

Legal Alert

March 20, 2014

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QUESTION: CAN'T I CHOOSE WITH WHOM I DO BUSINESS?

ANSWER: YES, PRIVATE BUSINESS CAN DECIDE WITH WHOM IT WILL DEAL, SO LONG AS NO LAW SAYS OTHERWISE.

Not all business is good business. Sometimes the costs of dealing with specific customers outweigh the hoped-for benefits. Some potential customers are bad credit risks, have a history of vexatious litigation, are abusive to your staff, or are otherwise troublemakers. Generally, the law lets you decide with whom you will deal. One of the reasons for the U.S. Constitution was to protect economic rights, such as the freedom of contract. See, Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1913).

Courts still uphold the right of a person "engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell." *U.S. v. Colgate & Co.*, 250 U.S. 300 (1919).

"The trader or manufacturer...carries on an entirely private business, and can sell to whom he pleases; ... he may charge as much as he can get for the article in which he deals, whether the price may be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction...." *U.S. v. Trans-Missouri Freight Association*, 166 U.S. 290, 320 (1897).

[I]f there is one thing which more than another public policy requires it is that

[people] of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.

Wood Motor Co. v. Nebel, 150 Tex. 86, 238 S.W.2d 181 (1951).

Nevertheless, the policy favoring freedom of contract is limited by statute in areas such as banking, petroleum products franchises, liquor franchises, automobile dealers, and wreckers. The policy favoring freedom of contract is also limited when contract terms may be unconscionable due to unequal bargaining power or when enforcing the contract would contravene public policy. Often, courts have implied covenants of good faith in situations such as the termination of employment contracts, insurance contracts, and franchise or dealership arrangements. Moreover, you may not be able to cancel or refuse a contract without cause if you are in a joint venture or professional relationship with the other party. State and federal antitrust laws may also limit your right to terminate or refuse to do business if you have monopoly power or are engaging in anticompetitive behavior, such as price fixing. The Equal Credit Opportunity Act and other civil rights acts prohibit discrimination and limit the ability to refuse to do business with certain parties in certain circumstances.

For example, *U.S. v. Colgate & Co.* said that you could refuse to deal with people so long as you did not violate the Sherman Act and violate antitrust laws. Eighty-eight years later, the court of appeals in Arizona said it was okay to "fire" customers for "no-cause" if there was no evidence of "bad cause" such as discrimination or violation of public policies. *Consumers International, Inc. v. Sysco Corporation*, 951 P. 2d 897, Ct. App., Div. 1 (1997).

In Arizona, and many other jurisdictions the law can usually be summarized as: You can refuse to deal with a business or terminate your relationship with it "for good cause or for no

cause, but not for bad cause – that which violates public policy." *Wagenseller v. Scottsdale Memorial Hospital*, 147 Ariz. 370, 710 P.2d 1025 (1985) (employment termination.)

So your "liberty of contracting," or not contracting is "sacred" unless Congress, the legislature or a court says otherwise! (Notice the cases supporting freedom of contract quoted in this article are all old!)

There may be risks in refusing to sell to someone or in "firing" a customer. If your company needs help in complying with the numerous statutes and regulations dealing with whether or not you can choose to do business with someone, please call me.

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