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## Annual Survey of Virginia Law: Consumer Protection Law

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# CONSUMER PROTECTION LAW

*Edward P. Nolde\**

## I. INTRODUCTION

This is the first year the *University of Richmond Law Review* has surveyed Virginia law concerning developments in the area of consumer protection. Thus, this article includes background material as well as recent developments that are more than one year old. Except as background for the current statutes, this survey does not discuss the common law torts of fraud and constructive fraud. Although these common law actions remain important to consumers, they have been discussed in several other recent publications.<sup>1</sup>

The majority of Virginia consumer protection statutes are found in Title 59.1 of the Code of Virginia.<sup>2</sup> Chapter 17 contains the Virginia Consumer Protection Act of 1977 (VCPA).<sup>3</sup> Chapter 17 sets forth certain rules of conduct, and incorporates by reference several other acts providing rights to consumers. Most of the incorporated acts cover specific types of businesses, such as health spas,<sup>4</sup> membership campgrounds,<sup>5</sup> extended service contracts,<sup>6</sup> and auto-

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The following discussion first addresses recent developments in substantive law with some contextual background material about older statutes. This article secondly discusses procedural matters and developments relating to consumer suits filed by both private individuals and government attorneys.

1. *E.g.*, Stephen M. Sayers, *The Law of Fraud in Virginia*, in *THE TORTS OF REVENGE* (1991).

2. VA. CODE ANN. §§ 59.1-9.1 to -459 (Repl. Vol. 1992 & Cum. Supp. 1993).

3. VA. CODE ANN. §§ 59.1-196 to -207 (Repl. Vol. 1992 & Cum. Supp. 1993).

4. Virginia Health Spa Act, VA. CODE ANN. §§ 59.1-294 to -310 (Repl. Vol. 1992 & Cum. Supp. 1993).

5. Virginia Membership Camping Act, VA. CODE ANN. §§ 59.1-311 to -335 (Repl. Vol. 1992 & Cum. Supp. 1993).

6. Extended Service Contract Act, VA. CODE ANN. §§ 59.1-435 to -441 (Repl. Vol. 1992).

mobile repair facilities.<sup>7</sup> Generally, civil remedies are awarded for violations of Title 59.1.<sup>8</sup>

The basic tools for consumer protection are the common law actions for fraud and constructive fraud, and the statutory action for violation of the VCPA. Each was designed to attack misrepresentation used as an inducement to contract. Fraud requires the speaker's knowledge of the falsity of the statement and an intent to deceive.<sup>9</sup> Constructive fraud, on the other hand, lies where the speaker innocently, but mistakenly, represents something to be true that is not.<sup>10</sup> The VCPA addresses both intentional and unintentional misrepresentations,<sup>11</sup> as well as other conduct which is not obviously deceptive.<sup>12</sup>

In 1992, the General Assembly enacted the Virginia Residential Property Disclosure Act (VRPDA),<sup>13</sup> which is applicable to many real estate sales. In some transactions, the VRPDA will provide vendors a means of defense against common law construction fraud actions.<sup>14</sup> In others, the common law rules will continue. In any event, the passage of the VRPDA now requires that individual real estate transactions be reviewed under four different state regimes: common law fraud, common law constructive fraud, the VCPA, and the VRPDA.

## II. SUBSTANTIVE LAW

### A. *Virginia Consumer Protection Act of 1977*

#### 1. Applicability

The Virginia Consumer Protection Act of 1977 (VCPA) applies to "consumer transactions," which include (a) the advertisement, sale, lease, or offering for sale or lease of goods, land, intangibles or

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7. Automobile Repair Facilities Act, VA. CODE ANN. §§ 59.1-207.1 to 207.6 (Repl. Vol. 1992).

8. See VA. CODE ANN. § 59.1-206 (Repl. Vol. 1992 & Cum. Supp. 1993).

9. *Winn v. Aleda Constr. Co.*, 227 Va. 304, 308, 315 S.E.2d 193, 195 (1984).

10. *Jefferson Standard Life Ins. Co. v. Hedrick*, 181 Va. 824, 833-34, 27 S.E.2d 198, 202 (1943).

11. Compare VA. CODE ANN. § 59.1-206A (Repl. Vol. 1992) (willful violations) with § 59.1-207 (unintentional violations).

12. E.g., VA. CODE ANN. § 59.1-207.4 (Repl. Vol. 1992) (automobile repair facility required to offer return of replaced parts to customer).

13. Act of Apr. 4, 1992, ch. 717, 1992 Va. Acts 1096 (codified at VA. CODE ANN. §§ 55-517 to -525 (Cum. Supp. 1993)).

14. See *infra* section II (c)(7).

services to be used primarily for "personal, family or household" purposes; (b) business opportunities to be conducted from a residence by an individual; and (3) services related to finding a job.<sup>15</sup> In a case of first impression, the sale of roofing materials to a building contractor was held not to constitute a consumer transaction as the materials were not to be used by the contractor primarily for personal, family, or household purposes.<sup>16</sup>

The rules of conduct for consumer transactions are applied to "suppliers."<sup>17</sup> These are sellers or lessors who advertise, solicit or engage in "consumer transactions," or manufacturers or distributors who advertise and sell or lease goods or services to be resold or leased by other persons in "consumer transactions."<sup>18</sup>

One decision held that VCPA was intended to cover only commercial entities that advertise, sell, or lease as a business.<sup>19</sup> On this reasoning, an individual selling his one building lot in an isolated, occasional transaction was not engaged in consumer transactions.<sup>20</sup> Circuit court decisions disagree on the question of whether real estate agents are covered by VCPA.<sup>21</sup>

## 2. Exclusions

The VCPA excludes certain conduct by "suppliers" as well as all conduct by certain kinds of businesses.<sup>22</sup> Those aspects of consumer transactions authorized by other statutes or regulations are excluded.<sup>23</sup> It is important, however, to distinguish "authorized" from silence and absence of prohibition. The failure of an agency to forbid a particular practice does not mean that the agency has

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15. VA. CODE ANN. § 59.1-198 (Repl. Vol. 1992).

16. *Winchester Homes, Inc. v. Hoover Universal, Inc.*, 27 Va. Cir. 62, 63 (Fairfax County 1992).

17. VA. CODE ANN. § 59.1-198 (Repl. Vol. 1992).

18. *Id.*

19. *Sullivan v. Reliable Realty*, 16 Va. Cir. 118 (Clarke County 1989).

20. *Id.* at 126-27.

21. Compare *Port Royal Condominium Ass'n v. Crossland Sav. FSB*, 15 Va. Cir. 239, 243 (Alexandria City 1989); *Messer v. Re/Max Properties, Inc.*, 15 Va. Cir. 15, 16-17 (Fairfax County 1985); *Messer v. Shannon & Lucks Co.*, 15 Va. Cir. 18 (Fairfax County 1985) (real estate agents are analogous to distributors and are covered by VCPA) with *Alvarez v. Dekar Homes, Inc.*, 17 Va. Cir. 250, 250-52 (Fairfax County 1989); *Sullivan* at 126-27 (agent not included because principal, as isolated, occasional seller not engaged in business, excluded from definition of "supplier").

22. VA. CODE ANN. § 59.1-199 (Repl. Vol. 1992).

23. VA. CODE ANN. § 59.1-199(A) (Repl. Vol. 1992).

“authorized” the practice.<sup>24</sup> The effect of this language may surprise those who are already regulated by an agency such as a medical professions board or a contractors board; they are also subject to suit under the VCPA. Though not subject to suit under the VCPA, this particular exclusion precludes any inconsistent rule of conduct.

The Federal Aviation Administration, for example, permits airlines to overbook, as long as they provide certain disclosures at ticket counters and in printed tickets and provide certain alternative accommodations.<sup>25</sup> This express authorization precludes a consumer from winning a VCPA suit challenging the practice as deceptive and the disclosure as inadequate to cure the deception.

Those aspects of a transaction that are regulated by the Federal Consumer Credit Protection Act<sup>26</sup> are also excluded. This is not a blanket exemption for every transaction subject to truth-in-lending disclosures, which are designed to require meaningful disclosure of credit terms. The Truth-In-Lending Act does not address misrepresentation about facts other than credit terms, thus the VCPA may apply in conjunction with this federal legislation.<sup>27</sup> Certain regulated industries, such as banks, savings and loan associations, small loan companies, public service companies and insurance companies regulated by the State Corporation Commission or a comparable federal agency, and licensed employment agencies are completely excluded from VCPA.<sup>28</sup> This exclusion is based on the assumption that the appropriate administrative agency is in fact actively prohibiting its regulatees from engaging in deceptive practices.

### 3. Prohibited Practices

The VCPA forbids a supplier, in connection with a consumer transaction, to commit any of a list of particular practices, to en-

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24. *Cf. West v. Costen*, 558 F. Supp. 564, 582 (W.D. Va. 1983) (“‘permitted by law’ is different from ‘not prohibited by law.’”).

25. 14 C.F.R. §§ 250.1-.11 (1993) (oversales).

26. 15 U.S.C. §§ 1601-1693(r) (1988 & Supp. III 1991).

27. *Port Royal Condominium Ass’n v. Crossland Sav. FSB*, 15 Va. Cir. 239, 243 (Alexandria City 1989); *Valley Acceptance Corp. v. Glasby*, 230 Va. 422, 443, 337 S.E.2d 291, 298-99 (1985). *But see Smith v. United States Credit Corp.*, 626 F. Supp. 102, 102-03 (E.D. Va. 1985), *aff’d*, 801 F.2d 661 (4th Cir. 1986).

28. VA. CODE ANN. § 59.1-199(D)-(E) (Repl. Vol. 1992).

gage in any other deceptive practices, or to violate any of the other statutes which are incorporated by reference.<sup>29</sup>

The particular prohibitions include: misrepresenting goods or services as those of another;<sup>30</sup> misrepresenting the source, sponsorship, approval, certification, quantities, characteristics, ingredients, uses, benefits, standard, quality, grade, style, model, and origin;<sup>31</sup> advertising or offering used, repossessed, blemished, deteriorated, irregular, imperfect, or reconditioned goods for sale "without clearly and unequivocally" disclosing such in the advertisement or offer;<sup>32</sup> advertising goods or services with the intent not to sell as advertised or at prices or upon terms advertised;<sup>33</sup> false or misleading statements of reasons for, existence of, or amounts of price reductions;<sup>34</sup> use in contract of any liquidated damage clause, penalty clause, or waiver of defense which, under some other substantive law, is unenforceable; attempting to collect such damages or penalties;<sup>35</sup> or using any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction.<sup>36</sup> Under this subsection misrepresentation by silence or omission may violate VCPA.<sup>37</sup>

In 1991, the Supreme Court of Virginia considered a consumer case that was litigated under a theory of unilateral contract.<sup>38</sup>

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29. VA. CODE ANN. § 59.1-200 (Cum. Supp. 1993).

30. *Id.* § 59.1-200(1).

31. *Id.* § 59.1-200(2-6); see *Valley Acceptance Co. v. Glasby*, 230 Va. 422, 337 S.E.2d 291 (1985) (loan arranger represented it would find favorable loan terms, but instead placed loan with its corporate president as lender without disclosing their relationship); *Gill v. Rollins Protective Serv. Co.*, 722 F.2d 55 (4th Cir. 1983) (fire alarm system represented as automatically calling fire department and being virtually foolproof).

32. VA. CODE ANN. § 59.1-200(7) (Cum. Supp. 1993).

33. *Id.* § 59.1-200(8).

34. *Id.* § 59.1-200(9).

35. *Id.* § 59.1-200(13).

36. *Id.* § 59.1-200(14).

37. *In re American Dollar Exch., Inc.*, 27 Va. Cir. 428, 428-30 (Campbell County 1992) (representation that a prominent Tennessee banker hoarded barrels of silver coins because of their investment value could be considered deceptive in violation of VCPA because of the omission of the additional fact that the banker had been convicted of various felonies in connection with the failure of his bank); see *Valley Acceptance*, 230 Va. at 432-33, 337 S.E.2d at 297 (failure to disclose that lender was president and owner of corporate loan finder which had promised to find favorable loan terms violates VCPA); 1985-86 Va. Att'y Gen. Ann. Rep. 324, 324-25 (Aug. 21, 1985) (duty of automobile dealers to disclose prior damage and repair of vehicles).

38. See *Chang v. First Colonial Sav. Bank*, 242 Va. 388, 410 S.E.2d 928 (1991). Although the bank's conduct was arguably deceptive, § 59.1-199(D) exempted the bank from suit under the VCPA. See VA. CODE ANN. § 59.1-199(D) (Repl. Vol. 1992).

There is a distinction in contract law between an advertisement's solicitation of offers and an advertisement's making of an offer that can be accepted by performance. The usual rule is that an advertisement merely solicits offers.<sup>39</sup> Some advertisements, however, make an offer that can be accepted by unilateral conduct. In *Chang v. First Colonial Savings Bank*,<sup>40</sup> the court considered a bank advertisement that offered to return \$20,136.12 for \$14,000.00 invested in one of its certificates of deposit for three-and-one-half years. The advertisement disclosed an interest rate of eight and three-quarter percent.<sup>41</sup> In response to the advertisement, the Changs gave their money to First Colonial.<sup>42</sup> The certificate of deposit disclosed an interest rate of eight and three-quarter percent, but did not mention the amount to be repaid to the Changs upon maturity. Upon maturity, the bank paid the Changs less than the amount advertised.<sup>43</sup> The bank argued that the \$20,136.12 amount stated in the advertisement was an error, while the advertisement and certificate of deposit both stated the correct interest rate, which the bank paid. The court held that the bank's advertisement made an offer that the Changs could and did accept by their unilateral performance of depositing their money.<sup>44</sup> The court held that the Changs were entitled to the advertised return of \$20,136.12.<sup>45</sup> Of particular significance in the opinion is the bank's failure for three-and-one-half years to correct the misunderstanding created in the Changs' minds by the advertising.<sup>46</sup>

Various other acts are incorporated into VCPA by reference. These include the Automobile Repair Facilities Act,<sup>47</sup> Virginia Health Spa Act,<sup>48</sup> the Home Solicitation Sales Act,<sup>49</sup> the Prizes and Gifts Act,<sup>50</sup> the Extended Service Contract Act,<sup>51</sup> the Virginia Membership Camping Act,<sup>52</sup> and the Credit Services Businesses

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39. *Id.* at 391, 410 S.E.2d at 930.

40. 242 Va. 388, 410 S.E.2d 928 (1991).

41. *Id.* at 389, 410 S.E.2d at 929.

42. *Id.* at 390, 410 S.E.2d at 929.

43. *Id.*

44. *Id.* at 391, 410 S.E.2d at 930.

45. *Id.* at 393, 410 S.E.2d at 931.

46. *Id.* at 392, 410 S.E.2d at 931.

47. VA. CODE ANN. § 59.1-207.1 to -207.6 (Repl. Vol. 1992).

48. *Id.* §§ 59.1-294 to -310 (Repl. Vol. 1992 & Cum. Supp. 1993).

49. *Id.* §§ 59.1-21.1 to -21.7 (Repl. Vol. 1992).

50. *Id.* §§ 59.1-415 to -423 (Repl. Vol. 1992 & Cum. Supp. 1993).

51. *Id.* §§ 59.1-435 to -441 (Repl. Vol. 1992).

52. *Id.* §§ 59.1-311 to -335 (Repl. Vol. 1992 & Cum. Supp. 1993).

Act.<sup>53</sup> Most recently, the legislature added the Travel Club Act.<sup>54</sup> In 1993, the General Assembly made certain rules for the towing of motor vehicles from private property enforceable through the VCPA, but only until July 1, 1994.<sup>55</sup>

The Virginia Motor Vehicle Warranty Enforcement Act,<sup>56</sup> popularly known as the Lemon Law, however, is not enforceable through the VCPA. The Lemon Law creates its own separate cause of action.<sup>57</sup> It is enforceable only by private parties and not by any agency of state or local government.

#### 4. Intent to Deceive

Proof of intent to deceive is not necessary to permit a finding of deceptive conduct in violation of the statute. Although this proposition is not explicit in the VCPA, it is easily inferred from the last clause of section 59.1-207, which addresses unintentional violations: "nothing in this section shall prevent the court from ordering restitution to individuals aggrieved as a result of an unintentional violation of section 59.1-200."<sup>58</sup>

#### B. *Virginia Health Spa Act*

Generally, the Virginia Health Spa Act<sup>59</sup> applies to contracts that require payment for more than three months in advance. A contract with large "initiation fees," coupled with a short membership of less than three months, and inexpensive monthly or yearly renewals thereafter, is also included within the act. This prohibits circumvention of the act by initial collection of almost all the membership fee with only nominal periodic renewal charges.<sup>60</sup>

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53. VA. CODE ANN. §§ 6.1-369.1 to -369.10 (Repl. Vol. 1988 & Cum. Supp. 1992).

54. Act of Mar. 28, 1993, ch. 760, 1993 Va. Acts 1038 (codified at VA. CODE ANN. § 59.1-445 to -454)(Cum. Supp. 1993)).

55. Act of March 22, 1993, ch. 455, 1993 Va. Acts 538 (codified at VA. CODE ANN. § 59.1-200.32 (Repl. Vol. 1992 & Cum. Supp. 1993). The rules of conduct may be found in VA. CODE ANN. §§ 46.2-1231 and 46.2-1233.1 (Repl. Vol. 1989 & Cum. Supp. 1993).

56. VA. CODE ANN. §§ 59.1-207.9 to -207.16 (Repl. Vol. 1992).

57. *Id.* § 59.1-207.14.

58. *Id.* § 59.1-207.

59. *Id.* §§ 59.1-294 to -310 (Repl. Vol. 1992 & Cum. Supp. 1993).

60. *Id.* § 59.1-296.3 (Repl. Vol. 1992). For memberships of 12 months or longer, however, an initiation fee not to exceed seventy-five dollars may be charged. VA. CODE ANN. § 59.1-306(B) (Repl. Vol. 1992).



For contracts covered by this act, consumers have a right to cancel in certain circumstances.<sup>61</sup> This right must be disclosed in the contract.<sup>62</sup> The consumer may cancel for any or no reason at any time prior to midnight of the third business day after signing the contract. Upon cancellation, the spa must refund all moneys paid under the contract.<sup>63</sup>

If the spa relocates more than five driving miles away or goes out of business, and in either event, fails to provide alternative facilities within five driving miles, then the spa must make a pro rata refund based on the proportion of the contract which was honored.<sup>64</sup> Likewise, the spa owes a pro rata refund if the consumer dies or becomes physically unable to use a substantial portion of the spa services for thirty or more consecutive days.<sup>65</sup>

In 1992, the General Assembly limited the permissible length of health spa contracts. Subject to certain exceptions, no contract shall have a duration longer than thirty-six months, including any renewal period.<sup>66</sup> Every legal contract longer than thirty-six months must permit the consumer to cancel after twelve months, upon thirty days notice.<sup>67</sup> Thus, a spa that attempts to lock in a customer for more than thirty-six months may lose that customer after only one year and would be better off using only a thirty-six month term.

### C. *Lease-Purchase Agreement Act*

Under the Lease-Purchase Agreement Act,<sup>68</sup> covered lessors are required to make certain, written disclosures to consumer lessees.<sup>69</sup> Enforcement is through the Virginia Consumer Protection Act.<sup>70</sup>

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61. VA. CODE ANN. § 59.1-297 (Repl. Vol. 1992).

62. *Id.* § 59.1-298.

63. *Id.* § 59.1-297(1).

64. *Id.* § 59.1-297(2).

65. *Id.* § 59.1-297(3).

66. Act of Mar. 3, 1992, ch. 117, 1992 Va. Acts 130 (codified at VA. CODE ANN. § 59.1-299 (Repl. Vol. 1992)).

67. *Id.*

68. VA. CODE ANN. § 59.1-207.17 to -207.27 (Repl. Vol. 1992).

69. *Id.* § 59.1-207.21.

70. *Id.* § 59.1-207.27.

#### D. Prizes and Gifts Act

If any person represents that another person has "won" anything in connection with the sale or lease of goods, property or services, the Prizes and Gifts Act<sup>71</sup> requires that he actually deliver the prize within ten days without obligation and at no expense to the recipient.<sup>72</sup> If any person represents that another person has a chance to win or receive anything in connection with the sale or lease of goods, property or services, he must disclose: (1) on whose behalf the promotion is conducted; (2) all material conditions (3) the actual retail value of the prize or gift; (4) the number of each item to be awarded; and (5) the odds of receiving each item.<sup>73</sup>

The United States Bankruptcy Court, Eastern District of Virginia, recently considered a scheme in which the supplier led consumers to believe that appliances were free bonus items given to purchasers of cleaning products.<sup>74</sup> The court found, in fact, that the consumers were purchasing the appliances, and the appliances were used as collateral to finance the contracts. The court held that the supplier's failure to disclose that it was really selling the appliances violated the requirement that all material conditions be disclosed.<sup>75</sup>

Suppliers must disclose the actual retail value of the offered prize or gift. The retail value is defined as either the price at which substantial sales were made in the area within the last ninety days or the actual cost to the promoter plus no more than seven hundred percent.<sup>76</sup> A supplier which merely affirmed the consumer's guess or estimate of the retail value did not satisfy the requirement that the retail value be disclosed.<sup>77</sup>

#### E. Virginia Membership Camping Act

The Virginia Membership Camping Act<sup>78</sup> defines membership camping contracts as those that allow the consumer the nonexclu-

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71. VA. CODE ANN. §§ 59.1-415 to -423 (Repl. Vol. 1992 & Cum. Supp. 1993).

72. VA. CODE ANN. § 59.1-416 (Repl. Vol. 1992 & Cum. Supp. 1993).

73. *Id.* § 59.1-417.

74. *In re Fravel*, 143 B.R. 1001 (Bankr. E.D. Va. 1992), *aff'd*, Civil No. 2:92cv748 (E.D. Va. Jan 8, 1993).

75. *Id.* at 1014.

76. VA. CODE ANN. § 59.1-417(A)(1) (Repl. Vol. 1992).

77. *Fravel*, 143 B.R. at 1014.

78. VA. CODE ANN. § 59.1-311 to -335 (Repl. Vol. 1992).

sive use of a campground together with other consumers for a period of more than one year's duration.<sup>79</sup> The definition also includes those campgrounds that deed title or other ownership interest to the consumer, subject to use restrictions which provide the consumer with only a nonexclusive right to use the facilities together with other purchasers.<sup>80</sup> The campground may sell as many as fifteen memberships for each camping site.<sup>81</sup> The campground must provide to each purchaser, prior to execution of the contract, a disclosure statement including, among other things, notice of the purchaser's right to cancel without penalty prior to midnight of the seventh calendar day following the date on which the purchaser executes the contract.<sup>82</sup>

### E. *Virginia Credit Services Business Act*

#### 1. Covered Entities

The Virginia Credit Services Business Act (VCSBA)<sup>83</sup> defines a credit services business as any entity which represents that, in return for payment of consideration, it can or will improve a consumer's credit record, obtain an extension of credit for a consumer, or provide assistance in such improvement or extension.<sup>84</sup>

#### 2. Registration and Bonding

Every credit services business must register with the Virginia Commissioner of Agriculture and Consumer Services. The Commissioner has delegated registration to the Division of Consumer Affairs.<sup>85</sup> Every credit services business must file with the Commissioner a bond with corporate surety in an amount equal to one hundred times the standard fee charged by it, but in no event less than \$5,000 or more than \$50,000.<sup>86</sup>

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79. VA. CODE ANN. § 59.1-313 (Repl. Vol. 1992).

80. *Id.*

81. VA. CODE ANN. § 59.1-317(C).

82. *Id.* § 59.1-326.

83. *Id.* §§ 59.1-335.1 to -355.12.

84. *Id.* § 59.1-335.2.

85. *Id.* § 59.1-335.3.

86. *Id.* § 59.1-335.4.

### 3. Advance Payment and Certain Practices Prohibited

Credit services businesses cannot be paid until they have performed the service for the consumer.<sup>87</sup> Further, they cannot be paid merely for a referral to a credit grantor who will or may extend credit to the consumer upon terms substantially the same as the credit grantor offers to the general public.<sup>88</sup> Credit services businesses are also forbidden to make any untrue or misleading statements to a consumer reporting agency or other creditor or prospective creditor with respect to a consumer's credit worthiness.<sup>89</sup>

### 4. Consumer Rights

A credit services business must provide its customers with certain disclosures including a notice that they have no obligation to pay anything until all of the services have been performed.<sup>90</sup> Contracts used by credit services businesses must contain a conspicuous statement providing the consumer with the right to cancel the transaction at any time prior to midnight of the third business day after the contract is signed.<sup>91</sup> Any contract for services from a credit services business that does not comply with the VCSBA is void and unenforceable.<sup>92</sup> A consumer may not waive any provisions of the act.<sup>93</sup> A violation of the VCSBA is a violation of the VCPA.<sup>94</sup>

The VCSBA has a two-year statute of limitations except that, if the defendant has materially and willfully misrepresented any information the VCSBA requires to be disclosed, and that information is material to the establishment of the defendant's liability,

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87. *Id.* § 59.1-335.5.

88. *Id.*

89. *Id.*

90. *Id.* § 59.1-335.7.

91. *Id.* § 59.1-335.8.

92. *Id.* § 59.1-335.9(B).

93. *Id.* § 59.1-335.9(C).

94. *Id.* § 59.1-335.12. The Office of the Attorney General obtained a comprehensive temporary injunction forbidding the offering of credit services by an unregistered business, forbidding certain misrepresentations, and freezing corporate and individual officer's assets in *Commonwealth v. Loan Consultants, Inc.*, No. CH90-1134 (Chesterfield County Cir. Ct. Nov. 16, 1990). Subsequently, a receiver was appointed to liquidate the business. Permanent injunction by Consent, Final Judgment and Order Appointing Receiver (June 6, 1992).

the action may be brought within two years after discovery of the misrepresentation.<sup>95</sup>

### G. *Comparison Price Advertising Act*

The Comparison Price Advertising Act<sup>96</sup> addresses both a supplier's advertisements of its own former prices and the supplier's advertisement of the prices charged by its competitors. The law is unusual in at least two regards. First, as to comparative prices of one's competitors, the act shifts the initial burden of proof in the investigative stage of any proceeding from the Commonwealth to the advertising supplier. Upon the request of the Commonwealth, the supplier is required to substantiate any advertised comparative price.<sup>97</sup> The act does not require the Commonwealth to have cause to investigate.<sup>98</sup> Instead, the supplier bears the responsibility to prove all comparative competitor prices used.

Second, as to former or comparative prices advertised in terms of "manufacturer's suggested price," "suggested retail price," "list price" or similar words, the Federal Trade Commission Act and relevant regulations of the Federal Trade Commission are adopted by reference.<sup>99</sup>

Comparative price advertisements are permitted if the advertiser can substantiate that the comparison price is the price at which another supplier has offered substantially the same goods or services; the trade area to which the advertisement refers is clearly defined and disclosed; and the advertisement discloses that it is the price of another supplier and not the former price of the advertising supplier.<sup>100</sup>

A supplier may advertise its own former price by meeting any one of the following criteria: (1) the supplier made substantial sales at or above the former price in the recent regular course of business; (2) the supplier openly and actively offered the same or comparable goods or services for sale at the former price for a reasonably substantial period of time in the recent regular course of business, in good faith and not for the purpose of establishing a

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95. VA. CODE ANN. § 59.1-335.11 (Repl. Vol. 1992).

96. VA. CODE ANN. § 59.1-207.40 to -207.44 (Repl. Vol. 1992).

97. *Id.* § 59.1-207.44.

98. *Compare id.* § 59.1-201(A) (reasonable cause).

99. *Id.* § 59.1-207.43(B).

100. *Id.* § 59.1-207.42.

fictitious higher price; (3) the former price is based on a markup which does not exceed the supplier's cost plus its usual and customary markup in the actual sale of the same or substantially similar goods or services in the recent regular course of business; or (4) the advertisement clearly and conspicuously discloses the date on which substantial sales were made or offered openly and actively at the former price.<sup>101</sup>

#### H. *Virginia Travel Club Act*

In 1993, the General Assembly addressed problems in the pre-paid travel services industry by enacting the Virginia Travel Club Act.<sup>102</sup> This statute applies to "travel clubs," defined as for-profit organizations that, in return for either an advance fee or an annual charge exceeding one hundred dollars, grant a customer the privilege to arrange or obtain future travel through or from the organization.<sup>103</sup> The legislation creates a term of art, "travel services agreement," defined, in effect, to be an agreement to provide the opportunity to reach future agreements on specific travel arrangements. The term excludes agreements for specific travel transportation, accommodation or other specific services.<sup>104</sup>

Travel clubs must register with the Virginia Division of Consumer Affairs before offering for sale any travel services agreements. They must also file with the Division a bond with corporate surety, letter of credit from a bank insured by the Federal Deposit Insurance Corporation, or cash in the amount of \$60,000.00. The bond is available to provide refunds to consumers who suffer damage caused by violations of the Act.<sup>105</sup>

The travel club must disclose to the customer in writing that the customer has a statutory right to cancel the contract within seven calendar days. If the customer has used any of the club services prior to such cancellation, the customer owes only for those services used. The club must refund the remainder.<sup>106</sup>

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101. VA. CODE ANN. § 59.1-207.41 (Repl. Vol. 1992).

102. Act of Mar. 28, 1993, ch. 760, 1993 Va. Acts 1083, 1085 (codified at VA. CODE ANN. §§ 59.1-445 to -454 (Cum. Supp. 1993)).

103. VA. CODE ANN. § 59.1-445 (Cum. Supp. 1993).

104. *Id.*

105. VA. CODE ANN. §§ 59.1-445 to -454 (Cum. Supp. 1993).

106. *Id.*

## I. *Untrue, Deceptive or Misleading Advertising*

Under the false advertising statute, the elements of a civil action for false advertising are: (1) a representation to members of the public; (2) an intent to induce a sale or consumption; (3) untruthfulness or deceptiveness of the representation; and (4) reliance and damage.<sup>107</sup> Any person who suffers loss caused by a violation of the statute may sue for the greater of his damages or one hundred dollars, and reasonable attorney's fees.<sup>108</sup> The United States District Court for the Eastern District of Virginia recently held that injury to one's health caused by the advertisements of a diet plan is the type of damage contemplated by the statute.<sup>109</sup>

## J. *Multi-Level Marketing Programs and Business Opportunities*

Fraud perpetrated in the sale of business opportunities, which are frequently multi-level marketing programs, has been addressed mainly by regulatory statutes other than the Virginia Consumer Protection Act of 1977. The statutes prohibiting pyramid promotional<sup>110</sup> and referral rebate schemes<sup>111</sup> both predate the VCPA and provide criminal as well as civil remedies. Although the VCPA has been amended to cover the sale of business opportunities that require the consumer's investment and operate out of the consumer's residence, the pyramid promotional and referral rebate scheme statutes remain separate from the VCPA. It is possible, however, that a scheme violating the pyramid promotional scheme statute may simultaneously violate the VCPA.<sup>112</sup>

### 1. Pyramid Promotional Schemes or Chain Letters

The statute defines "pyramid promotional scheme" as "any program utilizing a pyramid or chain process by which a participant gives a valuable consideration for the opportunity to receive compensation or things of value in return for inducing other persons to

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107. *Id.* § 18.2-216 (Repl. Vol. 1988).

108. *Id.* §§ 59.1-68.3, -68.5 (Repl. Vol. 1992).

109. *Maldonado v. Nutri/System, Inc.*, 776 F. Supp. 278 (E.D. Va. 1991).

110. VA. CODE ANN. § 18.2-239 (Repl. Vol. 1988).

111. *Id.* § 18.2-242.1.

112. Act of Mar. 26, 1987, ch. 464, 1987 Va. Acts 617 (codified at VA. CODE ANN. § 59.1-198 (Repl. Vol. 1992)) (amending the VCPA to include certain businesses to be operated out of a residence and confirming the effect of the *Bell* decision); see *Commonwealth v. Bell*, 5 Va. Cir. 296 (Richmond City 1985).

participate in the program."<sup>113</sup> All contracts that give any part of the consideration for the opportunity to participate in a pyramid promotional scheme are void and unenforceable.<sup>114</sup> Commonwealth's Attorneys are authorized to seek appointment of a receiver to redistribute any assets a participant has received from a pyramid scheme among the pyramid's victims as well as to prosecute criminally.<sup>115</sup>

A pyramid promotional scheme gives valuable consideration to the promoter. The valuable consideration does not have to be a cash payment. The time and effort expended to generate sales to third parties constitute valuable consideration.<sup>116</sup> In determining whether compensation is based on sales of goods to non-participants, as opposed to inducement of other persons to participate in the scheme, the predominant theme of the songs, cheers, printed materials, and representations about large profits from inducing others should be considered. This "predominant theme" may outweigh testimony by some individuals that they made purchases for legitimate reasons and not to participate in the scheme.<sup>117</sup>

The Supreme Court of Virginia recently considered a multi-level marketing plan that did not contain overriding commissions on sales or recruitment by one's own recruits.<sup>118</sup> The plan provided every distributor the opportunity to earn commissions by recruiting additional distributors, but the plan offered no commissions on subsequent recruitment by one's own recruits.<sup>119</sup> The promoter argued that this structure did not violate the statute. The court held, however, that the scheme violated Code of Virginia section 18.2-239,<sup>120</sup> even though it did not provide overriding commissions on recruitment by one's own recruits.<sup>121</sup>

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113. VA. CODE ANN. § 18.2-239 (Repl. Vol. 1988); *see generally* Commonwealth v. Dare To Be Great, Inc., 5 Va. Cir. 430 (Richmond City 1971) (applying and upholding constitutionality of statute).

114. There is a private civil cause of action for violation of the prohibition. VA. CODE ANN. §§ 59.1-68.3, -68.5 (Repl. Vol. 1992).

115. VA. CODE ANN. § 18.2-240 (Repl. Vol. 1988).

116. Bell v. Commonwealth, 236 Va. 298, 302-03, 374 S.E.2d 13, 16 (1988).

117. *Id.* at 303-04, 374 S.E.2d at 16.

118. Love v. Durastill of Richmond, Inc., 242 Va. 186, 408 S.E.2d 892 (1991).

119. *See id.* at 190, 408 S.E.2d at 895.

120. VA. CODE ANN. § 18.2-239 (Repl. Vol. 1988).

121. *See id.*



## 2. Referral Rebate Selling

It is illegal to induce a contract by offering customer *A* a rebate or other consideration if *A* refers additional customers *B* and *C* to the seller, where the payment of the consideration is contingent upon a subsequent sale, demonstration, or certain other events involving referred customers *B* or *C*.<sup>122</sup>

This statute covers certain sales of goods or services but not sales of real estate or intangibles. Contracts induced in whole or in part by the offer of such contingent payments or credits are void and unenforceable. The consumer may keep the goods or sue for a refund.<sup>123</sup>

## 3. New Businesses Sold to Consumers Who Expect to Operate from their Residences

The VCPA applies its remedies and rules of conduct to the sale of a new business opportunity requiring personal effort or time to be operated from one's residence.<sup>124</sup> A typical work-at-home business may also be subject to scrutiny under each of the pyramid scheme or referral rebate statutes. The VCPA prohibits all misrepresentations in connection with the sale of such business opportunities, such as misrepresentation of earnings of others, existing markets, necessary expertise, and time required.<sup>125</sup>

## K. *Motor Vehicle Warranty Enforcement Act*

Popularly known as the "Lemon Law," the Motor Vehicle Warranty Enforcement Act<sup>126</sup> is enforceable through private civil actions.<sup>127</sup> No state or local agency has enforcement authority. The Lemon Law provides rights during the period ending eighteen months after the date of the original delivery to a consumer of a

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122. VA. CODE ANN. § 18.2-242.1 (Repl. Vol. 1988).

123. VA. CODE ANN. §§ 59.1-68.3, -68.5 (Repl. Vol. 1992); VA. CODE ANN. § 18.2-242.1(c) (Repl. Vol. 1988).

124. VA. CODE ANN. § 59.1-198 (Repl. Vol. 1992).

125. VA. CODE ANN. § 59.1-200 (Cum. Supp. 1993). For a pre-VCPA business opportunity case apparently tried on a breach of warranty claim, see *McNeir v. Greer-Hale Chinchilla Ranch*, 194 Va. 623, 74 S.E.2d 165 (1953).

126. VA. CODE ANN. §§ 59.1-207.11 to -207.16 (Repl. Vol. 1992).

127. VA. CODE ANN. § 59.1-207.14 (Repl. Vol. 1992) (creating a cause of action and provides that the successful consumer "shall recover reasonable attorney's fees, expert witness fees and court costs . . ." (emphasis added)).

new motor vehicle.<sup>128</sup> If a new vehicle is sold by the first consumer to a second consumer during this period, the second consumer may also claim the benefits of the Lemon Law in some circumstances.<sup>129</sup>

The Lemon Law's primary benefit is its augmentation of the warranty remedies that the manufacturer provides voluntarily. A typical express warranty provides that the manufacturer will repair or replace defective parts within a certain period of time or below a certain mileage. The Lemon Law provides that the manufacturer must remedy the problem in a "reasonable number of attempts," rather than simply repair or replace parts that might again exhibit the same defects.<sup>130</sup> The Lemon Law creates an evidentiary presumption that a reasonable number of repair attempts have been made if, during the Lemon Law rights period, either of three fact patterns is proved: (1) "the same nonconformity to the warranty has been subject to repair three or more times," but continues to exist; (2) "the nonconformity is a serious safety defect and has been subject to repair one or more times," but continues to exist; or (3) the vehicle has been out of service due to repair for a cumulative total of thirty calendar days for any combination of different nonconformities, unless the repairs could not be performed because of conditions beyond the control of the manufacturer.<sup>131</sup>

If the vehicle is not conformed to its warranty after a "reasonable number of repair attempts," then the consumer is entitled to a comparable replacement vehicle or rescission of the contract, plus damages for mileage, expenses, and loss of use necessitated by attempts to conform the vehicle to the warranty.<sup>132</sup> The manufacturer, on the other hand, may subtract a reasonable allowance for use.<sup>133</sup>

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128. VA. CODE ANN. § 59.1-207.11. The 18 month period shall be extended if the manufacturer has been notified, but the nonconformity has not been effectively repaired within the lemon law rights period. The length of the extension, however, is not specified. VA. CODE ANN. § 59.1-207.13(C) (Repl. Vol. 1992).

129. *Id.* (defining "consumer" to include any person to whom such vehicle is transferred for the same personal, family or household purposes during the duration of any warranty applicable to the vehicle, and any other persons entitled by the warranty itself to enforce it. Thus, a subsequent consumer transferee within 18 months may or may not have rights under the Lemon Law, and the outcome will depend on the terms of the warranty).

130. VA. CODE ANN. § 59.1-207.13(B) (Repl. Vol. 1992).

131. *Id.*

132. *Id.* § 59.1-207.13(A).

133. *Id.* "Reasonable allowance for use" is defined as one half or less of the mileage deduction allowed by the Internal Revenue Service for business use of a personal vehicle. VA. CODE ANN. § 59.1-207.11 (Repl. Vol. 1992).

In *Cook v. Ford Motor Co.*,<sup>134</sup> the manufacturer refused to accept the consumer's return of a vehicle, despite six unsuccessful repair attempts. The consumer stopped using and making payments on the vehicle. Ford Motor Credit Company then repossessed it. When the consumer filed suit under the Lemon Law, the manufacturer denied liability on the ground that the consumer was not able to return the vehicle (because of the repossession).<sup>135</sup> The court denied the manufacturer's motion for partial summary judgment and held that,

[w]hile the statute does not explicitly make relief dependent upon the return of the vehicle, even were the Act read to implicitly require return as a condition of remedy, the Act does not require numberless, repeated attempts to return the vehicle in the face of the manufacturer's refusal to accept return or to make arrangements for return.<sup>136</sup>

#### L. *Virginia Residential Property Disclosure Act*

In 1992, the General Assembly addressed residential real estate transactions in a relatively comprehensive statute, the Virginia Residential Property Disclosure Act.<sup>137</sup> This act significantly changes the rules applicable to such contracts fully executed by all the parties on or after July 1, 1993.<sup>138</sup>

##### 1. Applicability

This act applies to sales and leases with an option to buy residential real property consisting of not less than one or more than four dwelling units, including those transactions in which a licensed broker or salesperson is involved. The act does not apply, however, to transfers pursuant to a court order, foreclosure, estate settlements, or divorce.<sup>139</sup> The act also applies, though with a dif-

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134. 24 Va. Cir. 377 (Fairfax County 1991).

135. *Id.* at 378.

136. *Id.* at 379.

137. VA. CODE ANN. §§ 55-517 to -525 (Cum. Supp. 1993).

138. *Id.* § 55-525.

139. *Id.* §§ 55-517, -518, -525.

ferent rule of conduct, to the sale of a new dwelling by its builder.<sup>140</sup>

## 2. Disclosures Required

### a. Used Property

The selling owner must provide on a form promulgated by the Real Estate Board, either:

- (1) an "as is" disclaimer covering all defects, if any, or all defects other than those listed in purchase contract; or
- (2) a disclosure of defects already known to owner, with:
  - (a) notice to buyers that they may wish to secure their own professional inspection, and
  - (b) notice that the representations are made only by the owner and not by the broker or salesperson.<sup>141</sup>

The disclosure need not mention that an occupant was afflicted with HIV or that the property was the site of either a homicide, felony, suicide, or any occurrence having no effect on the physical structure of the real property. The owner is not required to undertake any independent inspection of the property in order to make the required disclosures.<sup>142</sup>

### b. New Dwellings

The builder cannot use a disclaimer. The builder must disclose in writing all known material defects that would constitute a violation of any applicable building code. Such disclosure does not abrogate any warranty or any other contractual obligations of the builder to the purchaser.<sup>143</sup>

## 3. Time for Disclosure or Disclaimer

The disclosure or disclaimer must be delivered prior to acceptance of a contract, or as an addendum to a contract. A second

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140. VA. CODE ANN. § 55-518 (Cum. Supp. 1993)). For sale of new homes, see the one year implied warranty in *Id.* § 55-70.1.

141. *Id.* § 55-519.

142. *Id.* § 55-524(A) (Cum. Supp. 1993).

143. *See supra* note 138.

statement, which cannot be a disclaimer, is required at or before settlement in the form of a disclosure of any material changes in the physical condition, or a certification that the condition is substantially the same as when the original disclosure form was provided.<sup>144</sup>

#### 4. Owner Liability

An owner is not liable for error, inaccuracy, or omission of information delivered pursuant to this chapter if the owner had no actual knowledge of the error, inaccuracy, or omission, or if the error, inaccuracy, or omission was based on information provided by a public agency or certain professionals, such as an engineer or contractor.<sup>145</sup>

#### 5. Liability of Real Estate Licensee

A licensed real estate broker or agent (licensee) must inform his client of the obligation to disclose or disclaim, as noted above. If the purchaser is not represented by a licensee, then the owner's licensee must also inform the purchaser of the purchaser's right to such disclosure or disclaimer and its effect on the purchaser. If the licensee provides this information, then the licensee will not be liable for any failure to disclose or for any violation of the Residential Property Disclosure Act.<sup>146</sup>

#### 6. Remedies

If the seller makes a misrepresentation in the disclosure statement, the buyer may have a choice between suit for damages and cancellation of contract. The buyer may sue for damages suffered as a result of defects existing on the date of contract which would have been disclosed in compliance with the act and of which buyer was not aware at the time of settlement, if a contract for a sale, or an occupancy where the lease includes the option to buy. Alternatively, the buyer may elect to terminate the contract instead of suing for damages.<sup>147</sup>

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144. VA. CODE ANN. §§ 55-520(A), -522 (Cum. Supp. 1992).

145. *Id.* § 55-521.

146. *Id.* § 55-523.

147. *Id.* § 55-524.

The sole remedy for delivery of a disclosure or disclaimer after the deadline set by section 55-520 appears to be termination of the contract.<sup>148</sup> For failure to deliver either the disclaimer or disclosure, however, the buyer may either terminate the contract or sue for damages.<sup>149</sup>

If the buyer elects to terminate for late delivery, non-delivery or misrepresentation, he must do so at or prior to the earliest of: (1) three days after delivery of the disclosure or disclaimer in person; (2) five days after the postmark, if the disclosure or disclaimer is properly mailed; (3) settlement; (4) occupancy by the purchaser; (5) execution of a waiver of right of termination in a writing separate from the real estate contract; or (6) purchaser's written application to a lender for a mortgage loan where the application contains a disclosure that the act of applying for the loan terminates the right of termination.<sup>150</sup>

## 7. Defendants and Causes of Action

Sections 55-521 and 55-524(B)(1), read together, appear to abolish the common law cause of action for constructive fraud against sellers of used residential real property who comply with the disclosure or disclaimer provisions of the chapter.

The statute and case law leave one question unanswered in particular: does the use of an "as is" disclaimer by an owner who is aware of material defects insulate him from liability for willful nondisclosure? In other words, is the common law action for fraud based on deliberate nondisclosure to a buyer who is known to labor under a mistake of fact, as in *Spence v. Griffin*,<sup>151</sup> preserved by section 55-524(B)(2), or is the common law action instead negated by the owner's delivery of a disclaimer? The relevant section of the Act provides in part: "Nothing contained herein shall prevent a purchaser from pursuing any remedies at law or equity otherwise available against an owner in the event of an owner's intentional or willful misrepresentation of the condition of the subject property."<sup>152</sup> This section of the statute uses language which would appear to encompass intentional, fraudulent nondisclosure. This sec-

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148. *Id.* § 55-520.

149. *Id.* § 55-524.

150. *Id.* § 55-520.

151. 236 Va. 21, 28, 372 S.E.2d 595, 598-99 (1988).

152. VA. CODE ANN. § 55-524(C) (Cum. Supp. 1993).

tion thus appears to preserve the cause of action recognized in *Spence*.<sup>153</sup> The preservation of this cause of action for nondisclosure implies that the disclaimer may be used only by an owner who is truly ignorant of the defects which are disclaimed. By this inference and deduction, the courts may determine that this act in fact creates a duty to disclose on the part of owners with knowledge of defects.

Unlike the longer two-year statute of limitations for most other actions for fraud,<sup>154</sup> the applicable limitation under the Virginia Residential Property Disclosure Act is one year from receipt of disclosure or disclaimer statement. If no disclosure statement was delivered, the limitation is one year from settlement if by sale, or occupancy if by lease with option to buy.<sup>155</sup>

### III. PROCEDURAL LAW

#### A. *Governmental Enforcement Actions*

The Office of the Attorney General, Commonwealth's Attorneys and attorneys for any county, city or town (government attorneys), may sue for injunction, civil penalties, costs and restitution for individuals.<sup>156</sup>

Absent the target's intent to flee or hide assets and a reasonable determination that irreparable harm may occur without immediate action, the government attorneys usually must provide written notice of intent to sue and offer either an opportunity to explain or an opportunity to execute an assurance of voluntary compliance.<sup>157</sup> Admissions made during discussion of a possible assurance of voluntary compliance have been held inadmissible to prove violations in later proceedings under the VCPA.<sup>158</sup>

Ex parte pre-suit investigative orders are possible if voluntary requests for information or documents are unproductive.<sup>159</sup> The target of the order usually has twenty-one days from the date of service to comply or file and argue objections. Information ob-

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153. 236 Va. at 28, 372 S.E.2d at 598-99.

154. VA. CODE ANN. § 8.01-243(A) (Repl. Vol. 1992).

155. *Id.* § 55-524(C) (Cum. Supp. 1993).

156. *Id.* §§ 59.1-201, -203, -205 & -206 (Repl. Vol. 1992); *See, e.g., Bell v. Commonwealth*, 236 Va. 298, 374 S.E.2d 13 (1988).

157. *Id.* § 59.1-203(B).

158. *Stitt v. Nautilus Enter., Inc.*, 17 Va. Cir. 150 (Fairfax County 1989).

159. VA. CODE ANN. § 59.1-201 (Repl. Vol. 1992).

tained from such orders can be used only for enforcement of the VCPA.<sup>160</sup>

The government attorneys must have reasonable cause to believe that someone has violated, is violating, or intends to violate the VCPA in order to obtain an investigative order.<sup>161</sup> The supplier suspected of a violation does not have to be the same as the person to whom the investigative order is directed.<sup>162</sup> The order may compel production by innocent third parties such as banks. Reasonable cause requires less of a showing than does probable cause. Reasonable cause may be found in a supplier's promotional materials without considering testimony from consumers.<sup>163</sup>

In actions brought by government attorneys, the court may award relief for an entire class of victims, including those who are not identified until after the trial.<sup>164</sup> Civil penalties and costs may be imposed for willful violations.<sup>165</sup>

Imprisonment for criminal contempt of injunction issued under the VCPA is possible. However, a civil penalty imposed as punishment has been held to be punitive in fact despite its label.<sup>166</sup> Thus, a subsequent jail sentence as additional penalty for criminal contempt for the same conduct has been held to violate the prohibition against double jeopardy.<sup>167</sup>

## B. *Private Suit*

Any person who suffers loss may file a private suit for actual damages or one hundred dollars, whichever is greater, plus reasonable attorney's fees.<sup>168</sup> The VCPA's definition of "person" includes corporations as well as individuals.<sup>169</sup> An insurer, which has paid its insured consumer for loss, may be subrogated to consumer's

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160. *Id.*

161. *Id.*

162. Act of Mar. 26, 1987, ch. 464, 1987 Va. Acts 617 (codified at VA. CODE ANN. § 59.1-201). This Act eliminated the restriction of investigative orders to suspected violators, and instead permitted the issuance of an order against anyone with information. *Id.*

163. *In re American Dollar Exch., Inc.*, 27 Va. Cir. 428 (Campbell County 1992).

164. VA. CODE ANN. § 59.1-205 (Repl. Vol. 1992); see also *In re Fravel*, 143 B.R. 1001 (Bankr. E.D. Va. 1992).

165. VA. CODE ANN. § 59.1-206 (Repl. Vol. 1992); see, e.g., *Commonwealth v. Bell*, 5 Va. Cir. 296 (Richmond City 1985) (awarding \$33,500 in civil penalties and \$7,400 in costs).

166. *Small v. Commonwealth*, 12 Va. App. 314, 398 S.E.2d 98 (1990).

167. *Id.* at 317, 398 S.E.2d at 100.

168. Va. Code Ann. § 59.1-204 (Repl. Vol. 1992).

169. *Id.* § 59.1-198.



cause of action.<sup>170</sup> Also, a contractual limitation of liability for negligence does not limit liability for damages under the VCPA.<sup>171</sup>

It appears that this private cause of action provides, in some instances, a remedy different from that available in governmental enforcement actions. Section 59.1-204, which creates the private cause of action, permits the plaintiff to recover actual damages or one hundred dollars, whichever is greater.<sup>172</sup> Section 59.1-205, however, provides that, in connection with a permanent injunction which can be sought only by a government attorney, the court may enter additional orders necessary to restore any money or property obtained by a deceptive practice to all persons identified within 180 days of entry of the injunction.<sup>173</sup> The term "restore" implies restitution, not damages. Damages might far exceed the consumer's out of pocket loss, but restitution contemplates only the out of pocket loss.<sup>174</sup>

The conclusion that sections 59.1-204 and 59.1-205 contemplate different remedies is bolstered by the last clause of section 59.1-207. For unintentional violations, the consumer's only remedy in a private suit is "restitution." Thus, for unintentional violations, the minimum statutory remedy of one hundred dollars in damages is supplanted by the express provision for restitution in section 59.1-207.<sup>175</sup> A consumer who has suffered actual damage of only thirty-five dollars caused by an unintentional violation may recover only thirty-five dollars.

### C. *Unintentional Violations*

In certain situations, a supplier may avoid liability for damages and instead limit its liability to restitution. Likewise, the supplier may avoid its liability for the consumer's attorney's fees and costs. This limitation is permitted by section 59.1-207. The limitation is established by a showing that the violation of the VCPA was a

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170. See *Gill v. Rollins Protection Servs. Co.*, 773 F.2d 592 (4th Cir. 1985).

171. *Id.*

172. *Disharoon v. Wintergreen Dev., Inc.*, No. 90-0014-C (W.D. Va. May 20, 1991) (holding that § 59.1-204 provides a cause of action for damages, but not for rescission) (unpublished opinion).

173. VA. CODE ANN. § 59.1-205 (Repl. Vol. 1992).

174. *Cf. Jefferson Standard Life Ins. Co. v. Hedrick*, 181 Va. 824, 835, 27 S.E.2d 198, 203 (1943) (holding that compensatory damages for common law fraud include all which "fairly, reasonably, and naturally flowed from the wrong in the ordinary course of events.").

175. VA. CODE ANN. § 59.1-207 (Repl. Vol. 1992).

bona fide error that occurred despite the supplier's operation of a system or procedure reasonably designed to avoid such errors.<sup>176</sup>

#### IV. CONCLUSION

Consumer protection in Virginia involves a variety of statutes covering different types of businesses and specific practices. The General Assembly has recently enacted several new laws and amended older consumer laws. Indeed, the entire subject area is relatively new as the VCPA was enacted in 1977. The most recent developments have been in the area of residential property sales, travel clubs, and prize and gift promotions.

Almost all Virginia consumer protection statutes provide for the award of attorney's fees to the successful consumer. Given this incentive to private litigation, it is surprising that so few consumer cases are reported. Perhaps, as articles like this spread the word, more members of the bar will discover this subject area. As more discover the subject, perhaps some hearty souls will even undertake the representation of some consumer, who could not otherwise afford counsel, in hopes of winning attorney's fees from the opponent.

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176. *Id.* § 59.1-207. In subsection (ii) of section 59.1-207, the language "bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid a violation" is drawn from the Truth-In-Lending Act, 15 U.S.C. § 1640(c) (1993).

