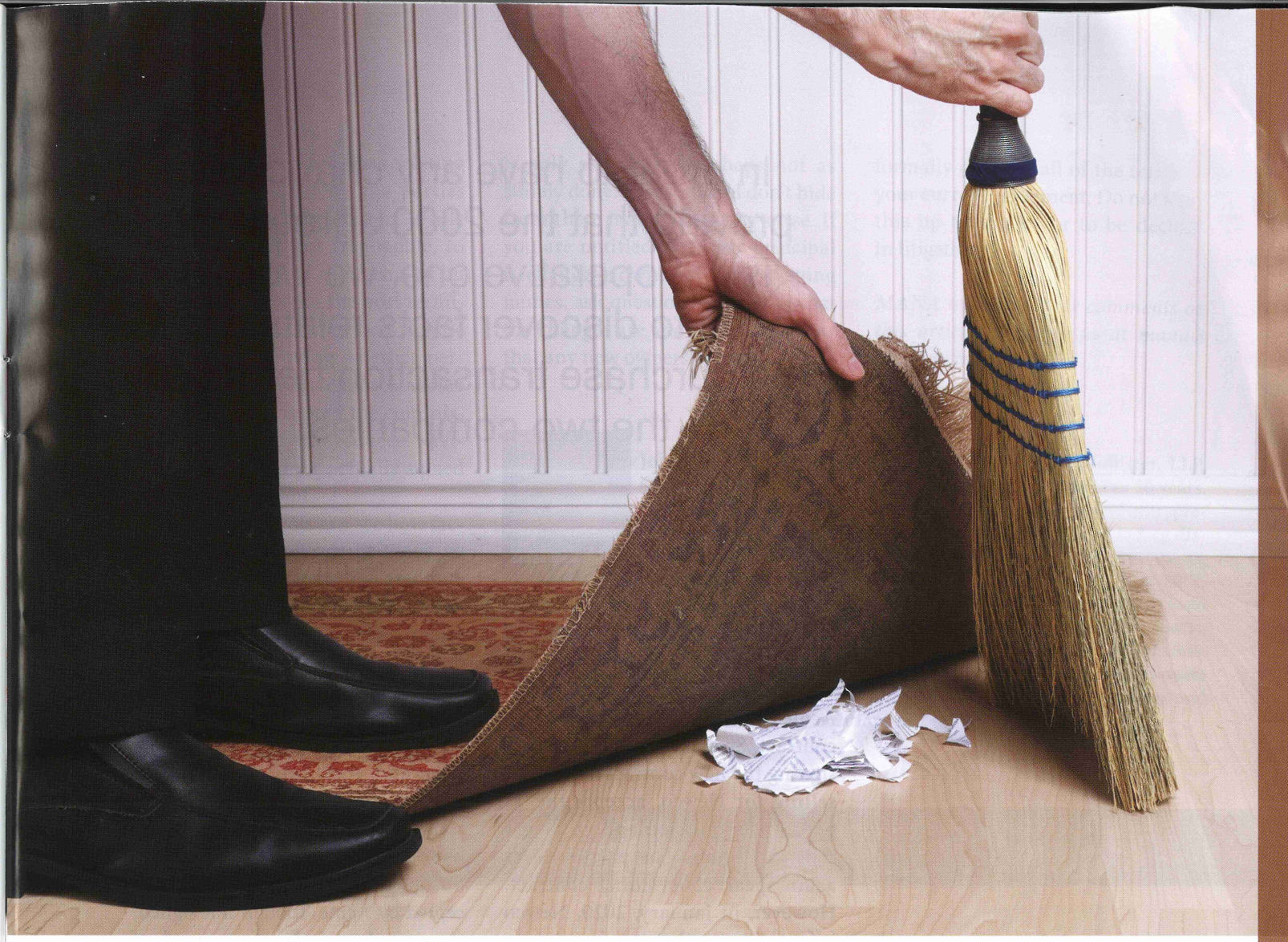
Your Principal Just Sold or Merged What About Your Sales Rep Contract?

BY JOHN RICCIONE

Lawyers who represent sales representatives often are faced with cases in which a sales rep has signed a sales rep agreement with a principal and then that principal goes through some change in ownership, either through a sale or merger, but the emerging principal may or may not be the same or continuation of the same company with which the rep originally signed a contract. Is the principal still bound by the terms of the original contract and, if not, what terms apply? Not surprisingly, when faced with such questions, we, lawyers, usually respond with: "It depends."

And when a lawyer answers a client's questions with those words, it means that not only is the applicable law important, but the facts are of greater importance. When a legal problem is factually intensive, litigating that case will typically be expensive because factual disputes must be resolved by trial. In contrast, purely legal ones may sometimes be resolved short of trial by motion. The following article will provide an example of this all-too-common scenario, explain the applicable law and factual issues to be resolved and offer some advice on how to avoid this scenario and save you money for things more satisfying to most people than litigation.

Scenario: In January, 2000, Acme



So Acme somehow avoids signing the new contract....

Sales Agency signed a sale representative agreement with Quality Products, Inc., which provided, among other things, that Acme would receive a 10 percent commission on goods sold, Acme would have an exclusive territory in the Midwest and if the parties' relationship ever terminated for any reason, Acme would be paid a post-termination lump sum of one month's average commission multiplied by the number of years of Acme's service.*

In 2005, Quality Products, Inc.'s owner wished to bring her children into the business, but she had MBE certifications and liabilities that she did not wish to disrupt, so her children formed a new company, Newco, LLC, which entered into an asset purchase agreement pursuant to which it purchased some, but not all, of the assets and liabilities of Quality. Newco offers Acme a new sales rep contract which provides among other things a higher commission rate, 11 percent, but de-

* Any similarities between this fact scenario and true events is merely coincidental and in such a circumstance this is not intended to be a substitute for actual legal advice or opinion on a solution.

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letes Illinois from Acme's previous territory and also deletes the post-termination lump-sum payment. Newco really wants Acme to stay on and continue selling the same products that Acme sold for Quality, but Acme does not wish to sign the new contract. So Acme somehow avoids signing the new contract but begins selling for Newco, accepts the 11 percent commission and no longer sells in Illinois. The parties never again speak about either contract. However, in January, 2020, Newco informs Acme that it is moving in a different direction and that path is without Acme. Acme is terminated. On its way out, Acme requests its 20-year lump sum payment. In reply, Newco says: "I have no idea what you are talking about."

The issue presented by this scenario is obvious: *Are the parties bound by the 2000 agreement, the 2005 agreement, or none of these?* In order to answer this question, we need to discover facts related to the following legal issues:

- Whether Newco purchased or was assigned the 2000 agreement pursuant to the terms of the asset purchase agreement between Newco and Quality; whether Newco can be said to have adopted the 2000 agreement by virtue of the fact that Newco is the alter ego or mere continuation of Quality Products, Inc.; or whether Newco "performed" the 2000 agreement and, therefore, accepted it by its performance.
- Equally important to the ultimate question above is whether the unsigned 2005 agreement was accepted by Acme, though not signed, through Acme's "performance" of its terms?

In order to have any chance at proving that the 2000 agreement is the operative one, we would need to discover facts relating to the purchase transaction between the two companies. Was it an asset purchase only, as opposed to a stock transfer, and if so, what assets were actually purchased? We would also want to know whether there was commonality of ownership, did they sell the same products, use the sale sales reps and otherwise look like a mere continuation of the former company, Quality?

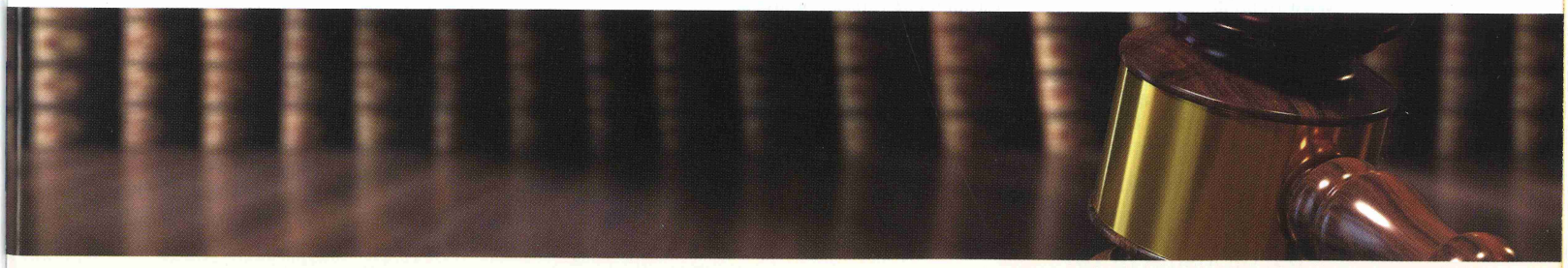
Speak up and don't hide from these issues when they arise.

Also important are facts relating to the performance by the parties after the 2005 transaction. While it is difficult, if not impossible, to "perform" many of the terms of an agreement especially the post-termination provisions, other facts may be important to proving whether performance equals acceptance. Acme seems to have accepted the commission change and the reduced territory, though it never actually signed the 2005 agreement.

Nonetheless, you can see how factually intensive solving the above dilemma can turn out to be and how the discovery, analysis and determination of facts in such a case are time-consuming. Unfortunately, generally, lawyers sell their time. So, how could this have been avoided? Simply stated; but perhaps not as simply done. Speak up and don't hide from these issues when they arise. If you are notified that your principal is changing ownership or changing names, ask questions. Find out what the changes are and make very clear that any new ownership or entity has formally adopted all of the terms of your current agreement. Do not leave this up to chance or to be decided in litigation.

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

John M. Riccione is partner in Taft Stettinus & Hollister, LLP, Chicago, Illinois, and has been a business litigator for over 30 years. His practice involves the representation of businesses and entrepreneurs in a wide array of complex commercial disputes, including distribution and manufacturers' representation agreements, real estate, construction claims, trade secrets, computer fraud and abuse, UCC warranties and remedies, and labor and employment. He has been named an Illinois Super Lawyer since 2005 and nominated by a *Fortune* 1000 client to BTI's Client Service All-Star Team, an honor extended to only 70 lawyers nationwide. He is a frequent speaker on the topics of alternative fee arrangements, non-compete agreements, commission disputes and Uniform Commercial Code warranties and remedies, to various trade and bar associations and client groups.



Legal Counseling

One of your benefits as a MANA member is a 30-minute consultation with an attorney known to us as being experienced and knowledgeable about the manufacturers' agency business and laws that govern rep-principal relationships.

The purpose of this short consultation is to enable you to get a quick answer to a general legal question. It is not intended for you to get specific legal advice or services such as a contract review or even a contract clause review.

The attorney you are speaking with will make the decision as to whether the consultation falls under the no-charge member benefit category or under a fee for service category. If the attorney believes the service is one you should be invoiced for, he should notify you and allow you to make the decision as to whether to proceed or not. Part of this notification would include the hourly rate and an estimate of the amount of time involved.

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