THE MISSOURI COMMISSIONS SALES ACT
(RSMo. § 407.911, *et seq.*)

General Overview

The Missouri Commissions Sales Act (the "Commission Act" or simply the "Act") is a stand-alone provision contained within the broadly encompassing Missouri Merchandising Practices Act (the "MMPA"). For those who are interested in a more thorough reading of the Commission Act, it can be found in the Missouri statutes from RSMo. § 407.911 through § 407.915.

The Missouri Court of Appeals has held that, "[t]he sales commission statutes focus on the timely payment of sales commissions earned by a sales representative under contract with a principal" (usually, an employer). *Lapponese v. Carts of Colorado, Inc.*, 422 S.W.3d 396, 401 (Mo.App. E.D. 2013) (internal citations omitted).

Who Qualifies for the Protections of the Missouri Commissions Sales Act?

The Act defines only three words: "Commission," "Principal" (e.g., employer), and "Sales Representative." RSMo. § 407.911.

> **"Commission"** is defined as ". . . compensation accruing to a sales representative for payment by a principal [e.g., an employer], the rate of which is expressed as a percentage of the dollar amount of orders or sales, or as a specified amount per order or per sale." RSMo. § 407.911(1).
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> **"Principal"** is defined as ". . . a person, firm, corporation, partnership or other business entity, whether or not it has a permanent or fixed place of business in the state, and who:" RSMo. § 407.911(2).
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> a. "Manufactures, produces, imports, provides, or distributes a product or service for sale;" RSMo. § 407.911(2)(a).
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> b. "Contracts with a sales representative to solicit orders for the product or service; **and**" RSMo. § 407.911(2)(b) (emphasis added).
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> c. "Compensates the sales representative, **in whole or in part**, by commission." RSMo. § 407.911(2)(c) (emphasis added).

"Sales Representative" is defined as ". . . **a person**, firm, corporation, partnership, or other business entity **who contracts with a principal [e.g., an employer] to solicit orders and who is compensated, in whole or in part, by commission**, but shall not include a person, firm, corporation, partnership, or other business entity who places orders or purchases for its own account for resale." RSMo. § 407.911(3) (emphasis added).

When are Commissions Due to an Employee?

Under the Commission Act, "[w]hen a commission becomes due shall be determined in the following manner:"

(1) "The written terms of the contract between the [employer] and sales representative shall control;"

(2) "If there is no written contract, or if the terms of the written contract do not provide when the commission becomes due, or the terms are ambiguous or unclear, the commission shall be paid when the product or service is delivered and accepted by the purchaser or the principal receives satisfaction in full;"

(3) "If neither subdivision (1) or (2) . . . can be used to clearly ascertain when the commission becomes due, then the commission shall be due on the date the [employer] accepts the order and receives satisfaction in full, unless the custom and usage prevalent in this stat for the parties' particular industry is different, in which event such custom and usage shall prevail." RSMo. § 407.912.1.

However, this provision in the Commission Act continues by stating that, "[n]othing in [the Commission Act] shall be construed to impair a sales representative from collecting commissions on products or services ordered prior to the termination of the contract between the [employer] and the sales representative but delivered and accepted by the purchaser after such termination." RSMo. § 407.912.2.

As to specifically when sales commissions must be paid to a sales representative, the statute states that, "[w]hen the contract between a sales representative and a principal is terminated, all commissions then due shall be paid within thirty days of such termination." RSMo. § 407.912.3. It further states that, "[a]ny and all commissions which become due after the date of such termination shall be paid within thirty days of becoming due." *Id.* Because the statute specifically uses the word "termination," one might be tempted to think that the protections of the Commission Act only apply if a sales representative has been fired (i.e., involuntarily terminated).

However, in *Lapponese v. Carts of Colorado, Inc.,* the Missouri Court of Appeals explicitly rejected such a narrow interpretation of the statute's definition of "termination." The court first observed that the legislature chose not to define the word "termination" in the Commission Act. Without such an explicit definition from the legislature, the court noted that, in order "[t]o determine legislative intent, [the appellate court] must give an undefined word used in a statute its plain and ordinary meaning **as found in a dictionary**." 422 S.W.3d at 401 (internal citations omitted) (emphasis added).

As a result, the *Lapponese* court turned to the Oxford Dictionary which the court noted defines "termination" as "the action of bringing something to an end," or alternatively, "an ending or final point of something, in particular." *Id.* at 402. Thus, the court held, "[t]o interpret the term 'termination' as meaning only an involuntary termination by one party adds a qualification that the statute simply does not contain." *Id.* Therefore, the court concluded that the Commission Act ". . . applies whenever the [sales representative's] contract is 'terminated,' **regardless of whether the termination is initiated by action of the sales representative or the [employer], or occurs simply upon the expiration of the stated term of the contract**." *Id.* at 403 (emphasis added).

What Damages Are Available to a Successful Missouri Commission Sales Act Plaintiff?

With regard to the types of damages collectible by a successful plaintiff, the Commission Act provides that, **"[a]ny principal who fails to timely pay** [a] sales representative **commissions** earned by [a] sales representative **shall be liable** to the sales representative in a civil action for:"

1. "[T]he actual damages sustained by the sales representative;" **and**

2. "[A]n additional amount as if the sales representative were still earning commissions calculated on an annualized pro rata basis from the date of termination to the date of payment;" **and**

3. [T]he court may award reasonable attorney's fees and costs to the prevailing party." RSMo. § 407.913 (emphasis added). RSMo. § 407.913.

In addition to these specifically enumerated legal remedies (i.e., "money remedies"), the Act also specifically states that, "[n]othing in [the Act] shall invalidate or restrict any other or additional right or remedy available to a sales representative from seeking to recover in one action on all claims against a principal [i.e., an employer]." RSMo. § 407.915.

You are probably asking yourself, what other "rights" or "remedies" could I potentially also be pursuing? That's a great question, but in practice, there are a number of other claims that your legal counsel may advise you to include along with a Missouri Commissions Sales Act claim. By way of examples, you may also be advised to pursue one or more of the following:

1. **Breach of Contract**: A breach of contract claim frequently goes hand-in-hand with a claim under the Act, and because both claims have differing legal elements, depending on the specific facts of your case, one or the other claim may be easier to prove in court.

2. **Fraudulent Misrepresentation:** As with any other type of MMPA claim, a Missouri Commissions Sales Act claim is subject to Missouri's cap on punitive damages. This cap limits your punitive damages recovery to the greater of $500,000 or 5x your actual damages (which, fortunately, include any attorneys' fees/costs awarded by the court). On the other hand, a fraudulent misrepresentation claim is not subject to any such punitive damages cap.

   As a very important aside here, while it is undisputed that the MMPA permits plaintiff's the opportunity to recovery punitive damages, it remains an unsettled matter whether or not the Missouri Commissions Sales Act, specifically, permits a successful plaintiff to recover punitive damages. Long story short, as a general legal principle, specific language in statutes trumps (i.e., takes precedence over) general language. Here, the "general language" has been found by several Missouri trial courts to be the MMPA's umbrella punitive damages subsection, and the "specific language" has been found to be the Missouri Commissions Sales Act's specific damages subsection (i.e., RSMo. § 407.913).

   From our perspective, the Act's subsection (i.e., RSMo. § 407.915) stating that ". . . [n]othing in [the Act] shall . . . restrict any other or additional right or remedy available . . ." should be dispositive in our clients' favor. That is, if the Act is a specific provision under the MMPA, and the MMPA permits the recovery of punitive damages, wouldn't the recovery of punitive damages be exactly the type of "right or remedy available" to a Missouri Commissions Sales Act plaintiff?!

   Regardless of how meritorious our legal position may seem to you (and Hollingshead & Dudley's attorneys), because this specific

matter has not yet been addressed by Missouri's appellate courts, it remains an open question of law that may or may not turn out in our clients' favor. For this reason, your legal counsel may advise you that, if your specific facts would support it, you may want to "hedge your bets" by also filing a count alleging fraudulent misrepresentation.

3. Injunctive Relief: Injunctive relief is largely beyond the scope of this particular article, but at the so-called "30,000-foot level," an injunction is a form of equitable remedy that a judge may order under certain circumstances. Broadly speaking, **an injunction is a court order demanding that one or more opposing parties either do or not do something.**

By way of simple examples, an injunction ordering a party **to do** something could be an order requiring a party to partition (i.e., sell off) a particular tract of real estate. Likewise, an injunction ordering a party **not to do** something could include an order prohibiting a party from disposing of a particular asset until the underlying case can be decided (e.g., the true owner of the property can be finally determined by the judge or jury).

Generally speaking, in order to obtain any form of an injunction, you must prove, by a preponderance of the evidence (i.e., more likely than not), that:

a. If the injunction is not issued, you will suffer irreparable harm. Irreparable harm can include things like damage to your reputation, social status, or to rights that, if not protected now, cannot later be protected. A great, albeit somewhat ironically untimely example would be seeking an injunction related to a woman's previously established general right to an abortion under *Roe v. Wade*. Assume that, prior to the SCOTUS' recent decision overturning *Roe v. Wade*, that a governmental entity such as a municipality or state had passed a law prohibiting all forms of abortions, without exception.

   Also now assume that you or someone you know became pregnant and wished to obtain an abortion. To understand irreparable harm element of seeking injunctive relief, there are two things you will need to keep in mind about this hypothetical. First, it is undisputed biological science that the

average gestation period of a human fetus is approximately nine-months. Second, it is nearly equally undisputed that the average amount of time in any American legal jurisdiction from the filing of a lawsuit to having a trial on the merits is **far** longer than the average nine-month gestation period of a human fetus.

As a result, if you were unable to obtain a court order preventing the governmental entity from enforcing its abortion ban (i.e., an injunction), by the time you had your case heard on the merits, your previously unborn fetus would be somewhere between three and five years old!! Because this result is, quite obviously, absurd, you would unquestionably be able to successfully argue that your circumstances satisfied this first element for obtaining injunctive relief—that is, without an injunction, you would suffer irreparable harm (i.e., being forced to raise a child that, but for the unconstitutional law, you would have aborted).

Of course, the sky is the limit when coming up with these types of hypothetical scenarios, but with the abortion example in mind, you will hopefully get the idea on what is meant by "irreparable harm" in seeking injunctive relief.

b. Other than injunctive relief, you have no other adequate remedy at law. Simply put, this means that money damages awarded to you at a later time would not fully compensate you for the loss. Examples of situations that could satisfy this element include family heirlooms, real estate (which is always considered unique—that is, money damages cannot replace a particular tract of land), priceless artwork, and confidentiality agreements; **and**

c. When the underlying case goes to trial, you are likely to prevail on the merits of the case. In other words, when your case is ultimately tried to a judge or jury, do you have a good chance of winning your lawsuit? As you have probably already guessed, this last element for seeking injunctive relief is highly subjective (i.e., the judge's personal opinion regarding the quality of your evidence, credibility of testimony, etc. is the court's sole basis for determining if you satisfy this element). In order to evaluate this last element, the court may order that witness depositions be taken,

> evidence be presented, legal briefs be filed with the court, and in many instances, the court may require a sometimes lengthy in-person evidentiary hearing whereby witnesses testify live in the courtroom and are subjected to cross-examination, just as they would be in a trial on the merits.
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> This "mini-trial" can, not only be incredibly burdensome and unpredictable, but it can also sometimes put you at a tactical disadvantage later in the case by virtue of the fact that your opposing party and counsel would have already seen some (or even a significant percentage) of your testimony in evidence. Because requests for injunctive relief frequently occur near the beginning of a lawsuit, your opponent and his or her legal counsel could potentially have many years to find testimony, witnesses, and legal theories designed to defeat your claims. As a result, the decision to seek injunctive relief should not be taken lightly, and before heading down that path, both you and your legal counsel should ensure that you have carefully considered both the advantages and disadvantages of such a strategy.

A couple of final thoughts on injunctive relief. First, if you are seeking an injunction that is designed to prevent another party from exercising his or her First Amendment right to free speech, you will be fighting an extremely uphill battle. In fact, if a party shows that his or her First Amendment rights are likely being violated (e.g., the government is refusing a citizen to speak at a public meeting, etc.), the federal courts have held that all other requirements for obtaining an injunction (i.e., irreparable harm and no adequate remedy at law) are deemed to have been satisfied.

Second, injunctions are predominantly viewed by the courts as a way to "preserve the status quo." That is, injunctions are typically designed to "keep things the way they are" until the underlying legal matter can be fully heard by a judge or jury. That said, it is quite common to see requests for injunctive relief that are seeking a court order changing the status quo.

To illustrate the difference between preserving vs. changing the status quo, assume you have filed a lawsuit over the true ownership of a tract of real estate. You claim to be the true owner of the property, as does your ex-spouse. Consider these two hypothetical

scenarios regarding how a court might view a request for injunctive relief:

Scenario 1: You are currently in possession of the real estate. In fact, you recently built a house in the property and are living on the property on a full-time basis. Under this scenario, if you sought a court order prohibiting your ex-spouse from entering the property without your permission or a court order, you would be seeking an injunction to **maintain the status quo**. By "status quo," since you are currently in possession of the property, your request to exclude your ex-spouse from the property would, practically speaking, change nothing about how things are currently supposed to be occurring (i.e., your ex-spouse shouldn't be unlawfully trespassing on property that **you** currently possess).

Scenario 2: Your ex-spouse is currently in possession of the real estate, but you would like to build a house on the property. In such a situation, even if you could prove all three elements for seeking injunctive relief, you would be less likely to obtain injunctive relief from the court than under scenario 1. Why? Well, unlike in scenario 1 where you were in possession of the property, under scenario 2, you are not. Thus, any request to change possession of the property (i.e., from your ex-spouse to you) would constitute **a change in the status quo**.

What Commissions are Owed to a Sales Representative?

While one might be tempted to simply gloss over the Act's language regarding a sales representative's right to be paid on "commissions earned," the issue is actually more complicated than it may appear. Namely, the Missouri Court of Appeals has made two incredibly important, overarching holdings regarding what constitutes "commissions earned:"

1. In *Ruff v. Interstate Book Mfrs, Inc.*, the Court of Appeals observed that, by the explicit language of the Act, "commissions owed" by a principal (i.e., an employer) is entirely derived from basic contract law. 545 S.W.2d 420, 421-22 (Mo.App. 1976) (internal citations omitted). That is, the "commissions owed" to the sales representative is based upon whatever terms he or she agreed on with the principal (i.e., the employer). As a result, if the parties' sales commission' agreement (oral or written) specified certain terms and conditions that had to be satisfied prior to a commission

being paid to a sales representative, then the courts will hold the parties to their agreed-upon terms and conditions. *Id.*

As was very well-articulated by the *Ruff* court, ". . . where a special contract exists, in order to entitle the broker to recover, he must show that he has fully complied with the terms and conditions thereof; for otherwise he has not completed his undertaking **and has earned no commission**." *Id.* (emphasis added). By way of example, in *Ruff*, the parties' agreement specified that commissions were only earned ". . . on repeat orders as long as [the sales representative] continue[s] to use [his or her] best efforts to retain such business." *Id.* at 421 (internal citations and quotations omitted). Because the sales representative in *Ruff* failed to meet this condition, the court held that the representative was **not** entitled to commissions on repeat orders.

2. On a slightly different issue that was addressed in *Ruff,* in *Independent Quality Foods, LLC v. Kansas City Steak Co., LLC*, the Missouri Court of Appeals was tasked with determining whether a sales representative was entitled to receive "post-termination commissions"—that is commissions on residual revenue received by the principal on contracts that a customer had signed **prior to** the sales representative's termination of employment.

In *Independent Quality Foods*, the court established a bright line standard for determining whether a sales representative is entitled to residual sales commissions for revenue received by the principal post-termination, and that standard is as follows:

> Missouri law differentiates between manufacturer's representatives and finders when determining whether a party is owed post-termination commissions. **A manufacturer's representative with servicing responsibilities loses his right to collect commissions on pre-termination business upon termination. A finder, however, retains the right to commissions on business even after termination.** The rationale behind this distinction is that **a finder has completed all of the work that needs to be completed and the right to payment vests upon the finding of business, while a manufacturer's representative has continuing duties to service an account**. 585 S.W.3d

855, 859 (Mo.App. W.D. 2019) (internal citations and quotations omitted) (emphasis added).

Continuing to explain this bright-line test on the right to receive post-termination commissions, the court noted that, "[t]he principle that a 'finder' may be entitled to ongoing commissions despite the termination of a contract is grounded in rudimentary contract law." *Id.* (internal citations omitted). That is, "[w]here a contractual party has fully performed its obligations under the contract, that party has a vested right to performance by the other party in accordance with the contract's terms." *Id.* (internal citations omitted).

Simply put, if a sales representative's agreement with the principal (i.e., the employer) is of such a nature that, at the time of the representative's termination, all contract terms have been fulfilled, then the representative **is** entitled to residual commissions on future revenue received by the principal. On the other hand, if the parties' agreement required the sales representative to have ongoing responsibilities with respect to a customer's residual sales, then the representative's commissions are cutoff for any post-termination deals that the principal enters into with the customer.

While this bright-line test may cause many readers (most possibly) heads to spin, it can really be broken down into a single, simple question. That question is, "was there anything more that the parties' agreement required of the sales representative with regard to future purchases by the customer, or was the sales representative's responsibilities 100% completed as of the time of his or her termination of employment?

If the answer is, "**there was nothing that needed to be done by the representative on an ongoing basis**," then he or she **is** entitled to receive residual sales commissions on the customer's contract under the Act. On the other hand, **if the sales representative had even a single material responsibility on an ongoing basis** with a customer, then the sales representative **is not** entitled to residual sales commissions post-termination. Clear as mud?!

What If Your Principal's (e.g., Employer's) Principal Place of Business is Outside the State of Missouri?

Under the Act, "[a] principal who is not a resident or citizen of this state who contracts with a sales representative to solicit orders in this state is declared to be transacting business in this state for purposes of the exercise of jurisdiction of the courts of this state . . ." RSMo. § 407.914.