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SALES REPRESENTATIVE AND DISTRIBUTORSHIP CONTRACTS IN ILLINOIS

Pursuant to Illinois common law and the general principles related to the freedom of contract, parties have broad discretion to negotiate contract terms, including the terms of sales representative contracts or distributor agreements. Illinois courts will generally enforce the terms of the parties' written agreements unless the terms are clearly against public policy or there is a problem related to contract formation. Because contracts for Illinois sales representatives and distributors will generally be enforced as written, the parties should negotiate the various terms in advance and detail the essential terms of the parties' relationship. In addition to common law contract principles, the legislature may enact additional requirements governing sales representative and distributor relationships. Specifically, contracts made between sales representatives and principals are governed by the Illinois Sales Representative Act ("ISRA"), 820 ILCS 120/1, *et seq.*

APPLICABILITY OF THE ISRA

The purpose of the ISRA is to protect the rights of independent sales representatives to receive timely commission payments. The ISRA is designated as a corollary to the Illinois Wage Payment and Collection Act ("IWPCA"), 820 ILCS 115, and is therefore interpreted broadly to protect the same workers who would be protected by the IWPCA but for their status as independent contractors. *See English Co. v. Northwest Envirocon, Inc.*, 278 Ill. App. 3d 406, 415 (2d Dist. 1996). Specifically, the ISRA requires that "[a]ll commissions due at the time of termination of a contract between a sales representative and principal shall be paid within 13 days of termination, and commissions that become due after termination shall be paid within 13 days of the date on which such commissions become due." 820 ILCS 120/2. To encourage compliance with this provision, the ISRA provides that a principal who does not conform to the statute "shall be liable in a civil action for exemplary damages in an amount which does not exceed 3 times the amount of the commissions owed to the sales representative" and the

principal “shall pay the sales representative’s reasonable attorney’s fees and court costs.” 820 ILCS 120/3. Therefore, it is important that written sales representative agreements require that commissions due at, or after, termination are payable within the thirteen (13) day period mandated by Illinois statute.

Under the ISRA, a principal includes any sole proprietorship, partnership, corporation or other business entity that (1) “manufacturers, produces, imports, or distributes a product for sale”; (2) “contracts with a sales representative to solicit orders for the product”; and (3) compensates the sales representatives by commission payments. 820 ILCS 120/1(3). Significantly, courts have limited the definition of “product” under the ISRA to tangible goods, not services. *English Co.*, 278 Ill. App. 3d at 415. A sales representative is defined as a “person who contracts with a principal to solicit orders and who is compensated . . . by commission.” 820 ILCS 120/1(4). A person has been defined to include a corporation under the ISRA. *M.S. Kind Assocs., Inc. v. Mark Evan Prods., Inc.*, 222 Ill. App. 3d 448, 450 (1st Dist. 1991). Notably, the statute specifically excludes one “who places orders or purchases for his own account for resale or one who qualifies as an employee of the principal pursuant to the Illinois Wage Payment and Collection Act” from qualifying as a sales representative. 820 ILCS 120/1(4).

EXEMPLARY DAMAGES AND ATTORNEYS’ FEES

Attorneys’ fees, costs, and exemplary damages are not recoverable at common law for breach of contract. *Installco, Inc. v. Whiting Corp.*, 336 Ill. App. 3d 776, 786 (1st Dist. 2002) (citing *Cirrincone v. Johnson*, 184 Ill. 2d 109 (1998)). Thus, fees, costs, and exemplary damages will not be awarded absent a statute or contract provision specifically providing for such an award. *Id.* (citing *Johnson v. Human Rights Comm’n*, 173 Ill. App. 3d 564 (1st Dist. 1998)). As previously referenced, the ISRA provides that a principal’s failure to pay the commissions due to a sales representative within thirteen days of termination, or thirteen days after commissions become due following termination, *shall* be liable for exemplary damages in an amount up to three (3) times the amount of the commissions owed and reasonable attorneys’ fees and costs. 820 ILCS 120/3. Despite this apparent mandatory order to award exemplary damages and attorneys’ fees, courts have interpreted this provision in a way that consistently awards attorneys’ fees but rarely awards the sales representative exemplary damages.

Courts have routinely refused to award exemplary damages under the ISRA “absent a finding of culpability that exceeds bad faith.” *Installco, Inc.*, 336 Ill. App. 3d at 784 (finding payment of untimely commission payments did not amount to willful or vexatious conduct and thus did not warrant exemplary damages). Despite the use of the mandatory language, “[n]o automatic award of exemplary damages is granted for every violation of the [ISRA].” *Id.* Further, the trial court’s decision not to award exemplary damages “will not be disturbed absent an abuse of discretion.” *Id.* Relying on principles of tort law, courts have reasoned that “the purpose of punitive damages is to punish and deter intentional or egregious conduct and must be awarded cautiously.” *Zavell & Assocs. v. CCA Indus., Inc.*, 257 Ill. App. 3d 319, 322 (1st Dist. 1994) (refusing to award exemplary damages where parties reached amicable resolution prior to the institution of the claim). Despite this analysis related to the award of exemplary damages, courts have found that attorneys’ fees and costs will be imposed based on the plain language of

the statute, and no showing of culpability is necessary. *Maher & Assocs., Inc. v. Quality Cabinets*, 267 Ill. App. 3d 69, 81 (2d Dist. 1994).

CHOICE OF LAW AND FORUM-SELECTION CLAUSES

Generally, a form-selection clause is *prima facie* valid and “should be enforced unless the opposing party shows that enforcement would contravene the strong public policy of the State . . . or that the chosen forum would be seriously inconvenient for trial.” *Maher & Assocs., Inc. v. Quality Cabinets*, 267 Ill. App. 3d 69, 74 (2d Dist. 1994). A party will not prevail on an inconvenience argument if both parties freely entered the agreement and contemplated such inconvenience in the event of a dispute. *Id.* at 75. Moreover, negotiations made at arm’s length by experienced and sophisticated parties should be honored and enforced unless there is a “compelling and countervailing reason” not to enforce the agreement. *Id.* Significantly, courts have determined that the ISRA “constitutes the legislature’s pronouncement that protecting sales representatives is fundamental public policy in Illinois.” *Id.* In reaching this decision, courts rely on the language used by the legislature in Section 2 of the ISRA, which provides, in relevant part, as follows: “Any provision in any contract between a sales representative and principal purporting to waive any of the provisions of this Act shall be void.” 820 ILCS 120/2. As a result of this interpretation, courts have found void forum-selection clauses in sales representative agreements.

Although choice of law provisions are related to forum selection clauses, the provisions remain distinct. Despite this distinction, Illinois courts have also invalidated choice of law provisions, presumably for public policy reasons. *See Maher*, 267 Ill. App. 3d at 76 (concluding that the matter must be determined under Illinois law “to avoid the absurd result of permitting this litigation to be brought in Illinois . . . and then requiring the application of Texas law, which has no statute or case law comparable to [the ISRA]”).

OTHER ISSUES

It is also important that parties entering distributor contracts be cognizant of the requirements of the Franchise Disclosure Act of 1987. 815 ILCS 705. The parties should be made aware of their obligation to register any franchise and to provide a disclosure statement to any prospective franchisee within fourteen days prior to the date of execution, or prior to the receipt of any such consideration, whichever occurs first. 815 ILCS 705/5. The form and content of the disclosure statement is governed by the Uniform Franchise Offering Circular Guidelines as adopted by the North American Securities Administrators Association, Inc. 815 ILCS 705/16.

In addition, distributor contracts may also be subject to the termination requirements of the Franchise Disclosure Act, which provide that a franchise may not be terminated prior to its expiration date without “good cause.” 815 ILCS 705/19. Section 19 of the Franchise Disclosure Act defines “good cause” as the failure of the franchisee to comply with any lawful provisions of the franchise or other agreement and to cure such default after being given notice thereof and a reasonable opportunity to cure such default, which in no event need be more than 30 days. *Id.* The Franchise Disclosure Act provides that the Attorney General Administrator may “suspend, terminate, prohibit or deny the sale of any franchise or registration of any franchise, or franchise

broker, or salesperson” based on their failure to comply with the Act. 815 ILCS 705/22. Both civil and criminal penalties may result from the violation of the Franchise Disclosure Act. *See* 815 ILCS 705/24-25.

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