Sales rep statute protects a rep's earned commissions upon actual and constructive termination

Regular readers of this column probably recall that most states have enacted statutes to protect sales reps whose commissions are wrongfully withheld by their principals.

While each of these states has its own version of a sales rep protection statute, the statutes share the goal of promoting the prompt payment of commissions.

When an unscrupulous principal retains a rep's earned commission, most statutes will subject the principal to additional liability.

One key limitation in many of these state statutes is that the significant protections they provide are available only upon the termination of a relationship with a principal. As if excluding reps who continue to perform from the statutory scope wasn't bad enough, the statutes typically do not define when a "termination" occurs.

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Thus, an exploitative principal angling to replace its longtime independent rep and withhold the commissions due could find a means to escape the statute's reach by stopping just short of affecting a full termination. Such a principal might see a way to avoid liability for double or triple commissions and attorney's fees under a sales rep statute by stripping away the valuable accounts or portions of a territory rather than formally terminating the agreement.

Enter footwear sales rep Rodney L. Cooperman, who faced just such a principal after successfully promoting its products to Target stores in the Minneapolis/St. Paul area. Although Cooperman reluctantly went along with manufacturer R.G. Barry Corporation's steady decreases to his commission rate, he drew the line when Barry wanted to take the Target account direct.

Cooperman's refusal to accept the loss of Target was hardly surprising in that Target was more than just a major component of the Barry account; Target sales comprised more than 90 percent of his rep firm's total business for Barry.

Filing suit in the Minneapolis federal court, Cooperman's claims included that Barry violated the Minnesota sales rep statute, which imposes limitations on the circumstances when sales reps can get terminated. Not so, asserted Barry in its motion attacking Cooperman's complaint.

Barry correctly noted that the Minnesota statute applies only to "terminations," and all it did was merely reassign one account.

"To construe the statute to apply in this case," Barry's argument continued, "would be to expand the statute to apply to all modifications in sales representative contracts, thus subjecting every term of those contracts to scrutiny under the act."

Demonstrating a flair for the dramatic, Barry even suggested that if the statute applied here, then "courts would be required to police every modification that might disadvantage a sales representative."

Cooperman responded by arguing to the District Court that when Barry took Target away, it deprived him of the commissions on more than 90 percent of the business. Such an action comprises an effective or constructive termination of the rep contract, that is, one with "the practical effect of terminating the agreement."

Courts should not enable principals to

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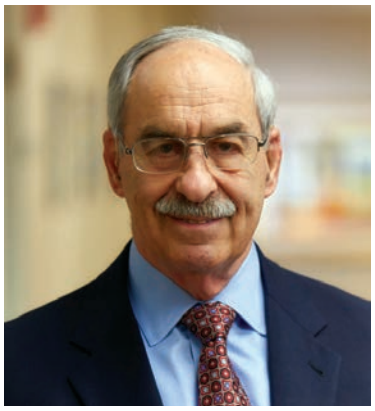

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MARKETING GROUPS: Technology advancements

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they may have never seen a manual typewriter, except perhaps in a museum. Looks like the fax machine may well be destined for that roll as well. I just saw where the last "beeper" system shut down. We could continue to add to this list things that were "cutting edge" just a few short years ago.

Fast forward to today and try to imagine what is in the very near future. You don't really have to imagine, just follow the news, read a few headlines like, "Self-flying aircraft are coming" as Uber and others are toying with the idea of vertical take-off and landing (VTOL) flying taxis. "What to expect from the 5G Network? We want instant gratification." Some of us can remember when we used operators to place long distance calls.

There are some things that "return to yesteryear." Trains have long been a part of transportation but fell out of favor over time. Fast forward to today. Here in Florida, "Brightline" is a buzz word. With the growing traffic congestion, we are now embracing the idea of leaving the car at home and taking the train. The interesting concept here is that the government is not involved. It's a privately funded enterprise and getting a lot of positive press. It will eventually tie most of the major metro areas together.

Advancements in manufacturing materials, like the use of carbon fibers and MIM (metal injection molding), speeds and enhances manufacturing processes. Use of these processes are reshaping manufacturing. They are reshaping the electrification of transportation by enhancing the future of batteries and reducing the weight of cars and planes.

We will likely see supersonic passenger aircraft in use in the foreseeable future. Passenger space flight just made a giant step forward as a passenger test space flight made a successful journey into space yesterday. Let's not forget also the "self-driving" automobile.

One thing is certain, technology is moving ahead exponentially. We must keep vigilant to stay abreast of it and utilize what is appropriate in our business and daily lives lest it leaves us way behind. ■

LEGALLY SPEAKING: Constructive termination

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evade the statute, maintained Cooperman, by merely eliminating commissions and stripping away accounts until reps receive no benefit under their contracts, rather than formally "terminating."

After considering the parties' respective positions, the federal judge denied the motion to deep-six Cooperman's action.

Minnesota's sales rep statute, unlike most other states, provides unusual protections to sales reps by limiting the principal's ability to terminate them. Recognizing this important purpose of the Minnesota rep statute, the court concluded that Barry read the statute too narrowly, and found that its "overly technical reading of the statute would allow that statutory protection to be easily circumvented."

The court also rejected Barry's argument "that a broader reading of the statute would require courts to scrutinize every modification of a sales representative's agreement." Cooperman had sought to invoke the statute only upon a constructive termination of his rep contract, not to challenge lesser modifications. Cooperman's action would live on.

Just as sales representative statutes vary in different states, so too does the treatment of constructive termination claims. Certain New York state courts, for example, do not recognize the ability of at-will employees or independent contractors to state claims for constructive termination. Other states, including Massachusetts, give constructive termination claims similarly limited application.

In the right jurisdiction, the Minnesota federal court's well-reasoned decision in Cooperman v. R.G. Barry Corp. should provide some necessary support to enable an action that looks like a termination, smells like a termination and feels like a termination to get treated like a termination for purposes of that jurisdiction's protective sales rep statute. ■