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FOSTER SWIFT

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SALES REPRESENTATIVE AND DISTRIBUTORSHIP CONTRACTS IN MICHIGAN

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Introduction:

Many domestic and foreign companies contract with sales representatives and distributors to market or sell their products in Michigan. Michigan law will generally apply to such contracts unless the contracts expressly state that the law of another jurisdiction should apply and the courts determine that Michigan does not have a greater interest in having its law applied to the contracts than such other jurisdiction. Like all of the United States other than Louisiana, Michigan has a common law legal system with roots in the English common law. Therefore, Michigan's common law of contract will generally apply to sales representative and distributorship agreements for the marketing or sale of products to Michigan customers.

Freedom of Contract:

Under Michigan common law, the parties have broad freedom to negotiate the terms of their sales representative or distributorship contracts, and Michigan courts will generally enforce the terms of the parties' contract as written unless the terms are clearly against public policy or there was a problem with the formation of the contract. Moreover, Michigan law does not require that such contracts include specific terms and does not generally read mandatory terms into such contracts. For instance, in

contrast to the laws of many foreign jurisdictions, Michigan law does not require that the manufacturer provide reasonable notice to terminate a sales representative contract or that the manufacturer pay a mandatory termination fee. Accordingly, contracts for Michigan sales representation or distribution will generally be enforced as written and should contain provisions that detail the essential terms of the parties' relationship.

Exceptions:

Two exceptions to the parties' general freedom of contract warrant particular attention. First are the non-waivable provisions of the Michigan Sales Representative Act, which authorize Michigan courts to award sales representatives up to \$100,000 in double damages, in addition to the sales representatives' actual damages and attorney fees, when a manufacturer intentionally fails to pay commissions more than 45 days after the later of the post-termination due date or the date of termination of the underlying contract. Second are Michigan's limitations on the enforceability of non-competition agreements. Michigan courts will only enforce a non-competition agreement to the extent that it is reasonable in duration and geographic scope. Michigan law also requires that the agreement protect the manufacturer's legitimate business interests, although Michigan courts have enforced this requirement leniently in contrast to the courts of many other jurisdictions.

Absent or Ambiguous Terms:

Where a contract does not address an important issue or does so ambiguously, Michigan courts may look beyond the written contract to ascertain the parties' intent. This may include evidence of the parties' negotiations, manner of performing the contract at issue or other contracts, and the customs of the trade. Where the parties' intent is entirely unclear, Michigan courts may even supply what they consider to be reasonable terms. This is especially true with respect to distributorship contracts, since such contracts are generally subject to Michigan's Uniform Commercial Code and its various default contract provisions, which will govern the parties' relationship when they have not otherwise agreed.

Oral Contracts:

A notable difference between Michigan law and the law of many other states is that oral sales representative contracts may be enforceable in Michigan, whereas the majority of states require that they be in writing. Generally, oral contracts are not enforceable if by their terms they cannot be performed within one year or are for the sale of more than \$500 worth of goods. Michigan courts, however, have held on at least one occasion that the latter rule does not always apply to sales representative contracts, holding that they often are not for the "sale of goods." Thus, Michigan courts may enforce an oral sales representative contract for an indefinite period of time, although distributorship contracts generally must be in writing to be enforceable.

Competition/Antitrust/Non-Compete Covenants:

Tax Considerations:

Other Issues:

Additional issues under Michigan law may be relevant to sales representative or distributorship arrangements. First, manufacturers should be wary of too closely dictating the marketing efforts of their sales representatives and distributors, since doing so may create a franchise relationship that is subject to the provisions of the Michigan Franchise Investment Law. For example, a franchise relationship has been found to exist in Michigan where the manufacturer recommended in the strongest terms that all of its sales representatives and distributors use the manufacturer's marketing, sales, training and recruitment guidelines to market its products.

Another important issue is whether the sales representative or distributorship arrangement will subject a foreign manufacturer's "unitary group" to the Michigan Business Tax on its apportioned business income, which is taxed at 4.95%, and its apportioned gross receipts, which are taxed at .8%. Solicitation of sales of tangible personal property alone will not subject a foreign manufacturer to the business income tax, although it could subject the manufacturer to the gross receipts tax. For instance, the physical presence of the manufacturer's sales representatives in Michigan, regardless of whether they are employees or independent contractors, will usually subject a manufacturer to the gross receipts tax. Physical presence of a manufacturer's employees for more than half of a day for purposes other than soliciting sales of tangible personal property (i.e., negotiating a sales representative or distributorship contract) will subject the manufacturer to both taxes. Additionally, if a manufacturer "actively solicits" sales in Michigan and has Michigan gross receipts of at least \$350,000, the manufacturer will be subject to both the business income tax and the gross receipts tax.

A third important issue that manufacturers should consider is whether their Michigan sales representative or distributorship agreements constitute an unreasonable restraint of trade in violation of the Michigan Antitrust Reform Act, which the Michigan courts interpret similarly to the federal Sherman Act. Manufacturers should analyze all of these complex issues, as well as any additional issues that may be relevant under the particular facts and circumstances, with local counsel.

Resources:

- Federal Trade Commission: <http://www.ftc.gov>. The FTC has regulatory jurisdiction over U.S. consumer protection laws and competition laws. Its website provides resources relating to its regulatory actions.
- U.S. Department of Commerce-International Trade Administration: <http://trade.gov/index.asp>. ITA's mission is to create prosperity by strengthening the competitiveness of U.S. industry, promoting trade and investment, and ensuring fair trade and compliance with trade laws and agreements. Its website provides access to ITA's information and services regarding U.S. international trade policy.
- U.S. International Trade Commission: <http://www.usitc.gov>. The United States International Trade Commission is an independent, quasijudicial federal agency with investigative responsibilities on matters of trade. The agency investigates the effects of dumped and subsidized imports on domestic industries and conducts global safeguard investigations and adjudicates cases involving alleged infringement by imports of intellectual property rights. The ITC gathers, analyzes, and makes public trade data and other trade policy-related information.

- U.S. Customs and Border Protection: <http://www.customs.gov>. The CBP is part of the U.S. Department of Homeland Security. Besides keeping terrorists and their weapons out of the U.S., the CBP has responsibility for securing and facilitating trade and enforcing hundreds of U.S. regulations, including immigration and drug laws.
- U.S. Department of Justice-Antitrust Division: <http://www.usdoj.gov/atr/index.html>. The Antitrust Division is charged, together with the FTC, with promoting and protecting competition in U.S. markets through the enforcement of the antitrust laws.
- U.S. Department of State- Travel: <http://travel.state.gov>. The Department of State's website offers resources relating to domestic and foreign travel.
- U.S. Trade Representative: <http://www.ustr.gov>. The USTR is a federal agency that negotiates directly with foreign governments to create trade agreements, resolve disputes and participate in global trade policy organizations. It also meets with governments, business groups, legislators and public interest groups to gather input on trade issues and explain the U.S. President's trade policy positions.
- U.S. Trade and Development Agency: <http://www.ustda.gov>. USTDA is an independent U.S. Government foreign assistance agency that is funded by the U.S. Congress. Its mission is to promote economic growth in developing and middle income countries, while simultaneously helping American businesses to export their products and services. USTDA provides grant funding to overseas project sponsors for the planning of projects that support the development of modern infrastructure and an open trading system.
- Export-Import Bank of the United States: <http://www.exim.gov>. Ex-Im Bank is the official export credit agency of the United States. Its mission is to assist in financing the export of U.S. goods and services to international markets by providing working capital guarantees (pre-export financing); export credit insurance; and loan guarantees and direct loans (buyer financing).
- Trade Regulation at Cornell University Law School: <http://topics.law.cornell.edu/wex/trade-regulation>. The Cornell University Law School's trade regulation webpage provides links to federal and state trade law and agency websites.
- International Commercial Law at Pace Law School: <http://www.cisg.law.pace.edu>. The Pace Law School website provides a variety of internet resources related to the United Nations Convention on Contracts for the International Sale of Goods.
- Anti-Trust and Trade Law Research Guide at Georgetown Law Library: <http://www.ll.georgetown.edu/guides/antitrustlaw.cfm>. The Georgetown Law Library's Antitrust & Trade Law Research Guide offers a variety of resources that primarily focus on U.S. anti-trust issues.
- National Law Center for Inter-American Free Trade InterAm Database: <http://www.natlaw.com/interam/>. The National Law Center for Inter-American Free Trade, a 501(c)(3) non-profit research and educational institution affiliated with the James E. Rogers College of Law at the University of Arizona, has developed the InterAm Legal Database of laws,

regulations and secondary source materials for selected countries in the Americas. This collection, primarily in original language (Spanish or Portuguese) but with some materials translated into English, is arranged in over 20 substantive areas.

- The Federation of International Trade Associations: <http://www.fita.org/webindex/index.html>. The Federation of International Trade Associations's website includes a vast array of links to trade-related resources.
- SICE-Foreign Trade Information System: <http://www.sice.oas.org/ctyindex/USA/USANatIDocs.e.asp>. The SICE website provides access to detailed trade information on western hemisphere countries, including the U.S.
- NAFTA Resources:
- NAFTA Secretariat: <http://www.nafta-sec-alena.org/DefaultSite/index.e.aspx>. The NAFTA Secretariat, comprised of a Canadian Section, a Mexican Section and a United States Section, is responsible for the administration of the dispute settlement provisions of the North American Free Trade Agreement.
 - U.S. Department of Commerce: http://www.export.gov/ftalnafta/doc_fta_nafta.asp. The Department of Commerce's website offers a variety of NAFTA-related resources.
 - United States Department of Agriculture: <http://www.fas.usda.gov/itp/Policy/NAFTA/nafta.asp>. The Department of Agriculture's website provides resources relating to NAFTA's agricultural provisions.
 - Secretariat of the Commission for Labor Cooperation: <http://www.naalc.org//index.cfn?page=137>. The Commission for Labor Cooperation is an international organization created by the United States, Canada and Mexico under the North American Agreement on Labor Cooperation. It provides a mechanism for member countries to ensure the effective enforcement of existing and future domestic labor standards and laws without interfering in the sovereign functioning of the different national labor systems. The Agreement complements the North American Free Trade Agreement (NAFTA).
 - Commission for Environmental Cooperation: <http://www.cec.org/home/index.cfn?varlan=English>. The CEC is an international organization created by Canada, Mexico and the United States under the North American Agreement on Environmental Cooperation. The CEC was established to address regional environmental concerns, help prevent potential trade and environmental conflicts, and to promote the effective enforcement of environmental law. The Agreement complements the environmental provisions of the North American Free Trade Agreement.

Firm Description:

Founded in 1902, Foster, Swift, Collins & Smith, P.C. is one of the 11 largest law firms in Michigan, with offices located in Lansing, Farmington Hills, Grand Rapids, Detroit, Holland and

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