

**Hooking the “One That Got Away”:
Using the Minnesota Commission Salesperson
Statute to Collect Unpaid Real Estate Commissions¹**

Introduction.

Minnesotans, more than most folks, are used to hearing about “the one that got away” -- usually a walleye over forty inches long. Talk to a real estate professional about “the one that got away,” though, and you will probably hear about a lost commission. While you can probably write off most of the stories you hear about the monster fishes of Lake Calhoun, many of the commission stories you will hear are true.

The loss of a commission may take various forms. It may occur through a “commissionectomy,” a procedure which is usually performed at a closing table, and always without anesthetic. Or, maybe in a transaction between parties a broker has introduced, but who now think the broker is safely out of the picture. Regardless of the particulars, a careful reading of Minnesota’s Commission Salesperson statute reveals that help may be on the way for the broker who feels the dull sensation of loss in their wallet or purse, and needs your help to recover a fee.

A Collection Mechanism With Teeth.

It is widely known that Minn. Stat. § 181.145 protects commission salespersons denied commissions owed after a sale, something evident upon even a quick reading of the statute:

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When any person, firm, company, association, or corporation employing a commission salesperson in this state terminates the salesperson, or when the salesperson resigns that position, the employer shall promptly pay the salesperson, at the usual place of payment, commissions earned through the last day of employment or be liable to the salesperson for [a penalty] . . . ²

The statutory penalty referenced above provides real teeth. First, the commission can be *doubled* if not paid within fifteen days:

If the employer fails to pay the salesperson commissions earned through the last day of employment on demand within the applicable period as provided under subdivision 2, *the employer shall be liable to the salesperson, in addition to earned commissions, for a penalty for each day, not exceeding 15 days*, which the employer is late in making full payment or satisfactory settlement to the salesperson for the commissions earned through the last day of employment. *The daily penalty shall be in an amount equal to 1/15 of the salesperson's commissions earned through the last day of employment which are still unpaid at the time that the penalty will be assessed.*³

Second, the statute provides for attorney's fees, if the matter is litigated. In fact, the statute appears to give strong encouragement to the courts to award fees:

If a dispute under this subdivision is later adjudicated and it is determined that the salesperson was not promptly paid commissions earned through the last day of employment as provided under subdivision 2 [referenced above], the employer *shall* pay reasonable attorney's fees incurred by the salesperson.⁴

Faced with the possibility of a double commission and liability for attorney's fees, the recalcitrant client of a broker has a strong incentive to pay the salesperson's fee. It has been the authors' experience that this incentive is often effective.

The Statute Applies to Typical Real Estate Transactions.

While there is no case law in Minnesota bearing on the issue, the statutory scheme read carefully is applicable to real estate transactions, although certain requirements must

² Minn. Stat. § 181.145, subd. (2)(a) (West, 2002).

³ Minn. Stat. § 181.145, subd. (3) (West, 2002) [emphasis added].

⁴ Minn. Stat. § 181.145, subd. (4)(B) (West, 2002) [emphasis added].

be met. First, the broker must be “paid on the basis of commissions.”⁵ Incidentally, the Court of Appeals of Minnesota has noted that “[i]mplicit throughout the statute is the notion that the salesperson is paid *by the principal* on the basis of commissions.”⁶

Second, although the statute uses the term “employ” to describe the relationship between the parties, Minn. Stat. § 181.145 specifically provides that one must be an independent contractor to be protected by it:

For the purposes of this section, "commission salesperson" means a person who is paid on the basis of commissions for sales and who is not covered by sections 181.13 and 181.14 *because the person is an independent contractor.*⁷

Note that this statute distinguishes the other statutes in the chapter which contemplate an employee-employer relationship, including Minn. Stat. § 181.13 (which applies to “any employer employing labor within this state” who “discharges an employee”⁸), as well as Minn. Stat. § 181.14 (which applies to “any . . . employee [who] quits or resigns employment”⁹), which afford relief to employees in other types of situations.

Most real estate transactions fit within the confines of the Commission Salesperson statute. Take, for example, the case of a homeowner who employs an agent with a realty firm: The principal broker contracts with the seller, and is an independent contractor. The real estate agent, though a fiduciary of the seller, is still an agent for the independent contractor, which can enforce its rights under the statute. And, moreover, there is no indication in the statute that real estate brokers are to be treated any differently

⁵ Minn. Stat. §181.145, subd. (1) (West, 2002).

⁶ Midwest Sports Marketing, Inc. et al. v. Hillerich & Bradsby of Canada, Ltd., 552 N.W.2d 254, 266 (Minn.App. 1996) [emphasis in original].

⁷ Minn. Stat. § 181.145, subd. (1) (West, 2002) [emphasis added].

⁸ Minn. Stat. §181.13 (West, 2002)

⁹ Minn. Stat. §181.14, subd. 1 (West, 2002)

than other commission salespersons, or that real estate sales are to be treated any differently than other sales.

If the Listing Contract is Terminated, Availability of the Remedy May be Affected.

Consider the situation in which the “one that got away” was a sale consummated after the listing agreement expired or was terminated. The principal is likely to claim that the transaction, occurring after the agreement ended, does not constitute timely performance. Does the broker still have a remedy?

The first step in answering that question is to determine what the broker was required to do to earn a commission, which requires a reading of the broker’s listing agreement. For example, the listing form approved by the Minnesota Association of Realtors provides that the principal is liable for the commission if he sells or agrees to sell the property before this contract ends, if the broker produces a ready, willing and able buyer during the term, or if a buyer meeting certain qualifications purchases the subject property after the term has expired.¹⁰ On the other hand, the form approved by the Minnesota State Bar Association shows that liability for the commission is triggered by “the successful closing of the sale of the property.”¹¹

This is important because the 15 day double damages provision “appl[ies] only with respect to the payment of commissions earned through the last day of employment.”¹² And, the Commission Salesperson’s attorney’s fees provision indicates that the broker is entitled to attorney fees only if the broker was not promptly paid

¹⁰ Exclusive Right to Sell Listing Contract, p. 1, ll. 28-46, Miller/Davis Co. Form 1519X (© Miller/Davis Co., 1996).

¹¹ Listing Contract, p. 1, l. 46, M.S.B.A. Real Property Form No. 51 (© Minnesota State Bar Association, 1996).

¹² Minn. Stat. §181.145 subd. 5 (West, 2002).

“commissions earned through the last day of employment.”¹³ This phrase is defined by the statute to mean that the services or merchandise in question must be “delivered to and accepted by the customer by the final day of the salesperson's employment.”¹⁴

Arguably, then, if the parties use the form requiring the sale to be closed before a commission is owed, and the closing occurs after the listing agreement expires, the broker is not entitled to relief under the statute. However, if the closing occurs after the agreement is terminated, it could be argued that the relief should still be applied because the principal terminated the contract in order to avoid payment of a commission, and letting the principal evade the remedies afforded by the statute would be inequitable.

The Agent or Broker Must Have a Signed Listing Agreement in Order to Enforce His Rights Under the Statute.

Finally, it is important to remember that none of the protections discussed above apply who does not have a signed listing agreement or fee agreement with the client. The reason for this is two-fold: First, real estate brokers in Minnesota are subject to the requirement that all listing agreements be in writing and meet other statutory requirements, such as indicating “the amount of any compensation or commission or the basis for computing the commission,” and providing “a clear statement explaining the events or conditions that will entitle a broker to a commission.”¹⁵ Second, one cannot bring a civil action to recover a fee unless there is a written listing or fee agreement.¹⁶

¹³ Minn. Stat. §181.145, subd. 4(b) (West, 2002)

¹⁴ Minn. Stat. §181.145, subd. 1 (West, 2002)

¹⁵ Minn. Stat. § 82.195, subd. 2(4), subd. 2(5) (West, 2002). A careful review of this statute should be made to confirm that a given listing agreement meets the requirements set forth therein.

¹⁶ Minn. Stat. § 82.33, subd. (2).

Therefore, availability of the Commission Salesperson statute is simply another reason in a long list for brokers to scrupulously adhere to the use of listing and fee agreements.

Conclusion.

Maybe it won't help you catch that huge walleye, but the Commission Salesperson's statute is still an effective and compelling collection tool. And, it is applicable to many, perhaps even most, unpaid real estate commission scenarios. The authors hope that it is of some use to you as you help your client land the commission that got away.

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