



WhitefordTaylorPreston^{LLP}

**SALES REPRESENTATIVE AND DISTRIBUTORSHIP
CONTRACTS IN VIRGINIA**

BY ERIC A. VENDT

Whiteford, Taylor & Preston LLP
319 Fairview Park Drive, Suite 300
Falls Church, VA 22042
703.280.9261
evendt@wtplaw.com

OVERVIEW OF VIRGINIA

The Commonwealth of Virginia, located on the Atlantic Coast of the Southern United States, is geographically shaped by the Blue Ridge Mountains on its west side and the Chesapeake Bay on its east side.

Virginia has a very diverse economy with industries such as agricultural production, healthcare, education, technology and federal government services. Virginia has the highest concentration of technology workers of any state of the U.S. Northern Virginia, in particular, is now a vibrant community for software, communication technology, and consulting companies. The Dulles Technology Corridor near Dulles International Airport is known for its high concentration of Internet, communications, and software engineering firms.

Tied to the technology sector is Northern Virginia's federal government services industry. While many of Northern Virginia's population work directly for Federal agencies located in Virginia, such as the Department of Defense, the Central Intelligence Agency, the National Science Foundation, the United States Geological Survey, and the United States Patent and Trademark Office, many others work for government contractors who service these and other federal agencies. Southern Virginia's Hampton Roads area has the largest concentration of military bases and facilities of any metropolitan area in the world and is Virginia's main seaport. Virginia is second only to Alaska in per capita defense spending.

Besides its military presence, the economy in Southern Virginia also includes cattle, tobacco and peanut farming. About twenty percent of Virginian jobs are in agriculture, with 47,000 farms, averaging 181 acres.

In recent years, Virginia has been named as the best state in the nation for business, having seventeen of the nations total Fortune 500 companies.

As a common law legal system, prior decisions of the courts of the Commonwealth of Virginia will form the basis of much of the law applicable to the consummation, validity, enforceability and interpretation of contracts, including those involving sales representatives and distributorships.

FREEDOM OF CONTRACT

Virginia law allows parties the freedom to negotiate an agreement that expresses the terms and conditions that will govern their relationship. Unless such agreement is ambiguous, invalid in the making, illegal or contrary to good morals and strong public policy, Virginia courts will generally enforce contracts according to their terms. Parties are free to contract and the law of Virginia will not invalidate a contract because it is ill-reasoned or ill-advised; where parties contract lawfully and the contract is free from ambiguity and does not prohibit nor violate public policy, the contract terms are the laws that will govern the parties.

Generally, Virginia law does not require that contracts contain specific terms nor that mandatory terms be read into them. However, one such exception is found in the Independent Sales Representative Act of Virginia which requires that sales representative agreements be in writing, include the method by which the commission will be computed and paid, the territory and whether such territory is exclusive. In addition, the Act requires that upon termination all earned commissions be paid within the time period specified in the contract but in no event later than 30 days from the date of termination. Applicable provisions of the Act cannot be waived.

FRANCHISE

Another impediment to a party's freedom to negotiate the terms and conditions of its sales representative or distributorship relationships would arise if such relationships were defined as a "franchise" under Virginia's Retail Franchising Act. As such, the relationship would be governed in part by the Act which could impact the terms and conditions of the relationship. There are a number of factors that are examined to determine whether or not a distributorship is in fact a franchise under the Act. Many of these factors focus on the degree of control exercised by the manufacturer over the distributor. One factor found in the definition of "franchise" is whether the distributor is required to distribute the particular product under a marketing plan or system proscribed by the manufacturer.

EXCLUSIVITY

Virginia law will generally honor and enforce exclusivity provisions of a contract, however, care must be taken to ensure that they do not run afoul of antitrust laws. Exclusive dealing contracts which might function to increase inter-brand competition have never been held to be a per se violation of the antitrust laws by the U.S. Supreme Court. Exclusive dealership or territory provisions have been sanctioned because the effected increase in inter-brand competition has outweighed the decrease in intra-brand competition. In Virginia, exclusivity provisions have been sanctioned when the effect on immediate and future competition in the relevant market was not substantial and the contract provided a mutual benefit to the manufacturer and distributor. In summary, exclusive distributorships or relationships cannot unreasonably foreclose competition in relevant markets and will be prohibited only when they have a substantial adverse effect on competition.

CHOICE OF LAW

Choice of law provisions in contracts are also acceptable under Virginia common law provided that a reasonable basis exists for the choice and it is not contrary to public policy. In Virginia, a choice of law provision in a contract will not be given effect when the contract does not bear a substantial relationship with the jurisdiction whose laws the parties have chosen to govern or when the application of that law would offend the public policy of the state. In addition, a choice of law provision may not be enforced where it

was induced by fraud or overreaching or the fundamental unfairness of a chosen law may deprive a party of a remedy.

NONCOMPETE PROVISIONS

Virginia will enforce noncompete provisions but they are strictly construed. In order to be enforceable, the court must find that the restriction is supported by consideration and that the covenant is not an unreasonable restraint of trade. Virginia applies three broad guidelines in determining whether the restraint is reasonable: (1) is the restraint no greater than necessary to protect the enforcing party in some legitimate business interest; (2) is the restraint reasonable in not being unduly harsh or oppressive in curtailing a party's legitimate efforts to earn a livelihood; and (3) is the restraint reasonable from the standpoint of sound public policy. When a business relationship involves the revelation of trade secrets or confidential information, courts have found a greater legitimate business interest to protect. In assessing the reasonableness of any restraint, courts in Virginia often examine (1) the duration of the restriction, (2) the geographic scope of the restriction, and (3) breadth of the activity being restricted. While noncompete provisions are subject to strict scrutiny in Virginia, courts are more concerned about noncompetes when they arise in the context of an employer-employee relationship than in a commercial context between two sophisticated parties.

SPECIAL TAX CONSIDERATIONS

Virginia will most likely be unable to impose an income tax on manufacturers or other vendors who derive income from interstate commerce in Virginia if such entity's only contact with Virginia was that of the mere solicitation of the sale or effectuation of the sale through independent contractors. However, if the actions of employees of the manufacturer within the Commonwealth of Virginia constitute intrastate, domestic or local commerce significant enough to constitute doing business in Virginia, the Commonwealth will most likely seek to impose a tax upon the income derived from the Commonwealth. The Commonwealth could attempt to make a claim that a distributor or sales representative located in Virginia is an agent of the out-of-state manufacturer causing sufficient nexus for taxation.

Virginia has a personal income with five brackets, ranging from 3.0% to 5.75%. The sales and use tax rate is 5%. The tax rate on food is 2.5%. Virginia's personal property tax, which includes a tax on the tangible property used in a business, is set and collected at the local government level and varies throughout the Commonwealth but is based on a percentage of the original cost. Real estate is taxed at the local level based on one-hundred percent of fair market value.

The information contained here is not intended to provide legal advice or opinion and should not be acted upon without consulting an attorney. Counsel should not be selected based on advertising materials, and we recommend that you conduct further investigation when seeking legal representation. – Albert J. Mezzanotte, Jr., Managing Partner

ABOUT THE FIRM

With capabilities backed by over 75 years of experience, Whiteford, Taylor & Preston has grown to over 155 attorneys, with offices in Maryland, Virginia, Delaware, and Washington, D.C. We maintain a range of practice groups to meet the needs of businesses and governmental entities and individuals, including corporate, litigation, employee benefits, real estate, international, government contracts, and bankruptcy. Our clients include businesses engaged in technology, finance, health care, insurance, transportation, communications, construction and real estate, securities, and manufacturing.

In 2007, *Legalease's Legal 500* ranked our Technology & Intellectual Property Group among the top 18 IP firms in the nation, our practice groups were again ranked in *Chambers USA* by Chambers & Partners, and our Bankruptcy group received national acclaim in the *Wall Street Journal*. Our firm and attorneys are listed in Legal Media Group/Euromoney PLC's *Benchmark Litigation*, *Law360 Litigation Almanac*, and Woodward White, Inc's *Best Lawyers in America*, among other publications.

OFFICE LOCATIONS

Seven Saint Paul Street, Baltimore, MD 21202
410.347.8700

10500 Little Patuxent Parkway, Suite 750, Columbia, MD 21044
410.884.0700

One West Pennsylvania Avenue, Suite 300, Towson, MD 21204
410.832.2000

1025 Connecticut Avenue, Suite 400, Washington, DC 20036
202.659.6800

3190 Fairview Park Drive, Suite 300, Falls Church, VA 22042
703.280.9260

1220 N. Market Street, Suite 608, Wilmington, DE 19801
302.353.4144