

Evergreen Clauses: Are They Enforceable?

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From an agent's perspective, including evergreen clauses, which ensure continuing commission payments for the life of the customer, in its agreements with carriers and master agents seems like a good idea. But are they enforceable? As with most legal issues, that depends on many factors, including the contract language and the governing law.

Contract Language. An evergreen clause may extend agent commission payments and typically provide for continuing commission payments on agent-generated revenues following the expiration or termination of the agent agreement. In simple terms, and in our view, an evergreen clause simply means that as long as the carrier gets paid by a customer that the agent generated, the agent gets paid the commission to which he/she is entitled.

However, a typical evergreen clause in an agent agreement might state the following: *"Master will pay Agent a commission of ___% of gross billed monthly revenues for all services sold by Agent to XYZ Company."* This language leaves open as many questions as it answers. For example, it does not address how long the payment obligation lasts or in what, if any, circumstances the obligation would not apply. Thus, we recommend that language be added that makes it clear that the obligation to pay commissions is absolute, survives termination and continues for as long as the carrier receives payment from a customer acquired by the agent.

Of course, each evergreen clause is different and the terms vary by agreement. Generally, evergreen clauses pertaining to agent commissions should specify the terms under which the commission will be paid, including:

- the commission amount or percentage
- to whom it should be paid
- the items(s) or event(s) are tied
- whether the commission survives the termination of the agent agreement
- any exceptions
- notice requirements

In addition, non-commission-related terms such as those concerning termination are, and should be, separate from the agent's rights to his/her commissions and should not impact them. While termination generally allows the carrier not to take *new* business generated by the agent, it does not — and should not — impact the agent's right to commissions on *existing* business provided the agreement includes a properly-drafted evergreen clause.

Governing Law. There are many legal cases pertaining to evergreen clauses or "perpetual obligation" terms as they pertain to certain business transactions. For example, federal courts have ruled that evergreen letters of credit must be "clear and unequivocal." They also have upheld evergreen clauses in collective bargaining agreements. However, few, if any, cases have addressed evergreen clauses as applied to agent commission agreements. This either means that evergreen clauses have been well written and crystal clear; that they are incredibly one-sided and favor the carrier/master; or that agents don't have the time, will, desire or resources to take on well-heeled multinational corporations. Given the number of recent disputes regarding agent commission payments, we suspect that the lack of evergreen clause cases is a function of agents facing pro-supplier agreements and the prospect of protracted litigation to enforce the agent agreement.

To the extent that evergreen clauses include or may be considered to be automatic renewal or perpetual clauses, state statutes may govern them. In New York, for example, a statute prohibits automatic renewal of contracts for service to, or repair of, personal or real property unless the service provider notifies the other party of the auto-renewal provision 15 to 30 days before the termination notice is due under the contract. So far this statute has not been applied to professional services, although it has been used successfully to prohibit the automatic renewal of an answering service agreement. It is therefore critical to ensure that

evergreen clauses in agent agreements apply to professional services, such as generating customers, as opposed to the underlying telecommunications services.

In addition, an agent agreement including future perpetual interest could run afoul of state proscriptions against perpetual interests, or perpetuities. Agents should therefore ensure that they have an existing right to a commission, rather than a contingent right based on future undetermined or unidentified events. This means that the commission should be specific, tied to a particular metric or revenue stream, and it should specify the particular time period during which the commission will be paid, including whether it survives the termination of the agent agreement. A vague commission that is not tied to a particular metric, revenue stream or triggering event invites litigation and puts the agent's commission at risk. Evergreen clauses that are clearly drafted, unambiguous and precise as to their terms and scope have a better chance of surviving a legal challenge than those that are not.

Given that the enforceability of evergreen clauses as applied to agent agreements depends on many factors, they should be drafted and reviewed in advance by competent legal counsel. Clearly written, precise, unequivocal and unambiguous vested-interest evergreen clauses are clearly enforceable and they should be used to the extent possible to protect the agent's commissions. Vague and ambiguous evergreen clauses run the risk of being ignored or misunderstood and invite lengthy and costly litigation with an uncertain outcome.

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