Liability and Other Insurance Requirements in Sales Representation Agreements

BY RANDALL J. GILLARY

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Every two or three years MANA conducts an Attorney Forum. This is when attorneys from around the country who handle sales commission disputes and related matters involving principals and sales representatives get together in Chicago to discuss common issues and other matters that may be of interest to the association and its members. Frankly, it is nice to meet some of the other attorneys who do the same type of work as I do. It is also valuable for the attorneys because it allows them to form alliances with other members of the Attorney Forum for clients who have issues that need to be resolved in other states.

Prior to our most recent meeting in June of 2016, Jerry Leth, MANA's vice president and general manager, asked that the attorney members consider addressing the issue of principals mandating that their sales representatives carry certain minimum amounts of liability insurance, product liability insurance, and worker's compensation insurance in their sales representation agreements. I responded to Jerry with my thoughts and he asked that I put them into an article for *Agency Sales* magazine. So here we are.

As a preliminary matter, I should note that I only represent sales representatives and almost never the principals. This should be kept in mind in reading any of the articles that I write for *Agency Sales* magazine. The primary mission of my law practice is to help sales representatives.

Mandated Insurance

Frankly, the issue of mandated liability and other types of insurance in sales representation agreements is one of my pet peeves. I have been representing sales representatives in contract negotiations and in commission disputes for about 37 years. I have yet to see any lawsuit or dispute which involved the issue of liability insurance or any other type of insurance for that matter. Some of the sales representation agreements I have seen have included insurance requirements and we were not able to get them negotiated out, but nothing ever came of those provisions to my knowledge. Needless to say, insurance requirements for sales representatives are not included in any of the sales representation agreements that I draft for my clients.

Other pet peeves of mine are when lawyers who draft sales representative agreements do the following: (a) Refer to the sales representative as a "sales agent" then later in the agreement say that the "sales agent" is not an "agent" for the principal but an independent contractor; and (b) Refer to the sales representative's "territory" in numerous provisions of the agreement and then describe the "territory" as specific named accounts and not in geographic terms.

The issue of mandated liability and other insurance requirements is really an offshoot of the issue of whether the sales representative is an agent, an independent contractor or an employee. This is really where the analysis starts. Generally an agent is someone who has the actual authority to contractually bind the principal. A sales representative has no such actual authority. Notwithstanding that we are all members of the Manufacturers' Agents National Association, I would be willing to bet that there are very few if any, true agents in MANA.

Considering a Rep's Authority

Sales agents were much more prevalent in the early 20th Century. Most of the early cases in Michigan involved agents who had the authority on behalf of their principals to purchase commodities such as lumber and gas and oil as well as real

estate. The agent could make the actual purchase in the principal's name and the principal would be liable for the payment. The contract would in many cases be signed by the agent on behalf of the principal. A sales representative has no such authority. Sales representatives solicit opportunities for their principals. If the principal accepts the opportunity then the contract is entered into between the principal and the customer.

One of the key reasons why the difference is important is that there are certain fiduciary responsibilities and duties that an agent has that a sales representative does not have. For example, an agent has a fiduciary responsibility to always act in the best interests of the principal. Basically this means that the agent who in the course of his representation of his principal discovers an opportunity, the agent cannot appropriate the opportunity for his or her own account. If the agent violates this fiduciary duty and appropriates the opportunity, then he or she is liable to the principal for any profits made as a result of the appropriation of the opportunity. Effectively in such a circumstance, the agent engaged in a conflict of interest thereby violating his fiduciary responsibility to his principal.

It is always aggravating to me to see attorneys representing the sales representative who draft agreements referring to the sales representative as a sales agent. One would think that the attorney should know the difference. This is important because when the sales representative is referred to as a sales agent then this gives the principal the opportunity to argue that the sales representative is a fiduciary which creates additional duties and responsibilities for the sales representative. Unfortunately, many of the judges who have decided these types of cases in the past have picked up on the misuse of the characterization of sales representatives and bad results have occurred.

Conflicts of Interest

Conflict of interest can also be a problem for sales representatives and many of my cases involve conflict of interest claims by the principal against the sales representatives. In almost all cases, the alleged conflict of interest is only a problem when it comes time to pay the sales representative. As a general rule, a sales representative who represents two principals who are competitors, can be engaged in a conflict of interest which may be actionable. The problem would occur when a sales representative discovers an opportunity which could be presented to more than one of his principals. A sales representative should never be in the situation where he or she is in a position to decide which principal should get such an opportunity. This is especially true when he has a financial incentive to send it to the principal who pays the higher commission.

The reality is that sales representatives almost never engage in true conflicts of interest. No buyer is going to want to deal with a sales representative who represents competitors. No principal is going to want to hire a sales representative who represents a competitor. It al-

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most never happens. Just because I can make an automotive part in my garage does not mean that I am a competitor to a multi-national automotive supplier. I typically advise my clients to disclose to their principals all of the other principals that the sales representative represents at the beginning of the relationship. Disclosure and consent is a defense to most conflict of interest claims.

Determining Liability

The reason why all of this is relevant to the issue of principals requiring sales representatives to carry liability and other types of insurance is that the root of the concern of the principal is that the principal may be liable for the actions of the sales agent taken during the course and scope of the sales representation relationship. This would include torts (civil wrongs such as auto accidents and other types of personal injury claims); product liability claims; and contracts which the sales representative may sign. The legal principal is that of *Respondiat Superior.* This is Latin for the principle that an employer (or principal) is responsible for the actions of its employee (or agent) committed during the course and scope of the employment (or representation). The reality is that most sales representative agreements contain a provision in the agreement similar to my agreements that the sales representative is not an agent of the principal but is an independent contractor. A principal is not liable for the actions of independent contractors because the principal or employer does not control the actions of the independent contractor.

The net result of all of this is that if the sales representative is an independent contractor and not an employee or true agent, then the principal would not be liable for the actions of its independent contractors. Thus there is no reason for the principal to require that the sales representative carry liability insurance; worker's compensation insurance; or product liability insurance. Most sales representatives carry these types of insurance but it is for their benefit and not for the benefit of the principal. The sales representative is an intermediary and not a party to any transaction between the principal and the customer and is therefore generally not liable to either the principal or the customer for defects in the parts or products. Further, if the sales representative is involved in an auto accident then the person injured in the accident would have no claim against the principal. The injured person's remedy would be against the sales representative.

Types of Requirements

These types of liability insurance requirements for sales representative in the principal's form sales representation agreement have no real basis in law or fact. If your principal wants you to sign a sales representation agreement with such a provision then you should consult your lawyer to see if he or she can try to get it excluded. Your lawyer would probably have a better chance of getting the principal's lawyer to remove the provision than you would.

MANA welcomes your comments on this article. Write to us at mana@manaonline.org.

Randy J. Gillary is an attorney and has been a member of MANA since 1991. He concentrates his practice in representing manufacturers' representatives in sales commission disputes. Gillary has been litigating sales commission disputes for more than 33 years. He is also the author of the definitive book for manufacturers' representatives entitled *Protecting Your Commissions—A Sales Representatives' Guide.* The book is available on Amazon.com or through his website at www.gillarylaw.com or by calling his office at (238) 528-0440.