Table of Contents

Volume 1

PART I. TEXT

CHAPTER 1. DISTRIBUTION AND ANTITRUST COUNSELING ADVICE

§ 1:1 Introduction
§ 1:2 The four principles of antitrust counseling
§ 1:3 Selection of the distributor
§ 1:4 Restraints on the distributor
§ 1:5 —Price restrictions
§ 1:6 — —Persuasion versus coercion
§ 1:7 — —Resale price maintenance can eliminate control
§ 1:8 — —Avoiding successful resale price maintenance claims by terminated distributors
§ 1:9 —Consignments
§ 1:10 —Minimum advertising programs
§ 1:11 —Promotional programs
§ 1:12 —Pricing policies
§ 1:13 —Territorial restrictions
§ 1:14 — —Exclusive territories
§ 1:15 — —The location clause
§ 1:16 — —Areas of primary responsibility
§ 1:17 — —Adequate representation clause
§ 1:18 — —The profit pass-over clause
§ 1:19 — —The "hard exclusive"
§ 1:20 —Restrictions as to products
§ 1:21 — —Restrictions against dealing in goods of a competitor
§ 1:22 — —Tying arrangements
§ 1:23 — —Full-line forcing
§ 1:24 — —Spot buying
§ 1:25 Other distributorship problems
§ 1:26 —Stock lifting
§ 1:27 —The distributor who becomes a competitor
§ 1:28 —The distributor who sues a supplier
§ 1:29 —The distributor as a distributor versus a broker or franchisee
§ 1:30 —Boycotts

§ 1:31 —Reciprocity
§ 1:32 —Trade associations
§ 1:33 —Price discrimination
§ 1:34 —Terminations
§ 1:35 — —Distributor terminations checklist
§ 1:36 — —Analysis of distributor terminations
§ 1:37 — —Conclusions
§ 1:38 —National account programs
§ 1:39 —Exclusive dealing arrangements
§ 1:40 — —The "quantitative substantiality" standard
§ 1:41 — —The "qualitative substantiality" test
§ 1:42 —Internet distribution
§ 1:43 Racketeer Influenced and Corrupt Organizations (RICO) Act
§ 1:44 Documentation
§ 1:45 Conclusion

CHAPTER 2. HOW TO AVOID, PREPARE FOR, AND (SHOULD ALL ELSE FAIL) WIN SUPPLIER-DISTRIBUTOR DISPUTES

§ 2:1 Inevitable conflicts
§ 2:2 Precise contracts can prevent disputes
§ 2:3 —The form of the distributor's payments to the supplier
§ 2:4 —Avoiding a franchise or other special relationship
§ 2:5 —Termination rights
§ 2:6 —Quota-based termination and renewals
§ 2:7 —Defining nonprice vertical restraints
§ 2:8 —Protecting trademarks, goodwill, and reputation
§ 2:9 —Arbitration clause
§ 2:10 Educating personnel about distribution law
§ 2:11 —Instituting compliance programs
§ 2:12 —Tailoring the employee brochure
§ 2:13 — —Abbreviating the brochure
§ 2:14 — —Senior management statement
§ 2:15 —Discussions and role playing
§ 2:16 Preparing for distribution disputes
§ 2:17 —Preparing for litigation in the contract
§ 2:18 —Talking it out or fighting it out
§ 2:19 —Evaluating the risk of litigation
§ 2:20 —Notice and opportunity to cure
§ 2:21 —The paper chase and its modern digital counterpart
§ 2:22 —Giving the reasons for termination
§ 2:23 —Selling after notice of termination
§ 2:24 —Arbitration
§ 2:25 Winning distribution disputes
§ 2:26 —Actions for declaratory judgment

§ 2:27 —Motions for preliminary injunction
§ 2:28 —Discovery and memorialization of evidence
§ 2:29 —Protecting your case
§ 2:30 —Overall strategy
§ 2:31 Conclusion

CHAPTER 3. EVALUATING THE TERMINATION DECISION

§ 3:1 Step one: determine all actual and arguable reasons for the termination
§ 3:2 Step two: review the written agreement
§ 3:3 —Termination provisions
§ 3:4 —Choice of law provisions
§ 3:5 — —Are they enforceable?
§ 3:6 — —Legislative reaction
§ 3:7 —Forum-selection clauses
§ 3:8 —Arbitration clauses
§ 3:9 —Integration clauses
§ 3:10 —Contractual statutes of limitation/limitations on remedies
§ 3:11 —Noncompete clauses
§ 3:12 —Future concerns
§ 3:13 Step three: evaluate potential antitrust issues
§ 3:14 —Remember state antitrust laws
§ 3:15 —Good antitrust insurance
§ 3:16 Step four: look for and analyze potentially applicable dealer protection statutes, both generic and industry-specific
§ 3:17 —State franchise acts
§ 3:18 — —The Wisconsin Fair Dealership Law
§ 3:19 — —The Minnesota Franchise Act
§ 3:20 —Industry-specific legislation
§ 3:21 —Typical industry-specific termination protection
§ 3:22 —What industry's laws apply?
§ 3:23 —What state's laws apply?
§ 3:24 —Does the statute apply to preexisting agreements?
§ 3:25 —Is there good cause for termination?
§ 3:26 — —Failure to meet performance criteria
§ 3:27 — —System-wide changes
§ 3:28 — —Violations of contract or law
§ 3:29 — —Market withdrawal
§ 3:30 — —*De facto* termination
§ 3:31 —Who is liable?
§ 3:32 —"Little FTC" and deceptive trade practices acts
§ 3:33 — —Deceptive trade practices
§ 3:34 — —"Little FTC" acts

§ 3:35 Step five: common-law considerations
§ 3:36 —What is the contract?
§ 3:37 —Unwritten terms
§ 3:38 — —Parol evidence
§ 3:39 — —Custom and practice, course of dealing
§ 3:40 — —Good faith and fair dealing
§ 3:41 —Estoppel
§ 3:42 —Recoupment
§ 3:43 —Fraudulent inducement
§ 3:44 —Tortious interference with contract and prospective contractual relationships
§ 3:45 — —Contracts
§ 3:46 — —Prospective contractual relationships
§ 3:47 — —One type of interference
§ 3:48 — —A second type of interference
§ 3:49 — —A third type of interference
§ 3:50 — —Defenses to tortious interference claims
§ 3:51 — — —Condition precedent
§ 3:52 — — —Manufacturers and franchisors cannot tortiously interfere with a contract to which they are a party
§ 3:53 Step six: analyze damages
§ 3:54 Injunctive or declaratory relief
§ 3:55 Recommendations for distributors, dealers, and franchisees
§ 3:56 Recommendations for manufacturers and franchisors

CHAPTER 4. DUAL DISTRIBUTION

§ 4:1 Introduction
§ 4:2 The applicable law
§ 4:3 Section 1 of the Sherman Act; unreasonable restraints of trade
§ 4:4 —Resale price maintenance
§ 4:5 —Nonprice restraints
§ 4:6 — —Horizontal or vertical?
§ 4:7 — —Enforcement agency views
§ 4:8 Section 2 of the Sherman Act; monopolization
§ 4:9 —Manufacturer's decision to sell only directly
§ 4:10 —Encroachment by a manufacturer
§ 4:11 —Refusal to deal in noninterchangeable goods
§ 4:12 Termination of independent distributors
§ 4:13 —Termination as attempted monopolization
§ 4:14 —Need to fairly and clearly terminate
§ 4:15 Price squeezing
§ 4:16 —Squeeze must be deliberate
§ 4:17 —Price squeezing in a regulated industry

CHAPTER 5. FUNCTIONAL DISCOUNTS

§ 5:1 Introduction
§ 5:2 The *Texaco* case
§ 5:3 The *Boise Cascade* case
§ 5:4 —The inference of injury under *Morton Salt*
§ 5:5 —Relationship to Robinson-Patman
§ 5:6 —The concurrences
§ 5:7 The *White Industries* case
§ 5:8 Commentary

CHAPTER 6. RESALE PRICE MAINTENANCE

§ 6:1 Introduction
§ 6:2 Per se illegality
§ 6:3 Pricing independence—Suggested retail prices
§ 6:4 —Even-dollar pricing
§ 6:5 —Promotional and advertising programs
§ 6:6 — —Promotional programs
§ 6:7 — —National account programs
§ 6:8 — —Advertising programs
§ 6:9 — —A look at MAPs: The FTC's change in policy and *The Advertising Checking Bureau, Inc.* case
§ 6:10 — —The *Pioneer* case
§ 6:11 — —Illustrative court cases
§ 6:12 —Bid rigging
§ 6:13 The requirement of an agreement
§ 6:14 —Conspiracy
§ 6:15 —Evidence of manufacturer's independent action
§ 6:16 —Coercion and persuasion
§ 6:17 Market definition
§ 6:18 Injury to competition
§ 6:19 Predatory pricing
§ 6:20 —Bundled discounts
§ 6:21 Standing
§ 6:22 —Competitors
§ 6:23 —Distributors
§ 6:24 —Indirect purchasers
§ 6:25 —Consumers
§ 6:26 Federal and state enforcement
§ 6:27 —Federal enforcement through settlements
§ 6:28 —State enforcement
§ 6:29 Conclusion

Appendix 6-A. Illustrative Transmittal Memos from the Sales Perspective

CHAPTER 7. TERRITORIAL RESTRICTIONS

§ 7:1 Introduction
§ 7:2 Contractual/formation issues
§ 7:3 Exclusive distributorships
§ 7:4 —Litigation
§ 7:5 — —Third-party beneficiary
§ 7:6 — —Damages for breach
§ 7:7 Territorial restriction clauses: The rule of reason analysis
§ 7:8 —Area of primary responsibility, adequate representation, and the profit passover technique
§ 7:9 — —Area of primary responsibility
§ 7:10 — —Adequate representation clause
§ 7:11 — —Profit passover arrangements
§ 7:12 — —Justification for use of these clauses
§ 7:13 —The location clause—Rule of reason applied
§ 7:14 — —Territorial restraints by actions
§ 7:15 The hard exclusive
§ 7:16 Federal/state distinction
§ 7:17 Where should the restrictions appear?
§ 7:18 Territorial rights
§ 7:19 Transshipping
§ 7:20 Territorial restrictions and the internet
§ 7:21 Covenants not to compete
§ 7:22 Summary and conclusions

CHAPTER 8. CUSTOMER RESTRICTIONS

§ 8:1 Introduction
§ 8:2 Supreme Court decisions on customer restrictions
§ 8:3 Customer restrictions and the rule of reason—Application of rule of reason analysis—Supplier's market share must be sufficiently high to justify any claims of illegality
§ 8:4 — —Some anticompetitive effect on interbrand competition is required
§ 8:5 — —Special case: Reserving certain customers for direct sales
§ 8:6 — —Summary: Rule of reason
§ 8:7 —Restrictions and effect on intrabrand competition
§ 8:8 The supplier's defense
§ 8:9 —Promotion of vigorous interbrand competition
§ 8:10 —Enhancement of interbrand competition
§ 8:11 —Legitimate purpose: Products liability protection
§ 8:12 —Legitimate purpose: Business justifications
§ 8:13 Customer restrictions in a dual distribution context

§ 8:14 National account programs
§ 8:15 —Vertical nonprice restraint or horizontal customer allocation?
§ 8:16 —Voluntary nature of the program
§ 8:17 Conclusion

CHAPTER 9. DISTRIBUTION CONTRACTS

§ 9:1 Methods of distribution; scope of checklist
§ 9:2 Written versus oral agreements
§ 9:3 —Business considerations
§ 9:4 —Dealer protection statutes
§ 9:5 Effect on termination rights of not having written agreement
§ 9:6 —Common-law contract rules
§ 9:7 —Recoupment
§ 9:8 —Other theories
§ 9:9 —Uniform Commercial Code
§ 9:10 —Antitrust concerns
§ 9:11 —State statutes
§ 9:12 State franchise laws—Breadth of coverage
§ 9:13 —Types of statutes
§ 9:14 —Special industry laws
§ 9:15 —Applicability—"Franchise" laws
§ 9:16 — —"Business opportunity" laws
§ 9:17 — —Exemptions
§ 9:18 —Substantive restrictions
§ 9:19 — —Termination and nonrenewal
§ 9:20 — —Addition of distributors
§ 9:21 — —Other substantive restrictions
§ 9:22 — —Waiver of rights
§ 9:23 —Avoiding the applicability of franchise laws
§ 9:24 — —Trademark element
§ 9:25 — —Marketing plan prescribed in substantial part
§ 9:26 — —Franchise fee
§ 9:27 — —Applicable exceptions
§ 9:28 — —Business opportunity laws
§ 9:29 Contents of the distribution contract
§ 9:30 —Supplier objectives
§ 9:31 —Distributor objectives
§ 9:32 Definitions of product
§ 9:33 Definition of territory—Where may this distributor sell?
§ 9:34 —May others sell in this territory?
§ 9:35 Pricing, payment terms, and execution
§ 9:36 Sales responsibilities
§ 9:37 Reporting responsibilities

§ 9:38 Restrictions on competition
§ 9:39 —Ancillary nature
§ 9:40 —Reasonableness
§ 9:41 —Franchise agreements
§ 9:42 —Bankruptcy
§ 9:43 —Survival of clause
§ 9:44 —Irreparable injury
§ 9:45 Trade secrets
§ 9:46 Restrictions on transfer
§ 9:47 Use of trademarks
§ 9:48 Supplier obligations
§ 9:49 Internet distribution
§ 9:50 Indemnification: Limitation of warranties
§ 9:51 Duration
§ 9:52 Termination—Grounds
§ 9:53 — —Without cause
§ 9:54 — —Performance standards
§ 9:55 — —Other breaches
§ 9:56 — —Changes in ownership and control
§ 9:57 — —Financial problems
§ 9:58 — —Other circumstances
§ 9:59 —Notice
§ 9:60 —Effect on noncompete
§ 9:61 —Inventory repurchase
§ 9:62 Arbitration
§ 9:63 —Choice of forum
§ 9:64 —Compromise decisions
§ 9:65 —Lack of discovery
§ 9:66 —Preliminary relief
§ 9:67 —Punitive damages
§ 9:68 —Lack of appeal
§ 9:69 Choice of forum
§ 9:70 Choice of law
§ 9:71 Miscellaneous provisions

CHAPTER 10. INTERNET DISTRIBUTION, E-COMMERCE AND OTHER COMPUTER RELATED ISSUES: CURRENT DEVELOPMENTS IN LIABILITY ON-LINE, BUSINESS METHODS PATENTS AND SOFTWARE DISTRIBUTION, LICENSING AND COPYRIGHT PROTECTION QUESTIONS

§ 10:1 Liability on-line: copyright and tort risks of providing

content, or who's in charge here?—The applicability of multiple laws
§ 10:2 —Jurisdictional questions
§ 10:3 — —Regulation of gambling
§ 10:4 —Determining applicable law
§ 10:5 —Copyright infringement
§ 10:6 — —Framing, deep linking, and thumbnails
§ 10:7 —Defamation and the Communications Decency Act
§ 10:8 —Trademark infringement
§ 10:9 —Regulation of spam
§ 10:10 —Spyware
§ 10:11 —Trespass
§ 10:12 —Privacy
§ 10:13 — —The European Community Directive
§ 10:14 — —U.S. online privacy regulation—Federal Trade Commission regulation
§ 10:15 — — —FTC enforcement actions and developments
§ 10:16 — — —State privacy protection
§ 10:17 — —Specific areas of regulation—Privacy of children's personal information: COPPA
§ 10:18 — — —Financial services: The Gramm-Leach-Bliley Act—Privacy regulation
§ 10:19 — — — —FTC enforcement
§ 10:20 — — — —The Safeguards Rule
§ 10:21 — — — —The SEC's proposed amendments
§ 10:22 — — —Medical records: HIPAA
§ 10:23 — — —Workplace privacy
§ 10:24 — —Balancing privacy and security
§ 10:25 —Internet access for persons with disabilities
§ 10:26 Mass market software issues—Loss of trade secrets by mass distribution
§ 10:27 —Enforceability of shrinkwrap and clickwrap licenses
§ 10:28 —Use of licenses instead of sales
§ 10:29 Copyright misuse and trade secret preemption
§ 10:30 —Copyright misuse
§ 10:31 —Preemption of trade secret claims

CHAPTER 11. ROBINSON-PATMAN ACT: PRICE DISCRIMINATION

§ 11:1 Background and overview of the Act
§ 11:2 Elements of § 2(a)—Basic prohibition against price discrimination
§ 11:3 — —Discrimination in price
§ 11:4 — —Two consummated sales
§ 11:5 — —The "same seller"
§ 11:6 — —Two different purchasers

§ 11:7 — —Sales must cross state lines
§ 11:8 — —Contemporaneous sales
§ 11:9 — —Sales must be of "commodities"
§ 11:10 — —Like grade and quality
§ 11:11 — —Sales within the United States
§ 11:12 — —Injury to competition
§ 11:13 — — —Primary level competition
§ 11:14 — — — —Injury through predatory pricing
§ 11:15 — — — —The threshold requirement of actual competition
§ 11:16 — — —Secondary level competition
§ 11:17 — — — —The threshold requirement of actual competition
§ 11:18 — — — —The *Morton Salt* inference
§ 11:19 — — — —Injury to competition: competition in general or specific competitors?
§ 11:20 — — — —Rebutting the inference
§ 11:21 — — —Tertiary level competition
§ 11:22 — — —Antitrust damages under the Clayton Act
§ 11:23 Defenses to § 2(a) violations—Cost justification
§ 11:24 —Meeting competition
§ 11:25 —The changing-conditions defense
§ 11:26 —The functional-availability defense
§ 11:27 Buyer liability
§ 11:28 Can Robinson-Patman Act claims be arbitrated?
§ 11:29 Documenting Robinson-Patman compliance with sample forms
§ 11:30 —Procedure for generating documents
§ 11:31 —Documents
§ 11:32 —Kinds of documents
§ 11:33 —Filing of documents
§ 11:34 —Education of company employees
§ 11:35 — —Simple form competitive price report
§ 11:36 — —More elaborate form
§ 11:37 — —Multiple product form
§ 11:38 — —Required customer signature form
§ 11:39 — —Competitive activity and price form

CHAPTER 12. ADVERTISING ALLOWANCES UNDER THE ROBINSON-PATMAN ACT

§ 12:1 Introduction
§ 12:2 The basic rules—Per se offenses
§ 12:3 —The scope of §§ 2(d) and 2(e)
§ 12:4 — —Promotional and advertising activities
§ 12:5 —The scope of § 2(d) and (e)—"In connection with the resale by the buyer"

§ 12:6 — —Additional restrictions
§ 12:7 Establishing elements of a discriminatory advertising allowances claim—Standing to assert the claim
§ 12:8 —Competing customers
§ 12:9 — —Customers of wholesalers versus direct-buying retailers
§ 12:10 — —Geographic and functional competition
§ 12:11 —The "resale" requirement
§ 12:12 —Functional availability on proportionally equal terms
§ 12:13 —The "promotional service or facility" requirement
§ 12:14 —Interaction with other Robinson-Patman claims
§ 12:15 Conclusion

Appendix 12-A. Federal Trade Commission Guides for Advertising Allowances and Other Merchandising Payments and Services (16 C.F.R. Part 240)

CHAPTER 13. RAIDING THE DISTRIBUTOR'S EMPLOYEES

§ 13:1 Introduction
§ 13:2 Case discussions
§ 13:3 —Damages
§ 13:4 Sample clauses on employee raiding
§ 13:5 Summary and conclusion

CHAPTER 14. EFFECT OF BANKRUPTCY ON DISTRIBUTORSHIP CONTRACTS

§ 14:1 Introduction
§ 14:2 The automatic stay
§ 14:3 —Activities affected by the stay
§ 14:4 —Effect of violation
§ 14:5 —Exceptions
§ 14:6 —Relief from the stay
§ 14:7 —Adequate protection
§ 14:8 —Termination
§ 14:9 Executory contracts
§ 14:10 —Determining whether a contract is executory
§ 14:11 —Termination
§ 14:12 — —Expiration of agreement
§ 14:13 — —Action taken prior to petition
§ 14:14 — —Action taken after the petition—Intervening events
§ 14:15 — — —Cure provisions
§ 14:16 — — —*Ipso facto* clause
§ 14:17 —Treatment of executory contracts—Disposition of contract by debtor
§ 14:18 — — —Assumption

§ 14:19 — — — —Preferences
§ 14:20 — — —Rejection
§ 14:21 — —Procedural requirements—Time limits
§ 14:22 — — —Court approval
§ 14:23 — —Rights of nondebtor party
§ 14:24 Claims
§ 14:25 Setoff
§ 14:26 Preemption
§ 14:27 Estate property
§ 14:28 Conclusion

CHAPTER 15. DISTRIBUTOR'S LIABILITY FOR BREACH OF WARRANTY

§ 15:1 Introduction and overview
§ 15:2 Illustrative cases
§ 15:3 —Warranties from a manufacturer when you buy from a distributor
§ 15:4 —Agents
§ 15:5 —Remedy limitations, warranty disclaimers, and remote buyers
§ 15:6 —Express warranties—Dealer's liability under manufacturer's warranty
§ 15:7 — —Dealer's adoption of manufacturer's express warranty
§ 15:8 —Dealer liable for breach of implied warranties
§ 15:9 — —Dealer's right to indemnity where product contains manufacturing defect
§ 15:10 — —Manufacturer's liability to distributor for distributor's breach of fitness warranty
§ 15:11 — —Dealer's improper acts as sole cause of customer's damages
§ 15:12 — —Liability when both manufacturer and dealer breach warranty of merchantability
§ 15:13 — —Effect of contractual limitations on indemnity between manufacturer and dealer
§ 15:14 —Vouching in
§ 15:15 —Liability of a nonmanufacturing distributor
§ 15:16 —Arbitration considerations
§ 15:17 —Applicable law

CHAPTER 16. PRODUCTS LIABILITY FOR DISTRIBUTORS

§ 16:1 Introduction
§ 16:2 Breach of warranty
§ 16:3 Negligence
§ 16:4 —Causation

§ 16:5 —The duty to warn
§ 16:6 —The duty to test and inspect
§ 16:7 —Defenses to negligence
§ 16:8 Strict liability
§ 16:9 —Elements of strict liability
§ 16:10 —Defenses to strict liability
§ 16:11 Indemnity and contribution
§ 16:12 Use of distribution to establish jurisdiction over manufacturer
§ 16:13 Conclusion

CHAPTER 17. DISTRIBUTION CONTRACT CASES

§ 17:1 Introduction
§ 17:2 United Nations Convention on Contracts for the International Sale of Goods
§ 17:3 Application of Uniform Commercial Code
§ 17:4 —Gap-filling
§ 17:5 When does the distributorship contract come into existence?
§ 17:6 —Actions and words can be binding
§ 17:7 — —Implied-in-fact contract
§ 17:8 —Mutuality of obligation
§ 17:9 When does the distributorship come into existence?—Multiple documents
§ 17:10 When does the distributorship contract come into existence?—Rejecting the prospective distributor
§ 17:11 —Condition precedent
§ 17:12 The effect of oral promises
§ 17:13 —Non-written agreements
§ 17:14 —The "lifetime distributorship"
§ 17:15 —Oral misrepresentations
§ 17:16 —Purchase orders
§ 17:17 Statute of frauds
§ 17:18 —Missing quantity term in writing
§ 17:19 —Merchant's exception applies in the distribution context
§ 17:20 —Court admissions exception
§ 17:21 —Other issues
§ 17:22 —Missing term of duration
§ 17:23 —Part performance
§ 17:24 —Modifications
§ 17:25 — —Course of dealing and usage of trade
§ 17:26 —Promissory estoppel
§ 17:27 Ancillary documents and exhibits
§ 17:28 Jurisdiction

§ 17:29 Forum selection clause
§ 17:30 Applicability of state laws—State law contract claims
§ 17:31 — —Failure to pay for goods
§ 17:32 —Statute of limitations
§ 17:33 —State franchise laws
§ 17:34 — —Choice of law provision
§ 17:35 —Arbitration
§ 17:36 — —Non-parties
§ 17:37 — —Federal Arbitration Act
§ 17:38 Intellectual property
§ 17:39 —Copyrights
§ 17:40 —Trade secrets and confidential information
§ 17:41 —Patents
§ 17:42 —Trademarks
§ 17:43 The duty of good faith—Every contract requires good faith in its execution
§ 17:44 —Distributor's/dealer's duty of good faith in execution of the contract
§ 17:45 —Course of dealing
§ 17:46 —Breach of contract for bad faith execution of the contract
§ 17:47 —Performance under contract
§ 17:48 — —Price
§ 17:49 —Good faith execution in assignment, transfer, or sale of franchise
§ 17:50 Remedy limitations
§ 17:51 Renewal
§ 17:52 New products
§ 17:53 Best efforts
§ 17:54 —Minimum purchase requirements
§ 17:55 Records retention
§ 17:56 Manufacturers have duties, too
§ 17:57 Liabilities created under the contract—When is a distributor an agent?
§ 17:58 —Independent contractor status
§ 17:59 —Relationship between distributors
§ 17:60 —Acquisitions
§ 17:61 Transfer or assignment of distributorship or franchise
§ 17:62 —Right of first refusal
§ 17:63 —Assumption
§ 17:64 Does the Uniform Commercial Code apply to the sale of distributorships?
§ 17:65 —Analysis of cases determining the application of the Uniform Commercial Code to mixed contracts—The "reasonable totality of the circumstances" test
§ 17:66 — —The "predominant factor" test
§ 17:67 — —Analysis comes full circle

§ 17:68 — —Conclusion
§ 17:69 —Transfer of title to goods
§ 17:70 Liquidated damages
§ 17:71 —The law
§ 17:72 —Questions and answers
§ 17:73 —Case example
§ 17:74 Noncontract claims—Fraud
§ 17:75 —Unfair trade practices
§ 17:76 —Discriminatory action
§ 17:77 —Unjust enrichment
§ 17:78 —Prevention doctrine
§ 17:79 —Tortious interference
§ 17:80 Conclusion

Volume 2

CHAPTER 18. DISTRIBUTION TERMINATION CASES

§ 18:1 Introduction
§ 18:2 Dangers of an abrupt termination—Document the termination decision
§ 18:3 —Reasonable notice
§ 18:4 —"For cause" termination
§ 18:5 —Effect of notice
§ 18:6 —Contracts of indefinite duration
§ 18:7 Legitimate business reasons for termination "without cause"
§ 18:8 —Recalls
§ 18:9 Adequate assurances of performance
§ 18:10 Change of control
§ 18:11 Constructive termination
§ 18:12 Dealing with missed quotas
§ 18:13 Working with the distributor during phaseout
§ 18:14 —Help the distributor/dealer finish its jobs
§ 18:15 —Manuals should spell out the termination process
§ 18:16 —Actions and words during phaseout can nullify termination
§ 18:17 Recoupment of expenditures by distributors
§ 18:18 —Failure to give timely notice of termination violates the recoupment doctrine
§ 18:19 —Duration of relationship
§ 18:20 —Duty to repurchase inventory
§ 18:21 Unconscionability
§ 18:22 Insurance
§ 18:23 The validity of releases

§ 18:24 Surviving terms
§ 18:25 Preliminary injunctions against termination
§ 18:26 —Attorney's fees
§ 18:27 Declaratory judgment
§ 18:28 Necessary parties
§ 18:29 Quantum meruit
§ 18:30 Tort claims for interference with contractual and economic relationships
§ 18:31 —Misappropriation of goodwill
§ 18:32 Other theories challenging distribution termination
§ 18:33 —Promissory estoppel
§ 18:34 —Illusory or inconsistent terms
§ 18:35 —Waiver
§ 18:36 —Fraud in the inducement
§ 18:37 —Good faith and fair dealing
§ 18:38 —Unjust enrichment
§ 18:39 —Fiduciary relationship
§ 18:40 —Consumer protection laws
§ 18:41 —Frustration of purpose
§ 18:42 —First breach
§ 18:43 —Set off
§ 18:44 Termination under state franchise statutes
§ 18:45 —Statutes of limitation
§ 18:46 Damages
§ 18:47 —Lost profits
§ 18:48 —Punitive damages
§ 18:49 —Limitation of damages
§ 18:50 —Loss of goodwill
§ 18:51 Conclusion

CHAPTER 19. GRAY MARKET GOODS

§ 19:1 Introduction
§ 19:2 Trademark
§ 19:3 —Lanham Act Section 42
§ 19:4 —Lanham Act Sections 32(1) and 43(a)
§ 19:5 —Lanham Act Sections 43(c)—Dilution
§ 19:6 —Tariff Act Section 526(a) and customs service enforcement
§ 19:7 —Tariff Act Section 526(c)
§ 19:8 —Tariff Act Section 337
§ 19:9 Copyright
§ 19:10 —First sale doctrine
§ 19:11 —Contributory infringement
§ 19:12 Contract and tort theories
§ 19:13 Joinder
§ 19:14 Conclusion

Appendix 19-A. Checklist of Possible Legal Remedies in a Gray Market Situation

Appendix 19-B. Trademarks, Trade Names, and Copyrights, 19 C.F.R. Part 133 (reprinted as amended by Gray Market Imports and Other Trademarked Goods, 64 Fed. Reg. 9058 (1999))

CHAPTER 20. THE ANTITRUST ASPECTS OF DISTRIBUTION

§ 20:1 Introduction
§ 20:2 Analyzing the distributorship situation
§ 20:3 —The relevant statutes
§ 20:4 — —The Sherman Act
§ 20:5 — —The Clayton Act
§ 20:6 — —The Federal Trade Commission Act
§ 20:7 — —The Robinson-Patman Act
§ 20:8 — —State laws
§ 20:9 —Administrative guidance
§ 20:10 —Standards of analysis
§ 20:11 Standing
§ 20:12 —Direct purchaser rule
§ 20:13 Terminating distributors
§ 20:14 Arbitration of antitrust claims
§ 20:15 Vertical price restraints
§ 20:16 —Resale price maintenance
§ 20:17 —Arrangements with agents
§ 20:18 —Minimum advertising programs
§ 20:19 —Promotional programs
§ 20:20 —National account programs
§ 20:21 —Pricing policies
§ 20:22 —Conspiracy
§ 20:23 Vertical nonprice restrictions
§ 20:24 —Exclusive distributorships
§ 20:25 —Territorial restrictions
§ 20:26 — —Conspiracy
§ 20:27 —Customer restrictions
§ 20:28 —Location clauses
§ 20:29 —Area of primary responsibility clauses
§ 20:30 —Profit pass-over arrangements
§ 20:31 Other distribution restrictions
§ 20:32 —Exclusive dealing arrangements
§ 20:33 — —The "quantitative substantiality" standard
§ 20:34 — —The "qualitative substantiality" test
§ 20:35 —Boycotts
§ 20:36 —Tying arrangements

§ 20:37 — —The per se/rule of reason dichotomy
§ 20:38 — —Two separate products
§ 20:39 — —Coercion or conditioning
§ 20:40 — —Defining the relevant market
§ 20:41 — —Market power
§ 20:42 — —Effect on "not insubstantial" amount of commerce
§ 20:43 — —Economic interest requirement
§ 20:44 — —Full-line forcing
§ 20:45 —Reciprocal dealing
§ 20:46 —Refusals to deal
§ 20:47 Other distributorship problems
§ 20:48 —Dual distribution

CHAPTER 21. THE PERSPECTIVE OF IN-HOUSE COUNSEL

§ 21:1 Introduction
§ 21:2 Counsel's view of communication and other philosophical approaches used in a successful franchise system
§ 21:3 —Communication
§ 21:4 —Other philosophical approaches in franchising
§ 21:5 — —Co-prosperity with your franchisees
§ 21:6 — —Customer focus
§ 21:7 — —Quality franchisees
§ 21:8 — —Operational efficiency focus and roles and responsibilities
§ 21:9 — —Knowledge
§ 21:10 — —Franchisor responsibility regarding services
§ 21:11 — —Defined business concept
§ 21:12 — —Stakeholders
§ 21:13 — —Consistency
§ 21:14 — —Chimney destruction
§ 21:15 —"Partnership"
§ 21:16 —"Human business"
§ 21:17 The role and organization of in-house franchise counsel
§ 21:18 —Legal department "mission"
§ 21:19 —Overall department functions
§ 21:20 —Overall department operations
§ 21:21 —Organization of in-house counsel
§ 21:22 —In-house counsel responsibilities with respect to unit franchises
§ 21:23 — —Legal advisor to franchisor management and assisting in communication
§ 21:24 — —Education of company personnel in the franchise system

§ 21:25 — —Litigation and investigation supervision
§ 21:26 — —Legislation monitoring
§ 21:27 — —Franchisor related trade associations
§ 21:28 — —Communication review
§ 21:29 — —Advisor to field personnel
§ 21:30 — —Dispute resolution
§ 21:31 — —Responsibilities with respect to regulatory requirements
§ 21:32 —Responsibilities with respect to area licenses
§ 21:33 — —Providing advice to area franchisees
§ 21:34 — —General system or legal climate updates
§ 21:35 In-house compliance and enforcement methods
§ 21:36 —Company compliance methods
§ 21:37 — —Internet/intranet legal information
§ 21:38 — —Manuals
§ 21:39 — —Systems or operations manuals
§ 21:40 — —Legal seminars
§ 21:41 — —Training of company personnel
§ 21:42 — —In-house counsel franchise system training
§ 21:43 — —Company franchise system training
§ 21:44 — —Legal advice
§ 21:45 —Enforcing compliance by franchisees
§ 21:46 — —Defining the standards
§ 21:47 — —Specific enforcement methods
§ 21:48 — — —Qualification process
§ 21:49 — — —Training
§ 21:50 — — —Bookkeeping
§ 21:51 — — —Field representative visits
§ 21:52 — — —Audits
§ 21:53 — — —Operational reviews
§ 21:54 — — —Indemnification
§ 21:55 — — —Counseling and opportunity to cure
§ 21:56 — — —Exercising nontermination related contractual rights
§ 21:57 — — —Formal dispute resolution mechanisms, litigation, arbitration, and mediation
§ 21:58 — — —Arbitration
§ 21:59 — — —Mediation
§ 21:60 — — —Settlement agreements
§ 21:61 — — —Nonrenewal
§ 21:62 — — —Termination
§ 21:63 — —Restrictions on enforcement
§ 21:64 Negotiating franchise sales
§ 21:65 —Negotiating area franchises
§ 21:66 —Negotiation of standard unit franchise agreements: Practical considerations
§ 21:67 —Legal considerations

§ 21:68 — —Mandatory negotiations
§ 21:69 — —Registration and disclosure issues
§ 21:70 — —Discrimination claims
§ 21:71 —Summary
§ 21:72 Transfer of franchises—7-Eleven approach
§ 21:73 —Laws affecting transfer
§ 21:74 —Summary
§ 21:75 Termination and nonrenewal—Termination and nonrenewal generally
§ 21:76 —Three-tier analysis generally
§ 21:77 —Other considerations in a termination or nonrenewal situation
§ 21:78 —Restraints on a franchisor's termination or nonrenewal actions
§ 21:79 —Termination in the 7-Eleven system
§ 21:80 —Renewal in the 7-Eleven system
§ 21:81 —Other termination or nonrenewal issues and summary
§ 21:82 Advertising franchises for sale
§ 21:83 Franchisee councils and associations—7-Eleven's experience with franchisee councils
§ 21:84 —Franchisee councils generally
§ 21:85 Structuring the franchise relationship
§ 21:86 —Individual unit franchise structure
§ 21:87 —Area licenses or franchises agreement structure
§ 21:88 —Change in franchise systems

CHAPTER 22. STATE AND FEDERAL REGULATION OF FRANCHISING ISSUES

§ 22:1 The Federal Trade Commission's franchise rule
§ 22:2 State laws
§ 22:3 —Registration and disclosure laws
§ 22:4 —Franchise relationship laws
§ 22:5 —Business opportunity laws
§ 22:6 Distributorship versus franchise

CHAPTER 23. INTERNATIONAL DISTRIBUTION AGREEMENTS

§ 23:1 General remarks—Definition of distributorship
§ 23:2 —General contract provisions
§ 23:3 — —Written form
§ 23:4 — —Title of agreement
§ 23:5 — —Parties to agreement
§ 23:6 — —Definitions
§ 23:7 — —Controlling language
§ 23:8 — —Exclusion of power to represent

§ 23:9 — —Registration and government approval
§ 23:10 — —Terms of sales
§ 23:11 — —Assignment
§ 23:12 — —Commencement and expiry of agreement
§ 23:13 — —Exclusivity of contractual products
§ 23:14 — —Contractual territory
§ 23:15 — —Warranty
§ 23:16 — —Limitation of liability
§ 23:17 — —Renegotiation of terms
§ 23:18 — —Local law updates
§ 23:19 — —Choice-of-law clauses
§ 23:20 —Distributor's rights and obligations—Directives and protection of interests
§ 23:21 — —Promotion of sales and establishment of network
§ 23:22 — —Subdistributors
§ 23:23 — —Minimum quantity purchases
§ 23:24 — —Advertising
§ 23:25 — —Exhibitions and trade fairs
§ 23:26 — —Conditions of sale
§ 23:27 — —Price-fixing
§ 23:28 — —Duty to provide information
§ 23:29 — —Exclusivity of purchase clauses
§ 23:30 — —Noncompetition clauses
§ 23:31 — —Proprietary property rights
§ 23:32 — —Use of manufacturer's trademarks
§ 23:33 — —Confidential and proprietary information
§ 23:34 — —Stock of products
§ 23:35 — —Anti-bribery/corruption
§ 23:36 —Manufacturer's obligations—Good faith
§ 23:37 — —Delivery of products
§ 23:38 — —Exclusivity
§ 23:39 — —Commercial information and technical assistance
§ 23:40 — —Advertising materials
§ 23:41 —Termination of distributorship—Fixed-term agreements
§ 23:42 — —Indefinite term agreements
§ 23:43 — —Automatic termination
§ 23:44 — —Termination without notice
§ 23:45 — —Notice period
§ 23:46 — —Compensation
§ 23:47 —Pitfalls of distribution agreements—Clauses against public policy
§ 23:48 — —Nationality of distributor
§ 23:49 — —Protection of distributor
§ 23:50 — —Registration of trademark

§ 23:51 — —EU competition and U.S. antitrust rules
§ 23:52 — —Continuation of fixed-term agreements
§ 23:53 — —Choice of distributor, exporting costs, and after sales service
§ 23:54 — —Battle of the forms
§ 23:55 — —Precontractual liability
§ 23:56 — —Manufacturer overinvolvement
§ 23:57 — —Mixed agency/distribution agreements
§ 23:58 — —Statute of limitations
§ 23:59 — —Hazardous applications
§ 23:60 — —United Nations sales of goods convention
§ 23:61 Distribution agreements according to specific country laws—Algeria
§ 23:62 —Argentina
§ 23:63 —Australia
§ 23:64 —Austria
§ 23:65 —Belgium—Definition
§ 23:66 — —Termination
§ 23:67 — —Notice period
§ 23:68 — —Choice between notice and indemnity
§ 23:69 — —Amount of indemnity
§ 23:70 — —Special indemnity
§ 23:71 — —Renewal of agreement
§ 23:72 — —Forum selection and choice-of-law clauses
§ 23:73 —Brazil
§ 23:74 —Chile
§ 23:75 —Denmark
§ 23:76 — —Termination
§ 23:77 — —Notice of termination
§ 23:78 — —Compensation
§ 23:79 —France
§ 23:80 — —Form of contract
§ 23:81 — —Indemnification
§ 23:82 — —Taxation of foreign companies
§ 23:83 — —Exclusive distributorship agreements
§ 23:84 — —Termination of exclusive distributorship agreement
§ 23:85 — —Indefinite term agreement
§ 23:86 —Germany
§ 23:87 — —Notice of termination
§ 23:88 — —Compensation for goodwill
§ 23:89 — —Choice of law
§ 23:90 — —Covenant not to compete
§ 23:91 —Greece
§ 23:92 —India
§ 23:93 —Israel
§ 23:94 —Italy

§ 23:95 — —Termination
§ 23:96 — —Notice of termination
§ 23:97 — —Damages
§ 23:98 — —Taxation of foreign companies
§ 23:99 — —EU bloc exemption
§ 23:100 —Japan—Definition
§ 23:101 — —Fair trade regulation
§ 23:102 — —Termination
§ 23:103 — —Choice of laws
§ 23:104 —Mexico
§ 23:105 —Netherlands
§ 23:106 —People's republic of China
§ 23:107 —Poland
§ 23:108 — —Currency regulations
§ 23:109 — —Choice of law
§ 23:110 —Portugal
§ 23:111 —Russia
§ 23:112 — —Registration
§ 23:113 — —Licenses, import permissions, etc
§ 23:114 — —Termination
§ 23:115 —Saudi Arabia
§ 23:116 —South Africa
§ 23:117 —Spain
§ 23:118 — —Special requirements
§ 23:119 — —Termination
§ 23:120 — —Compensation for unilateral termination
§ 23:121 — —Damages
§ 23:122 —Sweden
§ 23:123 —Switzerland
§ 23:124 —Taiwan
§ 23:125 —United Kingdom
§ 23:126 — —Termination
§ 23:127 — —Compensation
§ 23:128 Economic sanctions
§ 23:129 Bibliography

PART II. FORMS, CHECKLISTS, AND CLAUSES

CHAPTER 24. INTRODUCTION TO DISTRIBUTION FORMS

§ 24:1 Traditional product distribution
§ 24:2 Distribution by strategic alliance
§ 24:3 The value-added relationship
§ 24:4 The development relationship

§ 24:5 Distribution by joint venture
§ 24:6 Distribution by giving the product away
§ 24:7 Distribution by franchise
§ 24:8 Distribution directly through retail
§ 24:9 Distribution by incorporation of one product into another
§ 24:10 Using a sales representative

CHAPTER 25. FORMS

§ 25:1 Master Distribution Agreement (Mangoceuticals Inc.)—2025
§ 25:2 License, Supply, and Distribution Agreement (KalVista Pharmaceuticals, Inc.)—2025
§ 25:3 Distribution and Supply Agreement (Sonoma Pharmaceuticals Inc.)—2025
§ 25:4 Amended and Restated Customer Distribution Agreement (Vitamin Cottage Inc.)—2023
§ 25:5 Distribution Agreement between RepliCel Life Sciences Inc. and MainPointe Pharmaceuticals, LLC
§ 25:6 Exclusive Software License and Distribution Agreement between Cranes Software International Ltd. and Systat Software, Inc.
§ 25:7 Integration, Supply and Distribution Agreement (MiniMed Group)—2024
§ 25:8 License and Non-Stocking Distribution Agreement (ReShape Lifesciences Inc.)—2025
§ 25:9 Exclusive Distribution Agreement between Arcutis Biotherapeutics, Inc. and Cardinal Health 105, Inc.
§ 25:10 Sales Representative Agreement (CTRCT Piestro Inc.)
§ 25:11 Agreement Terminating Amended and Restated Exclusive Sales Representative Agreement (Tenon Medical Inc.)
§ 25:12 Distribution Agreement (Jupiter Wellness, Inc.)
§ 25:13 Global Technologies Ltd.—Exclusive Distribution Agreement
§ 25:14 Technology License and Distribution Agreement (TaoWeave Inc.)—2026
§ 25:15 Exclusive Distribution License Agreement (Wrap Technologies Inc.)—2026
§ 25:16 License and Exclusive Distribution Agreement (Emmaus Life Sciences Inc.)—2025
§ 25:17 Distribution Agreement (Structured Monitoring Products, Inc.)
§ 25:18 Exclusive Distribution Agreement (CASI Pharmaceuticals Inc.)
§ 25:19 Distribution and License Agreement (IR-Med Inc.)
§ 25:20 Distribution Agreement (CleanCore Solutions Inc.)—2023

§ 25:21 Distribution Agreement (Med-X Inc.)—2023
§ 25:22 Cooperative Sales and Distribution Agreement (Sharps Technology Inc.)—2024
§ 25:23 Exclusive Distribution Agreement (Interactive Strength Inc.)—2024
§ 25:24 License, Supply, and Distribution Agreement (Europe) (Evolus Inc.)—2024
§ 25:25 License and Distribution Agreement (Avinger Inc.)—2024
§ 25:26 Exclusive Distribution Agreement (VPR Brands LP)—2024
§ 25:27 Exclusive Distribution Agreement (AVITA Medical Inc.)—2024
§ 25:28 Distribution Agreement (PetVivo Holdings Inc.)—2023

CHAPTER 26. CHECKLISTS

§ 26:1 Checklist for drafting distribution agreements
§ 26:2 International distribution contracts checklists
§ 26:3 Checklist for preparation of domestic and international distributor and sales representative agreements
§ 26:4 Sales representation agreement checklist
§ 26:5 Technology escrow account checklist
§ 26:6 Checklist for avoiding basic antitrust risks

CHAPTER 27. ALTERNATIVE DISPUTE RESOLUTION CLAUSES

§ 27:1 Introduction
§ 27:2 Clauses—Simple arbitration clause
§ 27:3 —The least favored choice of forum clause
§ 27:4 —The combination clauses
§ 27:5 —Prelitigation requirement
§ 27:6 Conclusion

CHAPTER 28. CONFIDENTIALITY AND DISCLOSURE CLAUSES

§ 28:1 Introduction
§ 28:2 Clauses—Definition
§ 28:3 —Uses
§ 28:4 —Exceptions
§ 28:5 —Third parties
§ 28:6 —Termination
§ 28:7 —Remedies
§ 28:8 Conclusion

CHAPTER 29. AUDIT CLAUSES

§ 29:1 Introduction

§ 29:2 Clauses—Purposes
§ 29:3 —Access
§ 29:4 —Record retention
§ 29:5 —Confidential information
§ 29:6 —Cost
§ 29:7 —Resolution
§ 29:8 Conclusion

CHAPTER 30. TRAINING CLAUSES

§ 30:1 Introduction
§ 30:2 Clauses—Scope
§ 30:3 —Costs
§ 30:4 —Materials
§ 30:5 —Types of training
§ 30:6 —Frequency
§ 30:7 Conclusion

CHAPTER 31. EXCLUSIVITY CLAUSES

§ 31:1 Introduction
§ 31:2 Clauses—Exclusive arrangements
§ 31:3 —Conditions
§ 31:4 —Exceptions
§ 31:5 —Remedies
§ 31:6 Conclusion

CHAPTER 32. INTELLECTUAL PROPERTY CLAUSES

§ 32:1 Introduction
§ 32:2 Clauses—Definition
§ 32:3 —Ownership
§ 32:4 —Use
§ 32:5 —Approval
§ 32:6 —Indemnification
§ 32:7 Conclusion

CHAPTER 33. DEFECTIVE PRODUCT CLAUSES

§ 33:1 Introduction
§ 33:2 Clauses—Inspection
§ 33:3 —Returns
§ 33:4 —Recalls
§ 33:5 Conclusion

CHAPTER 34. PRICING CLAUSES

§ 34:1 Introduction

§ 34:2 Clauses—Changes
§ 34:3 —Computing price
§ 34:4 —Competitors
§ 34:5 —Resale price
§ 34:6 Conclusion

CHAPTER 35. WARRANTY DISCLAIMER AND REMEDY LIMITATION CLAUSES

§ 35:1 Introduction
§ 35:2 Limited warranty
§ 35:3 Disclaimers
§ 35:4 —Express warranties
§ 35:5 —Implied warranties
§ 35:6 Remedy limitations
§ 35:7 —Repair or replacement
§ 35:8 —Recovery cap
§ 35:9 —Damages

CHAPTER 36. INDEMNIFICATION CLAUSES

§ 36:1 Introduction
§ 36:2 General
§ 36:3 Medical product
§ 36:4 Software
§ 36:5 License
§ 36:6 Intellectual property
§ 36:7 Building materials

CHAPTER 37. TECHNOLOGY ESCROW ACCOUNT CLAUSES

§ 37:1 Introduction

CHAPTER 38. MARKETING CLAUSES

§ 38:1 Introduction
§ 38:2 Publicity
§ 38:3 Sales personnel
§ 38:4 Promotional materials
§ 38:5 Intellectual property
§ 38:6 Restrictions

APPENDICES

Appendix A. Antitrust Guidelines for the Licensing of Intellectual Property

Appendix B. Vertical Restraints Guidelines

Appendix C. Summaries of Forms Available on EDGAR
Index