

LEGALLY SPEAKING

Choice of law and choice of forum provisions in rep contracts

Two of the most important but often overlooked provisions in rep contracts are terms identifying the choice of law and the choice of forum. While these two contract provisions are often in the same paragraph and are typically in the miscellaneous section at the end of the document after the substantive terms such as commission rates, territory, products, post-termination rights, etc., they could have great impact on the outcome of disputes between principal and representative. Depending upon the skill of the person who drafted the contract, one or the other (or perhaps both) of the provisions may not be included in the document.

The choice of law provision determines which state's laws will apply to legal controversies under the contract. The parties cannot just select the law of any state. The state law selected must have some minimal contact with the principal or rep, such as the state where either party's primary office is located, or the state where the contract was executed or performed. Since the rep agreement most often is by the principal, it selects the state most convenient to it, or which gives it a legal advantage.

Choosing which state's law will apply is important because the laws of the various states can be vastly different. One area of the law that is uniquely important to reps is the various state statutes that protect reps. While the statutes have different names, they will be generally referred to in this article as the Independent Salesperson's Protection Act (ISPA). The ISPA in various forms has been passed in 36 states, although in several states, it has been declared unconstitutional because the specific language violates the interstate commerce clause of the U.S. Constitution. The legislatures of these states

must amend the laws with a relatively simple change to make it pass the constitutional test.

The importance of the choice of law is illustrated by the California ISPA, which only applies to and protects reps who sell goods in the state of California. If a rep contract states that California law (where the principal has its main office) is to be used, and the rep is located in Pennsylvania, and if the rep sues the principal for commissions in Pennsylvania, the Pennsylvania court will apply California law (yes, Pennsylvania judges can be educated on California law), which will preclude recovery under the California ISPA because the Pennsylvania rep didn't sell products or services in California. The rep is caught in a catch-22 situation of not being able to recover under the Pennsylvania statute because California law is controlling, and not being able to recover under California law because it only protects reps who sell goods in that state. California is an extreme example because it is one of the few states that limits protection of the rep under its act to sales of goods or services within the state. However, since many principals are located in California, the distinction becomes important. Fortunately, the acts of most other states apply to the sale of goods both inside and outside the sale. Also, in many states, the ISPA specifically provides that its statutory protection cannot be avoided by terms of a contract. In these states, reps are protected, despite contrary language in the contract.

The easiest way for non-California reps to avoid the harsh results of the California ISPA is to insist that the law of the state where the rep is located shall apply to the contract.

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by Gerald M. Newman
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If the contract does not identify the law of a particular state that will apply, then the law of the state where the law suit is filed will generally apply. Under this scenario, it is often advantageous for the rep to strike first and file a claim in his/her state in order to assure that the laws of his/her state will apply — assuming, of course, that the laws are favorable to the rep's position.

The choice of forum in the contract relates to the location where the lawsuit will take place. In legal jargon, it is the place where the court has jurisdiction to hear the case. Usually, there are benefits to having the suit heard in your hometown: the logistics are easier with less travel; witnesses (including customers) are nearby; there may be a hometown advantage before a judge and jury; and you may be able to use your local attorney — provided s/he is knowledgeable in rep law.

If the choice of law or choice of forum in a contract is not favorable to the rep, it is advantageous to the rep not to have either the choice of law or choice of forum recited in the contract, since this leaves both open to selection by the rep who is typically bringing the action to recover commissions, subject, of course, to the standard that both must have some minimal contact with at least one of the parties. If presented with a contract that has an unacceptable choice of law or choice of forum clause, and after determining that the law of the state where the rep's principal office is located is favorable, you might want to counter with the following:

This agreement shall be construed in accordance with the laws of the State of _____ pertaining to contracts made and performed entirely therein and Manufacturer agrees and consents that jurisdiction and venue of all matters relating to this Agreement shall be vested exclusively in the federal, state and local courts within the State of _____.

In conclusion, when reviewing a contract, it is important not to just look at the substantive provisions relating to commissions, territory, products and post-termination arrangements, but also to look at the legal effects of the choice of law and choice of forum set forth in the document. In the event of controversy, the choice may be critical to the rep's success.

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