

# Michigan Bar Journal

## Michigan Sales Representative Statute

By Larry J. Saylor and Frederick A. Acomb

**O**n June 29, 1992, the Michigan Legislature enacted a statute imposing sanctions on any "principal" which fails to make timely commission payments to a terminated "sales representative."<sup>1</sup> Surprisingly codified as Section 2961 of the Revised Judicature Act (RJA), the statute broadly applies whether the representative was an employee or an independent contractor, and whether the representative sold at wholesale or at retail. Sanctions include actual damages, plus a penalty of double the actual damages, attorney fees and court costs. The language of Section 2961, however, is unclear on many key points. Unless it is amended, the courts will have to unravel its meaning and determine the scope of its application.

Section 2961 traces its origin to a "Model Bill" proposed to State Senator David Honigman by the National Bureau of Wholesale Sales Representatives in 1989. Senate Bill No. 36, a much-modified version of the model bill, was introduced by Senators Honigman, Geake and Cherry and passed by both Houses in 1991, but vetoed by Governor Engler. In 1992, Senator Honigman introduced Senate Bill No. 717, styled as an amendment to the Revised Judicature Act. This bill was passed and went into effect, reportedly with little or no opposition.<sup>2</sup>

### Definition of "Principal"

Section 2961 broadly applies to any "principal" which manufactures, produces, imports, sells or distributes a "product" in Michigan.<sup>3</sup> If this definition is literally applied, a "principal" is subject to the statute even where it has no place of business in Michigan and the sales representative's territory is entirely outside the state. Ironically, sales representatives who themselves employ commissioned sales people are probably "principals" covered by the statute. Dealers and distributors who purchase for resale, however, are not within the protection of the statute.<sup>4</sup>

The term "product" is undefined. This term might include not only tangible personal property, but also securities, services, or even real property. The legislative history, discussed below, sheds some light on the intended meaning.

### Definition of "Sales Representative"

Section 2961 defines "sales representative" to include both independent contractors and employees who are paid a commission "for the solicitation of orders or sale of goods."<sup>5</sup> While SB 36 restricted its definition of "principal" and "sales representative" to the "wholesale" level, no such restriction appears in Section 2961.

Like the term "product," the term "goods" is not defined. It is unclear why the statute uses the term "product" in its definition of "principal," but uses the

term "goods" in its definition of "sales representative." Even assuming that the term "goods" was intended to mean tangible items of personal property,<sup>6</sup> the word "or" in the phrase "for the solicitation of orders or sale of goods" is mischievous. Must the "orders" solicited be for "goods"? Or does Section 2961 cover representatives who solicit orders for real estate, securities or services? Reading the definition as "solicitation of orders...of goods" is grammatically awkward and may make the words "or sale" surplus. Was the word "or" meant to be "for"?

The legislative history suggests that the drafters intended the words "product" and "goods" to be synonymous. The title of SB 36, which would have been a separate act rather than an amendment to the RJA, expressly stated that it was limited to commissions for the wholesale solicitation of "goods" within the state of Michigan. In the body of the bill, however, only the word "product" appeared; the word "goods" did not.

The Commerce Committee's April 30, 1992 analysis of SB 717 indicates that the then-current version of SB 717 would have applied to post-termination commissions "for the solicitation of orders or sale of goods or commercial real estate." No reference to real estate, however, appears in Section 2961 as finally enacted. This omission suggests that real estate (and perhaps intangibles as well) were not meant to be covered.

1. 1992 PA 125; MCLA 600.2961(5); MSA 27A.2961(5).
2. Telephone interviews with Shelley Edgerton, Administrative Assistant to Senator David Honigman, and Michael Waxenberg, Esq., counsel for the National Bureau of Wholesale Sales Representatives, May 1993.
3. MCLA 600.2961(1)(d)(i); MSA 27A.2961(1)(d)(i).
4. MCLA 600.2961(1)(e); MSA 27A.2961(1)(e).
5. MCLA 600.2961(1)(e); MSA 27A.2961(1)(e) (emphasis added).
6. Analogously, the Robinson-Patman Act, which bans price discrimination in the sale of "commodities," has been held inapplicable to services. See, e.g., *Ball Memorial Hosp v Mutual Hosp Ins*, 784 F2d 1325, 1340 (7th Cir 1969).

## Termination

Section 2961 does not apply unless there has been a "termination of a contract between a sales representative and principal."<sup>7</sup> It does not define "termination of a contract." The courts will have to decide whether it includes resignation, expiration or nonrenewal.

## Conduct Required

Section 2961 requires a principal to pay any commissions due the terminated representative within 45 days after the termination.<sup>8</sup>

Commissions that become due after the termination must be paid within 45 days after the date they become due.<sup>9</sup> Where the due date cannot be determined from the contract, the statute directs the court to look at the "past practices between the parties," or the "custom and usage prevalent in this state" for the type of business involved.<sup>10</sup>

The rights provided by the statute may not be waived by contract.<sup>11</sup>

## Penalties

A principal which "is found to have intentionally failed" to make timely payment is liable for a penalty of double the commissions due, up to a maximum of \$100,000.<sup>12</sup> The most glaring omission in Section 2961 is its failure to define the term "intentionally failed to pay." Nor does Section 2961 tell us if the determination of whether a failure to pay was "intentional" is to be made by the court or by the trier of fact, although the word "found" suggests that the latter was intended.

Principals will argue that a refusal to pay is not "intentional" if there is a good faith dispute over the amount of commis-

sions due, the date commissions are due or whether commissions are due at all. Representatives will argue that a failure to pay is "intentional" unless it is due to a mathematical or administrative error. Thus, a failure to pay might be "intentional" even where a good faith dispute exists about some portion of the representative's claim.

Where a sales representative brings suit for commissions, the "court shall award...reasonable attorney fees and court costs" to the "prevailing party".<sup>13</sup> "Prevailing party" is defined as "a party who wins on all the allegations of the complaint or on all of the responses to the complaint."<sup>14</sup> This definition suggests that the sales representative may recover fees only if he or she prevails on every fact and legal theory alleged and every remedy sought—the principal may recover attorney fees only if it prevails on every answer and every affirmative defense to the complaint, and perhaps on every counter-claim, cross-claim or third-party complaint. Evidently, the purpose of this provision is to restrict the availability of attorney fees and to encourage parties not to assert dubious legal theories or allege questionable facts.

The legislative history lends support to this notion. Senate Bill No. 36 provided for an award of fees to the "prevailing party" but contained no definition of that term. Governor Engler cited this failure as one of his reasons for vetoing the bill on July 15, 1991, and also stated that attorney fees and court costs should be awarded to prevailing parties "in all civil actions and should not be established on a case-by-case basis."<sup>15</sup> The Commerce Committee's April 25, 1992 analysis of

SB 717 (as reported without amendment) stated that "prevailing party" would mean the party "who won on the entire record."

Attorney fees are not available where the *principal* brings suit—for example, for declaratory judgment or to restrain the former representative from divulging trade secrets. Presumably, a principal may recover the attorney fees incurred in bringing a successful counter-claim.

## Jurisdiction

Section 2961 is a amendment to the Revised Judicature Act,<sup>16</sup> and states that jurisdiction is to be governed by the RJA.<sup>17</sup> Since the RJA governs procedure in the Michigan state courts, Section 2961 might not be applicable in a federal court or in the court of another state. In an arbitration case, the prevailing party might be able to petition an enforcing Michigan court for an award under the statute. If the "intentionally failed" element is an issue of fact, however, it would have to be decided by the arbitrators.

## Title-Object Clause

The title-object clause of the Michigan constitution, best known to municipal bond lawyers, was given new visibility by Judge Cynthia Stephens' May 1993 opinion striking down the Michigan assisted suicide statute.<sup>18</sup> This clause provides that "No law shall embrace more than one object, which shall be expressed in its title."<sup>19</sup>

By its terms, the title-object clause contains two requirements: (1) That an act shall not embrace more than one object; and, (2) that an act's object shall be expressed in its title.<sup>20</sup> The "object" of an act is its "general purpose or aim."<sup>21</sup>

7. MCLA 600.2961(4); MSA 27A.2961(4).

8. MCLA 600.2961(4); MSA 27A.2961(4).

9. MCLA 600.2961(4); MSA 27A.2961(4).

10. MCLA 600.2961(3); MSA 27A.2961(3).

11. MCLA 600.2961(8); MSA 27A.2961(8).

12. MCLA 600.2961(5)(b); MSA 27A.2961(5)(b).

13. MCLA 600.2961(6); MSA 27A.2961(6).

14. MCLA 600.2961(1)(c); MSA 27A.2961(1)(c).

15. Letter from Governor John Engler to Michigan Senate re Veto of Enrolled Senate Bill 36, July 15, 1991.

16. 1961 PA 236; MCLA 600.101 et seq.; MSA 27A.101.

17. MCLA 600.2961(7); MSA 27A.2961(7).

18. *Hobbins v Attorney General*, Wayne County Circuit Court No 93-30006178-CZ, Opinion dated May 20, 1993; *appeal pending*, Mich Ct App No 164936.

19. Mich Const 1963, Art 4, Sec 24.

20. *City of Livonia v Department of Social Services*, 423 Mich 466, 496; 378 NW2d 402 (1985).

21. 423 Mich at 497.

Although an act may contain more than one means of attaining its general purpose or aim, it may not constitutionally contain subjects "diverse in their nature, and having no necessary connection."<sup>22</sup> The courts have recognized that this clause serves the purpose of ensuring that the public and the Legislature are informed of the nature and purpose of laws.<sup>23</sup>

The title of Senate Bill 717 simply states that it is an act to amend the RJA, and then quotes the original title of the RJA. This title deals with "the organization and jurisdiction of the courts of this state"—not with enforcement of contractual rights. Principals will assert two reasons why Section 2961 is void under the title-object clause: First, that with the adoption of Section 2961, the RJA con-

tains two purposes. Second, that the title of the RJA fails to describe the purposes of the new section. The RJA's purpose is to "effect procedural improvements, not advance social, industrial or commercial policy in substantive areas."<sup>24</sup>

Unlike SB 717, SB 36 had a title which clearly indicated that the object of the bill was to provide remedies for violations of substantive contract rights:

*AN ACT to regulate post-termination commissions for contracts between principals and sales representatives for the wholesale solicitation of goods within this state; and to provide for remedies.*

Ironically, one of Governor Engler's stated reasons for vetoing SB 36 was his "belief" that the bill should be "created in the Revised Judicature Act in order to provide reasonable notice to the public."<sup>25</sup> It seems likely, however, that placing Section 2961 in a separate law, as was proposed with SB 36, would have given better notice to the public and to the Legislature—and might have led to more opposition to its enactment.

At least, one court has determined that the statute does violate the title-object clause of the Michigan Constitution. *Kingsley Associates, Inc v Moll PlastiCrafters, Inc, et al.*, Case No. 92-CV-74006-DT (ED Mich October 26, 1993) (Mich LW No. ED-10566). In that case, defendant principal sought summary judgment with respect to plaintiff sales representative's claims for statutory damages, alleging that the statute violates the title-object clause of the Michigan constitution. In granting the motion, the Honorable George E. Woods reasoned:

*The title of the RJA makes clear that the act relates "to the organization and jurisdiction of the courts of this state; the powers and duties of such courts; and of the judges and other officers thereof,...." That is, the RJA's title, and therefore its object, deals with jurisdiction and procedure in Michigan state courts. However, the catch line heading and the object of § 600.2961 deal with commis-*

sions due under a sales representative contract, and the damages due when such commissions are not timely paid.

Defendants also filed a motion to certify the question to the Michigan Supreme Court. Judge Woods denied that motion holding:

*The Court does not agree, however, that the instant issue is one appropriate for certification to the Michigan Supreme court. Defendants' own Brief...makes clear that the questions they wish this Court to certify do not involve unsettled issues of state law.*

Judge Woods' decision has not at this writing been appealed, and is not binding on the Michigan courts. Apparently, no other court has decided whether the statute violates the title-object clause of the Michigan constitution.

### Retroactive Application

The Act merely provides that it is to take "immediate effect." Thus, while Section 2961 unquestionably applies to contracts which were entered into after June 29, 1992, it does not state whether it is to be applied (1) to cases pending on the date of enactment, (2) to breaches which occurred prior to enactment, or (3) to contracts entered into before enactment, where the breach occurs afterward. A law is invalid if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past."<sup>26</sup> The Legislature may, however, modify, limit, and even alter a *remedy* without violating the rule against retrospectivity.<sup>27</sup> Principals will argue that Section 2961 takes away or impairs their vested rights acquired under prior law. Representatives will argue that Section 2961 merely creates a new remedy where a principal fails to comply with its contractual obligation to pay commissions when due—an obligation which has always existed at common law.■



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22. 423 Mich at 499.

23. *Hilderbrand v Revco Discount Drug Centers*, 137 Mich App 1, 6; 357 NW 778 (1984).

24. See *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 151; 200 NW2d 70 (1972). See also, *Sam v Balardo*, 411 Mich 405, 424; 308 NW2d 142 (1981).

25. Letter from Governor John Engler to Michigan Senate re Veto of Enrolled Senate Bill 36, July 15, 1991.

26. In *In re Certified Questions, Karl v Bryant Air Conditioning Co*, 416 Mich 558, 570-71; 331 NW2d 456 (1982).

27. *Guardian Depositors Corp v Brown*, 290 Mich 433, 439-40; 287 NW 798 (1939).

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