

LEGALLY SPEAKING

When is a sales representative not a sales representative?



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Akstrom Imports Inc. raised several interesting arguments in defense of the claims brought by Minnesota sales representative Kinneberg Management Group (KMG), including that, as a Canadian distributor, it was not subject to the jurisdiction of a Minnesota federal court. Even

if it was, Akstrom continued, Canadian law still controlled, not Minnesota's pesky sales rep statute.

But if Minnesota law did apply, Akstrom argued that KMG did not qualify as a "sales representative" within the meaning of the state's sales rep statute. Pulling out all the stops, Akstrom even raced to file its own lawsuit in Quebec, ahead of KMG's own filing. Not surprisingly, both KMG and the court took a different view.

The rep relationship

The relationship began in March 2020 when Akstrom signed Jennifer Olivero and her rep firm, KMG, to "develop and increase Akstrom's sales to Sam's Club and Walmart," and to "get new commitments, increase purchase agreements and purchase orders." In exchange, Akstrom agreed to pay KMG a 1 percent commission on all sales to Sam's Club and Walmart.

Under the parties' agreement, any disputes were to be governed by the law of Quebec. (The agreement apparently said nothing about where a lawsuit should be filed.)

KMG immediately began performing, and in the ensuing weeks, Akstrom made tens of millions in sales to Sam's Club and Walmart. By May, KMG invoiced Akstrom for \$221,082.40 in commissions due.

With sales now rolling in, Akstrom responded by terminating the agreement. Ignoring the strong performance, Akstrom claimed to have just discovered that Jennifer Olivero, whose services it had initially sought, was not permitted to call upon Sam's Club and Walmart.

Classic bad faith negotiations

Rather than rush into court, KMG's counsel wrote to Akstrom, seeking to work it out and threatening to file suit only if the amount owed was not paid. Akstrom's counsel responded that he would be away from the office for two weeks, and asked KMG's counsel to "keep this matter in abeyance until then."

Some discussions ensued, and on July 13, Akstrom's counsel scheduled a settlement conference with KMG's counsel for July 15. However, on July 14, Akstrom filed its own lawsuit against KMG in Quebec.

The Akstrom suit was for a “declaratory judgment.” Akstorm did not seek an affirmative recovery, but merely asked the Quebec judge to declare that no commissions were due. Upon discovering how Akstrom had strung out the negotiations to give it time to file first, KMG quickly brought its own action in St. Paul.

KMG’s claims were for breach of contract and under the Minnesota sales rep statute. Akstrom’s motion to dismiss first flexed its Canadian citizenship arguing that its contacts in Minnesota were so scant that it would be both unfair and unconstitutional for the court to exercise jurisdiction over it.

Minnesota, not Canada

Establishing jurisdiction is not a terribly difficult task, as this case demonstrated. In its decision entered earlier this year, the St. Paul federal judge denied the motion to dismiss and enumerated Akstrom’s various contacts in the North Star State.

Akstorm negotiated and entered into the rep contract with a Minnesota company and did so via phone and email with KMG in Minnesota. The termination of the contract also occurred in Minnesota when Akstrom sent a letter to KMG in Minnesota. Performance was due in Minnesota under the contract in that commission payments, had they been made, were to have been sent to a Minnesota bank account.

Disputing that it negotiated in Minnesota, Akstrom claimed it was only contracting for the services of Jennifer Olivero, who it conceded was a KMG employee, but noted was an Arkansas resident. As the court found, obtaining Olivero’s services “may have been Akstrom’s primary motivation for contracting with KMG,” but it negotiated with and contracted with KMG as a company. The evidence even showed that when Akstrom attempted to reach out to Olivero directly, she responded that any contract for her services must go through KMG.

Filing first is not always decisive

Seeking to vindicate its litigation strategy by exploiting the general legal rule that when two actions involving the same facts are filed in different courts, the action should only proceed in the court where jurisdiction first attached, Akstrom urged the Minnesota court to dismiss in favor of the Quebec forum.

The first-filed rule is not “rigid, mechanical, or inflexible,” and the court recognized that “exceptional circumstances” were present to render it inapplicable. Courts have found that when a party filing first has taken “misleading and egregious” actions, specifically including convincing the opposing party to delay its own filing, the rule should not apply.

Two “red flags” are recognized in the law to merit rejecting a first-filed approach: when the party filing first was on notice of the other party’s filing considerations, and when the suit filed first is for declaratory judgment. Because Akstrom’s actions “raise both red flags,” the court refused to follow the first-filed rule by deferring to the Quebec lawsuit.

The protections afforded reps in [Minnesota](#) get taken seriously

Relying on the contract term that states Quebec law governs any disputes, Akstrom argued that KMG could not invoke the Minnesota sales rep statute. From Akstrom’s view, this was a straightforward matter of following an unambiguous contract term agreed to by the parties in writing.

However, the Minnesota statute, like many state sales rep statutes, includes an anti-waiver provision that bars manufacturers from seeking to evade its terms by making a rep contract subject to the law of any other state or by calling for a waiver of any of its provisions. Accordingly, the choice of law provision was rendered unenforceable.

Akstrom’s fallback provision was that KMG had not shown it was a “sales representative” within the meaning of Minnesota’s rep statute. It claimed KMG was a mere liaison between Akstrom and its customers, Walmart and Sam’s Club, and was only to provide consulting services on orders and how to increase sales.

To qualify as a “sales representative” under the Minnesota statute, KMG had to show it entered into a contract “with a principal to solicit wholesale orders,” and that it “was compensated, in whole or in part, by commission.” The court readily found that KMG’s Complaint met both requirements.

By alleging “that KMG undertook to represent Akstrom as its sales representative at Walmart and Sam’s Club per the Agreement, and that it increased Akstrom’s sales to those companies as a result,” and that KMG was required to “develop and increase” such sales, “get new

commitments," and increase orders to purchase Akstrom's products, the Complaint adequately alleged KMG was charged with soliciting wholesale orders for Akstrom.

The Complaint also alleged that KMG was to be paid a commission of 1 percent on all sales to Walmart and Sam's Club. Thus, KMG had met the statutory definition of "sales representative," and Akstrom's effort to evade the statute by "trying to cast KMG's duties under the Agreement in a different light" was rejected.

As a result, KMG would get its day in court, or more likely, Akstrom will be forced to read the strong message sent its way and reconsider its decision to withhold the commissions duly earned and proceed in disregard of the protections afforded under Minnesota's strong rep statute.