

Best Practices with Respect to Distribution Agreements

I have been representing manufacturers in their relationships with dealers for more than 20 years. In the course of that work, I have learned a number of lessons regarding how a manufacturer should interact with its dealers. I have boiled these lessons down into ten “best practices” with respect to drafting and using dealer agreements and ten things a manufacturer’s employee should never say to a dealer. My advice on “best practices” with respect to dealer agreements is contained in this article. My advice on what your employees should never say to a dealer will be contained in a second article that will appear in a later issue.

Best Practice No. 1: Always use written agreements. Remember, if you have a dealer, you have a “contract” whether it is in writing or not. The problem with not having it in writing is that you may not know what its terms are until you are told by the dealers hometown judge or jury.

Best Practice No. 2: Have a person who is responsible for contract administration. Among other things, that person’s responsibility will be to make sure that there is a written and signed agreement (without unauthorized modifications) for every dealer in the network. If it is not signed by the dealer, it may be binding on you but not on the dealer. The contract administrator will also be responsible for making sure that all necessary exhibits and attachments are current and are attached to the contract.

Best Practice No. 3: Contracts with all dealers should be uniform. The system will work better and will be easier to administer if every dealer’s agreement is uniform, including having a uniform start and end date. It is a very difficult call to make when a particularly large dealer asks for some concession on certain contractual language, such as the length of the agreement. Because of the importance of keeping the large dealer and getting the large dealer to sign the agreement, such a concession might be necessary. However, whenever possible, each dealer’s agreement should be uniform.

Best Practice No. 4: Use a contract that has a definite term and end date. You can use the renewal process to your advantage when you need to make changes to your distribution channel. “Evergreen” contracts (contracts without a fixed term) are preferred by some attorneys and are easier from an administration standpoint, but a fixed term contract will have more flexibility for termination or changes at the time of renewal.

Best Practice No. 5: Establish standards for dealer performance. Performance requirements should be enforced on a regular basis so that they are not waived. Performance based terminations are a frequent source of litigation arising from the termination context. A fair, reasonable and rational performance requirement set forth in the contract and adjusted on a regular basis will minimize the possibility of litigation in this context.

Best Practice No. 6: Adopt a definition of the “products” covered by the agreement. It allows flexibility with respect to new products. If you don’t have one, merger or acquisition might inadvertently expand a dealer’s rights.

Best Practice No. 7: Define “exclusivity.” Both the supplier and the dealer need to know whether the supplier has the right to appoint other dealers in the same territory and whether the supplier has the right to sell direct into the territory. Also, both the supplier and the dealer need to know whether the dealer can carry competitive products.

Best Practice No. 8: Have a provision on trademark use. This is particularly important now because of Internet sales and dealer websites. Under the Lanham Act the manner in which a dealer can use your mark is controlled by the contract. The supplier has the right to set the rules but needs to do so in a way that is clear.

Best Practice No. 9: Avoid implicit franchise fees. The case law gets worse each year on the difference between a “franchise” and a dealer. Avoid charging dealers for anything (including promotional literature, training, software, etc.) other than the goods themselves. As a farm equipment manufacturer, you are already likely to be governed by the state’s dealer protection law applicable to your industry. You do not want to make the situation worse by also making yourself subject to the state’s franchise statute.

Best Practice No. 10: Incorporate your standard sales terms and exclude others. A supplier will want all purchases by the dealer to be based upon the supplier’s standard terms and condition of sale. You can win the battle of forms (which normally favors the buyer) by setting forth in the distribution contract that all sales are based upon the seller’s terms and conditions and all other terms and conditions are excluded.

Source: FEMA Shortliner, August 18, 2004