

[Handwritten signature]
Clewiston No.
44,810

such county or city in accordance with Chapter 29 of Title 59.1 (§ 59.1-364 et seq.) of the Code of Virginia?" Section 59.1-391(1).

A "petition" is defined as "[a] formal written request addressed to some governmental authority." 1984-1985 Att'y Gen. Ann. Rep. 316, 318 (quoting *Black's Law Dictionary* 1031 (5th ed. 1979)). Section 24.1-1(10) defines the phrase "qualified voter" as "a person who has qualified to vote pursuant to the Constitution and statutes of the Commonwealth." Article II, § 1 of the Constitution of Virginia (1971) provides, in part:

In elections by the people, the qualifications of voters shall be as follows: Each voter shall be a citizen of the United States, shall be eighteen years of age, shall fulfill the residence requirements set forth in this section, and shall be registered to vote pursuant to this article. . . .

After the petition is filed, the circuit court must determine whether the statutory requirements of § 59.1-391 have been met and whether the signatures on the petition for referendum are the signatures of qualified voters. If a signature appearing on a petition is not that of a qualified voter, the signature will be void. Section 59.1-391 does not require that a petition contain the printed name of a signatory, the signatory's address or the date on which the petition was signed. This statute also does not require that the petition be submitted in any particular form.

The postcard you describe does constitute a formal written request addressed to the circuit court and complies with the requirement in § 59.1-391 that the petition request that a referendum be held on the pari-mutuel betting question. The inclusion on the postcard of the printed name of the signatory is not required, but obviously is intended to help prevent illegible signatures from being stricken. The address of the signatory and the date the card is signed likewise are not required by statute, but this also would assist the circuit court in determining whether a voter is qualified on the date the petition is filed. The qualifications of a voter are to be judged as of the day the petition is filed. 1971-1972 Att'y Gen. Ann. Rep. 188.

Based on the above, it is my opinion that the postcard you describe qualifies as a petition to the circuit court requesting a referendum vote pursuant to § 59.1-391.

TRADE AND COMMERCE: VIRGINIA CONSUMER PROTECTION ACT.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING FRAUD - FALSE PRETENSES.

Authority of court to decline to enforce contract which, on its face, violates Act. Act or practice in violation of Act not criminal; another statute may make conduct criminal.

February 24, 1989

The Honorable J.R. Zepkin
Judge, Ninth Judicial District

You ask two questions concerning the authority of a court pursuant to the Virginia Consumer Protection Act of 1977, §§ 59.1-196 through 59.1-207 of the Code of Virginia (the "Act"). Specifically, you ask whether a court may find a contract unenforceable when, on its face, the contract violates a statute incorporated by reference in the Act. You also ask whether a contract found by the court to be "unlawful" because of such a statutory violation also is in violation of the criminal law, and if so, what the permissible punishment is.

I. Applicable Statute

The Act was enacted as remedial legislation by the General Assembly to promote fair and ethical standards in dealings between suppliers and the consuming public. See § 59.1-197. Section 59.1-200 details certain practices which are expressly prohibited by the Act:

The following fraudulent acts or practices committed by a supplier in connection with a consumer transaction are hereby declared unlawful:

* * *

18. Any violation of the Virginia Health Spa Act, Chapter 24 (§ 59.1-294 et seq.) of this title [Title 59.1];

19. Any violation of the Virginia Home Solicitation Sales Act, Chapter 2.1 (§ 59.1-21.1 et seq.) of this title;

20. Any violation of the Automobile Repair Facilities Act, Chapter 17.1 (§ 59.1-207.1 et seq.) of this title; and

21. Any violation of the Virginia Lease-Purchase Agreement Act, Chapter 17.4 (§ 59.1-207.15 et seq.) of this title.

Other statutes not referenced in the Act also provide that a violation of those statutes constitutes a prohibited practice pursuant to § 59.1-200. See, e.g., § 6.1-369.10(A) ("[e]ach sale of the services of a credit services business that violates any provision of [the Virginia Credit Services Businesses Act] is a prohibited practice under § 59.1-200").

II. Court Has Authority to Decline to Enforce Contract Which, on Its Face, Violates Act

Your first question, concerning the authority of a court to decline to enforce a contract found by the court to be "unlawful" pursuant to § 59.1-200, pertains to contracts which, on their face,¹ conflict with or omit contractual provisions which are prescribed by statute, the violation of which constitutes a practice prohibited by § 59.1-200. See, e.g., § 59.1-200(18)-(21).

"The general rule of law is that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract he cannot recover." *Watters & Martin v. Homes Corp.*, 136 Va. 114, 126, 116 S.E. 366, 370 (1923). Accord *Blick v. Marks, Stokes and Harrison*, 234 Va. 60, 64, 360 S.E.2d 345, 348 (1987); *Cohen v. Mayflower Corp.*, 196 Va. 1153, 1160, 86 S.E.2d 860, 864 (1955); *Roller v. Murray*, 112 Va. 780, 782, 72 S.E. 665, 666 (1911). When a contract violates "a police statute enacted for the public protection," such as a consumer protection law,² it is void. *Bowen Elec. Co. v. Foley*, 194 Va. 92, 100, 72 S.E.2d 388, 393 (1952). Based on these principles, the Supreme Court of Virginia has held that an unlicensed real estate agent may not enforce a contract to collect fees, and a contractor who has not registered the fictitious name of his business may not enforce a construction contract, because to do so would be against the Commonwealth's policy of protecting the public from fraud. See *Greco v. Nathaniel Greene*, 218 Va. 228, 231, 237 S.E.2d 107, 110 (1977); *Colbert v. Ashland Construction Co.*, 176 Va. 500, 11 S.E.2d 612 (1940).

There are exceptions to the general rule that a contract made in violation of a statute is void, based upon the intent of the legislature. *Blick*, 234 Va. at 64, 360 S.E.2d at 348; *Watters & Martin*, 136 Va. at 127, 116 S.E. at 370. An exception to the general rule has been held to arise, for example, when an innocent party to the contract maintains an action for its breach. See *Cohen*, 196 Va. at 1162-63, 86 S.E.2d at 865.³

You do
sumer contr
tract which
is my opinion

If, how
contract, it i
may be main
a party to a
for damages

It would
not mai
party .

This vic
class of
pari dei
to state
cases v
tended

Cohen, 196 V

Althoug
porates man
when the ill
ance is impo
(4th Cir. 197
consumer co
ensuring tha
Unless the fi
ion that, wh
rity and lega
with the sta
would defeat
misrepresent

Your s
§ 59.1-200 m
so, what the

The ter
thorized by
broad enoug
Conine v. Le
ments, mea
563 P.2d 115

The Ac
prisonment,
The Act doe
e.g., §§ 59.1
(private acti

Assembly to promote
consuming public. See
expressly prohibited by

You do not indicate in your inquiry whether the party seeking to enforce the consumer contract is the supplier or the consumer. If a supplier is seeking to uphold a contract which conflicts with the statutory requirements for certain consumer contracts, it is my opinion that the contract is void and may not be enforced.

supplier in con-
lawful:

If, however, a consumer institutes an action for damages for the breach of such a contract, it is my opinion that the contract is voidable, not void, and that such an action may be maintained. The Supreme Court of Virginia has held that, when a contractor was a party to a contract that was illegal because the contractor was unlicensed, an action for damages could be maintained by an innocent party to the contract.

§ 59.1-294 et

It would be a rare or nonexistent case in which such an innocent person could not maintain some kind of action for a breach of the agreement by the guilty party

Act, Chapter 2.1

This view is based upon the principle that such innocent party is among the class of persons designed to be protected by such statutes, that he is not *in pari delicto* with the unlicensed party, and is therefore entitled to relief. Or, to state the matter another way, to deny relief to the innocent party in such cases would defeat the purpose of the statute and penalize the person intended to be protected thereby.

Act, Chapter 17.1

Act, Chapter

Cohen, 196 Va. at 1162-63, 86 S.E.2d at 865.

violation of those stat-
e.g., § 6.1-369.10(A)
violates any provision of
the under § 59.1-200".

Although it is generally true that, when a contract covers several subjects or incorporates many provisions, those which are invalid may be severed, this is not the case when the illegality is so interwoven with the valid portions of the contract that severance is impossible. *Alston Studios, Inc. v. Lloyd V. Gress & Associates*, 492 F.2d 279, 285 (4th Cir. 1974). Those portions of the Act that require certain provisions to be included in consumer contracts do so to protect the consumer from fraud and misrepresentation by ensuring that certain information is disclosed to the consumer at the appropriate time. Unless the facts of a particular case dictate otherwise, therefore, it is further my opinion that, when conformity to statutory requirements is necessary to preserve the integrity and legality of a consumer contract as a whole, contractual provisions which conflict with the statute may not be severed and the remaining provisions enforced. To do so would defeat the intent of the General Assembly and expose the consumer to fraud or misrepresentation.

Its Face, Violates Act

line to enforce a con-
pertains to contracts
s which are prescribed
ed by § 59.1-200. See,

III. Act Is Not Criminal Statute

n of a statute is void;
ithout relying upon an
orp., 136 Va. 114, 126,
rison, 234 Va. 60, 64,
3, 1160, 86 S.E.2d 860,
911). When a contract
as a consumer protec-
S.E.2d 388, 393 (1952).
hat an unlicensed real
ntractor who has not
onstruction contract,
protecting the public
237 S.E.2d 107, 110
612 (1940).

Your second question requires a determination whether the term "unlawful" in § 59.1-200 makes an act or practice that is in violation of the Act a criminal act and, if so, what the permissible punishment would be.

The term "unlawful" is defined as "[t]hat which is contrary to, prohibited, or unauthorized by law. . . . While necessarily not implying the element of criminality, it is broad enough to include it." *Black's Law Dictionary* 1377 (5th ed. 1979). See also *Conine v. Leikam*, 570 P.2d 1156, 1159 (Okla. 1977) ("unlawful," as applied to agreements, means that they are ineffectual in law); *State v. Noble*, 90 N.M. 360, 364, 563 P.2d 1153, 1157 (1977) ("unlawful" means not authorized by law).

made in violation of a
Va. at 64, 360 S.E.2d
eption to the general
to the contract main-
..2d at 865.³

The Act contains none of the traditional criminal penalties, such as a fine or imprisonment, nor does it make a violation of its provisions a felony or a misdemeanor.⁴ The Act does, however, provide for equitable remedies, as well as civil penalties. See, e.g., §§ 59.1-203 (injunctive actions brought by state or local governments); 59.1-204 (private actions for damages, attorney's fees and court costs); 59.1-205 ("public" actions

for additional relief as may be necessary to restore to any identifiable person any money or property which may have been acquired from such person); 59.1-206 ("public" actions for civil penalties and attorney's fees). It is my opinion, therefore, that an act or practice which is in violation of the Act is not, by itself, a criminal act. Another statute may, of course, make the conduct criminal. See, e.g., § 18.2-178 (larceny by false pretense). Since I conclude that a criminal prosecution may not be maintained based solely on the Act, a response to your question concerning permissible punishment is unnecessary.

¹The Act, specifically in § 59.1-200, does not expressly make any contract illegal. The commission of the "fraudulent acts or practices" detailed in § 59.1-200 may result in a contract being procured or performed in a fraudulent manner. You state, however, that your inquiry does not refer to this type of contract, which may appear legal on its face, but instead refers to contracts which, by their terms, violate contractual provisions prescribed by statute and incorporated by reference in the Act.

²Consumer protection legislation generally is considered to be a valid exercise of a state's police power. See, e.g., *In re Charter First Mortg., Inc.*, 42 Bankr. 380, 382 (D. Ore. 1984).

³Another exception exists when the innocent party knows that the statute is violated and no defect exists in the contract's performance. *Greenco*, 218 Va. at 232, 237 S.E.2d at 110.

⁴Certain actions or practices which are actionable under the Act because they are fraudulent or deceptive also may support a criminal prosecution. The possibility of criminal prosecution, of course, will depend on the particular facts of a particular case. In addition to criminal prosecution for violation of a specific statute, an action based on common law fraud also may be available. See *Jefferson Stand. Ins. Co. v. Hedrick*, 181 Va. 824, 27 S.E.2d 198 (1943); *Clay v. Butler*, 132 Va. 464, 112 S.E. 697 (1922).

WELFARE (SOCIAL SERVICES): ADOPTION.

Procedures for direct placement adoption of child by birth parent or legal guardian pursuant to § 63.1-220.3 not applicable to petition for adoption by stepparent of infant filed by spouse of natural, or adoptive, parent pursuant to § 63.1-231.

September 18, 1989

The Honorable Robert C. Scott
Member, Senate of Virginia

You ask whether the requirements of § 63.1-220.3 of the Code of Virginia, which detail the procedures for a direct adoption placement of a child by a birth parent or legal guardian, apply to a petition for a stepparent adoption of an infant filed by the new spouse of the natural or adoptive parent pursuant to § 63.1-231.

I. Applicable Statutes

Section 63.1-220.3(A)¹ provides:

The birth parent or legal guardian of a child may place his child for adoption directly with the adoptive parents of his choice only after executing a valid consent to the proposed adoption before a juvenile and domestic relations district court of competent jurisdiction, upon compliance with the provisions of this section. [Emphasis added.]

Sect
tions distr
guardian 1
choice.

Sect
ural or ad

(a) V
of a
ent
the
ado
...

(b) V
infa
ado
the
and

(c) V
ries
suct
the

(d) V
desi
tive
...

The

Pro
suct
cha
in 1
plac

A b
tions dist
signed by
this statu
or legal
child. If
nation of
Gen. An
§ 63.1-22
petition :

A f
always is
a petitio