



8240 Devereux Drive
Suite 100
Viera, Florida 32940

321-259-8900
321-254-4479 Fax
www.deanmead.com

Attorneys and Counselors at Law
Orlando
Fort Pierce
Viera

CLAUDIA F. HAINES
321-259-8900
chaines@deanmead.com

Overview of Distribution Agreements - Florida

By Claudia F. Haines, Esq.

Researched by Jonathan P. Stevens

Florida's Regulatory Regime: The Florida legislature regulates the conduct of manufacturers and distributors in certain industries. These regulations are separate from the franchise regulations. Reference to applicable statutory provisions is essential to crafting a distribution agreement that will be governed by Florida law. For example, among others, Florida Statutes §686.40 et seq. governs relations among manufacturers and dealers of agricultural equipment, art dealers, and manufacturers, distributors, wholesalers and dealers of outdoor power equipment. Manufacturers and dealers in recreational vehicles are governed by F.S. §320.3201 et seq. The provisions of F.S. §320.61 require that manufacturers and dealers of new motor vehicles be licensed in the State of Florida by the Department of Highway Safety and Motor Vehicles. And under F.S. §320.8255, manufacturers of mobile homes and recreational vehicles must obtain a license annually for each factory location, both within and outside of the State of Florida, prior to distributing any of those types of vehicles for sale within the State. Florida also governs manufacturers and distributors of alcoholic beverages and tobacco, food and slot machines. (See. F.S. §§561-569, §500 and §551.108, respectively.)

Considerations at Commencement and During the Term: Distribution agreements are typically long-term commercial relationships, requiring the parties to contemplate changes that may occur during the term and to anticipate the business and market place challenges that may arise. Perhaps the most contentious and hotly negotiated provisions in a distribution agreement are the terms upon which the manufacturer may terminate the agreement. A manufacturer will naturally seek to preserve its ability to terminate for "good cause." Distributors bargain to limit their risk of being shuttered without a long notice period and provisions for disposing of inventory. During the term of the agreement, a manufacturer will wish to preserve its ability to control inventory flows, delivery times, a distributor's minimum inventory levels and its product mix. On the other hand, a distributor will seek flexibility to manage the same items but in order to minimize its balance sheet risks, protect its cash flow and maximize its local competitive posture within its territory. In order to balance those competing interests, the parties need to consider markets, financing, product cycles, operational procedures, customers' access to financing, the health of competitors, and lengthening or shortening of product life-cycles. Among the material terms a manufacturer will negotiate with its distributor are: (1) The territory—whether it will grant an exclusive or non-exclusive right to distribute in the territory; (2) whether the manufacturer's trademarks or service marks will be used to sell the product, whether the distributor will use company logos and promotional materials; (3) the product lines and mixes to be distributed in the territory, allowing for a mechanism to adjust both based upon demand-driven market data gathered during the term; (4) the types of market and other data the manufacturer will require the distributor to provide during the term and the frequency of reporting; (5) whether the distributor may sell competing brands, (6) whether the manufacturer will provide inventory financing for the distributor, and if so whether the distributor will be required to carry a minimum inventory; (7) precise performance metrics and the basis on which calculations and data collection will be conducted and the time period within which a distributor may cure deficiencies; and (8) the terms on which the distributor purchases from the manufacturer, whether it will be eligible for discounted purchases or whether a distributor may purchase from another distributor. Manufacturers should be alert to pricing schemes that may run afoul of state and federal anti-trust laws, especially if its distributor is required to purchase separate components from the manufacturer. During the term, the manufacturer will generally conduct periodic reviews of the distributor's performance, assessing whether performance metrics are working as intended, whether procedures are being followed, whether subsequent business or other economic events have materially changed the manufacturer's markets, the integrity of the data provided by the distributor, and whether comparative

sales data, payment records, inventory levels, warranty claims and/or distributor complaints are red flags about the distributor's financial health. In the aggregate, this data may form the basis for the manufacturer's right to terminate an agreement prior to the expiration of its term.

Termination Issues: Management should conduct a thorough review of the distribution relationship, including a detailed review of all the performance related data for a distributor, and consult with legal counsel prior to terminating an agreement. Under Florida law, in certain industries the failure to renew distribution agreements is an event of termination entitling a distributor to statutory remedies and procedures for winding down the business. Terminations of distribution agreements have spawned substantial litigation. Among the civil claims brought by distributors, fraud and fraud in the inducement are expensive suits to defend. As a consequence, a contractual limit on damages (to the extent not inconsistent with applicable statutes) may be a significant risk management tool. Defendants may also face a tort action (unique to Florida and a dozen other jurisdictions) for "economic loss." A plaintiff may not bring this suit and bring suit under the distribution agreement; a suit on the contract precludes a suit for economic loss. The tort suit permits recovery for economic losses that may be extrinsic to the distribution agreement but for which the manufacturer may be found liable nonetheless.

About the Author

Claudia F. Haines is a member of Dean Mead's Corporate Law Team. She represents clients in the area of business/corporate law with an emphasis on business combinations and divestitures, corporate governance, business contracts, the legal and business issues unique to technology start-ups, and business negotiations, including informal dispute resolution.

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