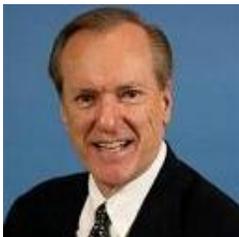


# FSMA LEGAL BRIEF

*A Legal Newsletter for Members from FSMA  
General Counsel Maloney & Knox, PLLC*

## Legality of Distributor/Buyer Demands on Agencies For Payments and Services

(April 2019)



Often we learn of a Distributor/Buyer's proposed demand that Sales and Marketing Agencies ("SMAs") pay them a fee or perform services that are not part of the SMA's contract with their Manufacturing client. ***Such demands are misplaced.*** It is the Seller/Manufacturer who controls and pays for the services of its Agency representatives and it is the Buyer who pays the Seller for the products sold.

A Buyer has no legal authority to impose contractual responsibilities on the Agent of the Seller/Principal in an attempt to transfer their overhead and labor costs to the Agent of the Selling/Principal. If such event occurred, the Agent would be deemed to be the Buyer's broker, undermining and impairing the relationship between the Agency and its client – the Principal. ***Accordingly, an Agency never makes payments to a Buyer.***

In the foodservice industry as in retail sales, all fees for services performed by Agencies in connection with its brokerage contracts are the expense of the Manufacturer, and ***it is the Manufacturer as the Principal who specifies the SMA's contractual use of Agencies' services thereunder, not the Buyer.*** SMAs never make payments from their own account to Distributors or their designated representatives, as they may be deemed to be violation of laws as described herein.

In our opinion, when a Buyer uses economic pressure or other tactics to induce or require an SMA to reimburse the Buyer for the designated services that SMAs have not been contracted to perform or compensated by their Manufacturing Clients, that ***Buyer is guilty of violations of state laws for tortious interference with the business and contractual rights between the Manufacturer and its existing Agencies,*** and the illegal element of that interference is the violation of state and federal anti-competition laws including the Robinson Patman-Act as described below. In view of the nature of Buyer's proposed mandate and knowledge of the SMA and Manufacturer relationships, the damages in such instance may include punitive damages.

With respect to the demand by Buyer, for a payment from SMA, as Agent for Seller, from Agencies' own account, whether for the demanded direct services by the SMA or for the demanded payments to Buyer's designated third party provider, such payments are illegal in violation of Section 2(c) of the Robinson-Patman Act, which prohibits the payment of or acceptance of "any allowance ... to the

other party to such transaction....” Section 2(c) of the Robinson-Patman Act further prohibits the granting of a discount in lieu of commissions, and the requested services or payments from the SMA could only come from an SMA rebating the commissions it receives from its Manufacturers.

*Accordingly, we recommend all FSMA Agency Members not participate in such a Buyer program that violates the foregoing provisions, without a validly executed Hold Harmless and Indemnification Agreement* in the form as attached to this Legal Brief. If an SMA uses this Agreement, they may (although we offer no assurances) protect themselves from civil liability associated with the proposed Buyer program. However, please note that the Hold Harmless Agreement will not protect SMAs from activities that may be deemed to be criminal under state and federal anti-competition laws including the Robinson-Patman Act or other laws, since this would be against public policy.

**FSMA Legal Counsel Member Benefit:**

As part of membership benefits, all FSMA Members are entitled to an initial free counsel on legal issues affecting their business by FSMA’s General Counsel, Barry Maloney, Esq. Thereafter, services are supplied to members at a 20% discount.

Barry has represented sales and marketing agencies and manufacturers on a myriad of legal issues for more than 30 years and is the author of several legal manuals on agency law, legal briefs for trade association newsletters, and has represented sales & marketing agencies on mergers and acquisitions and collection of unpaid commissions. In addition to being an attorney, Barry is a Certified Public Accountant, and formerly was Senior Branch Counsel to the Division of Corporate Finance of the Securities and Exchange Commission in Washington, DC.

**Attorney Contact Information:**

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**DISTRIBUTOR/BUYER HOLD HARMLESS AND INDEMNIFICATION AGREEMENT**

**THIS AGREEMENT** is entered into this \_\_\_ day of \_\_\_\_\_, 2019, by and between Distributor (“Buyer”) and the undersigned Sales & Marketing Agency (“SMA”).

**WHEREAS**, Buyer has required that SMA either: (1) directly assign its SMA personnel to perform services at Buyer’s locations or (2) require SMAs to pay a third party representative of Buyer to perform such services. Furthermore, Buyer demands payment of a per visit site fee to be paid by the SMA, whether such services are directly supplied by the SMA or by a Buyer designated third party representative (“Buyer Program”); and

**WHEREAS**, SMA is concerned with the possible liability exposure associated with such demands, including the potential for state tortious interference of contract claims and violations of the state and federal anti-competition laws, including the federal Robinson-Patman Act;

**NOW, THEREFORE**, in consideration for SMA’s participation in such Buyer Program, Buyer agrees as follows:

To indemnify and hold harmless SMA and its officers, agents, and employees from any and all claims, demands, or suits known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted as of this date, arising from or related to the events and transactions which are or could be the subject matter of Buyer’s requirement of SMA that it participate in Buyer’s Program.

**IN WITNESS WHEREOF**, the parties have executed this Hold Harmless Agreement the day and year first above written.

**Distributor:**

**Sales & Marketing Agency:**

Print Name:\_\_\_\_\_

Print Agency Name:\_\_\_\_\_

By: \_\_\_\_\_

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Print Name:\_\_\_\_\_

Print Title: \_\_\_\_\_

Print Title:\_\_\_\_\_

*(FSMA Recommended Contract)*