract is set to expire by its terms? Ending the relationship under that circumstance should be easy enough, right? Not so fast. The MTSRA also restricts a manufacturer's right not to renew a sales representative agreement by requiring either good cause and a 60-day cure period or 90 days' written notice. A supplier whose agreement has no set term has an even bigger problem: a sales representative agreement of an indefinite duration is "treated as if it were for a definite duration expiring 180 days after the giving of written notice of intention not to continue the agreement."

The consequences of complying with the MTSRA are steep and the consequences for failing to comply are even steeper. Under the MTSRA, a sales representative terminated without notice "is entitled to be paid for all sales as to which the representative would have been entitled to commissions … made prior to … the end of the notification period … regardless of whether the goods have been actually shipped." To enforce this right, a sales representative may either initiate an arbitration or civil lawsuit. In addition to commissions, the MTSRA authorizes judges or arbitrators to: (1) reinstate the sales representative agreement or award damages; (2) order the manufacturer to pay the sales representative's attorney's fees and costs; or (3) where the manufacturer's defense in arbitration is vexatious and lacking in good faith, order the manufacturer to pay the arbitrator's fees and expenses. In contrast, while the MTSRA gives sales reps the choice between bringing suit in court or in arbitration, the MTSRA's plain language only allows suppliers to bring suit in arbitration.

How can the MTSRA be avoided?

Until recently, a supplier could avoid the harsh consequences of the MTSRA by including in the agreement a choice-of-law provision selecting the law of a state other than Minnesota. Minnesota courts respected those provisions and it provided more certainty for suppliers. But the Minnesota legislature recently eliminated this option for manufacturers and suppliers by amending the MTSRA, effective August 1, 2014, to read:

Subd. 7. Prohibition of inclusion of certain unfair contract terms in sales representative agreement.

(a) No manufacturer, wholesaler, assembler, or importer shall circumvent compliance with this section by including in a sales representative agreement a term or provision, whether express or implied, that includes or purports to include:

(1) an application or choice of law of any other state; or

(2) a waiver of any provision of this section.

(b) Any term or provision described in paragraph (a) is void and unenforceable.

With this new provision, there is little a supplier can do to avoid the effects of the MTSRA — other than deciding not to market to Minnesotans — which is probably not a reasonable option since the benefits of selling to Minnesotans likely outweigh the risks of a sales representative agreement going bad. One option might be to limit a Minnesota sales representative to only Minnesota as a territory so that the effect of the statute is limited to sales in the state. For sales representatives located in other states, an option might be to have two separate sales representative agreements — one that applies to Minnesota under the MTSRA and a second that applies to the rest of the sales rep's territory and specifies that another state's law governs.

Moreover, as there is currently no case law interpreting the MTSRA's recently added provisions, the success of these measures is not guaranteed. After all, the Legislature has manifested a clear intent to protect sales representatives and the statute should be read with that intent in mind. Nonetheless, even if ultimately unsuccessful, such protective measures could create uncertainty and give suppliers leverage to negotiate an acceptable settlement. At the very least, manufacturers who are considering selling products in Minnesota through a sales representative should familiarize themselves with the MTSRA and factor the risks associated with the statute into the business analysis. Better to understand the risks ahead of time than to have to learn them the hard way.

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