

LAW OFFICES
MALONEY & KNOX, LLP
5225 Wisconsin Ave., NW, Suite 316
Washington, D.C. 20015-2014
(202) 861-8810 (202) 293-1702 fax

Rick Abraham, President
Foodservice Sales & Marketing Association
1810J York Road #384
Lutherville, MD 21093

Re: Legality of Unauthorized Deductions

Dear Mr. Abraham:

You have requested our opinion as General Counsel to the Foodservice Sales & Marketing Association regarding a Supplier's deduction from its Agency's commissions to offset unauthorized invoice deductions by customers. As described below, such deductions by the Supplier may not only involve a breach of contract but also the tort of conversion and a potential violation of Section 2(c) of the Robinson-Patman Act.

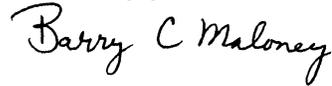
In normal trade usage an "unauthorized deduction" is generally understood to occur when a customer deducts from a Supplier's bona fide invoice sums not consistent with the terms of the sale. As a result of the frequency with which such deductions occur, some Suppliers have made contract changes with their Agency, or unilaterally established new policies whereby the Agency has its commissions offset for the commission portion of the unauthorized deductions to the Supplier.

The issues raised by Supplier's policies are governed by principles of agency and contract law, as well as federal price discrimination law. Under accepted principles of the law of agency (which governs the relationship between Suppliers and their representatives), the Agency's commission is earned when the sale is made, namely, at the time the buyer places the order for the Supplier's goods. The Supplier's obligation to pay its Agency for procuring the sale is not excused simply because the buyer may be slow in making payment or may refuse payment due to its own dispute with the manufacturer or a misunderstanding of the manufacturer's terms. The Agency is not a guarantor of payment by the buyer, and he cannot legitimately be forced to assume this role by the Supplier. The deduction of such amounts by the manufacturer is universally actionable in a law suit for "breach of contract." At a minimum, the damages recoverable from the Supplier in such an action would include the full amount of commissions earned, interest on such sums unlawfully deducted, and court costs.

Lastly, in our opinion, such acts may be deemed to violate Section 2(c) of the Robinson-Patman Act. Section 2(c) prohibits a Supplier from paying or granting to a customer "anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof..." Where there is an

unauthorized deduction by a customer for which a Supplier thereafter either reduces an Agency's commission or requests a repayment for any amount of the deduction, the Supplier may be illegally rebating a commission to a customer. Such contractual provisions may involve violations of the Robinson-Patman Act, especially where the Suppliers directly and indirectly force the Agency to accept such practices as an incident of doing business with them.

Sincerely yours,



Barry C. Maloney

FSMA employs legal council on behalf of its members. Legal opinions and services from FSMA are for the sole use of FSMA and its members. Unauthorized use by non-members is expressly prohibited. FSMA is not responsible for use of these materials by non-members. If you would like to become a member, or determine your membership status, please visit our website for current FSMA contact information. (www.fsmaonline.com)

FSMA