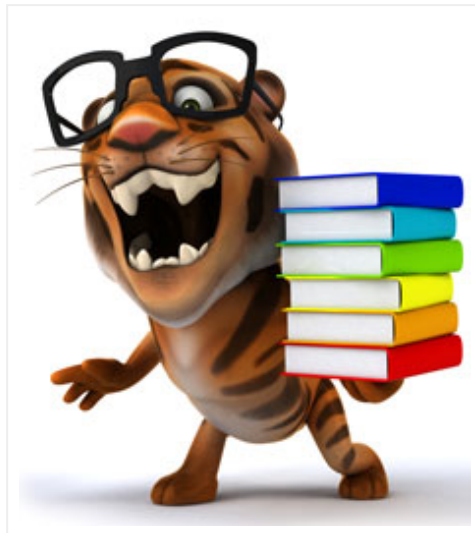


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# From Toothless to Tigers: A Look at State Sales Rep Statutes

By Adam Glazer  
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**“Hey, Adam,” begins many an incoming office call, “the principal who owes me back commissions didn’t remember that our contract says Tennessee law (or Utah, Colorado, New Jersey, Georgia, etc.) applies. I can get triple commissions, right?”**

“Well,” begins the formal, technical response to many such calls, while stalling for time. Then, the very first legal phrase taught in law school is invoked: “That depends.”

Many independent reps are familiar with sales rep protection statutes. These state laws are generally intended to help level the playing field with their principals when a commission dispute arises.

When a rep is terminated and the commissions due go unpaid, the rep may face the daunting prospect of taking to court a typically much larger and better-funded manufacturer. The availability of a sales rep statute, offering the potential recovery of attorneys' fees and "exemplary" damages, can ease the rep's decision to pursue a commission recovery action.

Virtually no two statutes are identical, however, and the relief available when commissions are wrongly withheld under Texas law can prove vastly different than when the same principal withholds commissions under Delaware law.

Of the roughly 36 state sales rep statutes, some are toothless tigers, offering no relief beyond what a breach of contract action provides, while others offer significantly meatier remedies.

### **Exemplary Damages Range From 0 to 3x the Amount of Unpaid Commissions**

In deciding to protect reps in California, the state legislature expressly determined that "independent wholesale sales representatives are a key ingredient to the California economy." Part of the statute provides: "wholesale sales representatives spend many hours developing their territory in order to properly market their products, and therefore should be provided unique protection from unjust termination of the territorial market areas."

The robust California statute establishes liability against a manufacturer who fails to timely pay commissions "for treble the damages proved at trial," plus attorney's fees.

Nationally, treble damages are the norm for violating a statute requiring timely payment of commissions, but a few states like New York provide for a more modest double damages recovery. Meanwhile, certain states like Washington have statutes requiring timely payment, but offering no additional remedy for a violation.

In a league by itself is the Minnesota statute (as recently strengthened with the help of hard-working MANA attorney Gene Hoff). While no exemplary damages are available under that act, it precludes manufacturers in most cases from terminating their sales rep agreements without "good cause" (unlike the traditional "any reason or no reason" standard), and even then requires providing the rep a 60-day cure period.

### **Limiting an Act's Reach to Sales Within the State**

Other quirky differences found among the statutes consist of certain states limiting the protection to sales of goods and not services, some covering only sales made to "wholesalers" not "consumers," and some applying only to sales made within their states.

Principals sued under the various statutes will often seize on their lack of uniformity and mount challenges based upon particular language. For example, a manufacturer hauled into the Columbus, Ohio, federal court in 2016 for non-payment of commissions moved to dismiss the claim, arguing the Ohio statute did not apply to reps making sales out of state.

The manufacturer apparently relied upon the original version of the Ohio statute drafted in 1988. That version made exemplary damages available for unpaid commissions to a sales rep, defined as

“a person who contracts with a principal to solicit wholesale orders for a product *within this state* and who is compensated, in whole or in part, by commission.”

However, the Ohio legislature amended the statute in 1999, including by omitting the “*within this state*” phrase. The manufacturer’s motion was denied.

Alas, other states, including Texas and Kansas, retain the “*within this state*” limitation to the significant detriment of their sales reps.

### **Distinguishing Between Sales Made to Wholesalers and End Users**

As amended, the Ohio statute not only enables reps to solicit orders outside the state and remain covered, but also to solicit orders for services as well as products, and eliminated its limitation to “wholesale orders.” These welcome changes opened up the statute to reach many more deserving reps.

A similar approach was adopted in a notable 2013 California appellate court case that examined the exclusion of sales made to “ultimate consumers” in its rep statute, before ultimately rejecting as “absurd” the manufacturer’s contention that this referred only to end users. Instead, the court recognized that OEMs and other entities who buy components are also consumers of goods. The court then affirmed a jury award of more than two million dollars in unpaid commissions to the rep, which was trebled under the California rep statute for a total award of well over six million, plus attorneys’ fees.

Many statutes, however, remain applicable only to “wholesale” sales, and exclude sales made to end users. This shortsighted yet common approach is found in states ranging from Oregon to Colorado to Maine, yet it is hoped that when these states update their statutes, they follow the Ohio approach of eliminating this distinction.

### **Statutory Damages ≠ Punitive Damages**

Some states have expressed concern with “out-of-control” punitive damage awards, typically arising in personal injury contexts. Indiana, for example, restricts such awards by capping amounts and diverting 75 percent to the state’s coffers. Fortunately, awards of treble damages under Indiana’s sales rep statute are not considered punitive, and are not subject to these restrictions.

A similar approach would seem to apply in most jurisdictions where awards entered against a principal for failing to timely pay commissions under a sales rep act are viewed as *exemplary* or *statutory*, not *punitive* damages. Efforts by states to rein in punitive damages should not spill over to awards specifically authorized by their legislatures to deter principals from wrongfully withholding commissions.

Of course, exceptions are found here too, such as in the South Carolina statute, which unartfully describes its treble damages hammer as “punitive damages.” Since punitive damages are usually discretionary while statutory damages are not, use of this language promotes confusion. With sales rep statutes, including South Carolina’s, the only discretion to be applied by a judge should involve the *amount* to be awarded, not *whether* to award damages.

## Ending the Call

After covering each of the above points, the phone call with the rep is near its end. “Thanks for the help, Adam,” winds down many a call. “Now, how much is all this gonna cost me?”

*MANA welcomes your comments on this article. Write to us at [mana@manaonline.org](mailto:mana@manaonline.org).*



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