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HOUSE BILL NO. 2387

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Joint Conference Committee
on February 23, 2001)

(Patron Prior to Substitute—Delegate Clement)

A *BILL to amend and reenact §§ 59.1-198, 59.1-501.4, 59.1-501.5, 59.1-501.9, 59.1-502.12, and 59.1-505.3 of the Code of Virginia, relating to the Uniform Computer Information Transactions Act and consumer protection.*

Be it enacted by the General Assembly of Virginia:

1. That §§ 59.1-198, 59.1-501.4, 59.1-501.5, 59.1-501.9, 59.1-502.12 and 59.1-505.3 of the Code of Virginia are amended and reenacted as follows:

§ 59.1-198. Definitions.

As used in this chapter:

"Business opportunity" means the sale of any products, equipment, supplies or services which are sold to an individual for the purpose of enabling such individual to start a business to be operated out of his residence, but does not include a business opportunity which is subject to the Business Opportunity Sales Act, Chapter 21 (§ 59.1-262 et seq.) of this title.

"Consumer transaction" means:

1. The advertisement, sale, lease or offering for sale or lease, of goods or services to be used primarily for personal, family or household purposes;

2. Transactions involving the advertisement, offer or sale to an individual of a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged;

3. Transactions involving the advertisement, offer or sale to an individual of goods or services relating to the individual's finding or obtaining employment; and

4. A layaway agreement, whereby part or all of the price of goods is payable in one or more payments subsequent to the making of the layaway agreement and the supplier retains possession of the goods and bears the risk of their loss or damage until the goods are paid in full according to the layaway agreement.

"Goods" means all real, personal or mixed property, tangible or intangible. *For purposes of this chapter, intangible property includes but shall not be limited to "computer information" and "informational rights" in computer information as defined in § 59.1-501.2.*

"Person" means any natural person, corporation, trust, partnership, association and any other legal entity.

"Services" includes but shall not be limited to work (i) performed in the business or occupation of the supplier or (ii) performed for the supplier by an agent whose charges or costs for such work are transferred by the supplier to the consumer or purchaser as an element of the consumer transaction.

"Supplier" means a seller or lessor who advertises, solicits or engages in consumer transactions, or a manufacturer or distributor who advertises and sells or leases goods or services to be resold or leased by other persons in consumer transactions.

§ 59.1-501.4. (Effective July 1, 2001) Mixed transactions; agreement to opt-in or opt-out.

The parties may agree that this chapter, including contract-formation rules, governs the transaction, in whole or part, or that other law governs the transaction and this chapter does not apply, if a material part of the subject matter to which the agreement applies is computer information or informational rights in it that are within the scope of this chapter, or is subject matter within this chapter under § 59.1-501.3 (b), or is subject matter excluded by § 59.1—501.3 (d) (1) or § 59.1-501.3 (d) (2). However, any agreement to do so is subject to the following rules:

(1) An agreement that this chapter governs a transaction does not alter the applicability of any *statute, administrative rule, regulation, or procedure* that may not be varied by agreement of the parties or that may be varied only in a manner specified by the *statute, administrative rule, regulation, or procedure, including but not limited to the Virginia Consumer Protection Act of 1977 (§ 59.1-196 et seq.) and other consumer protection statutes, administrative rules, or regulations.* In addition, in a mass-market transaction, the agreement does not alter the applicability of a law applicable to a copy of information in printed form.

(2) An agreement that this chapter does not govern a transaction:

(A) does not alter the applicability of § 59.1-502.14 or § 59.1-508.16; and

(B) in a mass-market transaction, does not alter the applicability under this chapter of the doctrine of unconscionability or fundamental public policy or the obligation of good faith.

(3) In a mass-market transaction, any term under this section which changes the extent to which this

chapter governs the transaction must be conspicuous.

(4) A copy of a computer program contained in and sold or leased as part of goods and which is excluded from this chapter by § 59.1-501.3 (b) (1) cannot provide the basis for an agreement under this section that this chapter governs the transaction.

§ 59.1-501.5. (Effective July 1, 2001) Relation to federal law; fundamental public policy; transactions subject to other state law.

(a) A provision of this chapter which is preempted by federal law is unenforceable to the extent of the preemption.

(b) If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.

(c) Except as otherwise provided in subsection (d), if this chapter, *including but not limited to Part 4 of this chapter*, or a term of a contract under this chapter conflicts with *a consumer protection statute, administrative rule or regulation, including but not limited to the Virginia Consumer Protection Act of 1977* (§ 59.1-196 et seq.), the ~~Virginia Consumer Protection Act~~, *consumer protection statute, administrative rule or regulation* governs.

(d) If a law of the Commonwealth in effect on the effective date of this chapter applies to a transaction governed by this chapter, the following rules apply:

(1) A requirement that a term, waiver, notice, or disclaimer be in a writing is satisfied by a record.

(2) A requirement that a record, writing, or term be signed is satisfied by an authentication.

(3) A requirement that a term be conspicuous, or the like, is satisfied by a term that is conspicuous under this chapter.

(4) A requirement of consent or agreement to a term is satisfied by a manifestation of assent to the term in accordance with this chapter.

(e) If this chapter conflicts with Chapter 39 (§ 59.1-469 et seq.) of this title, Chapter 39 governs.

§ 59.1-501.9. (Effective July 1, 2001) Choice of law.

(a) The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a *statute, administrative rule, or regulation* that may not be varied by agreement under the law of Virginia.

(b) In the absence of an enforceable agreement on choice of law, the contract is governed by the law of Virginia.

§ 59.1-502.12. (Effective July 1, 2001) Efficacy and commercial reasonableness of attribution procedure.

The efficacy, including the commercial reasonableness, of an attribution procedure is determined by the court. In making this determination, the following rules apply:

(1) An attribution procedure established by law is effective for transactions within the coverage of the statute, ~~or administrative rule, or regulation~~.

(2) Except as otherwise provided in paragraph (1), commercial reasonableness and effectiveness is determined in light of the purposes of the procedure and the commercial circumstances at the time the parties agreed to or adopted the procedure.

(3) An attribution procedure may use any security device or method that is commercially reasonable under the circumstances.

§ 59.1-505.3. (Effective July 1, 2001) Transfer of contractual interest.

The following rules apply to a transfer of a contractual interest:

(1) A party's contractual interest may be transferred unless the transfer:

(A) is prohibited by other law; or

(B) except as otherwise provided in paragraph (3), would materially change the duty of the other party, materially increase the burden or risk imposed on the other party, or materially impair the other party's property or its likelihood or expectation of obtaining return performance.

(2) Except as otherwise provided in paragraph (3) and § ~~59.1-508 (a) (1) (B)~~ 59.1-505.8 (a) (1) (B), a term prohibiting transfer of a party's contractual interest is enforceable, and a transfer made in violation of that term is a breach of contract and is ineffective to create contractual rights in the transferee against the nontransferring party, except to the extent that:

(A) the contract is a license for incorporation or use of the licensed information or informational rights with information or informational rights from other sources in a combined work for public distribution or public performance and the transfer is of the completed, combined work; ~~or~~

(B) the transfer is of a right to payment arising out of the transferor's due performance of less than its entire obligation and the transfer would be enforceable under paragraph (1) in the absence of the term prohibiting transfer; ~~or~~

(C) the term is in a mass-market license, the transfer is made along with a computer, and the transfer is a gift or a donation (i) to a public elementary or secondary school, (ii) to a public library,

122 (iii) to an organization exempt from taxation under § 501 (c) (3) of the Internal Revenue Code, or (iv)
123 from a consumer to another consumer.

124 (3) A right to damages for breach of the whole contract or a right to payment arising out of the
125 transferor's due performance of its entire obligation may be transferred notwithstanding an agreement
126 otherwise.

127 (4) A term that prohibits transfer of a contractual interest under a mass-market license by the licensee
128 must be conspicuous.