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In My Defense: The Author on the 25th Anniversary of the Michigan Sales Representative Commission Act

By Dave Honigman and Jordan B. Segal[1]

"[T]the Court examines first the language of the statute. In this regard, the Court finds this statute to be one of the most haphazardly and inartfully drafted pieces of legislation that it has ever been called upon to review."[2]

It has been said that an actor should never read his own reviews. Indeed, nobody likes to be criticized; least of all by a jurist of Judge Gerald Rosen's stature. In his ruling in *Kenneth Henes Special Projects Procurement, Mktg v Continental Biomass Indus,* Judge Rosen described the Michigan Sales Representative Commission Act (the "MSRCA")[3] as "haphazardly and inartfully drafted," and he suggests that the Legislature revisit the statute to cure the interpretive difficulties he confronted. As the law's primary sponsor and author (albeit subject to editing by my Senate and House colleagues and the Governor), I took his comment on the chin—as an actor might do upon reading a bad review of his performance in a play. Yet now, twenty-five years since its passage, a review of the decisions both in Michigan and elsewhere regarding the MSRCA (and its analogs) show that Judge Rosen's concerns proved to be largely unnecessary. As intended, the MSRCA has promoted the necessity for parties of commissions contracts to be bound, notwithstanding the many incentives to dishonor such obligations and has been a valuable protection to ensure timely payment to sales representatives, who are often at a practical disadvantage in disputes with principals.

This article will review the construction and interpretation of the MSRCA and take stock of how the law, now twenty-five years old, measures up to the author's, the Michigan Legislature's, and the Governor's original intentions. It will discuss Michigan courts' evolving interpretation of the MSRCA with regard to: (1) the enhanced damages and fee shifting provisions; (2) whether the principal's conduct must be in bad faith, or merely "intentional" to trigger the statute's enhanced damages/penalty provision; (3) whether the law applies to out-of-state principals who have sales representatives in Michigan; (4) the types of transactions to which the MSRCA applies; and (5) the MSRCA's anti-waiver provision. Finally, this article will review Judge Rosen's criticisms, and will argue that the courts have overwhelmingly interpreted the law as its creators intended.

The Michigan Sales Representative Commission Act: Purposes and Principles

Compensation and Deterrence

The law itself is quite simple: a principal must pay his sales representatives all commissions due at the time of termination of the sales commission agreement or thereafter within 45 days of when such commissions become due. If the principal intentionally fails to do so, he is liable for the actual damages, plus a penalty equal to two times the amount of the unpaid commissions (up to a cap of $100,000) and reasonable attorneys' fees and court costs.

The primary feature of the law is its enhanced damages and fee provision.[4] Simply put: ordinary contract damages do not fully compensate a sales representative when a principal has broken his promise to pay a commission. Ordinary contract damages are inadequate in this context because prosecuting commission claims can be uniquely difficult.

In the sales commission context, post-termination sales enjoyed by a principal are frequently procured by a former sales representative before termination. Sales representatives are often entitled to product commissions over the life of a sales contract and commissions on those sales often extend beyond the life of the commission contract. These post-contract termination sales are frequently difficult to unearth or establish except through discovery.

Without enhanced penalties for concealing these commissions, the utilitarian calculus favors promise breaking and concealment of the contract breach. If principals pay the commissions they wrongfully retain only when they are caught, and keep the proceeds the rest of the time, then principals have a perverse incentive to wrongfully retain commissions. Similarly, if victims recoup only the ordinary contract damages (i.e. the amount of the commissions due, and no more) *and* face the burdens and uncertainties of the legal process plus the costs of their own counsel, then victory will not make them whole. The shortfall may mean that victims will not vigorously investigate and litigate. As Judge Posner noted: "[i]f, because of concealability, the probability of being punished for a particular…violation is less than unity, the prospective violator will discount (i.e. multiply) the punishment cost by that probability in determining the expected punishment cost for the violation."[5] Thus, enhanced statutory damages and fee shifting are critical to produce proper incentives.

Because of the concealability of future commissions, the likely cost for not disclosing and paying commissions is severely discounted in favor of the unscrupulous principal. Thus, civil suits may be deterred where an aggrieved plaintiff must invest a great deal of time and money to prove his claim and the financial reward for successful prosecution of the claim is not sufficiently large. No rational prospective plaintiff would invest in prosecuting a suit, if the expected costs (including financial costs, opportunity costs, and the distraction and diversion of time and emotional resources) exceed the anticipated recovery. In other words, justice is a mirage if civil remedies do not take into account the costs of and obstacles to seeking relief.

The Sanctity of Promise and Equality Before the Law

Public purposes are served by statutes like the MSRCA, and litigation to enforce those statutes uphold the sanctity of promise keeping. Viable free markets and the culture of voluntary exchange are based on widely shared expectations that promises can be relied on and, when broken, the state will umpire disputes and enforce promises. In addition to the sanctity of promise keeping, another public purpose which undergirds the enhanced damages remedy and is served by the MSCRA is the principle that the rich and the poor are equal in the eyes of the law and ought to have an equal opportunity to seek legal redress. The double damages $100,000 maximum remedy, along with the statute's fee shifting provision, express the State's commitment to the principle that wealthier and more powerful parties to contracts will be held to account for their promises to the relatively weaker parties to contracts.

Even though society's faith in the integrity of free markets and the system of voluntary exchange may be seriously damaged by the cumulative injury wrought by rampant promise breaking by more powerful and wealthy parties to contracts, the damages to an individual victim of such promise breaking is frequently too small to warrant hiring an attorney to sue on the victim's behalf. There can be no free market if only wealthy victims of promise breaking have access to the courts to obtain relief. Enhanced damages and fee shifting not only encourage the enforcement of promise keeping in a general sense, but are often necessary to permit ordinary people to have any access to the machinery of the State that enforces promise keeping in commercial trade.

Work compensated by commission for a profitable outcome rather than payment for time spent without regard to the outcome is, by definition, compensation deferred until the outcome manifests itself days, months and sometimes years after the work is performed. Sales representatives frequently cultivate sales over months and years, travel large distances to cultivate potential customers, incur entertainment expenses, invest in samples, models, demonstrations, and marketing materials, and painstakingly build relationships for the benefit of their principals. These and other investments, including administrative overhead (copying, telephones, computers, and the like) are costs that sales representatives are frequently required to pay out of pocket. These large, sunk costs make a sales representative inherently vulnerable to extortionate demands by principals who refuse to pay commissions even though the principal knows that the commissions have been earned and should rightfully be paid. Faced with the total loss of a large investment the sales representative has made over a long period of time in the form of unpaid commissions and a recalcitrant ex-principal, the cessation of at least one stream

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of future income from at least one principal (or many principals in the case of a retiring sales representative), principals frequently withhold commissions they know are earned and due to induce sales representatives to accept a distressed settlement or, especially in the case of a vulnerable sales representative with modest resources who is owed a relatively small amount of money relative to the cost of litigation, even to forego remuneration entirely. To avoid paying commissions, principals have a financial incentive to commit opportunistic terminations of sales representatives just prior to the consummation of sales procured by the sales representative.

Clarity of Draftsmanship

If the meanings of contract terms are clear, parties need consume few resources to adjudicate their meaning. On the other hand, if the meanings of contract terms are ambiguous, parties must consume a great deal of resources to establish their meaning. A contracting party with modest resources is less able to afford protracted litigation involving a contract with ambiguous terms than a wealthy party. Indeed, the weaker party may only be able to afford to enforce a contract whose terms are clear. In many cases, principals bully sales representatives into accepting less money than they are entitled to, because sales representatives often can ill-afford to pursue protracted litigation. Principals are usually the primary drafters of sales commission agreements and they usually possess superior resources relative to sales representatives. In the absence of multiple damages and fee shifting, principals are therefore incentivized to draft agreements with ambiguous terms, because ambiguity favors the more powerful party to a bargain. If litigation becomes mired in a swamp of warring interpretations of multiple, fuzzy contract terms dictating, for example, when sales commissions are due, the amount of the sales commissions, whether the agreement provides for the payment of a "commission" at all, or whether there is even an enforceable contract, summary disposition is not available. In that event, parties—usually the sales representative—who cannot afford to consume substantial resources to adjudicate those issues are at a disadvantage.

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Multiple damages and fee shifting change that calculus. Their presence incentivizes the drafting party to be clear about when commissions are due and how they are calculated. Because double damages and fee shifting empower sales representatives to enforce promises and they raise the costs of promise breaking by principals, that motivates principals to state the terms of their promises with clarity. It is no wonder that passage of the MSRCA led to the publication of advice by corporate law firms to avoid vague commission agreements. In one case, a law firm advised its clients that "[t]he bottom-line is that such agreements should be as specific as possible. The more ambiguous an agreement is, the more likely it is that the provisions of the SRCA—with its harsh remedies—will come into play."[6] Indeed, the statute encourages principals to express sales representatives' duties and rights with clarity, because ambiguity opens the door to a double damages remedy plus fee shifting whenever a judge or jury concludes that the principal breached a contract clause whose meaning is disputed.

Jurisprudence of the MSRCA: A Review of MSRCA Litigation Over the Last Twenty-Five Years

The Ten-Year War Over Statutory Damages and Their Conditions Precedent

Over time, and with not too many missteps, the courts correctly divined the Legislature's intent by focusing on the plain meaning of the statute's language and ultimately refusing to be sidetracked by lobbying by litigants—both sales representatives and principals—to rewrite the law to favor their interests. The courts correctly declared that the statutory penalty was neither as dreadfully large as principals initially feared and sales representatives hoped, nor did the statutory language sharply limit the availability of what turned out to be the anything-but-annihilating double damages/$100,000 maximum penalty as sales representatives initially feared and principals hoped. In other words, the courts arrived at the more temperate interpretive destination contemplated by the statute's drafters and did so by carefully studying the map that the Legislature and the Governor left behind—the words of the statute and the legislative history. Although the courts did not arrive at the right destination in an uninterrupted straight line and without losing their way on occasion, over a series of decisions they correctly divined both the size of the statutory penalty and the scope of its application, which were crafted to reflect a restrained balancing of interests and to put in place incentives and tools that have proven to be effective and well-tailored to achieve the ends the Legislature intended—to effectively bind contracting parties to their promises, to reliably fulfill the expectations of transacting commercial parties, to encourage due consideration and prudent reflection before entering into sales commission agreements, to promote clarity in the language of such agreements, and to encourage the just and efficient adjudication of disputes concerning such agreements.

The early cases following the enactment of the MSRCA into law tested both the maximum extent of the statutory penalty, and the conditions that must be satisfied to trigger any statutory penalty at all. The two issues were frequently raised together because the threat of a large statutory penalty motivated anxious principals to argue that the statute sharply restricted the circumstances under which the enhanced penalty in excess of actual damages was available. These principals and some courts alternatively called the MSRCA remedies "a heavy penalty against violating principals,"[7] "double damages," "treble damages," and "triple commissions and attorney fees," and commentators characterized the statute as "scary," "harsh," and even a fearsome "dragon" (and comically depicted as spewing fire).[8]

Thus, the earliest cases involving the MSRCA frequently questioned whether the statutory penalty (and its cap) applied to each unpaid commission, or to all unpaid commissions in the aggregate. Many plaintiffs argued that the MSCRA requires that an additional $100,000 maximum statutory penalty is to be exacted for each and every unpaid commission. If these plaintiffs were right, then a principal who wrongfully withheld 20 commissions in the amount of $60,000 each would be liable to his victim sales representative for actual damages in the amount of $ 1,200,000 ($60,000 x 20 = $1,200,000), plus a $2 million ($100,000 x 20 = $2 million) statutory penalty, which equals a $3.2 million total award. The penalty under that interpretation of the statute amounts to 167 percent of the unpaid commissions due the sales representative. Such an interpretation would indeed make the statute "scary" to principals.

On the other hand, if the $100,000 maximum statutory penalty applies once to unpaid commissions in the aggregate and not separately to each unpaid commission, then the penalty is far from fearsome. Under this rendering of the statute, the recalcitrant principal above would owe his former sales representative actual damages in the amount of $1,200,000 ($60,000 x 20 = $1,200,000), plus a $100,000 statutory penalty, which equals a $1.3 million total award. The penalty under this interpretation of the statute amounts to 8% of the unpaid commissions due the sales representative.

Before it was settled that $100,000 capped the aggregate penalty that a sales representative could collect from a principal, principals feared that the statute might permit a penalty up to $100,000 for each and every unpaid commission. Thus, principals were understandably desperate to avoid the imposition of such large penalties. As a result, advocates for principals championed strained statutory constructions that, if adopted by courts, would radically limit the circumstances under which a failure to pay commissions would trigger the ostensibly additive statutory penalty. They argued that an "intentional" failure to pay means a "bad faith" failure to pay, or, more specifically, that "Defendant knew a commission was due to the Plaintiff and chose not to pay it."[9] In other words, when principals feared that courts might construe the statute to permit the awarding of cumulative penalties amounting to millions of dollars in addition to actual damages as well as attorneys' fees and costs, they went to great lengths to avoid the MSRCA statutory penalty by arguing that a refusal to pay is not "intentional" if the principal reasonably and in good faith disputes any element of the sales representative's MSRCA claim, including: (1) the date when the sales representative claims commissions are due, (2) the amount that the sales representative claims is due, (3) that commissions are called for in the contract, or (4) that a contract has been formed.

Over time, court decisions revealed that the gnashing of teeth about ostensibly large statutory penalties by lawyer-commentators in the initial years following the statute's enactment was unnecessary. The courts uniformly rejected the more severe construction of the double damages provision urged by plaintiff sales representatives and declared that the statutory penalty was, in fact, calculated in the aggregate—the cap of $100,000 applies to the total statutory penalty and is not a "per-commission" cap of $100,000. This construction of the statute was consonant with my personal intentions regarding the

> Over time, and with not too many missteps, the courts correctly divined the Legislature's intent by focusing on the plain meaning of the statute's language and ultimately refusing to be sidetracked by lobbying by litigants[.]

The court also rightfully rejected the relevance to statutory construction of speculation about whether the Legislature intended the double damages provision to be compensatory or punitive.

meaning of the statute and, as best as I can remember, the intentions of my colleagues. While it is impossible to know if my understanding was universally shared by my colleagues, to my knowledge not even one legislator expressed a diverging interpretation over the course of the law's enactment or thereafter.

With this issue resolved, the courts quickly, and correctly, dispensed with defendants' attempts to read into the law a "good-faith" safe harbor. Under the MSRCA, a principal is liable for enhanced damages in excess of actual damages when he has "intentionally" failed to pay a commission when due. In *Henes*, the defendant principal requested a new trial, claiming that the court had erred in refusing the principal's requested jury instruction defining "intentional failure to pay" to mean that "Defendant knew a commission was due to the Plaintiff and chose not to pay it." The trial court ruled that it had not erred by failing to define "intentionally" to require bad faith. It had neither misinstructed nor confused the jury by simply parroting the language of the statute and instructing the jury to award double damages if the "principal is found to have intentionally failed to pay commissions."[10] The trial court concluded that even though it did not assist the jury in understanding "intentionally" by further defining it, the instruction created no prejudicial error because "intentionally" is defined in the dictionary and is commonly understood by ordinary men and women who serve on juries to mean "willful and voluntary," which is the meaning the Michigan Legislature intended. In addition to its dictionary definition and common-understanding rationales, the trial court also arguably based its holding—a voluntary, non-accidental failure to pay a commission is sufficient to trigger MSRCA double damages; "bad faith" is not a prerequisite—on the "'compensatory' nature of the double commissions provision."

While defendant's appeal was pending in the Sixth Circuit Court of Appeals, the Michigan Supreme Court issued *Frank W Lynch & Co v Flex Techs Inc*.[11] In *Lynch*, which addressed the MSRCA's retroactivity, the Michigan Supreme Court stated that "the [M]SRCA clearly serves a punitive and deterrent purpose,"[12] and the MSRCA was "indisputably punitive, not compensatory."[13] Those statements arguably contradicted the *Henes* trial court's conclusion regarding the compensatory nature of the MSRCA.

Observing that "the Lynch opinion did not indicate what specific intent standard applies and the appeal turns on what level of intent is needed to invoke the double-damages provision,"[14] the Sixth Circuit certified the following question to the Michigan Supreme Court:

> What standard is appropriate in evaluating the mental state required for double damages under the Michigan Sales Representative Commission Act?[15]

The Michigan Supreme Court answered that good faith is not a safe harbor from MSRCA double damages and that a principal who deliberately fails to pay a commission when due is liable for double damages under the statute even if the principal did not believe, reasonably or otherwise, that the commission was owed. "The clear and unambiguous language of the statute penalizes intentional failure to pay, without regard to the motivation of the principal. … The only cognizable defense to a double-damages claim is if the failure to pay the commission were based on inadvertence or oversight."[16]

In contrast with the U.S. District Court's view of the statute as beset with ambiguities, the Michigan Supreme Court held that the language of "the statute is clear, there is no ambiguity that would permit or justify looking outside the plain words of the statute."[17] To aid its goal of construing the term "intentionally" in accordance with its ordinary and generally accepted meaning, the court looked to the dictionary definition of "intentional" as "done with the intention or on purpose; intended."[18] The court concluded that "nothing in the generally accepted meaning of the word leads to the inference that a good faith belief on the part of the principal precludes recovery."[19]

In *Henes*, and in many instances, the defendant-principal argued that (1) because the purpose of the enhanced damages provision is punitive, and (2) because courts and legislators typically require some sort of wrongful intent before punishing a civil defendant, the MSRCA enhanced damages must require some sort of wrongful intent or bad faith.

The court also rightfully rejected the relevance to statutory construction of speculation about whether the Legislature intended the double damages provision to be compensatory or punitive. The court noted—commendably from this former legislator's point of view—that there is no need to resort to legislative history or to speculation about legislative purpose based on that history because the language of the MSRCA is unambiguous.

The Judicial Interpretation of "Principal"

A good deal of MSRCA litigation addresses the question "who is a Principal" under the statute. Section 2961(1)(d) defines "Principal" as a person that does either of the following:

> (i) Manufactures, produces, imports, sells, or distributes a product in this state.
>
> (ii) Contracts with a sales representative to solicit orders for or sell a product in this state.[20]

This definition was the very issue that Judge Rosen was facing when he described the law as "inartfully drafted." He writes:

> [A]lthough the Court finds the first definition of the term in § 2961(1)(d)(i) to be reasonably clear—i.e., a "principal" is a person who manufactures, produces, imports, sells or distributes a product in Michigan—the Court can envision several plausible constructions of subsection (ii) due to the string of four prepositional phrases and the obviously *inartful* placement of the last prepositional phrase "in this state" within § 2961(1)(d)(ii).[21]

Thus, Judge Rosen wonders, whether the location of the contract or the principal makes the principal subject to the law. He continues:

> As written, subsection (ii) states that a principal is a person who "[c]ontracts with a sales representative to solicit orders for or sell a product in this state." One could read this subsection with the phrase "in this state" modifying the verb "contracts." As such, the statute would apply to a principal who enters into a contract in Michigan with a sales representative who may or may not be based in Michigan. Under this view, it would be the place of contracting that governs. However, one could also read this subsection with "in this state" describing the situs of the sales representative with whom the principal has contracted. Under this construction, the statute would apply to sales representatives who have their businesses based in Michigan, regardless of the place of contracting. Or, one could read "in this state" as modifying the product sold by the sales representative (or the product for which the sales representative solicits orders). Under this interpretation, the statute would apply if orders were solicited in Michigan or the product was sold in Michigan.[22]

The court resolved the ambiguity by resorting to (1) a core purpose of the statute that it deduces from the legislative history and (2) the rule against surplusage. According to the bill analysis, prepared by the Senate staff, the rationale for enacting the sales representative statute was to protect Michigan sales representatives and "to ensure that they would timely receive payment for commissions earned by them. . . regardless of geographic territory or type of product sold."[23]

> The remedial intent of the law, as Judge Rosen noted, was to protect Michigan sales representatives.

Along with the legislative purpose derived from the legislative history, the court also relies on the *rule against surplusage* to construe section (1)(d)(ii). (See endnote 2 for the full statutory text.) A basic principle of statutory interpretation is that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed."[24] A statute should be construed so that "effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant…"[25]

The rule against surplusage in combination with the legislative history are, at least here, more probative of legislative intent than the *rule of the last antecedent* (the canon of construction that a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows)[26]—the rule of statutory interpretation advocated by the defendant. Judge Rosen doesn't seem to be aware that the defendant-principal's argument was premised on this grammatical canon known as the rule of the last antecedent and that courts should assume, *if possible*, that a legislative drafter writes in accordance with the rules of grammar. Applying the rule of the last antecedent to section (1)(d)(ii), and ignoring all other canons of statutory construction would yield the conclusion that "in this state" modifies either (1) "solicit orders for or sell a product" or (2) "sell a product." This interpretation would at most permit the statute to apply only if orders were solicited in Michigan or the product was sold in Michigan. Judge Rosen astutely observed that the defendant's

If the MSRCA applies, its anti-waiver provision forbids principals and sales representatives from contractually opting-out of its requirements and liabilities.

interpretation would render subsection (ii) to be duplicative of subsection (i) and, therefore, superfluous, thereby violating the rule against surplusage—that statutes should be construed "so as to avoid rendering superfluous" any statutory language:

> To read the statute as Defendant CBI suggests construing the phrase "in the state" in both parts (i) and (ii) of (2) 2961 (1) (d) as calling for application of the statute only when the sale occurs in Michigan would render subsection (ii) duplicative of subsection (i). As Defendant CBI acknowledges, the Legislature is presumed to have had a purpose in mind in inserting every clause in the statute here, the court presumes that, by subdividing the statutory definition of "principal," the Legislature intended to delineate separate and distinct occasions when the statute would apply, i.e., one when a sale (or production) of a product occurs in Michigan in one when a contract is entered into with the sales representative in Michigan to procure orders or to sell goods on the principal's behalf.[27]

Although it does not label it as such, the court effectively adopts the rule against surplusage and rejects the rule of the last antecedent as its primary interpretative canon. It, therefore, reaches the correct conclusion: the application of the statute is not intended to be limited by the place where the sales representative solicits the order or sells a product. Consequently, the court ruled that the MSRCA applies where "a sale (or production) of a product occurs in Michigan and [] when a contract is entered into with a sales representative in Michigan to procure orders or to sell goods on the principal's behalf."[28] Thus, Judge Rosen was able to appropriately read the statute, using the judicial interpretive tools at his disposal. Michigan state courts have applied the same analysis.[29]

Judicial Interpretation of "Sales Representative"

The remedial intent of the law, as Judge Rosen noted, is to protect Michigan sales representatives. The statute defines a "sales representative" as "a person who 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."[30]

Admittedly, there exists a discrepancy between what should have been mirror-image definitions of *principal* and *sales representative*. A principal is one who either "[m]anufactures, produces, imports, sells, or distributes a product in this state" or who "[c]ontracts with a sales representative to solicit orders for or sell a *product,*"[31] whereas a sales representative is employed by a principal "for the solicitation of orders or sale of *goods.*"[32] Colloquially, "goods" and "products" are used interchangeably, but the difference in statutory language has created some confusion. For example, in two separate cases, *Klapp v United Ins Group Agency*[33] and *Mahnick v Bell Co,*[34] decided approximately two months apart, the Michigan Court of Appeals decided that some "products"—insurance policies (*Klapp*) and construction estimator services (*Mahnick*)—are not "goods" for which commissions are subject to the MSRCA.

In *Mahnick,* the plaintiff sued the defendant construction company for (among other causes of action) MSRCA violations. As a project estimator, plaintiff estimated the cost of completing a construction project on which defendant intended to bid. Plaintiff's estimate served as the basis of a bid submitted by defendant on competitively bid construction projects. According to plaintiff, defendant agreed to pay plaintiff a regular salary, plus a "bonus" of four percent of project revenues generated by plaintiff that exceeded $600,000.[35] The Michigan Court of Appeals held that the "SRCA is inapplicable to the employment relationship between plaintiff and defendant because plaintiff was not a salesperson who sold 'goods,' and defendant did not produce, sell, or distribute a 'product,' as we interpret those terms as used in the act."[36] Central to the court's analysis was the dictionary definitions of the words "product" and "goods":

> The word "product" is defined as "a thing produced by labor," "the totality of goods or services that a company produces," and "material created or produced and viewed in terms of potential sales." Random House Webster's College Dictionary (2001), p. 1055. "Goods" are defined as "possessions, esp[ecially] movable effects or personal property" and as "articles of trade; merchandise." … Here, applying the fair and natural import of the SRCA's use of the terms "goods" and "product" to the facts of this case, we find that plaintiff, as a project estimator, was not engaged in soliciting for

> the order or sale of goods on behalf of the defendant.[37]

Because construction estimation is a "service," and not a "good," the plaintiff was not a "sales representative" as defined in the statute. Similarly, in *Klapp v United Ins Group Agency*, the Michigan Court of Appeals looked to the UCC definition of "goods" to determine that insurance policies were not "goods" and so an insurance salesman, paid on commission, could not maintain an action under the MSRCA.[38] The courts correctly held that the MSRCA does not apply to sales representatives who sell intangibles or services. However, the boundary between goods and services can be murky, especially the boundary between intangible goods and services.

Opting-Out of the MSRCA

One of the primary features of the MSRCA is its anti-waiver provision, which states "a provision in a contract between a principal and a sales representative purporting to waive any right under this section is void."[39] Such provisions are common in consumer protection statutes and in federal and state blue sky and securities regulations.[40] The intention of the anti-waiver provision should be clear, and is entirely consistent with the law's purpose: the principal cannot contract around the requirements of the law by foisting abusive contract clauses on its sales representatives. Although law is sparse on the anti-waiver provision in the MSRCA, in other contexts, statutory anti-waiver clauses are an important tool that prevents powerful companies from defrauding consumers. If the MSRCA applies, its anti-waiver provision forbids principals and sales representatives from contractually opting-out of its requirements and liabilities.

In *Howting-Robinson Assocs v Bryan Custom Plastics*, the Eastern District of Michigan federal court considered whether a choice of law clause in an employment contract that allows the contracting parties to opt-out of Michigan law, including the MSRCA, is void.[41] The court held that a choice of law clause in a sales commission agreement that selected Ohio law as governing was unenforceable, because "Ohio law contains no such protection or provision. In this case, the parties have selected, through their choice of law provision, a jurisdiction in which there is a substantial erosion of the quality of protection that the [MSRCA] would otherwise provide."[42] Thus, the court held that the choice of law clause would deprive the plaintiff of the protection of Michigan's law safeguarding sales representatives. Here, the court correctly understood that the MSRCA imposes certain mandatory statutory requirements for principals who do business within the state of Michigan: they must pay their sales representatives what they owe and in a timely manner. Parties cannot contract around this obligation, whether by attempting to select a different state's laws as governing or otherwise.

However, it should be noted that some courts have enforced choice of law clauses where the chosen state law is *similar, but not identical,* to the MSRCA. Shortly after the *Bryan Custom Plastics* case was decided, Ohio enacted Ohio Rev Code § 1335.11, which amended Ohio's sales representative commission statute so that it was a lot more like the MSRCA than it was when the *Bryan Custom Plastics* case was decided.[43] Thus, in 2012, because of the change in the Ohio law, the Western District of Michigan came to a different conclusion than the Eastern District in *Bryan Custom Plastics*.[44] In *Volunteer Energy Servs, Inc*, the Western District Court held:

> *[A]fter Howting-Robinson and Johnson were decided, Ohio enacted a statute that provides for relief comparable to the [M] SRCA*.… In light of the comparable Ohio statute, application of Ohio law would not be contrary to Michigan public policy. Accordingly, any action for commissions owed under the contract must be predicated on Ohio law in accordance with the parties' choice of governing law in the Agent Agreement.[45]

Thus, if a choice of law clause is at issue in a sales commission case, whether the chosen state has enacted a MSRCA analog may well be the decisive factor. A principal *may*, therefore, be able to choose a state law that provides for relief comparable to the MSRCA, but it cannot evade the core requirements of Michigan's sales commission statute altogether.

Or can it?

In *Reicher v SET Enters*,[46] the court held that the MSRCA's anti-waiver provision does not apply to a settlement agreement waiving a sales representative's rights under the MSRCA:

> [T]he [M]SRCA provides that "[a] provision in a contract between a principal

A principal *may*, therefore, be able to choose a state law that provides for relief comparable to the MSRCA, but it cannot evade the core requirements of Michigan's sales commission statute altogether.

> and a sales representative purporting to waive any right under this section is void." MCL 600.2961(8).
>
> By its plain language, this prohibition against waiving rights under the [M]SRCA applies only to a contract between a principal and a sales representative. We conclude, therefore, that by its clear intent and import, the [M]SRCA prohibition applies only to waivers contained in sales representation contracts. In the present case, the release or waiver is contained, not in a sales representation contract, but rather in the settlement agreement.[47]

The court is not only wrong—it is *very* wrong. The purpose of the anti-waiver provision was to prevent principals with superior resources from extorting waivers from vulnerable sales representatives, and forcing them to accept distress settlements. The statutory language, the statute's structure as a whole as well as the relationship between its constituent provisions, and the legislative history all argue for a conclusion contrary to the one the court reached.

Unfortunately, the Michigan Court of Appeals has opened a good-sized door to evasion of the statute's application by improperly cabining the reach of the statute's all-important anti-waiver provision.

Confirming the statutory purposes that an ordinary reader would infer from the language of the statute itself, both the Senate and House of Representatives staff analysis of Senate Bill 717 declare that a core purpose of the statute is to prevent exactly what the *Reicher* court allows when it ignores the statute's absolute prohibition against *any* contract provision waiving the MSRCA rights of a sales representative or a principal:

> 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, which forces sales representatives either to accept distress settlements (i.e., a portion of their earned commissions not yet received) or forego 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, and penalties for failing to pay them, be statutorily mandated.[48]

The analysis of the legislative staff goes on to state that "a provision in the contract between a principal and the sales representative purporting to waive any right under the bill would be void."[49]

Unfortunately, the Michigan Court of Appeals has opened a good-sized door to evasion of the statute's application by improperly cabining the reach of the statute's all-important anti-waiver provision. The court's strained interpretation creates an exit door from MSRCA liability that a principal may be able to open simply by disputing any term of the agreement, such as the time when a commission is due, the amount of a commission, or which items entitle the sales representative to a commission when sold. To constitute a "settlement agreement" of the sort that the Court believes is necessary to overcome the MSRCA's blanket anti-waiver provision, it is not clear if such a "settlement agreement" waiving MSRCA rights must be made while litigation is pending, or merely threatened, or simply looming unspoken as it always is as soon as any term of the original sales commission contract becomes the subject matter of disagreement. In *Reicher*, the agreement waiving MSRCA rights (and amending the initial sales commission agreement) was executed while litigation concerning the initial sales commission agreement was pending.

The court states that "the release or waiver [of MSRCA rights and remedies] is contained, not in the sales representation contract, but rather in a settlement agreement. … Given the discrete differences between a settlement agreement and the sales representation agreement, we conclude that plaintiff's settlement with Noble [the defendant] falls outside the scope of the MSRCA."[50] The court is guilty of several errors here.

First, the court insists that a settlement agreement cannot be both a settlement contract and a sales commission contract. But, the two are not mutually exclusive. The court conjures a false choice—a contract is either a settlement contract or a sales representation contract; it cannot be both. In fact, a contract can be both a settlement contract and a sales commission contract at the same time. In fact, what the *Reicher* court called a "settlement agreement" was both a sales commission contract and a settlement agreement.

Second, the MSRCA expressly applies to all contracts concerning the payment of a commission. Any settlement agreement concerning the payment of a commission is controlled by the MSRCA without regard to whether it also settles a dispute about the meaning of a prior sales commission agreement and notwithstanding that it amends that prior sales commission agreement. The *Reicher* settlement agreement purported to govern the obligation of the principal to pay commissions and the right of the sales representative to receive commissions. It is, therefore, "a contract between a principal and a sales representative purporting to waive any right under [the MSRCA]."[51]

The MSRCA irrevocably governs the amount of statutory damages and the payment deadlines that trigger statutory damages. The parties have unfettered freedom to set the dates when commissions are due, the amount of the commissions, and all the other terms of a sales commission agreement, except for the statutory damages and the statutory conditions precedent to those statutory damages, such as the 45-day grace period for the payment of commissions subsequent to the due dates set by the parties in their agreement. The parties are free to waive the dates when commissions are due, the amount of the commissions, and most other terms of an agreement between a principal and a sales representative. However, the conditions precedent to the statutory damages and penalties and the statutory damages and penalties themselves cannot be waived—*period*—because "a provision in a contract between a principal and a sales representative purporting to waive *any right under this section* is void." The statutory damages and their statutory conditions precedent are "right[s] under this section."

The court is effectively adding words to the statute excepting contracts between a sales representative and a principal that simultaneously settle a dispute about the initial agreement governing the parties' commission rights and obligations. But if a settlement contract amends a prior commission obligation, it is simply a new contract between the principal and his sales representative—and *all* contracts between principals and their sales representatives are subject to the MSRCA.

Third, the anti-waiver provision, MCL 600.2961(8), states that "a provision in *a* contract between a principal and the sales representative purporting to waive any right under this section is void."[52] The dictionary denotes that "a" means "any" or "all" members of a class, whereas "the" means one or several specific, but not all or any, members of a class. The anti-waiver provision, therefore, applies to "a" or "any" or "all" "contract[s] between a principal and the sales representative," and is not limited only to what the court calls a "sales representation contract" (a term invented by the court that appears nowhere in the statute), by which the court appears to mean only the initial contract establishing the relationship of principal and sales representative and not subsequent contracts amending or abrogating that relationship, The court is, therefore, effectively amending the statute, changing the indefinite article "a" into the definite article "the," which would denote a single, definite, specific or particular instance of a contract, that is, the initial contract regarding the payment of commissions by the principal to his sales representative as opposed to any instance of a contract regarding the payment of commissions by the principal to his sales representative.[53]

We hope that subsequent decisions correct this errant ruling.

Attorney's Fees

MCL 600.2961(6) provides that "if the 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."

Of course, in Michigan, attorneys' fees cannot be recovered unless expressly authorized by statute, court rule, contract, or a judicially created exception to the American rule that each party is responsible for paying its own attorneys' fees. More than 80 Michigan statutes authorize an award of attorneys' fees and most Michigan statutes leave an award of attorneys' fees to the discretion of the court.[54] The MSRCA is one of a handful of statutes that mandates an award of attorneys' fees to the prevailing party.[55]

MCL 600.2961(1)(c) 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." In *HJ Tucker & Assocs v Allied Chucker & Eng'g Co,* a sales representative sued a manufacturer to recover unpaid commissions.[56] In its complaint, plaintiff alleged breach of contract, fraudulent misrepresentation, innocent misrepresentation, detrimental reliance, quantum meruit, unjust enrichment, and breach of fiduciary duty. Plaintiff later added an additional count for damages under the MSRCA. Following a nine-day bench trial, the trial court found that the defendant had intentionally withheld sales commissions in violation of the

The MSRCA is one of a handful of statutes that mandates an award of attorneys' fees to the prevailing party.

MSRCA and awarded plaintiff commissions, statutory damages, attorneys' fees, costs, expert witness fees, and statutory interest.[57] The defendant appealed the award of attorney's fees, arguing that plaintiff was *not* a prevailing party because he won on only his MSRCA and breach of contract claims and he did not prevail on his other alternative theories of liability. The Michigan Court of Appeals upheld the attorneys' fees award, stating that "Defendant's construction of the statute is too narrow and would defeat the purpose of MCR 2.111(A)(2) to allow inconsistent claims or alternative theories to be pleaded for a single cause of action."[58]

Although more explanation why defendant's construction of the statute was too narrow would have been helpful, the court's decision was the correct one. The Court of Appeals decision is grounded in a careful reading of the statutory text of MCL 600.2961(6), which states that "if the 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." A "cause of action pursuant to this section" is exclusively an MSRCA cause of action and is not an unjust enrichment, breach of contract, fraud or any other cause of action. Thus, a plaintiff who wins on all the allegations of the complaint that constitute his MSRCA cause of action is the "prevailing party" and is entitled to an award of attorneys' fees.

Albeit in dicta, three years after its ruling in *HJ Tucker & Assocs*, the Michigan Court of Appeals again construed "prevailing party" to require only that the sales representative prevail on all of the allegations of his MSRCA claim and not on all of the allegations of alternative theories of liability other than the MSRCA: "a party cannot be deemed a prevailing party entitled to reasonable attorney fees and court costs unless that party is found to have prevailed fully on each and every aspect of *the claim or defense asserted under the [M]SRCA*."[59]

Unlike *HJ Tucker & Assocs*, the *Peters v Gunnell, Inc* court also grappled with what constitutes "all" of the allegations of an MSRCA cause of action. The defendant-principal argued that the sales representative-plaintiff did not prevail on "all" of the allegations of his MSRCA cause of action, because his complaint's jurisdictional allegation stated that the amount of damages in controversy exceeded $25,000 and the amount of actual damages awarded by the trial court was only $8,102.26. The court found that the actual damages, statutory double damages, and attorney fee award combined exceeded $25,000, which was sufficient for the sales representative to prevail on his jurisdictional allegation of the amount in controversy at the time he filed the complaint. Since the plaintiff-sales representative did prevail on his jurisdictional allegation as well as his MSRCA claim for past-due commissions, the court found that he had prevailed on all of the allegations of his MSRCA cause of action and was, therefore, entitled to attorneys' fees. However, it is not clear if the *Peters* court regarded the jurisdictional allegations to be constituent allegations of an MSRCA cause of action that a plaintiff must win to recover attorneys' fees. It is not clear whether the court would have awarded attorneys' fees to plaintiff had he not prevailed with respect to his jurisdictional allegations that the amount in controversy exceeded $25,000.

The court further held that a manufacturer's success on his countercomplaint against a sales representative has no bearing on the sales representative's entitlement to attorneys' fees, because the MSRCA attorneys' fees provision only requires that the sales representative prevail on all the allegations of the MSRCA cause of action in his complaint and does not require the sales representative to prevail on his defenses against a manufacturer's countercomplaint, holding:

> "[b]ecause the attorney fees provision of the SRCA relates only to prevailing parties on original causes of action under the SRCA and responses to those actions, we conclude that the disposition of defendant's countercomplaint has no bearing on plaintiff's entitlement to attorney fees and costs under the SRCA."[60]

Conclusion

Far from a mythical beast in need of "slaying," the MSRCA is a sensible policy that protects vulnerable commissioned sales representatives. The law upholds the sanctity of promise; sustains the system of voluntary exchange and free markets that are grounded in a widespread expectation of promise keeping; and equalizes the bargaining power between powerful principals and relatively weaker sales representatives. Moreover, the law encourages careful and clear drafting, which makes litigation less likely in the long-term. However, the statutory text cannot answer every possible question. As all laws do, it relies on the judiciary to determine its proper application. To abuse the metaphor used to describe the law, the holes in the dragon's scales can be—and largely have been—filled by the judiciary.

NOTES

1. The authors give special thanks to the many judges who have labored to flesh out the meaning of the law, and to apply and understand the statute in the context of live disputes. The authors also express their gratitude to the many lawyers who have dedicated themselves to divining the practical meaning of the law in the crucible of representing their clients in the adjudication of disputes, the review and negotiation of contracts, and in scholarly writings. The statute has been blessed to have attracted the attention of some great lawlerly minds over the years, including many who have written about the law, such as Randy J. Gillary, Kevin Albus, Stephen M. Wolock, and, of course, Judge Gerald Rosen.

2. *Kenneth Henes Special Projects Procurement, Mktg v Continental Biomass Indus*, 86 F Supp 2d 721, 728–29 (ED Mich 2000) (Rosen, J).

3. MCL 600.2961:

(1) As used in this section:

(a) "Commission" means 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.

(b) "Person" means an individual, corporation, partnership, association, governmental entity, or any other legal entity.

(c) "Prevailing party" means a party who wins on all the allegations of the complaint or on all of the responses to the complaint.

(d) "Principal" means a person that does either of the following:

(i) Manufactures, produces, imports, sells, or distributes a product in this state.

(ii) Contracts with a sales representative to solicit orders for or sell a product in this state.

(e) "Sales representative" means a person who 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. Sales representative does not include a person who places an order or sale for a product on his or her own account for resale by that sales representative.

(2) The terms of the contract between the principal and sales representative shall determine when a commission becomes due.

(3) If the time when the commission is due cannot be determined by a contract between the principal and sales representative, the past practices between the parties shall control or, if there are no past practices, the custom and usage prevalent in this state for the business that is the subject of the relationship between the parties.

(4) All commissions that are due at the time of termination of a contract between a sales representative and principal shall be paid within 45 days after the date of termination. Commissions that become due after the termination date shall be paid within 45 days after the date on which the commission became due.

(5) A principal who fails to comply with this section is liable to the sales representative for both of the following:

(a) Actual damages caused by the failure to pay the commissions when due.

(b) If the principal is found to have intentionally failed to pay the commission when due, an amount equal to 2 times the amount of commissions due but not paid as required by this section or $100,000.00, whichever is less.

(6) If 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.

(7) In an action brought under this section, jurisdiction shall be determined in accordance with chapter 7.1

(8) A provision in a contract between a principal and a sales representative purporting to waive any right under this section is void.

(9) This section does not affect the rights of a principal or sales representative that are otherwise provided by law.

4. MCL 600.2961(5)(b)-(c).

5. Richard Posner, *Antitrust Law: An Economic Perspective* 223 (1976).

6. *See, e.g.*, http://www.fosterswift.com/communications-Michigan-Sales-Rep-Act-Review-Commission-Agreements.html.

7. *Howting-Robinson Assocs v Bryan Custom Plastics,* 65 F Supp 2d 610, 613 (ED Mich 1999).

8. *See, e.g.*, Daniel N. Sharkey & Brent W. Warner, *Treble Damages and Other Dragons: Slaying the Sales Representative Commission Case*, Mich B J 34 (2014).

9. 86 F Supp 2d at 731.

10. *See, generally*, 86 F Supp 2d 721.

11. *Frank W Lynch & Co v Flex Techs Inc*, 463 Mich 578, 624 NW2d 180 (2001).

12. *Id.* at 586.

13. *Id.* at n. 4.

14. *Kenneth Henes Special Projects Procurement, Mktg, & Consulting Corp v Continental Biomass Indus (In re Certified Question),* 468 Mich 109, 118, 659 NW2d 597 (2003).

15. *Id.*

16. *Id.*

17. *Id.* at 116.

18. *Id.* at 114.

19. *Id.*

20. MCL 600.2961(1)(d).

21. 86 F Supp 2d at 729.

22. *Id.*

23. Senate Legislative Analysis, SB 717, April 30, 1992 *quoted in* 86 F Supp 2d at 729.

24. *E.g. Nelski v Ameritech*, No 244644, 2004 Mich App LEXIS 1798 at *13 (June 29, 2004) (quoting *United States v Menasche*, 348 US 528, 538-539 (1955).

25. *E.g. Gusler v Fairview Tubular Prods,* 412 Mich 270, 294, 315 NW2d 388 (1981).

26. *See* Generally *Barnhart v Thomas,* 540 US 20 (2003).

27. 86 F Supp 2d at 730.

28. *Id.*

29. *Walters v Bloomfield Hills Furniture*, 228 Mich App 160, 164–65, 577 NW2d 206 (1998) (also quoting the Senate Legislative Analysis, SB 717).

30. MCL 600.2961(e)(emphasis added).

31. MCL 600.2961(1)(d) *supra* (emphasis added).

32. MCL 600.2961(1)(e), *supra* (emphasis added).

33. 259 Mich App 467 (2003).

34. 256 Mich App 154 (2003).

35. *Mahnick v Bell Co*, 256 Mich App 154, 155, 662 NW2d 830 (2003).

36. *Id.* at 162.

37. *Id.*

38. *Klapp v United Ins Group Agency,* 259 Mich App 467, 471, 674 NW2d 736 (2003) ("'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action.") (overruled on other grounds, *Klapp v United Ins Group Agency,* 468 Mich 459, 663 NW2d 447 (2003)).

39. MCL 600.2961(8).

40. *See e.g.* 15 USC 77n; *also see* MCL 451.2509(12) ("[a] condition, stipulation, or provision binding a person purchasing or selling a security or receiving investment advice to waive compliance with this act or a rule adopted or order issued under this act is void.").

41. *Howting-Robinson Assocs, Inc v Bryan Custom Plastics,* 65 F Supp 2d 610 (ED Mich 1999).

42. *Id.* at 613.

43. Ohio Rev Code § 1335.11 ("A principal who fails to comply ... with any contractual provision concerning timely payment of commissions due upon termination of a contract with a sales representative is liable in a civil action for exemplary damages in an amount not to exceed three times the amount of the commissions owed to the sales representative if the sales representative proves that the principal's failure to comply . . . the contractual provision constituted willful, wanton, or reckless misconduct or bad faith."). *See also* Steven M. Wolock, *Michigan's Sales Representative Act Revisited*, Mich B J 1532, 1535 (2000) ("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.").

44. *Volunteer Energy Services, Inc v Option Energy, LLC*, No. 1:11-CV-554, 2012 US Dist LEXIS 115170 (WD Mich Aug 16, 2012) (unpublished).

45. *Id.* (emphasis added).

46. *Reicher v SET Enters,* 283 Mich App 657, 770 NW2d 902 (2009).

47. *Id.*

48. Staff of Labor Comm. on Senate Bill 717 with Senate Amendments and House Committee Amendments, First Analysis (Comm. Print 1992)

49. *Id.*

50. 283 Mich App at 664.

51. MCL 600.2961 (8).

52. *Id.* (emphasis added).

53. "Second, not only do the placement of subsection (2) and the absence of language in subsection (2) distinguishing it from subsection (1) suggest that subsection (2), as with subsection (1), only applies to county highways, but the syntax of subsection (2) also suggests that both these subsections apply only to county highways. Subsection (2) refers to "the highway." (Emphasis added.) As this Court has explained:

> "The" and "a" have different meanings. "The" is defined as "definite article. 1. (used, [especially] before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an)...." Random House Webster's **180 College Dictionary, p. 1382. *Massey v Mandell*, 462 Mich 375, 382 n 5, 614 NW2d 70 (2000).

Because subsection (2) refers to "the highway," we must determine to which "specific or particular" highway subsection (2) refers to. That is, because subsection (2) does not refer to "a highway," we cannot read subsection (2) as applying to highways in "general."14 Given that subsection *15 (2) immediately follows subsection (1), which limits its application to "county highway[s]," "the highway" referred to in subsection (2) must be the same highway referred to in subsection (1)—the county highway." *Robinson v City of Lansing*, 486 Mich 1, 14–15, 782 NW2d 171, 179–80 (2010). Emphasizing that it is our task to give the words used by the Legislature their common, ordinary meaning," the court states that "'the' does not mean 'a'." *Massey v Mandell*, 462 Mich at 384.

54. Mich Law of Damages §29.9

55. Use of term "shall" in a statute means that an act is mandatory unless other considerations compel a contrary conclusion. *Sears v Department of Treasury,* 57 Mich App 218, 226 NW2d 63 (1974); *Lundberg v Corrections Comm'n,* 57 Mich App 327, 225 NW2d 752 (1975).

56. *HJ Tucker & Assocs v Allied Chucker & Eng'g. Co,* 234 Mich App 550, 555–56, 595 NW2d 176 (1999). In its complaint, plaintiff alleged breach of contract, fraudulent misrepresentation, innocent misrepresentation, detrimental reliance, quantum meruit, unjust enrichment, and breach of fiduciary duty. Plaintiff later added an additional count for damages under the MSRCA.

57. The MSRCA itself provides that a principal "is liable to the sales representative for… actual damages caused by the failure to pay the commissions when due." MCL 600.2961(5)(a). (Emphasis supplied). Interest is a universally accepted measure of the damages caused by the loss of funds. By statute, when a money judgment is entered, interest accrues on the judgment from the time of the filing of the complaint until the judgment is paid. MCL 600.6013. Michigan courts therefore recognize a distinction between interest as an element of actual damages and interest on a judgment. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 499 n. 9, 475 NW2d 704 (1991); *Moore v Department of Military Affairs*, 88 Mich App 657, 660, 278 NW2d 711 (1979). In a suit for commissions due a salesperson, the jury should be instructed to include interest from the date the commissions became due. Under the MSRCA, a prevailing sales representative may recover pre-complaint, pre-judgment and post-judgment interest. *Kenneth Henes Special Projects Procurement, Mktg v Continental Biomass Indus*, 86 F Supp 2d 721 737-8 (2000). Importantly, Interest is not subject to doubling when a principal intentionally fails to pay a commission. The MSRCA provides for a double *commissions* remedy, not a double *damages* remedy. MCL 600.2961(5)(b) states that a principal is liable to the sales representative for "an amount equal to 2 times the amount of *commissions* due but not paid as required by this section or $100,000, whichever is less." (Emphasis added).

58. 234 Mich App at 561.

59. *Peters v Gunnell, Inc*, 253 Mich App 211, 223, 655 NW2d 582 (2002). (Emphasis added).

60. *Id.* at 224–25.

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