Antitrust Aspects of Drafting Distributor Agreements

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Business lawyers are regularly called on to draft or review agreements for the sale of products from a manufacturer to wholesalers or retailers. Manufacturers as well as distributors often desire to restrict the manner in which resales are made or the customers with which each distributor may deal, but these restrictions can raise significant issues under the antitrust laws and related forms of trade regulation.

The cases show that the legality of restrictions in a distributor agreement often turn on the way the applicable clauses are drafted, negotiated and administered. This article discusses general antitrust principles, with specific applications, for the drafting of these important contracts. The article is intended as a reference for lawyers and business personnel who do not have an antitrust background. Readers who are trade regulation specialists may wish to combine this material with their own reflections in training and compliance programs.

GENERAL DRAFTING PRINCIPLES

Distributor agreements involve a higher likelihood of disputes than other contracts in a number of ways. First, unlike discrete sales, the distributor agreement governs a relationship that may last several years. Over such a period, the parties' interests and resources may change and become incompatible. Second, unlike contracts that are tended to by senior executives and their lawyers, distribution relationships are often established and administered by personnel of the manufacturer and distributor who are unassisted by legal counsel and who may be inexperienced in following the applicable rules. Third, because a distribution arrangement can represent a predominant portion of the business of at least one of the parties, actions taken with respect to the contract may have an enormous impact on that company's viability, making virtually any dispute a potential subject for litigation.

The potential liability if a distributor dispute erupts is also high. Distributor litigation may involve preliminary and final injunctions requiring the parties to continue to deal with one another, as well as other extraordinary relief that can encumber each company's management. Damage awards can be large, particularly if the relationship is of long standing. A private action under the federal antitrust laws qualifies for treble damages plus attorneys' fees, and punitive damages are frequently sought for fraud or other torts.

Because of these heightened risks, the drafter of a distributor agreement should be sensitive to the following general concerns.

Specify the business justifications.

Lawyers are trained to draft commercial documents in a measured and objective manner. This otherwise worthy instinct should be relaxed while preparing a distributorship. More than for most types of contracts, the drafting of a distributor agreement needs to be a work of good communication and advocacy. The contract and supporting documents should be written in a manner that educates the client, the other party and any other readers concerning the purpose of particular restraints, and that outlines for these readers the good business reasons for including the restraints.

The drafter should not hesitate to state the intent of clauses. If clearly written in plain English, the contract can help the manufacturer's and distributor's personnel avoid antitrust pitfalls and can serve as a key part of an antitrust compliance program. And if all else fails, the contract will be one of the most important pieces of written evidence in any litigation or arbitration. The drafter may therefore wish to use the contract itself as an opportunity to explain and advocate the client's position.

Do not hesitate to state plainly the rights of the parties, even at the risk of obviousness or redundancy. For example, if the distributorship is "nonexclusive," the drafter should go on to state that the manufacturer reserves the right to establish additional distributors in the same area and to compete directly with the distributor through any channel of distribution. In addition to precluding an argument that oral evidence is necessary to interpret the intent of the parties, such additional language may forestall distributor claims (which are frequently made) that the manufacturer has in some way breached the implied covenant of good faith and fair dealing.

Focus on the most important objectives.

The restraints in a distributor agreement should be carefully adapted to the client's genuine concerns. The drafter and the client should thoroughly discuss the factual setting and evaluate the client's objectives for the relationship. The drafter should steer clear of preconceptions, and should avoid simply inserting the most onerous and one-sided provisions. Frequently, a restraint of lesser scope, involving less antitrust risk, is a better solution for the client in a particular fact situation. This is not to say that the drafter should refrain from achieving the result desired by the client. But while the contract should be strong on those points where the most protection is needed, balance elsewhere in the contract will help to assure the enforceability of the critical restraints.

Beware of arrangements that require extensive monitoring by the manufacturer.

Restraints on a distributor may place the manufacturer in the unenviable position of policing that distributor's conduct to protect the actual or asserted rights of other distributors. The manufacturer is likely to receive complaints from the other distributors of any violations of the restraints, which would increase the risk that a jury would be permitted to infer an illegal agreement between the manufacturer and the complainers.

Conversely, any rights granted to a particular distributor (such as limited exclusivity), require the manufacturer to impose restraints on all other distributors *and* to monitor and enforce those restraints. Accordingly, a manufacturer must be especially careful not to promise anything to a particular distributor that the manufacturer's existing agreements with other distributors do not allow the manufacturer to enforce.

From an antitrust law perspective, the manufacturer should make sure that any restraints imposed actually benefit the manufacturer (and that those benefits are documented), and are not instituted and enforced for the benefit of a number of competing distributors. Otherwise, the agreement may be open to the implication that the manufacturer is merely the agent for dividing customers and territories among distributors. Such a horizontal agreement among parties at the same level of trade would be a *per se* antitrust violation—one that is illegal without regard to its purpose or effect. As discussed below, there are usually a number of restrictions that the drafter may consider as alternatives to those that require or invite elaborate monitoring by the manufacturer.

LEGAL PRINCIPLES

In order to place the distribution arrangement in the most favorable antitrust posture, the drafter should be aware of the antitrust law principles applicable to restraints in a vertical relationship—here, the arrangement between a manufacturer and its distributor.

First, the antitrust statutes most widely invoked in distributor litigation are triggered by concerted activity. Section 1 of the federal Sherman Act (15 U.S.C. § 1) applies to a "contract, combination…or conspiracy," for example. In the absence of monopoly power or attempted monopolization, conduct that would be illegal for two parties to agree on can be perfectly legitimate if engaged in by a single economic actor. Thus, a non-monopoly manufacturer generally may, for its own good business reasons, terminate or fail to renew a distributor under the antitrust laws. (But, as discussed below, many states have statutes outside of the antitrust arena that may restrict a manufacturer's ability to terminate or fail to renew a distributor.)

Second, even agreements that potentially restrict trade frequently pass antitrust muster if they are between parties in a vertical relationship. Restraints in an agreement between a manufacturer and a distributor are generally judged under the "rule of reason," i.e., they are unlawful only if they result in an "unreasonable" restraint of trade. The Supreme Court confirmed this principle in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), in which the Court held that even minimum prices required by a manufacturer for its distributors would no longer be judged by the *per se* rule.

The Supreme Court originally held nearly one hundred years ago in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) that it was *per se* illegal for a manufacturer to agree with its distributor to set the minimum price the distributor could charge for the manufacturer's goods. Then, in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), the Supreme Court held that the *per se* rule of illegality applied with equal force to maximum resale prices. Both of these decisions have now been overruled. *Albrecht* was overruled in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), and, as noted, the long-standing *Dr. Miles* precedent was overruled this year in *Leegin*. A manufacturer's establishment and enforcement of minimum or maximum resale prices will now be judged by the rule of reason instead, although that simply begins the analysis.

Maximum resale price restrictions are more likely to be imposed where the distributors might be tempted to exploit local market power to raise prices and thereby dampen sales volumes (e.g., for newspaper delivery routes) than where the affected products require extensive pre-sale or post-sale servicing. *See, e.g., Lubbock Bev. Co. v. Miller Brewing Co.*, 2002 WL 31011266 (N.D. Tex. 2002) (beer distribution); *Mathias v. Daily News, L.P.*, 152 F. Supp. 2d 465 (S.D.N.Y.

2001) (newspaper deliveries). And minimum resale price restrictions are more likely to be imposed where certain distributors might offer deep discounts on a manufacturer's high-value goods, thereby undercutting those distributors willing to invest in providing additional services to consumers (such as product display and education). While *Leegin* and *Khan* reduce the risk in the area of vertical price restraints under federal law, manufacturers must still be concerned with state statutes and court decisions that remain hostile to resale price maintenance in any form.

Finally, the manufacturer has long had the right to deal or not to deal with distributors and retailers, in general, as the manufacturer sees fit. (This is known as the "*Colgate* doctrine," after the name of a 1919 Supreme Court decision.) Indeed, although likely no longer to be as widespread an approach to influencing resale prices now that minimum resale price maintenance is not subject to the *per se* rule, the manufacturer may suggest resale prices to its distributors and retailers and terminate those who do not follow the suggestion. While such a decision to terminate (or to nonrenew or refuse to deal with a distributor) might lead to considerable antitrust exposure if it results from the agreement of the manufacturer and a group of other parties at the same horizontal level of trade (such as complaining fellow distributors)—which agreement the Supreme Court has held could be inferred from numerous complaints to the manufacturer from competing distributors about a particular distributor's price-cutting practices—the Court has also held that a jury should be permitted to make such an inference only if there is independent evidence that tends to exclude the possibility that the manufacturer acted independently. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). Buttressing this evidentiary directive, the Supreme Court has also said that an agreement between a manufacturer and a distributor to terminate a competing "price-cutter" distributor would not be condemned under the *per se* rule unless the parties actually agreed on the price or price levels to be charged. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

SPECIFIC APPLICATIONS

The general drafting principles and legal rules outlined above are best understood by applying them to the most typical forms of distributor restrictions.

Purchase obligations.

Exclusive dealing. Some manufacturers insist that the distributor purchase its entire requirements of a given type of product from the manufacturer and not offer products from a competing manufacturer. Such requirements or exclusive dealing agreements raise antitrust issues not only under section 1 of the Sherman Act but also, as to tangible goods, under section 3 of the Clayton Act. While generally sustained, exclusive dealing agreements can be found to violate these laws if the effect is to impair the ability of other manufacturers to find sources of distribution. These agreements can be troublesome if they are used by a manufacturer holding a large market share. (These "exclusive dealing" arrangements are to be contrasted with "exclusive distributorships"—which involve a different concept and a different body of law—as discussed below in the section regarding geographical and customer restrictions.)

Occasionally, all that the manufacturer needs is to require the distributor to purchase such quantities as are required "to meet the demand for [the manufacturer's branded] products" in the distributor's trade segment. This should not cause exclusive dealing problems, because the distributor is free to handle other brands of products. The requirement merely ensures that the distributor buys products of the manufacturer's brand from the manufacturer, not from other resellers. The drafter may also wish to state affirmatively that the distributor is entitled to handle competing goods, subject to any performance goals.

A manufacturer may not need a requirements obligation because its commercial objectives may be obtained by requiring distributors to offer a full line of its products. Such "full-line forcing" presents fewer antitrust problems if distributors are not prohibited from purchasing competing products, especially where the manufacturer's products are related and reasonable consumers would expect the products to be sold together. *See U.S. v. J.I. Case Co.*, 101 F. Supp. 856 (D. Minn. 1951); *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1295-97 (10th Cir. 1989); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1383-85 (5th Cir.1994); *Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869, 875-76 (11th Cir.1998).

Performance goals. Distributor agreements frequently specify performance goals. These goals are most often expressed in terms of sales volume or revenues, but they may refer to promotional activities such as the number of sales personnel or the level of advertising expenses. The drafter should carefully consider the purposes of the goals and the specific consequences of the distributor not meeting them. It may be sufficient to use the goals as one important part of a periodic review between manufacturer and distributor to determine whether the distributor is performing satisfactorily, so that the manufacturer can determine whether to renew the arrangement. In this manner, the manufacturer can use any shortfall as leverage to negotiate remedial measures for the following year.

Rather than declaring that failure to meet performance goals is grounds for immediate termination, the drafter should consider permitting the manufacturer to convert an exclusive distributorship to a non-exclusive one. These provisions are less onerous and less likely to provoke litigation, since the distributor is free to continue selling the products.

Geographical and customer restrictions.

The manufacturer typically desires each of its distributors to develop and satisfy the demand for its products in a particular segment of trade. Sometimes the segment is defined by a geographical area (e.g., sales of products in the States of California and Nevada). In other cases, the segment is defined by the type of customer (e.g., sales of products for use by hospitals and other health care providers, or sales other than to major "national accounts").

Exclusivity. The principal consideration is whether the distributor's segment is defined exclusively or nonexclusively. A reference to an "exclusive" distributorship can be ambiguous, and the drafter can prevent costly misunderstandings and litigation by carefully discussing the possible meanings of this term with the client. For example, the client may intend only that the manufacturer itself will not compete with the distributor; or that while the distributor cannot sell outside of the trade segment, the manufacturer is permitted to sell to customers within the segment; or that the segment is truly "closed," such that the distributor cannot sell outside the segment and the manufacturer and other distributors cannot sell within the segment.

A closed exclusive distributorship involves heightened antitrust risk, measured by the rule of reason under section 1 of the Sherman Act and comparable state statutes. The rule of reason is applied to territorial and customer restrictions in vertical arrangements. In general, the rule of reason requires that such a restraint be imposed with the purpose of enhancing the manufacturer's ability to compete with suppliers of competing products ("interbrand competition"); that the restraint have the effect of improving interbrand competition; and that the benefits of improved interbrand competition are not in some sense outweighed by the reduction in competition among distributors of the manufacturer's products ("intrabrand competition"). *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

The comparison between effects on interbrand and intrabrand competition has subtly changed over the years. *Sylvania* appeared to require an explicit balancing of interbrand effects against intrabrand effects. However, the primary question expressed in the later cases is whether the pro-competitive effect on interbrand competition is substantial. *See Dickson v. Microsoft Corp.*, 309 F.3d 193, 208 (4th Cir. 2002); *Ezzo's Investments, Inc. v. Royal Beauty Supply, Inc.*, 243 F.3d 980, 987-88 (6th Cir. 2001). Recent cases have also focused more closely on the market share of the manufacturer, with restraints of this type more likely to be sustained if the manufacturer has a smaller market share and is therefore clearly facing significant interbrand competition. *Ezzo's Investments*, 243 F.3d at 988; *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Industries, Inc.,* 889 F.2d 524, 529 (4th Cir. 1989).

Geographical and customer restrictions are usually defended by demonstrating that they induce the distributor to increase its promotional efforts and customer service in its designated segment. But by absolutely precluding the competition of the manufacturer and other distributors, closed territories eliminate intrabrand competition and require correspondingly greater proof of the clause's beneficial impact on competition among brands. The very few cases decided against the manufacturer under the rule of reason have generally been closed exclusive distributorship cases. *See Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560 (11th Cir. 1983); *cf. Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980)).

The manufacturer may disfavor exclusive territory or customer segments, particularly if the segments do not overlap. If the manufacturer becomes dissatisfied with an exclusive distributor's performance, it may be quite difficult, from both a commercial and an antitrust standpoint, to replace the distributor or induce it to do a better job. Moreover, closed territories tend to make the manufacturer a police officer for its entire distribution system, having to respond to complaints by affected distributors. For business as well as legal reasons, therefore, the lawyer for many manufacturers should explore the alternatives to an exclusive distributorship.

A new entrant seeking to grow through arrangements with larger established distributors, however, will often find exclusive distributorships to be useful. The new manufacturer's products may be much more attractive to a distributor if the distributor can be assured that the distributor can have an "exclusive" in a particular territory or market segment.

Non-exclusivity.

The alternatives to a closed distributor trade segment include areas of primary responsibility, location clauses, and profit or warranty passovers. These alternatives may satisfy the parties' commercial objectives without triggering the heightened legal risks and monitoring headaches of exclusivity.

Areas of primary responsibility. In an area of primary responsibility ("APR") clause, the distributor covenants to use its "reasonable efforts" or "best efforts" to develop and satisfy the demand for the manufacturer's products in a specified territory or class of trade. Performance goals may be established to aid in determining whether the distributor has met this goal for the APR. However, the distributor is not prohibited from making sales outside of the APR. The great advantage of APRs from an antitrust standpoint is that there is no absolute covenant that demands or invites monitoring at the behest of other distributors. The covenant is one of best efforts or of satisfying a given performance goal, which are matters for only the manufacturer and the affected distributor to resolve.

APRs of different distributors can be made to overlap, either initially or later if a distributor fails to achieve performance goals. Overlapping APRs lessen the antitrust risk, because intrabrand competition will be stronger, and may be preferred by manufacturers from a commercial standpoint. They are correspondingly less attractive than separate APRs to prospective distributors.

Drop shipment policies. Some manufacturers have a policy or practice of drop shipment: for a specified charge, the manufacturer will ship products directly to the distributor's customer, saving the distributor storage, handling and reshipment costs. Many of these manufacturers perform drop shipment services only in favor of customers located within the distributor's APR. A restricted drop shipment policy of this type is judged by the rule of reason under the antitrust laws and would ordinarily be sustained. *See Dart Industries v. Plunkett Co.*, 704 F.2d 496 (10th Cir. 1983). Because the market and the strategies of competitors can change rapidly, most manufacturers prefer not to commit themselves to a specific drop shipment policy in its distribution contracts. Rather, the policy is announced and refined from time to time.

Location clauses. The agreement may require that the distributor may only receive shipments from the manufacturer at specified warehouse locations, or that the distributor shall establish warehouse or resale offices only at specified locations. These restrictions can satisfy the manufacturer's desire that the distributor's efforts be concentrated in a particular geographical area, but do not preclude the distributor from making some quantities of sales elsewhere. Location clauses involve less antitrust risk than do exclusive arrangements, because intrabrand competition is not foreclosed. *See Sylvania*, discussed above.

Profit or warranty passovers. In an APR or location clause arrangement, the manufacturer may wish to preserve the economic incentives of the local distributor to provide pre-sale and post-sale services such as extensive showrooms, trained sales personnel and warranty repairs. A passover clause provides that if a distributor makes a sale in another distributor's APR, the seller is required to remit a specified portion of the sale price to the other distributor in consideration of the services that the other distributor is expected to provide for the customer. These clauses create antitrust risks, because they impose a direct economic disincentive on intrabrand competition. For example, in *Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980), a profit passover was held to be a sham because it bore no relation to actual services performed by the recipient distributor. They also invite complaints and the other problems associated with monitoring.

The drafter of a passover clause can enhance its enforceability by stating clearly and persuasively the purpose of the clause. It is useful for the judge or jury to see on the face of the contract that the intent of the clause is to compensate the other distributor for services, not to eliminate competition among the distributors.

Covenants against direct sales. Sometimes, the only restraint that is necessary is the promise by the manufacturer itself not to sell in the geographical area or to specified classes of customers. These promises typically involve very little antitrust risk.

Resale pricing matters.

Resale prices. As noted above, after much debate by scholars and advocates, the Supreme Court in *Leegin* recently authorized most efforts by manufacturers to regulate resale prices. Prior to *Leegin*, an agreement between a manufacturer and a distributor regulating the distributor's minimum resale price levels was prohibited by the *per se* rule. But even after this change in the federal rule, there are state antitrust laws and enforcement mechanisms that constrain the practical flexibility in this area. Manufacturers desiring to influence the minimum pricing of its products continue to invoke the Colgate doctrine (described above), so that the manufacturer would suggest resale prices and terminate distributors who did not comply, or adopt "Minimum Advertised Price" (or "MAP") cooperative advertising programs under which the distributor's promotions are partially funded by the manufacturer as long as any advertised price was above a minimum threshold.

Even where subject to the rule of reason, vertical pricing restrictions will be closely evaluated based on the manufacturer's market power, competitive justifications offered, and the likely anticompetitive effect of the arrangement. An agreement specifying minimum resale prices remains illegal if used, for example, by a manufacturer with significant market power to maintain monopoly profits. A manufacturer with significant market share should thus remain careful in implementing pricing floors, and consider the pro-competitive reasons for doing so.

If a manufacturer produces the type of goods for which a minimum price serves no purpose (such as low-value, frequently purchased items), then leaving the price-setting to the distributor remains the safest approach. In these cases, and any others in which for commercial or other reasons the manufacturer determines not to institute minimum resale pricing, the drafter should consider stating affirmatively that the distributor's resale prices are for the distributor alone to determine (to help keep the manufacturer's own personnel from making statements, and other distributors from registering complaints, that could be inferred as attempts to regulate resale prices).

Netbacks and price sharing clauses. Courts have recognized that manufacturers in many situations have a legitimate interest in ensuring that price reductions are passed through to the consumer, rather than being retained by the distributor. Such requirements are akin to maximum resale price restrictions, so the Supreme Court's 1997 decision in *Khan* helps to confirm this approach. The drafter may wish to consider provisions that protect a specified netback or that reduce the sale price if the distributor makes a corresponding reduction in the resale price. Such clauses are also less likely to raise possible issues under state antitrust laws. From a business standpoint, such provisions may be better suited for a pricing policy announced and amended from time to time, rather than for inclusion as a contractual commitment. Any such approach does, however, impose a significant monitoring requirement upon the manufacturer.

Independent contractor clause. Manufacturers and distributors are increasingly describing their relationships with language previously reserved for partnerships and other fiduciary settings. One chemical product manufacturer describes its distributors as “stewards” having “stewardship” responsibilities; a computer hardware manufacturer has entered into self-styled “partnerships” with software vendors. The drafter should consider redoubling efforts to confirm that the parties are independent contractors, and that neither is the agent, partner or fiduciary of the other. This will help negate any inference that prices to customers are to be set jointly or that the distributor has the power to bind the manufacturer (e.g., where the distributor makes promises of efficacy or safety in excess of the warranty made by the manufacturer). It may also help negate inference of a special relationship leading to fiduciary status and enhanced liability exposures under state tort law.

Termination matters.

Duration. The natural inclination of the business personnel for both the manufacturer and the distributor is to provide for an evergreen duration (i.e., that the agreement will continue until such time as either party elects to terminate it). In some industries evergreen arrangements are favored as a means for ensuring an actual contract is always in effect. Nevertheless, it is almost always better to use a fixed term instead. A fixed term allows a periodic review of the relationship and causes the parties to focus on specific goals to be achieved during that time. The term also helps to create mutual expectations on the life of the relationship, making nonrenewal a less challenging event than a termination would be. (Note that some franchise and special industry laws, such as the federal Petroleum Marketing Practices Act, require a minimum term for the manufacturer to have maximum flexibility for termination or nonrenewal of the agreement.) The drafter may also wish to declare that any sales made after expiration of the term are made on open account rather than constituting a renewal or extension of the agreement term.

Termination without cause. A drafter representing either the manufacturer or the distributor should consider providing that the distributor may terminate the agreement without cause at any time on reasonable notice. From the manufacturer’s standpoint, this right will help refute any claim that the distributor was coerced by the manufacturer to take any particular action. Depending on the relative bargaining powers, the manufacturer may also be able to reserve the right of termination without cause on reasonable notice. (But the manufacturer should consider whether it will need such a clause.) As a precaution, the drafter should consider providing for at least 90 days’ notice for termination without cause, so the agreement comports with a number of state franchise and business opportunity laws which require that amount of time for termination or nonrenewal.

Termination for cause. The manufacturer should consider reserving the right to terminate immediately or on very short notice (and without an opportunity to cure) if the distributor takes actions that are fundamentally inconsistent with the purpose of the relationship. (The distributor may desire comparable rights if it does not have the right to terminate without cause.) The following are examples of grounds for manufacturer’s termination for cause:

- If the distributor is in breach of the agreement.

- If the distributor becomes insolvent or files a bankruptcy petition. Although this right would not be given full effect in a federal bankruptcy proceeding, it is helpful in other contexts.

- If the distributor sells products made by others under the manufacturer's brand.

- If the distributor switches customers' orders from the manufacturer's product to that of a competitor.

- If the distributor becomes a manufacturer of competing products, or acquires an interest in such a competitor, where the interest adversely affects its ability to promote the sale of the manufacturer's products.

Buyback option on termination. The manufacturer should consider reserving the option to repurchase any existing stocks of inventory in the event the distributor agreement is terminated for any reason. A buyback option facilitates supply for the successor distributor and ensures that pre-sale and post-sale services accompany the sale of the affected stocks. Also, the manufacturer may offer to exercise the option in appropriate cases to facilitate resolution of distributor disputes.

However, the manufacturer's lawyer should be wary of having the manufacturer covenant to repurchase the inventory. Such a buyback covenant can be construed as a "manufacturer assisted marketing plan" that may, in a number of states, trigger business opportunity statutes which would not otherwise be applicable.

State Dealer Day in Court statutes. Over 20 states have statutes that may restrict a manufacturer's right to terminate or fail to renew a distributor agreement. Other states have such laws that apply to distributors in specific industries. The application and requirements of these statutes vary widely. Hence, in making and implementing a decision to terminate or fail to renew a distributorship, it is important that any local requirements be considered.

Recitals and correspondence.

The recitals to the contract, the cover letters, and any explanatory material used by the manufacturer may stress the existence of interbrand competition and the need for restraints to enhance the distribution of the manufacturer's products. For example, one manufacturer's contract form includes a recital that "[t]here is intense competition among manufacturers in the marketing of [type of products]. Consequently, Company needs active and aggressive sales efforts by Distributor with retailers in Distributor's area of primary responsibility." Similar references can be included where appropriate in correspondence between the manufacturer and a distributor, particularly if a dispute is brewing.

Another document for which careful drafting is essential is the manufacturer's response to a distributor that has complained about the practices of another distributor. Because of the *Monsanto* case, the response should politely but firmly state that the relation between the manufacturer and the distributor is for those two parties to handle, and that any actions the manufacturer may take will be the result of the manufacturer's independent judgment. Because of the legal sensitivity of such communications, it is critical that they be drafted by legal counsel.

CONCLUSION

Restrictions in distributor agreements can create large liabilities and commercial problems if the drafter is not sensitive to the issues raised by the antitrust laws. The drafter can help the parties achieve their objectives for the relationship by identifying restrictions that entail major antitrust risks; considering the use of alternative arrangements that involve lesser risks and avoid the difficulties of monitoring; and including statements of intent that will educate and persuade the companies' personnel (and any trier of fact) concerning the business justifications for the restrictions.