

News & Types: Commercial, Competition & Trade Update

Illinois Court Either Confirms or Limits Scope of Illinois Sales Representative Statute

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The Illinois Sales Representative Act (820 ILCS 120/0.01 et. seq.) ("Act") is intentionally very favorable to sales representatives. It protect sales representatives from the improper withholding of commissions and permits sales representatives to recover three times the amount of withheld commission and to recover attorneys' fees. So a sales representative who is covered by the Act is in a strong position. In addition, many states have similar statutes protecting sales representatives.

A recent Illinois case discussed the scope of the Act and its application in a unique set of circumstances. (*Johnson v. Safeguard Construction Company, Inc.*, 2013 IL App (1st) 123616, December 30, 2013)

Safeguard was an Illinois corporation that was in the business of insurance restoration by facilitating the repair of damaged homes. Safeguard would dispatch "independent sales representatives" to areas hit by a storm to interview homeowners about damage, coordinate with insurance adjusters and obtain contracts from homeowners to restore damaged homes. Safeguard did not perform the repair work, but subcontracted the repair work to third parties.

In March, 2011 Scott Johnson entered into an agreement with Safeguard by which he became Safeguard's independent sales representative "for the sale of Safeguard products and services." Safeguard agreed to pay Johnson a percentage of net profits.

In July 2011, Safeguard cancelled its agreement with Johnson after Johnson claimed Safeguard had deprived him of substantial commission. In a letter dated August 5, 2011, Safeguard told Johnson that his outstanding earned commissions would not be paid unless Johnson agreed to waive all claims arising out of their agreement and arising out of Johnson's role as an independent sales representative. In December 2011, Johnson filed a complaint against Safeguard claiming violation of Illinois' Sales Representative Act and breach of contract. Safeguard then filed a motion for summary judgment, arguing that Johnson was not covered by the Sales Representative Act. (The separate breach of contract claim was not the subject of the appeals court's opinion.)

Safeguard's ultimatum to Johnson, that Safeguard would withhold commissions unless Johnson released all claims against Safeguard, may have been an effective negotiating tactic. But in the context of the Illinois Sales

Representative Act, it was a dangerous strategy. As noted above, under the Act, a principal, such as Safeguard, could become liable for three times commission and attorney's fees for improper withholding of commission. Safeguard basically conceded it was withholding commission. It was not in a good position to avoid these remedies if the Illinois Sales Representative Act applied.

Safeguard argued that the Act did not apply. The trial court agreed and Johnson's claim was dismissed. Johnson appealed to the Illinois Court of Appeals.

Johnson's role was clearly characterized as "sales representative." So why wouldn't he be covered by the Act? The appeals court looked at the coverage of the Act. It protected a sales representative from the acts of a "principal" which a) manufactures, produces, imports or distributes a product, b) contracts with a sales representative to solicit sales for the product, and c) compensates by commission. The element that Safeguard emphasized in the statute is "product." Safeguard argued that Johnson solicited services not products. In arguing this, Safeguard had to overcome its own Agreement which appointed Johnson as a sales representative "for the sale of Safeguard products and services."

Johnson conceded that if he only solicited sales of services, he would not be covered by the Act. But he claimed that his role was mixed – soliciting sales of products and services, just like it said in his Agreement.

But the appeals court was not convinced. Fortunately for Safeguard, the appeals court looked at evidence beyond the Agreement. Although Safeguard's website described products, as well as services, the appeals court cited testimony from Safeguard's owner that Safeguard had no agreements with the manufacturers. Rather, it relayed the homeowner's preferences to subcontractors which became the actual purchasers of the products and who, of course, did not owe and did not pay commission to Johnson. Further, Johnson's duties were described in a document called "Field Representative (Next Steps)", which the court found "did not involve the selling of specific brand-name products to homeowners."

Johnson was not done. He cited "mixed product cases", involving products and services. He claimed that, as his Agreement stated, this was a "mixed products case" involving products and services. But the appeals court found that Johnson's activities were for the solicitation of repair services and products were "incidental to the services provided."

The appeals court did not stop there and thereby created some confusion. Citing an earlier Illinois case, the court said, "Moreover, even assuming, arguendo, that the materials incidentally used in Safeguard's home repairs could be considered products under the Act, Johnson's claim would still fail as a matter of law because Safeguard was merely "in the chain of distribution" and was not the original source of those products so as to hold Safeguard as a "principal" under the Act."

Nothing in the Act requires the principal to be "the original source" of products. In fact, distributors who buy and re-sell the products of others are frequently the subject of claims under the Act. It seems unlikely that the appeals court intended to exclude them as not being "the original source" of the products and only in the "chain of distribution." But the language is problematic. What is absent from the opinion of the appeals court is whether any of the disputed commissions represented the sales of products. This would help to determine if the appeals court was simply re-affirming that services are not covered by the Act or creating new case law

under the Act that sales of products "incidental" to the services, even if compensated by commission, are excluded from the Act.

Safeguard was fortunate that both the trial court and appeals court disregarded the language of its agreement that appointed Johnson as a sales representative for the sale of Safeguard's "products and services." It's high-stakes ultimatum to Johnson was vindicated. Safeguard is now able to use the commissions which it appeared to concede that it owed as leverage to require Johnson to resolve all of his claims with Safeguard.