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MICHIGAN'S SALES REPRESENTATIVE ACT REVISITED

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Effective June 29, 1992, the Michigan Legislature enacted the Michigan Sales Representative Act [1] (the "act" or "section 2961") authorizing courts to award "sales representatives" up to $100,000 in double damages, in addition to actual damages, where their "principal" has intentionally failed to pay commissions. [2] Section 2961 applies to both employees and independent contractors, [3] and provides for an award of reasonable attorney fees and court costs to the prevailing party. [4] The act also requires that commissions due at the time of the termination of a sales representative's contract be paid within 45 days of termination and that post-termination commissions be paid within 45 days of their due date. [5]

Section 2961 is anything but a model of draftsmanship. Echoing early criticism of the act, [6] a United States District Court this year described the statute as "one of the most haphazardly and inartfully drafted pieces of legislation that it has ever been called upon to review." [7] The court further stated that
[t]here is no stated scope of the statute, nor any specific declaration of applicability or intent. Further, numerous terms critical to an informed understanding of the legislation are left completely underfined, and several provision are, at best, ambiguous and susceptible to differing interpretations as they can be read in both the conjunctive and disjunctive. [8]

In the eight years since its enactment, courts have made only modest progress in clarifying the act. Although the Michigan Court of Appeals appears to have laid to rest early questions about the act's constitutionality [9] and helped to clarify the construction of the act's attorney fees provisions, [10] important issues remain unsettled.

The single most controversial unresolved issue concerns the standard for an award of double damages. A second open issue is whether the act covers sales representatives who sell intangibles such as advertising, insurance, or real estate. This article discusses these issues and others, and canvasses recent case law developments.

DOUBLE DAMAGES

The act's double damage provision is triggered "[i]f the principal is found to have intentionally failed to pay the commissions when due." [11] Representatives and principals have differed sharply on the interpretation of the intentionality requirement. While representatives argue that only volition is necessary to satisfy the requirement, principals contend that something in the nature of bad faith, such as willfulness, must be shown. The act's legislative history, such as it is, can be read to support contrary constructions. Three legislative analyses were prepared in connection with the act. [12] All three describe the rationale for the act as follows:

Regardless of geographic territory or type of product sold, after the business relationship between a wholesale sales representative and a principal (e.g., a manufacturer or distributor) has been terminated, many sales representatives reportedly experience difficulty in recovering commissions they have earned. This can happen, for example, when a delay in the delivery of goods delays payment of the commission, although the commission actually accrued to the sales representative at the time the sale was made. Apparently, to recover a commission, a sales representative often must sue in the domicile of the principal, and bear the added costs of attending depositions and trial in another state. Knowing that recovery through the courts can be a costly and time-consuming proposition that many sales representatives would wish to avoid, some principals allegedly withhold earned commissions, thus forcing sales representatives either to accept distress settlements (i.e., a portion of their earned commissions not yet received) or to forgo the remuneration completely. To ensure that sales representatives receive the commissions to which they are entitled, it has been suggested that prompt payment of post-termination commissions, ***1533** *and penalties for failure to make the payment, be statutorily mandated.* [13]
The analyses also state:

The bill would help ensure that wholesale sales representatives receive the sales commissions to which they are entitled, and upon which they depend for income, without having to resort to expensive and time-consuming lawsuits ... the provision for awarding double damages in the event of noncompliance should deter recalcitrant principals from failing to pay earned commissions. [14]

At least one court has read these legislative "tea leaves" to mean that the double damage provision is not intended to be punitive. In *M&C Corporation v Erwin Behr GMBH & Co, KG,* [15] the defendant challenged an arbitrator's jurisdiction to grant double damages on the grounds that such damages were punitive and thus beyond the scope of the submission.

The Sixth Circuit Court of Appeals, however, held that such damages were "compensatory in nature," reasoning that "the legislative history ... reveal(s) that the statute was indeed an attempt by Michigan lawmakers to compensate sales agents for goodwill and other assets lost that would be difficult to quantify in a dispute." [16] While the court in *M&C Corporation* did not decide the issue of the standard for double damages, the court's logic implies that proof of bad faith or willfulness should not be required.

To date, there is only one published decision that construes the double damage provision. In *Kenneth Henes Special Projects Procurement v Continental Biomass Industries, Inc,* [17] the United States District Court for the Eastern District of Michigan discussed the issue at length, but in the end failed to shed much light on the issue. [18]

In *Henes,* the defendant principal sought a new trial on the grounds that, among other things, the court had failed to properly charge the jury on double damages. The defendant requested that the court give an instruction defining an "intentional failure to pay" as meaning "that Defendant knew a commission was due and chose not to pay it." [19] The court, however, tracking the language of the act, merely instructed the jury that it should award double damages if the "principal is found to have intentionally failed to pay commissions." [20]

The defendant in *Henes* argued that the June 15, 1992 SFA analysis expressed an intention that an element of bad faith be required for an award of double damages. The court rejected that argument, finding "nothing" in the analysis to support it. The court also relied on the holding in *M&C Corporation* that the double damage provision was intended to be compensatory and not punitive. [21] In the end, the court concluded that it was unnecessary to provide the jury with a specific definition of the term "intentional." [22]

The *Henes* case has been appealed, and presumably the Sixth Circuit will soon decide this interesting and somewhat confounding issue. Indeed, construing the double damage provision in an analytically satisfying manner is not easy. Representatives can reasonably argue that "intentional" should be construed to mean simply that the failure to pay was voluntary and conscious and not inadvertent. They can argue that if the Legislature meant to require a finding that the principal knew it was violating the contractual rights of the representative, it would have used the term "willful." Representatives can point to the clear import of the holding in the *M&C Corporation* case as strongly supportive of their position. Further, representatives can argue that their proffered construction of the double damage provision is consistent with the remedial [23] nature of the statute and its inclusion in the Revised Judicature Act. [24]

***1534** On the other hand, principals can forcefully argue that it is unfair to impose double damages when a principal in good faith believed that its representative had no contractual right to a commission. Principals can argue that the references in the legislative materials to "penalties," "recalcitrant principals," and so on, reflect a legislative intent to require a showing of something in the nature of willfulness. They can argue that the *M&C Corporation* case is not on point inasmuch as that the holding concerned the vacating of an arbitration award (a disfavored action) and that the court's conclusion that the act's double damages are compensatory is strained. [25]

How Michigan courts will ultimately construe the act's double damages provision remains to be seen. In any event, however, a principal who anticipates a commission dispute with its representative should, prior to cessation of payment, take steps to create a record of its good faith. Such steps may even include paying commissions into escrow and/or commencing a declaratory judgment action and seeking to pay the commissions to the court.

THE ACT'S COVERAGE

The act defines a "sales representative" as a commissioned salesperson retained by a "principal for the solicitation of orders or sale of *goods*." [26] The act defines a "principal" as a person who either "[m]anufactures, produces, imports, sells, or distributes a *product* in this state" or "[c] ontracts with a sales representative to solicit orders for or sell a *product* in this state." [27] The act's use of the term "goods" has encouraged principals who sell intangibles to argue that they are not covered by the act. [28]

At least one Michigan court, in an unpublished decision, has held that the act applies to the sale of intangibles. In 1998, the Kent County Circuit Court held in *Smith v Kramer Entertainment Agency, Inc*, [29] that the Michigan Sales Representative Act covers commissions earned by selling anything resulting from intellectual or physical effort, as well as tangible goods. [30]

More specifically, in *Kramer*, the sales representative was a booking agent who sued an entertainment agency over unpaid commissions. The defendant entertainment agency argued that the act does not apply to commissions earned on intangibles. The court, however, rejected the defendant's argument, noting that the phrase in the statute that
includes the word "goods" also refers to "the solicitation of orders." MCLA 600.2961 (1)(3); MSA 27A.2961 (1)(e). Orders can be solicited for other than inanimate objects. More significantly, the other sentence in the definition of "sales representative" does not use the word "goods," but the word "product," and, in two other places in the statute, the word "product" again appears ... (and) the word "goods" does not appear again. [31]

Quoting *Webster's Dictionary*, the court stated that "in common parlance, the word 'product' is not limited to objects. A product is anything 'compose[d], create[d] or [brought] about by intellectual or physical effort."' [32] Accordingly, the court concluded that "unless something in it says otherwise, the [act] extends beyond commissions earned by selling items, but includes commissions earned by selling anything resulting from intellectual or physical effort." [33]

Reasoning that an ambiguous statute "must [be] interpreted" in accordance with its underlying purpose, [34] the court concluded that "[t] o limit the [act] to tangible items leaves many sales representatives unprotected from the very kind of misconduct that the statute seeks to deter." [35]

ATTORNEY FEES

The act provides that "[i]f a sales representative brings a cause of action pursuant to this section, the court shall award to the prevailing party reasonable attorney fees and court costs." [36] The act's definition of a "prevailing party" is curiously drafted. It defines a "prevailing party" as "a party who wins on all the allegations of the complaint or on all of the responses to the complaint." [37] Read literally, this definition is at odds with the realities of modern-day pleading practice as specifically sanctioned by Rule 2.111(A)(2) of the Michigan Court Rules, which provides for pleading in the alternative.

Recognizing this readily apparent point, the Court of Appeals recently gave little consideration to the argument that a sales representative, who prevailed on his Sales Representative Act claim, should not be awarded attorney fees because he failed to prevail on his alternative theories of liability. In *H.I. Tucker and Associates, Inc v Allied Checker and Engineering Co*, [38] the plaintiff pled a variety of claims, but prevailed only on his breach of contract and Sales Representative Act claims. [39] The court upheld the award of attorney fees, stating "[d]efendant's construction of the statute is too narrow and would defeat the purpose of MCR 2.111(A)(2)." [40]

THE NON-WAIVER PROVISION

The act contains a "non-waiver" provision. Section 2961(8) states that "[a] provision in a contract between a principal and a sales representative purporting to waive any right under this section is void." The apparent intent of this subsection is to prevent principals from contractually neutralizing the act's double damage and attorney fee provisions or negotiating a reduction in post-termination commissions at the time that the relationship between the principal and the representative is terminated.

In *Walters v Bloomfield Hills Furniture*, [41] the Michigan Court of Appeals indicated that the reach of the provision may be considerably broader. In *Walters*, the plaintiff was an employee who entered into an oral agreement with the defendant furniture ***1535** store in February 1994 to sell furniture and to be compensated solely by commission, with payment contingent on delivery. In May 1994, the owner of the store had the plaintiff sign a letter in which he agreed that upon the termination of his employment he would not be paid any commissions on furniture sold but not delivered as of the date of termination. In August 1995, the plaintiff quit his job and then sued the defendants, seeking commissions on sales delivered after his separation.

The trial court granted summary disposition to the defendants, holding that the plaintiff's oral agreement had been modified by the May 1994 letter agreement. The lower court rejected the plaintiff's Sales Representative Act claim, pointing to the section of the act providing that "[t]he terms of the contract between the principal and sales representative shall determine when a commission becomes due." MCLA 600.2921; MSA 27A.2921.

The Court of Appeals reversed, ruling that under the parties' original oral contract, the plaintiff was entitled to post-termination commissions. After noting that the act conferred a right on sales representatives to receive post-termination commissions within 45 days of their due date, the court held that the May 1994 letter constituted a waiver of the plaintiff's right to post-termination commissions, which he would have been entitled to under the parties' oral agreement. [42]

Defense attorneys question the logic and implications of the *Walters* decision. Construing the May 1994 letter as a waiver of the plaintiff's right to receive post-termination commissions when they are due seems strained and circular. As indicated, the act expressly recognizes that the parties' contract determines when a commission is due. [43] In *Walters*, the defendant proposed a

modification of its employment agreement with the plaintiff, and the plaintiff signed it and continued working for the defendant. At that juncture, it would seem that as a matter of contract law post-termination commissions were no longer due.

Nevertheless, given the unusual facts of the case, the Court of Appeals appears to have reached an equitable result. Walters was an employee whose compensation was based solely on his commissions. Under the May 1994 letter, he could not quit his job without forfeiting much or all of his compensation for the last several weeks or perhaps months of his employment. Understandably, the Court of Appeals was reluctant to sanction such an arrangement. Presumably, the *Walters* decision will be limited to its singular facts and will prove to be an unimportant precedent. In the meantime, a principal who wishes to modify a commission agreement with respect to post-termination commissions should proceed cautiously.

CONTRACTUAL CHOICE OF LAW PROVISIONS

In *Howting-Robinson Associates, Inc v Bryan Custom Plastics*, [44] the United States District Court for the Eastern District of Michigan, in disregarding the choice of law provision in the parties' sales representative agreement contract, held that Michigan law rather than Ohio law governed the parties' dispute over commissions. The court reasoned that (a) Michigan had a more substantial relationship than Ohio to the matter and (b) application of Ohio law, which the court mistakenly assumed did not provide for similar rights as the Michigan Sales Representative Act, [45] would be contrary to a "fundamental policy" of Michigan law as expressed in its Sales Representative Act.

The court's analysis, although flawed by its error regarding Ohio law, seems generally correct, at least compared to states that do not afford their sales representatives protections similar to those in Michigan.

RETROACTIVE APPLICATION

Recently, in *Flynn v Flint Coatings, Inc*, [46] the Court of Appeals, in a split decision, held that the act may be applied retroactively to claims that accrued prior to its passage. The court held that a plaintiff was entitled to seek the remedies provided by the act, despite that his relationship with his principal had terminated and his claim had accrued in 1990—two years prior to the passage of the act. The plaintiff filed his lawsuit in 1991. The court concluded that the act could be applied retroactively because it did not create new obligations or impose new duties but merely "alters the remedy available to plaintiffs who have been denied their justly earned commissions." [47]

CONCLUSION

As is evident, there remain important open issues arising from this heavily litigated statute. Assuming the case does not settle, practitioners can look to the Sixth Circuit Court of Appeals decision in the *Henes* case to clarify the standard for an award of double damages—the most significant unresolved Sales Representative Act issue.

Footnotes

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1 1992 PA 125; MCL 600.2961; MSA 27A.2961.

2 MCL 600.2961(5)(b); MSA 27A.2961(5)(b).

3 MCL 600.2961(1)(e); MSA 27A.2961(1)(e).

4 MCL 600.2961(6); MSA 27A.2961(6).

5 MCL 600.2961(4); MSA 27A.2961(4).

6 Saylor & Acomb, *Michigan Sales Representative Statute*, Michigan Bar Journal, February 1994 at 208.

7 *Kenneth Henes Special Projects Procurement v Continental Biomass Industries, Inc*, 86 F Supp 2d 721, 728-729 (ED Mich 2000).

8 *Id.*

9 Questions concerning the constitutionality of the act were first raised in 1993, when United States District Court Judge George Woods held the act to be unconstitutional under the Title-Object Clause of the Michigan Constitution. *Kingsley Assoc v Moll Plasticrafters, Inc*, 1993 US Dist Lexis 17614 (ED Mich, October 23, 1993). The Sixth Circuit Court of Appeals, however, reversed. *Kingsley Assoc v Moll Plasticrafters, Inc*, 65 F3d 498, 507-508 (CA 6, 1995); see also *Terry Barr Sales Agency, Inc v All-Lock Company, Inc*, 96 F3d 174, 182 (CA 6, 1996). In 1999, the Michigan Court of Appeals addressed the question in *H.I. Tucker and Associates, Inc v Allied Checker and Engineering Co*, 234 Mich App 551, 560; 595 NW2d 176 (1999), *Iv app den*, 461 Mich 944; 607 NW2d 722 (2000). In an opinion written by a panel that included now Supreme Court Justice Markman, the court held the act constitutional.

10 *H.I. Tucker and Associates, Inc, supra* at 560.

11 MCL 600.2961(5)(b); MSA 27A.2961(5)(b).

12 The legislative materials available on the act consist of an April 30, 1992 Senate Fiscal Agency ("SFA") Analysis of Bill 717, as passed by the Senate, a May 21, 1992 House Legislative Analysis Section Analysis of Bill 717, with Senate and House committee amendments, and a June 15, 1992 SFA Analysis of Bill 717. The SFA Analyses expressly state that they do not "constitute an official statement of legislative intent." However, courts may look to such analyses for guidance. *See Webster v Secretary of State*, 147 Mich App 762, 766 (1985).

13 *Id.*

14 *Id.*

15 87 F3d 844 (CA 6, 1996).

16 *Id.* at 850.

17 86 F Supp 2d 721 (ED Mich 2000).

18 The *Henes* court also treated the question whether the $100,000 cap on double damages applies to each unpaid commission or to all intentionally withheld commissions in the aggregate and held that the act contemplates an aggregate award only. 86 F Supp 2d at 735.

19 *Id.* at 731.

20 *Id.* at 730.

21 *Id.* at 731.

22 However the Sixth Circuit ultimately defines the term "intentional," the plaintiff in *Henes* will face a challenge in persuading the court to sustain the district court's decision to read the statutory language to the jury and leave it at that. The district court's support for this approach seems confusing and open to question. The district court reasoned that case law routinely equates "intentional" with "willful" and *Webster's Dictionary* equates "intentional" with "voluntary." The court then concluded that "given that the jury was instructed to use its 'general knowledge and experience' in evaluating the evidence, and given that the accepted definitions of the term 'intentional' equates that term with the terms 'willful and voluntary,' the court's instruction ... was sufficient." *Id.* at 732-733. However, among other things, the court's assertion that case law equates the terms "willful" and "intentional" is questionable. "Willful" misconduct is typically defined as involving a knowing violation of one's legal duties. See *United States v Gregory*, 124 F3d 200 (CA 6, 1997),

cert denied, 522 US 1083, 118 S Ct 869, 139 L Ed 2d 766 (1998) (defining "willfulness" as the "voluntary, intentional violation of a known legal duty"). Yet, the instruction that the district court refused to give (i.e. "the intentional failure to pay means that the defendant knew a commission was due to the Plaintiff and chose not to pay it") seems to capture the essence of willfulness.

23 Arguably, case law providing that social legislation regulating workplace relations should be read broadly to assure that such legislation's purposes are served has application to the Sales Representative Act. See e.g. *Dunlop v Carriage Carpet Co*, 548 F2d 139, 144 (CA 6, 1977) (adopting an expansive interpretation of the term employer to effectuate the "broad remedial purposes" of the Fair Labor Standards Act); *United States v Silk*, 331 US 704, 712 (1947) (stating "[a]s the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the (statute's) phrasing by the courts would not comport with its purpose"); *NLRB v Hearst*, 322 US 111 (1944) (stating, with regard to the National Labor Relations Act, that the terms "independent contractor," "employee," and "employer" are not to be construed in their common law sense when used in federal social welfare legislation).

24 MCL 600.102 provides that the Revised Judicature Act "is remedial in character, and shall be liberally construed to effectuate the intents and purposes thereof."

25 Principals can also contend that when Michigan courts have construed ambiguous or unclear statutory double damage provisions in the past they have readily imposed a requirement of willfulness. See e.g., *Federal Gravel Co v Detroit & Mackinac Ry Co*, 263 Mich 341; 248 NW 831 (1933) (construing MCLA 462.19; MSA 22.38) and *Heath v Alma Plastics Co*, 121 Mich App 137; 328 NW2d 598 (1992) (construing MCLA 408.393; MSA 17.255(13)).

26 MCL 600.2961(1)(e); MSA 27A.2961(1)(e) (emphasis added).

27 MCL 600.2961(1)(d); MSA 27A.2961(1)(d) (emphasis added).

28 Such principals may also argue that the decision of the Legislature to exclude sellers of commercial real estate from the act's coverage supports their position. In particular, the April 30, 1992 SFA Analysis indicates that the original version of Bill 717 as passed by the Senate defined a "Sales Representative" as "a person who contracts with or is employed by a principal for the solicitation of orders or sale of goods or commercial real estate ...." April 30, 1992 SFA analysis of Bill 717 at 2. The House Labor Committee amended Bill 717 to delete the reference to commercial real estate. May 21, 1992 House Legislative Analysis Section Analysis at 2. The May 21, 1992 House Legislative Analysis Section's explanation of the change arguably lends a degree of support to the claim that the act was not intended to cover intangibles. The section stated, "[s]ellers of commercial real estate fall into an entirely different category of 'sales representative' than the type of sellers meant to be protected under the bill and, thus, should be dealt with apart from this bill." *Id.*

29 Case No: 96-10193-CK (Kent Cty Cir Ct, Sept 11, 1998).

30 But see *Holland v. Graves Publishing Co*, Civil Action No. 97-40083 (ED Mich, May 6, 1998), in which the District Court for the Eastern District of Michigan held that a representative who sold advertising was not covered by the act because she did not "deal in goods."

31 *Kramer Entertainment Agency*, *id.* at 2.

32 *Id.*

33 *Id.*

34 *Id.* at 5, quoting *Warren Police Assn v Warren*, 89 Mich App 400, 403 (1979).

35 *Id.* at 5.

36 MCL 600.2961(6); MSA 27A.2961(6).

37 MCL 600.2961(1)(c); MSA 27A.2961(1)(c) (emphasis added). Bill 717, as first passed by the Senate defined a prevailing party as a "party who won on the entire record." April 30, 1992 SFA Analysis at 1. The House Labor Committee amended the bill to define "prevailing party" as a party who won "on all the allegations of the complaint or on all of the responses to the complaint." May 21, 1992 House Legislative Analysis Section Analysis at 2.

38 234 Mich App 551, 560; 595 NW2d 176 (1999), *lv app den* 461 Mich 944; 607 NW2d 722 (2000).

39 *Id.* at 572, n 9.

40 *Id.* at 562. The *Tucker* court's construction of the act's attorney fees provisions is supported by the Sixth Circuit Court of Appeals decision in *Kingsley Associates, Inc. Id.* at 501, 506. There, the plaintiff prevailed before the jury on its breach of contract claim, but not on its unjust enrichment claim. After reinstating the jury's verdict on the grounds that the trial court had erroneously held the act unconstitutional in response to a post trial motion, the court instructed the lower court to award attorney fees to the plaintiff. Although the Sixth Circuit did not explain its award of attorney fees, the fact that it granted attorney fees to the plaintiff, despite its failure to win "on all the allegations of the complaint" supports the *Tucker* court's common sense treatment of the issue.

41 228 Mich App 160, 577 NW2d 206 (1998), *lv app denied*, 459 Mich 943, 590 NW2d 64 (1999).

42 228 Mich App at 166.

43 MCLA 600.2962(2); MSA 600.2962(2).

44 65 F Supp 2d 610 (ED Mich 1999).

45 See Ohio Rev Code § 1335.11.

46 230 Mich App 633 (1998), *lv app gtd* 459 Mich 991; 595 NW2d 845, case closed 603 NW2d 262 (1999).

47 *Id.* at 638.

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