

Product Distribution and Franchise Team

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SILENCE IS NOT ALWAYS GOLDEN: AN EXCLUSIVE RELATIONSHIP MAY BE "IMPLIED" IF THE CONTRACT DOES NOT SAY OTHERWISE

As the old proverb goes—"Silence is golden; speech is silver." But is silence golden? Not when you have a written distribution agreement.

For example, what happens when your written distribution agreement fails to state whether it is nonexclusive or exclusive? Some courts presume that a business relationship is nonexclusive unless the parties expressly say it is exclusive. But this is not always the case, as a manufacturer and dealer recently discovered in *Kaesar Compressors, Inc. v. Compressor & Pump Repair Services, Inc.*, No. 09-C-521, 2009 WL 3055341 (E.D. Wis. Sept. 18, 2009).

In that case, a compressor parts dealer claimed its supplier could not appoint another dealer in its territory because it had an exclusive dealership. The manufacturer countered that the agreement did not place any "exclusivity type" restrictions on the manufacturer. When the manufacturer threatened to appoint another dealer and the dealer protested, they sued each other.

The court decided that even though the contract was silent on the issue, exclusivity might be implied based on the parties' conduct and course of dealing. The dealer had been the manufacturer's only dealer in its territory for many years, and the manufacturer was required to forward all sales leads to the dealer. The manufacturer had proposed an addendum to the dealership agreement that would have confirmed that the agreement was nonexclusive, but the dealer refused to sign it. The court found these facts to be sufficient to support an argument that the parties intended their relationship to be exclusive. The court said that although a distribution agreement may be silent as to exclusivity, "the arrangement may in fact become an exclusive one through the parties' course of conduct so long as the grantor's intention to avoid granting exclusivity was not manifest."

An implied exclusive relationship can create potential traps for the unwary. A manufacturer that assumes it can sell products directly to customers and appoint other dealers may be surprised to learn that it cannot do so under implied obligations and statutes like the Wisconsin Fair Dealership Law. Dealers likewise may be surprised to learn that the "exclusive" territories they thought they had may in reality be nonexclusive territories that they must share with competing dealers.

So instead of being golden, silence may invite ambiguity to creep in based on the parties' conduct. The best way to avoid disputes is to specifically address issues like these in your distribution contracts. Reinhart's Product Distribution and Franchise Team drafts contracts and advises companies about their distribution relationships and compliance with dealer and franchise laws. Please feel free to contact a team member to help you with your distribution contracts.

The *Reinhart Product Distribution and Franchise Law E-Alert* provides general information about topical issues. It should not be construed as legal advice or a legal opinion. Readers should seek legal counsel concerning specific factual situations confronting them.