

# FRANCHISING BOOKSHELF

REVIEWED BY DAVID A. BEYER

## Distribution Law of the United States

DAVID GURNICK

JURIS PUBLISHING INC. (SEPT. 1, 2011)

398 PAGES

\$125 (HARDCOVER)

**D**avid Gurnick has synthesized into one volume cogent explanations of the various bodies of law that affect the distribution of goods and services in the United States.

In one place, a reader can answer questions about distribution issues that otherwise would require research into vastly different areas of law, such as intellectual property, antitrust, product liability, commercial codes, and, of course, franchise laws. This one-stop shopping treatise is a valuable addition to the library of any practitioner of franchise and distribution law.

The book begins with a description and analysis of the various distribution methods companies utilize in the United States. These range from so-called cash-and-carry methods of product sales to distribution through multiple parties in the supply chain. Gurnick describes a variety of unique and surprising (to many) distribution systems from the agency relationships between moving companies and their agent van lines to the cooperative systems employed by citrus growers. The legal and practical advantages and disadvantages of the various distribution methods are compared and contrasted. Frequent use of bullet points creates an easy checklist for practitioners evaluating the propriety of different distribution methods.

While many practitioners focus on the sales regulation aspects of recruiting prospective franchisees and business opportunity purchasers, Gurnick recognizes the legal issues involved in the recruitment of many other distribution participants. Chapter 3 not only introduces the concept of franchise and business opportunity sales regulation, but also discusses the variety of laws that impact the recruitment process for other participants in the supply chain, such as employees, independent sales representatives, and distributors. These include not only federal and state antidiscrimination laws, but also laws forbidding misrepresentation, misappropriation of trade secrets, and interference with contracts and business relationships. These concerns apply to the recruitment of virtually any participant in the distribution chain. The chapter gives examples and practical tips on avoiding liability.

In Chapter 4, Gurnick summarizes the law of sales by translating Article 2 of the Uniform Commercial Code into plain



David A. Beyer

English. Essentially, he describes the various ways buyers and sellers arrange their transactions, illustrates when the code is available to set the default terms, and emphasizes when the parties can vary the default rules. This chapter provides a good review of the application of the commercial codes and also introduces elements of electronic commerce that appear in some newly amended versions. The chapter addresses everything from formation of contracts, modification of terms, and setting prices, to issuing warranties, risk of loss, nonperformance, and remedies for failure to perform.

Chapter 5 turns to discussing the warranties required by the commercial code and an explanation as to how they may be varied, while summarizing various statutes that impose warranties. It contains an excellent discussion on express and implied warranties and the ability to disclaim them and analyzes to what extent third parties may rely on those warranties. The chapter then discusses federal and state consumer warranty and protection laws.

Gurnick provides a primer on federal and state antitrust laws in Chapter 6. The chapter begins with a summary of federal antitrust statutes and then discusses a number of different activities commonly found in supply chains that risk violation of antitrust laws. These activities include those familiar to franchise lawyers like price-fixing and tying, but also includes more unfamiliar activities such as standards settings by associations, bid-rigging, and patent fraud. As with other topics, Gurnick provides numerous examples from case law and state attorney generals' opinions.

Chapters 7 and 8 are devoted to the connection between intellectual property and product and service distribution. Chapter 7 introduces branding concepts and constitutes a primer on trademark protection, while Chapter 8 describes the laws governing trade secrets, patents, and copyrights. The author describes how each body of intellectual property law applies and is used in the distribution context. The chapters are interlaced with case law examples of how these rights have been used in commerce. The trademark chapter includes a section explaining the derivation of many famous marks. Gurnick also quotes the illustrious Professor McCarthy in explaining the term "genericide" as the ultimate demise of previously famous trademarks such as "Aspirin," "Escalator," "Cellophane," and "Thermos." Gurnick advises trademark owners on how to prevent genericide, abandonment, and the like.

Chapter 8 also helps distinguish between trade secrets and information that companies merely wish to be secret. Not only does the chapter describe Coca Cola's efforts to maintain the secrecy of the infamous "Merchandise 7X," it includes numerous examples of methods other manufacturers and distributors have used to protect their company secrets. Franchising companies often fail to take necessary precautions to

*David A. Beyer is a partner in Tampa office of Quarles & Brady Ltd.*

protect their trade secrets and, therefore, may ultimately fail to protect them. Manufacturers and distributors that adopt many of the real-life practices used by others described in this chapter will greatly bolster their ability to protect their secrets.

The author does a great job of comparing the different types of intellectual property and contrasting them. He explains how a simple necktie can utilize intellectual property protection under patent, copyright, and trademark laws. This portion of the chapter demonstrates the advantages and disadvantages of the various bodies of law to protect intellectual property, including a helpful comparison of patent protection and trade secret protection. Gurnick carefully explains both the limitations of these intellectual property devices and their misuse.

Next, the treatise examines product liability and liability risk management in the product supply and distribution scenario. The author sets the stage by identifying the characteristics of various types of liability in the distribution process, from strict liability, to negligence and misrepresentation claims. He then describes the various ways different participants in the supply chain can be liable for injuries to users resulting from the products. The discussion touches on new developments such as private labeling by retailers and the proliferation of dealers of used goods.

After cataloguing the various defenses available to those in the supply chain, Chapter 9 discusses ways in which those participants share and allocate the risk of liability among them. It also includes a very helpful discussion of the uses of insurance, indemnification, and disclaimers to limit and allocate liability among members of the supply chain. This chapter ties together with the earlier chapters covering the Uniform

Commercial Code warranties and consumer claims, like the Magnuson-Moss Warranty Act.

The final chapter contains a summary of franchise sales and relationship laws familiar to all franchise practitioners. It also touches on laws governing relationships with sales representatives and laws protecting special industry distributors such as motor vehicles, farm machinery, motor fuel, and alcoholic beverages. The chapter then lists and summarizes the numerous laws that address product labeling at the federal level. The author includes a bullet point list of recommendations for complying with federal food labeling laws and notes the impact of state variations.

With today's global economy, no treatise on product distribution would be complete without mentioning the impact of import and export regulations. Gurnick provides a summary of the basis of these laws and the process of compliance. Among these are laws of more recent vintage that deal with country-of-origin marking. The chapter concludes with a thirty-two bullet point checklist for import requirements.

Unlike many treatises, the book concludes with a forms appendix. These forms include sample contracts covering many of the methods of distribution described within the book. Although the table of contents enables easy navigation throughout the larger topic areas, an index may have been helpful in finding particular subjects.

Gurnick has done an excellent job of synthesizing the various laws that impact the supply chain. Although a treatise, both the layout and the frequent use of examples, comparisons, and bullet points make this publication an easy handbook for quick reference. This new book also may become a popular text in the expanding curricula on franchise law.