

B>CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING FRAUD.

Cash payment made by company conducting "No Purchase Required Cash Referral Certificate Program" in its retail stores after completing successful referral sale represents inducement to sale only if company has established pattern of making offer of payment as inducement to consumer purchases.

The Honorable Anne G. Rhodes

Member, House of Delegates

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You ask whether a company's method of transacting business in its retail stores by means of a cash referral program violates § 18.2242.1 of the *Code of Virginia*.¹

You present a hypothetical situation in which retail stores owned by a company ("company A") sell retail goods that are purchased by consumers primarily for personal, family or household purposes and not for resale. As part of its marketing program, company A conducts a cash referral program at its retail stores that allows individuals, under no obligation to purchase goods and with no assistance from sales personnel, to obtain referral certificates that, once signed, are to be given to prospective consumers. If a prospective consumer presents a signed referral certificate at a company A store, purchases and takes delivery of merchandise, company A will send a check to the referring person. Both the referral certificate and signs posted in company A stores advertising the "No Purchase Required Cash Referral Certificate Program" explicitly state that no purchase is necessary by the referring person.

You state that some of the key aspects of the "No Purchase Required Cash Referral Certificate Program" include: (1) general advertisement, as well as direct mail, of the "No Purchase Required Cash Referral Certificate Program," and prominent display of descriptive signs inside company A stores indicating that absolutely no purchase is necessary to participate in the program; (2) placement of boxes containing referral certificates near the signs, urging individuals to take enough to give to friends and neighbors; (3) if a sale is made, explanation of the "No Purchase Required Cash Referral Certificate Program," and before closing a contract, clarification of the no-sale requirement for anyone desiring a referral certificate, and not allowing execution of such contract by an individual who mistakenly presumes a sale is necessary to receive a referral certificate; and (4) execution of a disclaimer stating (a) that the individual understands that no purchase is necessary to participate in company A's "No Purchase Required Cash Referral Certificate Program" and (b) that company A has made no inducement contingent on any purchase such individual may now, or in the future, make, nor was the individual induced by the program to make a purchase.

A 1982 opinion of the Attorney General considers "whether a seller who makes its offer of payment for successful referrals after, rather than before, the completion of the sale has thereby induced the buyer to make a purchase," and concludes that "[i]f such offer of payment in return for successful referrals serves as an inducement to the sale, it would cause such sale to be a prohibited referral sale under § 18.2242.1."² Furthermore, the prior opinion also concludes that "an offer of payment in return for successful referrals where such offer is made after the completion of a sale would be an inducement to a sale only if the pattern is clearly established that the consumer could have expected such an offer to be made."³

Section 18.2242.1 is a penal statute. Penal statutes must be construed strictly against the Commonwealth.⁴ Consequently, any doubt about its meaning in a particular case must be

resolved against the Commonwealth and in favor of the defendant.⁵ A principle of statutory construction is that "the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."⁶ Finally, words and phrases must be considered in the context in which they are used to arrive at a construction that will promote the object and purpose of the statute.⁷

In the hypothetical situation you present, company A is making its offer of payment to individuals for successful referrals, but not as an inducement to a sale. Company A does not require a purchase as a prerequisite to participating in the referral program and to making a referral, which may result in company A forwarding a check to the referrer for a successful referral. Consequently, it would appear that company A does not make its offers of payment in return for successful referrals as an inducement to a sale.

Consistent with the 1982 opinion, however, I am also of the opinion that payment made after completion of a successful referral sale, such as that based on the "No Purchase Required Cash Referral Certificate Program" you describe, would represent an inducement to a sale only if there were a clearly established pattern that company A was making the offer of such payment as an inducement to consumer purchases, in violation of § 18.2242.1.

¹Section 18.2242.1 provides:

"(a) For the purpose of this section, the term `consumer sale or lease of goods or services' means the sale or lease of goods or services which are purchased or leased by a natural person primarily for a personal, family or household purpose, and not for resale.

"(b) With respect to a consumer sale or lease of goods or services, no seller or lessor shall give or offer to give a rebate or discount or otherwise pay or offer to pay value to the buyer or lessee as an inducement for the sale or lease in return for the buyer's giving to the seller or lessor the names of prospective buyers or lessees, or otherwise aiding the seller or lessor in entering into a transaction with another buyer or lessee, if the earning of the rebate, discount, or other value is contingent upon the occurrence of any sale, lease, appointment, demonstration, interview, conference, seminar, bailment, testimonial or endorsement subsequent to the time the buyer or lessee enters into the agreement of sale or lease.

"(c) Agreements made in whole or in part pursuant to a referral transaction as above described shall be void and unenforceable by the seller or lessor. The buyer or lessee shall be entitled to retain the goods, services or money received pursuant to a referral transaction without obligation to make any further or future payments of any sort on the transaction total, or he shall be entitled to avoid the transaction and to recover from the seller or lessor any sums paid to the seller or lessor pursuant to the transaction."

²1981-1982 Op. Va. Att'y Gen. 314, 315.

³*Id.* at 31516.

⁴*See Harward v. Commonwealth*, 229 Va. 363, 330 S.E.2d 89 (1985); *see also* 1992 Op. Va. Att'y Gen. 152, 154, and opinions cited therein.

⁵*Graybeal v. Commonwealth*, 228 Va. 736, 324 S.E.2d 698 (1985); *Branch v. Commonwealth*, 14 Va. App. 836, 839, 419 S.E.2d 422, 424 (1992).

⁶*Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

⁷*Id.* at 46061, 309 S.E.2d at 339 (meaning of words finds expression from purport of entire phrase of which it is part).