

Understanding the Process of Negotiating the Settlement of a Sales Commission Case

BY RANDALL J. GILLARY

My firm is in the business of litigating sales commission disputes. That is virtually all that we do and we almost always represent the sales representative. Many times my client will ask me what we will be asking the defendant / principal to pay to settle the case. Obviously, that will depend on the case but our process is essentially as follows.



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Calculate the amount of commissions which are due to date and those which will become due in the future.

This is generally the first step in the process. We calculate the amount of commissions due to date and then try to come up with a number for the commissions which will be due in the future. Since I live and work in Michigan, most of the sales commission disputes which we handle involve the sale of automotive production parts. Usually, we are seeking life of part/product commissions. Typically that means that we will be seeking commissions for the full production life of the part or product. The typical life of the part or product will be in the range of three to five years or

more. Some parts have a production life much longer and can be five to 10 years or more. If there is a written sales representation agreement which provides for the payment of post-termination commissions for a lesser term, then we will use the agreed-upon period for the payment of post-termination commissions. I will ordinarily ask my clients to prepare a spreadsheet listing the parts and the anticipated production life of the agreed upon post-termination commission payment period. We will also include an itemization of the commissions due to date or through the date of the most current sales numbers which we have been provided by the defendant or obtained by other means. This will be

our best-case scenario regarding the recovery of commissions.

Make a demand for the payment of the commissions due to date plus those commissions which will become due into the future.

We like to make a demand as soon as we have reliable sales numbers together with penalty damages and attorney fees under the Michigan Sales Commission Act. Our typical demand is for the commissions which my client would be entitled to under our best-case scenario. Our demand has the effect of letting the principal know what the principal's risk is in the event that we are successful after a trial. We try to make this number as large as possible.

The sales representative then needs to decide whether he or she is willing to put that amount of chips onto the table to gamble on a better result after trial.

Settlement negotiations.

At some point in time there will normally be negotiations regarding the settlement of the lawsuit. Sometimes this is early in the litigation and sometimes it is later. Most lawsuits settle before trial. The statistics are generally in the range of 95 percent of cases settling prior to trial. Normally with our cases, we try cases when the principal does not give us a good reason not to.

My primary objective in settlement discussions.

My primary objective in trying to settle one of our sales commission disputes is to find out the maximum amount of money the principal is willing to pay to avoid the risk of losing a trial. Sometimes this can hap-

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pen relatively early in the process and sometimes it can happen after a trial has started. When the principal makes a settlement proposal which I believe is the maximum amount that they are willing to pay to avoid a trial, the sales representative knows how much money he or she will be risking in the event that we try the case. At this point we are in a high-stakes game of poker. The sales representative then needs to decide whether he or she is willing to put that amount of chips onto the table to gamble on a better result after trial. Whether or not the sales representative accepts the offer or decides to gamble on a better result in a trial, is a decision to be made by the sales representative. I will always give my opinion but I make it clear that the ultimate decision is up to my client.

My rule of thumb in evaluating settlement proposals.

The typical process that I use in evaluating settlement proposals is as follows:

- Determine our best-case scenario in terms of dollars.
- Multiply that number by the probability of success after a trial.
- The resulting number is then a reasonable settlement number. For example, if there are \$1 million of commissions at issue and I think that our chances of prevailing after a trial

are 50-50, then a reasonable settlement number would be \$500,000.

One case that we tried a few years ago is a good example of the settlement discussion process. In that case, the commissions due as of the date of trial were between a low of about \$1.1 million up to a maximum of about \$3 million, depending on whether the jury awarded us commissions on all business or just a portion of it. The last settlement proposal made by the principal before trial was about \$800,000. Our earlier settlement demand was about \$2 million. My client decided to reject the proposal in the amount of \$800,000. After we started the trial and after both sides gave their opening statements, the defense attorney called me and offered \$900,000 to settle the case. I promptly called my client and relayed the settlement proposal. At this point my client had to make a decision as to whether he was willing to gamble \$900,000 on the possibility that we could do better after a jury trial. He statement to me was, "We have gone this far, we might as well have the jury decide." That was fine with me.

As indicated above, the reality was that we were in a high-stakes game of poker. My client had to decide whether he was willing to put \$800,000 worth of chips on the table to gamble that we could get sig-

nificantly more after a trial, or take the \$800,000 and call it a day. This is always a tough decision for anyone to make. Often there are calls to the spouse so that the decision can be made by both of them because the decision and the consequences of the decision will impact the entire family.

In that case, my client's gamble paid off and we were awarded the higher amount of commissions due to date of about \$3 million plus life of part commissions. The defendant appealed the judgment on the jury verdict to the United States Sixth Circuit Court of Appeals and the Court of Appeals affirmed the judgment. We ended up settling the case after the decision of the Court of Appeals for more than \$8 million. Good call by my client.

This is one reason why I do not gamble in casinos. In fact, I have been to many casinos but have yet to gamble even one dollar. Since I gamble for a living, I see no point in gambling in casinos. When I try a case, my client and I are gambling on my skills and I feel that I can control the odds much better than in a casino where the odds are always stacked against the customer. I definitely do not need the thrill of a casino. Just like most sales representatives who get paid on commission, I gamble every day. ☞

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a tough decision
for anyone
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Randy Gillary is an attorney and has been a member of MANA since 1991. He concentrates his practice in representing manufacturers' representatives in sales commission disputes. Gillary has been litigating sales commission disputes for more than 33 years. He is also the author of the definitive book for manufacturers' representatives entitled *Protecting Your Commissions — A Sales Representatives' Guide*. The book is available on Amazon.com or through his website at www.gillarylaw.com or by calling his office at (238) 528-0440.

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