

Michigan's Sales Representative Commission Act

A Primer

By Randall J. Gillary and Kevin P. Albus

The Michigan Sales Representative Commission Act was enacted in 1992 “to ensure that sales representatives are paid the commissions to which they are entitled, especially where those commissions come due after the termination of the employment relationship.”¹ We have dealt with lawsuits involving claims under the act since its inception; in this article, we share some advice for best practices in applying the act.

Most lawsuits we handle involve claims for unpaid sales commissions relating to the sale of production parts in the automotive industry. We have also litigated cases concerning the sale of computer software and hardware, building materials, consumer products, industrial tooling, office furniture, and other products. Most of the sales commission lawsuits we file include a claim for violation of the Sales Representative Commission Act. The act sets time limits for the payment of commissions to terminated sales representatives and imposes penalty damages on principals who intentionally fail to pay commissions within those limits.² The act also permits a prevailing party to recover reasonable attorneys' fees and court costs.³

Generally, a claim under the Sales Representative Commission Act represents only a small part of the work that is done in litigating a sales commission case. The bulk of the work focuses on the contractual issues supporting the claim for sales commissions.

Many disputes arise when the parties have failed to expressly set forth all the terms of their agreement, and it becomes necessary to turn to Michigan's procuring cause doctrine to resolve the commission dispute. The act only applies if it can be proven that there are earned sales commissions that have not been paid within 45 days after they became due once the contract or agreement has been terminated.

Analysis of a claim under the Sales Representative Commission Act begins with the definitions in the act. The key definitions are as follows:

- **Principal:** an individual, corporation, or other legal entity that “[m]anufactures, produces, imports, sells, or distributes a product” in Michigan, or that “[c]ontracts with a sales representative to solicit orders for or sell a product in” Michigan.⁴
- **Sales representative:** an individual, corporation, or other legal entity that “contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or in part, by commission.”⁵ Brokers and resellers are generally excluded from the definition of “[s]ales representative.”⁶
- **Commission:** “compensation accruing to a sales representative for payment by a principal, the rate of which is expressed

as a percentage of the amount of orders or sales or as a percentage of the dollar amount of profits.”⁷

When a contract between a principal and a sales representative is terminated, the act requires the principal to pay all commissions that were due at the time of termination within 45 days after the termination, and to pay any commissions that become due after the termination within 45 days after they become due.⁸ A principal who fails to pay commissions within the prescribed time limits is liable for the actual damages caused by failure to pay the commissions when due.⁹ A principal who is found to have intentionally failed to pay commissions within the prescribed time limits is also liable for penalty damages equal to two times the overdue commissions, not to exceed \$100,000.¹⁰

Can a fixed amount per piece be a commission?

One of the first issues to be considered when deciding whether to bring a claim under the Sales Representative Commission Act is whether the compensation sought by the sales representative comes within the act's definition of “commission.” The act generally requires that commissions be calculated as a percentage of sales or profits.

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The Sales Representative Commission Act can be an effective tool for sales representatives who have not been paid the commissions they are owed.

We have been involved in some cases where the parties agreed the commission would be calculated based on a fixed-dollar amount per individual automotive part sold rather than a percentage of the sale price for each part. At first blush, a fixed-dollar commission might not appear to meet the act's definition of commission, but an argument can be made for applying the act when the fixed-dollar amount was first calculated as a percentage of the selling price of the individual part in question. Often, the calculation of a fixed-dollar amount as compensation for the sale of a specific part is done for administrative convenience.

Due date for payment

Determining the due date for payment of commissions can also be an issue under the act, especially if there is no express language in the sales representation agreement indicating when the commissions are due. This problem is addressed in subsection 3 of the act, which provides that if the time when commissions are due cannot be determined from the contract, the past practices of the parties control.¹¹ If there are no past practices, the custom and usage in the industry in Michigan should control.¹² This has never been an issue in our cases, primarily for the reason that by the time a case gets to trial, the commissions are long overdue under pretty much any method of determining the due date.

"Actual damages"

Another issue that can arise under the act is what constitutes "actual damages" under subsection 5(i). We have taken the position in past cases that actual damages includes any damages proximately resulting from the failure to pay the sales commissions within the time limits set by the act. Theoretically, this could include the cost of borrowing money to replace the unpaid sales commissions and other related damages.

In one case we handled, the bank called in our client's line of credit after the principal stopped paying commissions that were running at the rate of approximately \$1 million per year. The bank's rationale was that our client's accounts receivable were

impaired because the commissions were not being paid. This nearly led to our client's filing for bankruptcy protection. The case ultimately settled after we won an arbitration award of \$6.5 million.

In another case, the principal withheld the payment of more than \$1 million in commissions for the sale of software after our client's New Jersey lawyer sent a letter demanding that the principal comply with the agreement regarding the payment of commissions. After receiving the letter, the principal attempted to change its termination of our client from one "without cause" to one "with cause." The principal's withholding of the more than \$1 million in commissions along with the litigation delay caused our client to lose his summer home and incur significant out-of-pocket expenses.

While we did not obtain a specific recovery for actual damages in either of these cases, we did include actual damages in our claims, and this possibility of enhanced damages helped us maximize the amounts awarded to our client. In one case, we obtained an award of 100 percent of the commissions owed plus penalty damages and full attorneys' fees calculated on a contingency fee basis in accordance with the agreement with our client. There is no caselaw addressing subsection 5(i) of the Sales Representative Commission Act, but it is a potential weapon in the arsenal.

MSC settles issue of "intentional"

Turning to the act's penalty damages provision in subsection 5(ii), a principal's claim that commissions were withheld due to a "good faith dispute" does not provide a defense to an award of penalty damages. This was a hotly contested issue in the early years after the act became law. The Michigan Supreme Court resolved the issue definitively in *Kenneth Henes Special Projects v Continental Biomass Industries, Inc.*¹³ which held that the act does not require evidence of bad faith before penalty damages may be imposed.

We represented the plaintiff in the *Henes* case. After we won the jury trial and while the case was on appeal in the Sixth Circuit Court of Appeals, we wrote a law-review

article contending that the Sales Representative Commission Act should be construed according to its plain language, and that no requirement for bad faith should be read into the act.¹⁴ The Sixth Circuit certified the issue to the Michigan Supreme Court, and the Michigan Supreme Court cited our article in its decision, holding that "intentional" means intentional and does not require a showing of bad faith.¹⁵

Once it has been determined that a principal has failed to pay commissions within the time limits prescribed by the act, an award of penalty damages is virtually automatic. The only real defense is "inadvertence" or "oversight."¹⁶ Inadvertence or oversight is a difficult argument for the principal's attorney to make after a lawsuit has been filed and sales commissions remain unpaid for more than 45 days.

Attorney fees

Subsection 6 of the act allows a "prevailing party" to recover reasonable attorneys' fees and court costs.¹⁷ A prevailing party is defined as one "who wins on all of the allegations of the complaint or on all of the responses to the complaint."¹⁸ The attorneys' fee provision is thus a double-edged sword. There have been times when we have decided against including a claim under the act when we believed a case could go either way. Sometimes, the risk is not worth the reward. Our client must make this decision. We note that we have never had a case where our client has been ordered to pay the opposing parties' attorneys' fees under subsection 6 of the act.

Choice of law

Another issue that can arise under the Sales Representative Commission Act is whether Michigan law or the law of another state is to apply. Sales representation agreements often include provisions mandating the application of another state's law. Subsection 8 of the act states that "[a] provision in a contract between a principal and a sales representative purporting to waive any right under this section is void."¹⁹ We have had mixed results arguing that application of the law of another state that does

not have a sales commission act is effectively a violation of subsection 8.

Final thoughts

We believe the most important advice for practitioners handling sales commission disputes is to have a thorough understanding of the client's business, especially the process of obtaining orders or sales. The intricacies of the manner in which sales are obtained by a representative can be complicated. It is important to have a good understanding of the client's business and the customs and practices in the industry at issue. Other resources we have authored may provide helpful information on litigating commission cases.²⁰

In conclusion, the Sales Representative Commission Act can be an effective tool for sales representatives who have not been paid the commissions they are owed. It is important to take into consideration the benefits and potential risks of the act before including a claim for violation of the act in a complaint for past due sales commissions in the event of a termination. ■



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ENDNOTES

1. *Walters v Bloomfield Hills Furniture*, 228 Mich App 160, 164; 577 NW2d 206 (1998).
2. MCL 600.2961(4) and (5).
3. MCL 600.2961(6).
4. MCL 600.2961(1)(d).
5. MCL 600.2961(1)(e).
6. *Id.*
7. MCL 600.2961(1)(a).
8. MCL 600.2961(4).
9. MCL 600.2961(5)(i).
10. MCL 600.2961(5)(ii).
11. MCL 600.2961(3).
12. *Id.*
13. *Kenneth Henes Special Projects v Continental Biomass Indus, Inc*, 468 Mich 109; 659 NW2d 597 (2003).
14. See Gillary & Albus, *Michigan's Sales Representative Act Revisited—Again—or, Does "Intentionally" Mean "In Bad Faith"?*, 2001 L Rev Mich St U Det C L 965 (2001).
15. *Henes*, 468 Mich at 109, 114.
16. *Id.* at 118.
17. MCL 600.2961(6).
18. MCL 600.2961(1)(c).
19. MCL 600.2961(8).
20. Gillary, *The History of the Procuring Cause Doctrine in Michigan*, 74 Mich B J 1264 (1995); *Michigan's Sales Representative Act Revisited*; Gillary & Albus, *Unsupportable Limitations on Michigan's Procuring Cause Doctrine in the Case of Roberts Associates, Inc v Blazer International Corp*, 2004 Mich St L Rev 101 (2004); Gillary, *Protecting Your Commissions: A Sales Representative's Guide* (Troy: R. J. Law Publishing, LLC, 2003); articles written by Randall J. Gillary for *Agency Sales Magazine*, a publication of the Manufacturer's Agents National Association.

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