



A GUIDE TO BICYCLE DEALER AGREEMENTS

Some Suggestions for Leveling
the Playing Field

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Dealer agreements used in the independent bicycle dealer segment of the market are similar in style and content and very one-sided. Independent bicycle dealers have had virtually no input on the content of dealer agreements currently being used. Sellers (bicycle manufacturers or wholesale distributors) rarely negotiate or modify their standard printed forms of dealer agreement, perhaps because dealers seldom ask them to do so.

NBDA has commissioned the preparation of this Guide to help its members understand the terms of the typical dealer agreement and to offer some suggestions on clauses which might be added to a printed dealer agreement form to provide the dealer with a more even-handed relationship with its seller.

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| 1. Always Use Your Advisors |
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Bicycle dealers tend to be small businesses with little capital and with an understandable aversion to spending money on a lawyer or other advisors. When handed a printed form by a bicycle seller, some dealers may simply sign the form without carefully reading or understanding what they are signing. Perhaps on the assumption that the seller is unlikely to modify the document or perhaps because the seller orally assures the dealer that the agreement won't be enforced as written, many dealers may never show the document to their advisors. When a problem develops at a later date, the dealer is often surprised at what the agreement provides and permits the seller to do. By then it is too late to do anything to help the dealer.

The time to get provisions you can live with is before the agreement is signed and while everyone is still happy and needs each other. You should always provide the dealer agreement to your lawyer and other advisors **before** the agreement is signed. **You can't rely on the oral assurances of the seller.** In many cases, your lawyer may not be able to do more than explain the respective rights and obligations of the parties under the agreement. However, if the seller told you how it plans to enforce the dealer agreement, your lawyer may be able to have the agreement amended to reflect those understandings. **If the seller won't amend the agreement to reflect your oral understandings, that is a warning signal.**

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| 2. Read Your Agreement and Understand It |
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It is important that you read the entire agreement and understand it. That will help you and your lawyer to determine which provisions are important to you and may need to be modified.

This Guide will provide you and your lawyer with an explanation of why certain provisions are in the typical bicycle dealer agreement and offer some suggested modifications that might be appropriate in certain circumstances. Realistically, your lawyer may only be able to modify a limited number of provisions in the dealer agreement. Because the seller is unlikely to completely rewrite its printed form of agreement, any changes which are agreed to will most likely be embodied in an addendum attached to the Agreement or by striking out and/or hand marking changes on the printed form.

The balance of these Guides will address various provisions of the typical bicycle dealer agreement and offer some suggestions on alternative provisions that might provide higher levels of protection to a dealer.

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| <p>3. You Should Set Up A Corporation to Operate Your Business and Be a Party to the Agreement</p> |
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To protect yourself from the claims of creditors, injured consumers and others, **you should always operate your business as some form of limited liability entity. Use either a corporation or a limited liability company.** Whenever possible, that entity should also sign the agreement as the dealer. If for some reason you sign the agreement as an individual, you should make sure the agreement gives you the absolute right to assign it at any time to a limited liability entity of which you are the principal owner. [See Sample Provision No. 1.]

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| <p>4. Personal Guaranties</p> |
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Some sellers routinely require all of their dealers to provide a personal guaranty. If your dealership is adequately capitalized and has a good credit history, a guaranty should not be necessary. The seller can adequately protect itself either by establishing a limited line of credit for the dealership until the dealership establishes a satisfactory credit history with seller and/or by taking a purchase money security interest in the goods sold.

If you sign the agreement as an individual and later assign it to an entity of which you are the principal owner, you may be still liable to the seller as a guarantor for the obligations of the dealership to the seller unless there is a novation (i.e., a substitution of the new entity as the responsible party). [See Sample Provision No. 1.]

5. The Appointment Provision Should Clearly State What You Are Authorized To Do

The typical bicycle dealer agreement appoints the dealer as an "authorized dealer" only at a specific location. Some agreements specifically state that they are non-exclusive, but none that we have seen states that the appointment is exclusive.

Every dealer would like to have an exclusive appointment within a particular territory. Every seller is likely to resist this. But this would especially seem to be a fair request to make if the seller is going to require you to make minimum sales or purchases (i.e., meet a quota). To have a fair chance to achieve your quotas, you should be entitled to some reasonable territorial protection. Defining the territory as a radius from the dealer's location (e.g., 3 miles from the location of your store) or defining the territory by described boundaries (the town of XYZ) would be the easiest way to define a territory. [See Sample Provision No. 2.]

The appointment provision should clarify whether you are being appointed to provide services on the products you are reselling. Most sellers will expect you to assemble their bicycles and provide warranty and other services to consumer purchasers. [See Sample Provision No. 2.]

The appointment provision should also clarify whether your appointment is only for the retail sale of products or whether you can also resell at wholesale. Sellers typically will not grant you an indiscriminate right to resell at wholesale. If wholesale sales are important to you, you need to spell out that right very clearly. Some sellers will allow you a right to sell at wholesale only to other authorized dealers of the seller (i.e., transshipping).

6. A Simple Location Clause Provides No Protection to You

Because the typical dealer agreement appoints the dealer as a (non-exclusive) authorized dealer only at a specific location, the seller will be free to appoint another dealer almost anywhere else or to sell through any other channel of distribution in competition with the dealer.

The seller typically does not want you to relocate your business without its approval in order to protect the seller's selection of dealers at various locations. This is understandable, but you should have the right to relocate your business when appropriate and the seller should not unreasonably withhold its consent to a transfer of the location, at least as long as it is the same market area. [See Sample Provision No. 3.]

If you want either the right or option to add additional locations or a right of first refusal to open additional locations in your market area or territory, you need to have a written understanding

with the seller describing under what circumstances you can have that right. [See Sample Provision No. 4.]

7. Make Sure You Know What The Seller's Obligations Are To You

The dealer agreement typically sets forth the obligations of the seller to you, although a few agreements do not have any obligations and others impose very limited obligations. In fairness to you, the agreement needs to address at least the minimum expected obligations of the seller. Some of these seller obligations that you may want to see in an agreement could include the following:

1. The seller should have the obligation to make available and to sell its products to you **whenever** you place an order, as long as you are maintaining satisfactory credit relationships.
2. If the seller offers different product brands or lines, the product brands or lines available to you should be carefully identified. You should be entitled to sell future product offerings under all of those brands or lines.
3. It should be clear whether the seller can sell its products to anyone other than authorized dealers (e.g., to sporting goods stores, by mail order, through mass merchants, through department stores, etc.), especially if you have an exclusive territory.
4. If the seller is going to make parts and accessories available to you, that should be clearly stated.
5. The prices at which products will be sold to you should be stated or identified in some manner. If the seller has or will have a published price list, that list should be sent to you as soon as it is available. Price increases should be applied prospectively, such as by having a 30 day lead time before implementation of a price increase or by applying the price increase only to future orders of products. [See Sample Provision No. 5.]
6. If the seller is going to provide you with advertising support, the type of support should be clearly indicated: national, regional and/or local. If you are obligated to engage in local advertising, the extent of that obligation should be spelled out. If the seller has a cooperative ad program under which it will contribute to local advertising on some percentage or other basis, those terms should be spelled or made available to you prior to signing. **If you have to contribute to an advertising fund, consult with your lawyer to see if there is a franchise fee.**
7. If the seller will make promotional materials available to you, that obligation should

be stated. If those materials are going to be made available at a cost, that cost should be clarified. Preferably such promotional material should be provided to you free of charge or at the seller's cost with no profit added on.

8. If the seller will make store fixtures or equivalent available to you, that should be spelled out together with the pricing structure. **Note: If you will be required to purchase fixtures and equipment from the seller, consult with your lawyer to see if there is a franchise fee (this will vary by state).**
9. If the seller is going to provide you with training, the type of training and its location should be identified and a statement added as to who will bear those costs. **Note: If you are required to pay a fee for training, consult with your lawyer to see if there may be a franchise fee involved.**
10. There should be a clear statement of the extent of the trademark license given to you by the seller. Can you use the seller's trademark in your dealership name, to identify your store as an authorized dealership, on advertising, on letterheads, in the yellow pages, etc.?
11. The seller should be obligated to extend its regular credit terms to you as long as you remain current on its account receivable payments. Ask your seller to advise you in writing as to what those credit terms are.
12. The seller should clearly state its product warranty obligations to you. If the seller also offers a warranty directly to the consumer purchaser and expects you to provide warranty services, the warranty must comply with the federal warranty law. Under the federal warranty law, the seller must make reasonable arrangements to compensate you for any warranty services you perform under the seller's warranty. While there need not be a dollar for dollar reimbursement under the federal warranty law, some compensation is necessary and those arrangements should be spelled out. Under several state laws, a dealer providing warranty services under a seller's warranty must be reimbursed at essentially retail rates. You should consult with your lawyer to see if your state has an applicable warranty reimbursement law. [See Sample Provision No. 6.]
13. Some agreements allow the seller to allocate bicycles and other products among its dealers when they are in short supply. If the seller seeks to allocate products as it deems reasonable, you may want to add a provision that you will be treated no differently than other dealers in your state or market area. [See Sample Provision No. 7.]
14. If the seller will make credit card programs, group insurance programs or other similar group benefits available to you, ask the seller to describe the existing programs in some detail.

15. The seller should be obligated to provide you with an owner's manual for each bicycle so that you can provide it to the consumer purchaser.
16. The seller should reimburse you for any costs you incur as a result of a product recall, whether voluntary or ordered by the Consumer Product Safety Commission or some other agency. [See Sample Provision No. 8.]
17. The seller should indemnify, hold harmless and defend you against any claims brought by a third party alleging either (i) that the seller's products are infringing the third party's trademark or patent rights, or (ii) that the seller's products caused injuries or damages. [See Sample Provision No. 9.]

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| 8. Make Sure You Can Fulfill Your Obligations |
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The dealer agreement typically has an extensive list of obligations the authorized dealer must fulfill. Some of the common provisions, many of which probably will not be objectionable to you, are the following:

1. You will probably be obligated to maintain a neat and orderly retail store with adequate display and service facilities.
2. You will have to have a sign identifying your store as an authorized dealership. Issue: who pays for the sign? Will the seller make one available for free or at its cost?
3. You may need to have a yellow page listing. You should make sure that you own your telephone number and that you will not have to surrender it to the seller on termination, expiration or non-renewal of the agreement.
4. Make sure you can live with any requirements as to the maintenance of an inventory and supply of the seller's products. **Note: If those requirements are more than a reasonable businessperson would purchase, consult with your lawyer to see if there may be a franchise fee involved.**
5. You may be obligated to have trained employees who can service the seller's products. That's probably okay, but the agreement should clarify who will provide the training and where, and at whose cost. **Note: If there is a required charge for that training, consult with your lawyer if a franchise fee might be involved.**
6. You may want to have a provision allowing you to place orders with the seller by telephone, E-mail, facsimile or other electronic means. If so, the parties should agree

on how those orders will be confirmed and accepted.

7. You may have an obligation to maintain records of sales of all of the seller's products. This benefits both parties if there is ever a recall, as long as the retention period is not too long.
8. There will probably be an obligation on you to advertise and promote the sale of the seller's products. However, you should be careful that there not be a "best efforts" clause; it may not be possible for you to exert best efforts if you are handling several brands.
9. Many agreements have minimum annual sales quotas (purchases or sales). You need to participate in developing those quotas and you must make sure you can meet those expectations. As noted before, if quotas are included in your agreement, this may justify the inclusion of a protected (*i.e.*, exclusive) territory in the agreement in order to give you a fair chance to meet those quotas.
10. Often you may have an initial order requirement. **Note: If the initial order requirement is in an amount more than a reasonable businessperson would purchase, check with your lawyer to see if there may be a franchise fee.**
11. You likely will be required to assemble and service all of the seller's products before sale to the consumer. Most sellers in the independent bicycle dealer segment of the market comply with the Consumer Product Safety Commission's Federal Bicycle Safety Regulation by requiring their dealers to assemble the bicycle before sale. This is an accepted practice.
12. You probably will be obligated to provide warranty services on the seller's products. As noted above, you should be compensated in some way for those services. [See Sample Provision No. 6.]
13. Many bicycle warranties include a free 30-day check-up. If you find this to be costly, you wish to negotiate the right to be reimbursed by the seller for those services. [See Sample Provision No. 10.]
14. The agreement should spell out how you can use seller's trademarks in the manner authorized. It is difficult to complain about this because the seller has to police the use of its trademarks from a quality control standpoint so it does not lose its rights in its marks. You should also understand any goodwill that is developed from your use of the seller's mark belongs to the seller, not you.
15. You usually will be obligated to maintain satisfactory credit relationships with the seller.
16. When providing the seller's products to a consumer, you may be obligated to provide

an owner's manual, explain use and care of the product, explain the seller's warranty, and record sales data and serial numbers.

17. You generally will be allowed to sell only from an identified location and not resell at wholesale. Sometimes you may be allowed to transship (*i.e.*, resell at wholesale) to other authorized dealers, but some agreements prohibit even such transshipments. As discussed above, your rights in this regard should be spelled out.
18. You typically will be prohibited from selling by mail order, but you should not be prohibited from accepting an E-mailed or faxed order from a customer in the dealer's market area.
19. If you want to have the right to have periodic displays in other locations, such as at trade shows or in kiosks in malls during holiday or peak seasons, that right needs to be built into the agreement at the beginning. As long as the temporary display is not impinging on some other dealer's market area, this could benefit both the seller and you. [See Sample Provision No. 11.]
20. The seller can suggest a retail price to you, but cannot force you to sell at that price. Under the recent U.S. Supreme Court decision in Kahn v. State Oil Co., however, the seller's fixing of maximum resale prices will be judged under the rule of reason if the agreement gives it the right to set such prices. Moreover, if the dealer regularly sells at a discount, the seller may be able to terminate that dealer if it does so independently and not because of a price-fixing agreement.
21. You may be required to maintain adequate insurance. If such a provision is included in the agreement, you should determine **before** it signs the agreement that such insurance is available at a reasonable cost.
22. Some agreements may give you the right to engage in a program of renting the dealer's products. Many states have so called "rent to own" laws. You should check with your legal advisor on the obligations which you would have under your local laws.

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| <p>9. You Should Review the Seller's Terms and Conditions of Sale Before Signing a Dealer Agreement</p> |
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Some sellers attach their standard terms and conditions of sale to their dealer agreements as an exhibit, but most do not. Because the seller will rely on those standard terms of sale to govern the sale of products to you, and because those standard terms will modify the U.C.C.'s provisions and control your rights with respect to the products you buy, it is important that you obtain a copy of those standard terms and review them **before** signing a dealer agreement.

The seller's standard terms typically govern acceptance of orders, shipping terms, warranties, risk of loss and title, force majeure and other items. If there are provisions that concern you, they should be amended as part of the dealer agreement negotiation process and a provision added that the dealer agreement as amended will control over any inconsistent terms of sale in the seller's forms. [See Sample Provision No. 12.]

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| 10. Term, Renewal and Termination Provisions Do Not Favor Dealer |
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Bicycle dealer agreements tend to be short term: none that we have seen lasts more than one year and some allow **either** party the right to terminate on 30 days notice at any time. Allowing the seller to terminate on 30 days notice seems inherently unfair, if you are committing to handle that seller's line, because the dealer will be investing time, money and floor space to display and sell the dealer's products.

If the seller imposes quotas or minimum purchase obligations on you, you may want to ask the seller to agree to a longer term agreement (e.g., 5 years) as long as you maintain or meet your annual quotas, or at least to provide for automatic annual renewals of your agreement if those quotas are met. [See Sample Provision No. 13.] If the seller will not give you a long term agreement, then it is difficult to understand why any sales quotas are necessary.

Some agreements are for a term which expires at the end of the initial calendar year. It would be better for those types of agreements to expire at the end of the next succeeding calendar year in order to give you a fair opportunity to perform under the agreement.

In a distribution arrangement, it seems inherently unfair for the seller to be able to terminate you at any time on 30 days notice. In fairness to you since you are investing your time, money and floorspace to develop business for the seller, there should be some minimum term, at least one year. On the other hand, it makes sense for the seller to allow you to exit the system at any time upon reasonable notice (30 to 60 days); it does the seller no good to keep a disgruntled dealer in its system since the dealer will lose its motivation to promote the seller's products if it is unhappy with the arrangement. [See Sample Provision No. 14.]

At the end of the specified term, dealer agreements generally provide that either party can elect not to renew by giving written notice to the other party. Typically, either party should be able to not renew by providing adequate advance written notice to the other side. The notice should be long enough to give the other party a reasonable opportunity to find other sources of supply or other dealers (e.g., 60 to 90 days). Some state franchise or dealership laws may control the length of these notice provisions insofar as the seller is concerned and require an even longer notice period. Some state laws also provide that if there is a right to renew, the seller cannot fail to renew except for good cause and must give you an opportunity to cure any deficiencies that might otherwise justify non-renewal.

The seller may condition renewal on your executing a new dealer agreement. You should make sure that if your agreement has that type of provision you get the new agreement far enough in advance of the expiration date to give you a reasonable opportunity to review its provisions in a leisurely fashion.

The dealer agreement typically gives the seller the right to terminate the agreement if you breach the agreement. Oftentimes, the agreement can be terminated immediately in the event there is a change in your ownership, your business is sold, a voluntary or involuntary bankruptcy petition is filed against you or you become insolvent, you are convicted of a crime, etc. In other situations, the seller generally must give you notice of a breach and opportunity to cure before terminating. Thirty days to cure (10 days for monetary defaults) is generally fair, although some of the state franchise or dealership laws may require a longer cure/notice period. The cure period should run from the date of receipt of notice and not from the date of notice.

The dealer agreement typically provides that you will be obligated on termination, expiration or non-renewal to cease using the dealer's trademarks or representing that the dealer was or is associated with the seller. Since you are using the seller's trademark, such a provision is fair. Sometimes the seller will have the option to repurchase your inventory of the seller's products. At a minimum, this should be at the price you paid for those products, not at their current fair market value.

11. Dealers Want the Right To Assign Agreement

The dealer agreement typically will not allow you to assign it on the presumption that it is personal to you. This works to your disadvantage if you want to sell your business.

A fair provision would allow you to assign the agreement to the purchaser of substantially all of the assets of your business as long as the purchaser meets the reasonable qualifications of the seller and the seller consents, but the seller should not unreasonably withhold its consent. [See Sample Provision No. 15.]

As discussed above, if you sign a dealer agreement as an individual, you should have the absolute right to assign the agreement at any time to an entity of which you are the principal owner. [See Sample Provision No. 1.]

Upon your death or incapacity, your family or the family of the principal owner should have the right to continue to operate the business for a period of time (e.g. up to 12 months) to find a buyer for the business. [See Sample Provision No. 16.]

12. Dispute Resolution

Most dealer agreements do not address dispute resolution, but a few require venue in the seller's jurisdiction (i.e., all litigation must be in the courts of the seller's state) or provide for arbitration in the state where the seller has its principal place of business. If you have limited resources, this will make it difficult, if not impossible, for you to sue the seller or defend yourself. The fairest thing may be delete these provisions altogether.

Some believe arbitration is an easier way to resolve disputes. Consult with your lawyer on this. If there is an arbitration clause, it is important to designate the rules to be used (Commercial Arbitration Rules of the American Arbitration Association), the location (yours, theirs or a neutral site), the number of arbitrators (one should be adequate), and the controlling law. You may want the arbitrators to be experienced in bicycle matters. As discussed above, arbitration in the seller's jurisdiction may be difficult for you. A fair compromise may be to have arbitration in the seller's jurisdiction you initiate it, and in your jurisdiction if the seller initiates it. [See Sample Provision No. 17.]

13. Be Careful of the Miscellaneous or So-Called "Boilerplate" Provisions

There are a number of miscellaneous or boilerplate provisions which can have a significant impact on the rights of the parties:

1. The controlling law is usually that of the seller's jurisdiction. That normally is not a problem for you because any statutes in your state which might apply to the dealer agreement would probably be held to apply anyway as a matter of that state's public policy. However, you may want to have the law of your jurisdiction apply. You should consult with your lawyer to see if there are any real advantages in having the law of your state apply.
2. There should be a clear provision on how notice is to be given under the agreement. The typical methods are by personal delivery, certified mail (return receipt requested), facsimile (with a copy mailed) or by overnight courier. The time when delivery is effective should be stated (upon delivery, 3 days after mailing, one business day after sending by facsimile, etc.).
3. Many agreements have an entire agreement or integration clause (e.g., "this is the entire agreement between the parties"). The courts will uphold this type of provision, which means that all prior agreements, oral understanding and negotiations are merged into and superseded by the written dealer agreement. If there are understandings or agreements you believe are part of your relationship with the seller but are not in the written agreement, those other agreements should be specifically identified in the dealer agreement and/or the terms of those other

understandings set forth in an addendum to the dealer agreement. **If they aren't included, you will not be able to rely on them.**

4. Typically, amendment of the agreement can only be made by a writing signed by both parties. This protects both parties. Beware of an agreement that allows the seller to modify the agreement unilaterally.
5. Non-compete provisions are virtually non-existent in bicycle dealer agreement and with good reason: non-competes are inappropriate in this industry because most bicycle dealers sell more than one brand of bicycle and should be free to replace a brand of bicycle at any time, particularly on termination, expiration or non-renewal.
6. A prohibition against the revealing of the seller's confidential information is sometimes found. You may not want to agree to such a confidentiality clause since virtually nothing that a seller provides to you is a true trade secret or is so proprietary as to justify non-disclosure. If the seller insists on such a clause, however, you may want to add a provision that each allegedly confidential item must be specifically identified, and that the duty to maintain confidentiality ends if the item becomes available publicly or is obtained by you from other sources, or if you are ordered by a court to turn over that information.

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| 14. You Should Make Sure You Have a Copy of the Executed Agreement |
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The dealer agreement should be signed on your behalf and on the seller's behalf by persons authorized to sign on behalf of each respective entity. You should obtain a copy of the fully executed dealer agreement and place that copy for safekeeping. It would also be a good idea for you to give your lawyer and other advisors a copy for their files.

SAMPLE PROVISION NO. 1

Right of Individual Dealer to
Assign Agreement to Entity Owned By Dealer

Dealer may at any time transfer and assign this Agreement and all of his rights and obligations hereunder to a corporation, limited liability company or other entity as long as Dealer is and remains the principal executive officer and the owner of more than 50% of the voting rights in such entity. Dealer must promptly notify [Seller] of such assignment. Thereafter, only the entity shall be responsible for Dealer's obligations under the Agreement.

SAMPLE PROVISION NO. 2

Giving the Dealer an Exclusive Territory

[Seller] hereby appoints Dealer as its exclusive authorized dealer for the retail sale and service of [brand] bicycles and other products within the following territory: _____

("Territory"). During the term of this Agreement, [Seller] will not operate a dealership or appoint any other person, firm or entity to sell [brand] bicycles and other products within the Territory.

SAMPLE PROVISION NO. 3

Relocation

Dealer may relocate its business within its [Territory] [market area] with the consent of [Seller], which consent shall not be unreasonably withheld.

Alternative:

If Dealer's lease expires or is terminated without Dealer's fault, or if Dealer's lease cannot be renewed, or if the location is destroyed, condemned or otherwise rendered unusable, or if there is a change in the character of the location, Dealer may relocate the business within its [Territory] [market area] with the consent of [Seller], which consent shall not be unreasonably withheld.

SAMPLE PROVISION NO. 4

Right of First Refusal to
Obtain Additional Dealerships

Dealer shall have the right of first refusal to be appointed as an authorized dealer for [Seller] in the following areas: _____.

In the event [Seller] has a qualified prospective dealer for that area, [Seller] shall notify Dealer in writing of the availability of an authorized dealership and provide Dealer with the right, exercisable for 30 days after receipt by Dealer of written notice, to agree to open an additional authorized dealership in such area. Dealer must find a suitable location for such additional store and open such additional store within six (6) months of exercise of its option.

SAMPLE PROVISION NO. 5

Price Increases

[Seller] shall sell products to Dealer at the prices set forth in its dealer price list. [Seller] shall periodically provide a copy of its current dealer price list to Dealer as soon as it becomes available. Prices may be increased by [Seller] at any time by giving Dealer not less than 30 days advance written notice of a price increase; provided, however, that any price increases shall only apply to future orders of products.

SAMPLE PROVISION NO. 6

Warranty Services and Reimbursement

Dealer shall provide warranty services to consumer buyers under [Seller's] consumer warranty. [Seller] shall provide compensation to dealer for such services as follows: _____

SAMPLE PROVISION NO. 7

Allocation of Products

[Seller] may allocate products among its dealers when products are in short supply, but [Seller] shall allocate products in Dealer's [state] [market area] on an equally proportional basis.

SAMPLE PROVISION NO. 8

Product Recall Reimbursement

[Seller] shall reimburse dealer for any costs and expenses it incurs as a result of any recall of [Seller's] products, whether voluntary or ordered by the Consumer Product Safety Commission or any other agency.

SAMPLE PROVISION NO. 9

Seller's Indemnification

[Seller] shall indemnify, hold harmless and defend Dealer from and against any or all claims, suits, losses or actions of any kind or nature directly or indirectly arising out of a claim either (i) that [Seller's] products or trademarks infringe the intellectual property rights of a third party, or (ii) that [Seller's] products caused property damage or personal injury to any third party.

SAMPLE PROVISION NO. 10

Free 30 Day Check-Up

Dealer shall be reimbursed by [Seller] for its actual out of pocket costs and expenses in providing a free 30 day check-up to its customers.

SAMPLE PROVISION NO. 11

Sales from Temporary Locations

Dealer may lease space or booths at trade shows, or acquire temporary space in or use a kiosk in a mall during peak or holiday seasons, by providing written notice to [Seller]. Unless [Seller] objects to such temporary location within five (5) days of such notice, Dealer may use that temporary location to offer [brand] bicycles and other products for sale.

SAMPLE PROVISION NO. 12

Terms and Conditions of Sale

This Agreement will modify and supersede any terms and conditions of sale in [Seller's] sales documents to the extent that there is an inconsistency.

SAMPLE PROVISION NO. 13

Longer Term Agreements

This Agreement shall be for a term that commences on the date set forth above and expires five (5) years thereafter, provided that Dealer meets its purchase quota for each calendar year of this agreement.

Alternative:

This Agreement shall be for a term which expires one (1) year from the date hereof, and will automatically renew itself for successive periods of one (1) year each as long as dealer has met its purchase quota for the then current year.

SAMPLE PROVISION NO. 14

Term of the Agreement

This Agreement shall remain in effect for one (1) year from the effective date shown above and shall automatically be renewed for successive one (1) year periods thereafter unless [Seller] notifies Dealer at least 90 days prior to the expiration date that this Agreement will not be renewed. Dealer may terminate this Agreement at any time upon not less than 30 days written notice to [Seller].

SAMPLE PROVISION NO. 15

Assignment to Buyer of Dealer Assets

Dealer shall have the right to assign this Agreement to the purchaser of substantially all of its assets as long as the purchaser meets the [Seller's] reasonable requirements and [Seller] consents to the assignment, which consent shall not be unreasonably withheld.

SAMPLE PROVISION NO. 16

Operation by Heirs

If Dealer (if Dealer is an individual) or its principal owner (if Dealer is an entity) dies or becomes incapacitated, Dealer or the owner's heirs or spouse shall be entitled to continue to operate the business as an authorized dealership for a period not to exceed 12 months in order to allow them to find a substitute owner who meets the reasonable qualifications of [Seller] and who can take over the business.

SAMPLE PROVISION NO. 17

Arbitration

Any controversy or claim arising out or relating to this agreement shall be determined by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association by one arbitrator appointed in accordance with said Rules. The arbitrator shall be experienced in the bicycle industry. The parties agree that the substantive laws of the State of _____ shall govern this agreement. If [Seller] initiates the arbitration, it shall be held in the county and state where Dealer's business is located. If Dealer initiates the arbitration, it shall be held in county and state where [Seller's] principal place of business is located. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

TIPS AND QUESTIONS TO ASK WHEN
NEGOTIATING YOUR DEALER AGREEMENT

- ALWAYS get the advice of your legal and accounting advisors.
- Read your agreement **before** you sign it and understand what each provision means.
- **Don't rely on the seller's oral promises to you.**
- Set up a corporation or limited liability company to operate your business and have that entity sign your dealer agreement.
- Does your dealer agreement give you a protected territory?
- What obligations does the seller have to you?
- If you have to meet quotas, can you do that?
- Are you being compensated by the seller for performing warranty services on its products?
- What is the term of your agreement?
- Do you know under what circumstances the seller can terminate you or not renew your agreement?
- What grounds can you use to terminate?
- Do you have the right to assign the dealer agreement to your heirs or the buyer of your business?
- How and where will disputes be resolved?
- ALWAYS get a signed copy of the agreement and file it in a safe place so you can find it if necessary.

THE LAWS THAT MIGHT APPLY TO YOUR DEALER AGREEMENT

There are a variety of laws that might apply to your dealer agreement. What they are may depend on the state in which your store is located. While only your own lawyer can give you specific advice on your legal rights, this article will identify some laws that might apply to your dealer agreements.

1. The Franchise and Dealership Laws.

Not every bicycle seller requires its dealers to sign a dealer agreement. For those that do, generally the most visible names in the bicycle field, the agreement's primary purpose is to obtain a commitment from the dealer that the dealer will treat that seller's brand as its primary (or one of its primary) brands in terms of display, promotion and sales.

Most bicycle dealer agreements appoint the dealer as an "authorized dealer" for the seller. This type of "selective distribution" system generally is not covered by the franchise laws, but could be. There are two types of franchise laws: disclosure laws and relationship laws.

The Federal Trade Commission and 14 states have **franchise disclosure laws** that require a seller of a franchise to provide a disclosure document (a "prospectus" or "Offering Circular") to a prospective franchisee prior to the execution of an agreement or the taking of any money. While the definitions in these disclosure laws vary somewhat, generally they have three elements (New York has only two):

1. A franchisee must be granted the right to engage in business of offering goods or services under a prescribed or suggested marketing plan or system;
2. The operation of the franchisee's business pursuant to the plan must be substantially associated with the seller's trademarks; and
3. There must be a required payment of a fee (usually in excess of \$500).

In some states, the first element is replaced with a requirement that there be a community of interest in the marketing of goods or services at wholesale or retail. The FTC says instead that the seller must have significant control over the franchisee's method of operation or provide significant assistance to the franchisee in its method of operation.

Regardless of what the standard is, **all three elements must be present to have a franchise.**

If there is a franchise, the seller must register to sell or file a notice of intent to sell in the 14 states that have laws. In all 50 states, the seller must provide a disclosure document 10 business days prior to sale.

Is your dealer agreement a franchise? For most purposes, probably not. The typical bicycle dealer agreement gives the dealer a license to use the seller's trademark to identify the dealer's business as an authorized dealership, so the second element of the definition is almost always met. Whether the seller has a marketing plan or system depends on how much involvement the seller attempts to exert over your business. If the seller advises you on how to sell the product to the public or has an operations manual, the seller may be getting close to having a marketing plan or system. It is generally easier to find a community of interest in those states that describe the first element in that manner.

But most bicycle dealer agreements are **not** franchises because the seller only sells goods at a bona fide wholesale price to its dealers and does not charge a fee. Bicycle dealers likely would resist paying an obvious franchise fee, but a fee can be a lot of things, depending on the state involved. In addition to an upfront initial fee or a continuing royalty, a fee can exist if there is a requirement that you either purchase an unreasonably large quantity of goods, purchase equipment for your store from the seller, pay an advertising fee, pay for training, purchase promotional materials, etc. If the seller imposes any of these type of required payments, you should consult with a lawyer experienced in franchising to see if you are being offered a franchise.

In a large number of states, there are also **franchise relationship laws** or **dealership laws** which might apply to your dealer agreement. These laws generally deal with the relationship of the parties during the term of the agreement and with the franchisee or dealer's rights on expiration, termination or renewal. While most of these laws have definitions of "franchise" similar to those used in the franchise disclosure laws discussed above and probably would not apply to a bicycle dealer, a few have broader definitions and probably would apply to many bicycle dealer agreements.

Examples of laws with broader definitions are the Wisconsin Fair Dealership Law, New Jersey Franchise Practices Act, Missouri Franchises statute, Mississippi Franchise Law, Puerto Rico Dealers' Contracts Law and U.S. Virgin Islands Franchised Business statute. The Wisconsin, New Jersey, Puerto Rico and Virgin Island laws each require "good cause" to terminate a dealer agreement before the end of the stated term. All six of these laws require that the franchisor/seller give notice a certain number of days before termination. If your store is located in one of these jurisdictions, you may want to consult with a lawyer experienced in these laws to learn whether and how they would apply to your relationship with the seller.

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| <p>2. The Uniform Commercial Code Governs Sales to a Dealer</p> |
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The Uniform Commercial Code ("U.C.C.") governs contracts for the sale of goods. While the U.C.C. may or may not specifically apply to the terms of your dealer agreement, it clearly would apply to govern the sale of products by the seller to you. However, because the U.C.C. allows the parties to agree between themselves on the terms of sale and purchase, the U.C.C. will be most useful for you as a gap filler to determine the rights of the parties in the absence of a specific term dealing with a particular issue. In addition, certain rights (such as implied warranty rights) will continue to exist under the U.C.C. unless the seller adequately disclaims or limits those rights.

You should ask your lawyer to review your dealer agreement and the seller's terms and conditions of sale so he can advise you how the U.C.C. applies to your relationship.

3. There are Warranty Laws That Will Apply to Sales to You and to Any Warranties the Seller Gives to the Consumer

If the seller extends a warranty directly to the consumer, that warranty will be governed by the Magnuson-Moss Warranty Act and the Federal Trade Commission rules implementing that Act ("federal warranty law"). Under the federal warranty law, if the seller requires you to perform warranty services on its products, the seller must make "reasonable arrangements" to compensate you for providing those warranty services. This does not require a dollar for dollar reimbursement, but some arrangement to compensate you for your services must be made.

The warranty that the seller gives to you as a dealer will be governed by the U.C.C., not the federal warranty law, although the seller can use the same warranty form for both you and the consumers. You should ask your lawyer to explain what warranty is being given to you as opposed to the consumer.

In addition, some states also require that the dealer be reimbursed at essentially retail rates for warranty work performed on the seller's products. You should also consult with your lawyer to determine whether any state warranty protections may be available in your state.

4. The Common Law Provides Protections to a Dealer

The common law provides you with the broadest types of protection. The common law is the body of court decisions that define the rights of parties to written or oral contracts. If the seller breaches your contract, you most likely would seek relief against the seller using common law principles.

Under the common law in almost all states (but not all), there is an implied duty of good faith and fair dealing in the performance or enforcement of every contract. Note, however, that this implied duty applies to performance under a signed agreement and **not** to the negotiations leading to the signing of an agreement.

The application of the duty of good faith varies somewhat by state. For example, in Illinois it is used by courts to interpret the conduct of the parties under a written agreement where an exercise of discretion is involved. In Minnesota, good faith means that a party cannot unjustifiably hinder the other party's performance of its contract. You should consult with your lawyer to understand whether this duty exists in your state and how it would apply to your relationship with your seller.

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Depending on the issue, there may be other specific laws that may apply to your relationship with your seller. If you get into a dispute, it's comforting to know that there are some laws which will help you. On the other hand, if you have to rely on those laws to protect your relationship with your seller, you've already lost because it probably means the parties don't have a good working business relationship.

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