

OP. NO. 05-069

**ELECTIONS: CAMPAIGN FINANCE DISCLOSURE ACT —
DISCLOSURE FOR POLITICAL CAMPAIGN ADS.**

Private right of action does not exist for private individuals and entities to enforce provisions of Campaign Finance Disclosure Act and Disclosure Requirements for Political Campaign Advertisements.

The Honorable Ken Cuccinelli
Member, Senate of Virginia
October 12, 2005

Issue Presented

You inquire whether a private right of action exists for private individuals and entities to enforce the provisions of the Campaign Finance Disclosure Act, §§ 24.2-900 through 24.2-930 ("Campaign Act"), and the Disclosure Requirements for Political Campaign Advertisements, §§ 24.2-941 through 24.2-944 ("Disclosure Act").

Response

It is my opinion that a private right of action does not exist for private individuals and entities to enforce the provisions of the Campaign Finance Disclosure Act and the Disclosure Requirements for Political Campaign Advertisements.

Background

You advise that in *Virginia Society of Human Life, Inc. v. Caldwell*,¹ the federal court describes private enforcement actions in political campaigns in 1989 and 1993 whereby private individuals attempted to enforce predecessor statutes of the Campaign Act and the Disclosure Act through private legal proceedings in the circuit courts of the Commonwealth.² You advise further that the reported decision in *Virginia Society* describes cases in which such circuit courts entered injunctions barring the distribution of voter guides and other written political materials in the closing days of the political campaigns in 1989 and 1993.³

The federal court described the 1989 and 1993 enforcement actions to which you make reference as follows:

In connection with the 1989 elections, the "Committee for Providing Truth in Political Candidate Positions," an unincorporated association in Fairfax County, Virginia,

consisting of various Fairfax County residents, prepared a handbill entitled "Read Before You Vote." The Democratic Party of Virginia ("DPV"), brought suit against that association and the VLC seeking an injunction. The day before the election, the Circuit Court of Fairfax County issued an unconstitutional prior restraint enjoining them from distributing or causing to be distributed the "Read Before You Vote" handbills and the "Leadership '89 Voter Cards" as well as "any other materials or publications or writings as defined in 24.1-277." The injunction was effective "until such time as the defendants [could] demonstrate to the Court compliance with the law."

In 1993, elections were held again for Governor, Lieutenant Governor, Attorney General, and the General Assembly. Following a similar pattern, the Circuit Court of Fairfax County entertained a suit shortly before the election to enjoin distribution of certain handbills. On October 27, 1993, the Circuit Court enjoined the defendants "from distributing any writing about candidates for any office elective ... without first filing a statement of organization with the [Virginia State] Board [of Elections]" and identified on the writing "the person responsible therefore" and the registration number. The Virginia Supreme Court dissolved the injunction on November 1, 1993, without opinion.^[4]

Applicable Law and Discussion

As a general rule, a private right of action cannot be implied from statutory provisions because "[w]hen] 'a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise.'"⁵ Clearly, the Campaign Act and the Disclosure Act confer certain rights and obligations upon citizens and entities of the Commonwealth and the enforcement of such obligations on certain governmental entities. It is equally clear that the rights and obligations conferred by these Acts did not exist in the common law and were created through the statutory scheme of these Acts.⁶

The Campaign Act constitutes "the exclusive and entire campaign finance disclosure law of the Commonwealth."⁷ Section 24.2-923(A) of the Act requires that "[p]ersons and political committees shall file the prescribed reports of contributions and expenditures with the State Board [of Elections] in accordance with the applicable schedule set out in subsections C, D, and E." The Campaign Act requires contributions and expenditures of persons and political committees to be reported to the State Board in accordance with the schedule set forth in the Act.⁸

The provisions of the Disclosure Act "apply to any sponsor of an advertisement in the print media or on radio or television the cost or value of which constitutes an expenditure or contribution required to be disclosed" by the Campaign Act.⁹ Section 24.2-943 of the Disclosure Act sets forth the basic disclosure requirements for political campaign advertisements in the print media or that appear in print on television, and § 24.2-944 sets forth the basic disclosure requirements for political campaign advertisements that appear on radio or television.

Both the Campaign Act and the Disclosure Act contain civil and criminal penalties for violation of their reporting requirements. Section 24.2-928 of the Campaign Act specifically requires the State Board of Elections and the local electoral board, in cases involving required filings with the local electoral board, to report any violation of the Campaign Act to the appropriate Commonwealth's attorney. Furthermore, § 24.2-929(A) of the Campaign Act requires that within 90 days of any missed deadline, the "State Board or the general registrar or local electoral board, as appropriate, shall ... notify the [Commonwealth's] attorney ... who shall initiate civil proceedings to enforce the civil penalties and penalties assessed by the State Board or the local electoral board as provided herein." In the case of a willful violation of the Campaign Act, the party "shall be guilty of a Class 1 misdemeanor."¹⁰

Section 24.2-943(C) of the Disclosure Act requires the assessment of a civil penalty not to exceed \$100 for a violation of this section. Section 24.2-944(G) of the Act requires the assessment of a civil penalty not to exceed \$500 for each violation of the disclosure requirements of the Act. Both statutory provisions provide that a willful violation is a Class 1 misdemeanor.

The General Assembly clearly authorizes the civil penalties in both the Campaign Act and the Disclosure Act to proscribe conduct which, though not criminal in nature, is in violation of the statutory requirements. The obvious purpose of the civil penalties is not punitive in nature, but rather to strengthen the effectiveness of the regulatory requirements of the Acts. The civil penalties, therefore, clearly are designed to regulate conduct.¹¹ It is equally clear that the General Assembly intends for willful violations of the Campaign Act and the Disclosure Act to be treated as criminal acts punishable as Class 1 misdemeanors.¹²

It is my opinion that the Campaign and Disclosure Acts do not create a cause of action for enforcement by a private entity or an individual. No civil right of action exists unless the Acts, by virtue of the terms used therein, so provide or unless proof of a set of facts establishing violation of these Acts also constitutes proof of an otherwise existing civil cause of action.¹³ The clear provisions of both Acts place the duty for the enforcement of the Acts on the State Board of Elections, the general registrars and the local electoral boards, and in some cases enforcement of the Acts with the assistance of the appropriate Commonwealth's

attorney.¹⁴ It is presumed that public officials will discharge their duties in accordance with law.¹⁵

The General Assembly knows how to create a private cause of action and how to preserve a private cause of action when that is its intention.¹⁶ Considered as a whole, it is my opinion that the statutory language demonstrates a clear legislative intent to require enforcement of violations of the Campaign Act and the Disclosure Act by the appropriate elections officials of the Commonwealth. My conclusion is supported by the general rule that a penal statute does not automatically create a private right of action, and that equity will not enter an injunction merely because a statute has been violated.¹⁷ This rule, however, is qualified by the long standing principle that an injunction is appropriate relief where violation of a penal statute results in special damage to property rights which would be difficult to quantify.¹⁸

Conclusion

Accordingly, it is my opinion that a private right of action does not exist for private individuals and entities to enforce the provisions of the Campaign Finance Disclosure Act and the Disclosure Requirements for Political Campaign Advertisements.

¹906 F. Supp. 1071 (W.D. Va. 1995).

²*Id.* at 1073-1074.

³*Id.* at 1081-88.

⁴*Id.* at 1073-74 (alterations in original) (footnotes omitted).

⁵*Vansant & Gusler, Inc. v. Washington*, 245 Va. 356, 360, 429 S.E.2d 31, 33 (1993) (alteration in original) (quoting *Sch. Bd. v. Giannoutsos*, 238 Va. 144, 147, 380 S.E.2d 647, 649 (1989)).

⁶Va. Code Ann. § 1-200 (LexisNexis Repl. Vol. 2005) (providing that common law continues in full force except as altered by General Assembly).

⁷Va. Code Ann. § 24.2-900 (LexisNexis Supp. 2005).

⁸See §§ 24.2-914 to 24.2-928 (LexisNexis Repl. Vol. 2003 & Supp. 2005).

⁹Section 24.2-941 (LexisNexis Repl. Vol. 2003).

¹⁰Section 24.2-929(A)(4) (LexisNexis Supp. 2005).

¹¹ See Op. Va. Att'y Gen.: 1990 at 109, 111; 1977-1978 at 162, 164.

¹² See § 24.2-929(A)(4); § 24.2-943(C) (LexisNexis Supp. 2005); § 24.2-944(G) (LexisNexis Supp. 2005).

¹³ See, e.g., *Hortenstein v. Virginia-Carolina Ry. Co.*, 102 Va. 914, 923-24, 47 S.E. 966, 999 (1904).

¹⁴ See § 24.2-928(A)-(B) (LexisNexis Supp. 2005); § 24.2-929(A); § 24.2-943(C), § 24.2-944(G).

¹⁵ *WTAR Radio-TV Corp. v. City Council*, 216 Va. 892, 895, 223 S.E.2d 895, 898 (1976); *Ours Props., Inc. v. Ley*, 198 Va. 848, 850-51, 96 S.E.2d 754, 756 (1957).

¹⁶ See, e.g., Va. Code Ann. § 6.1-363.24 (LexisNexis Supp. 2005) (providing that any person who suffers loss from violation may bring civil action); § 6.1-469 (LexisNexis Supp. 2005) (providing that any person who suffers loss from violation may bring civil action); Va. Code Ann. § 32.1-138.14 (LexisNexis Repl. Vol. 2004) (providing that no private right of action is created); Va. Code Ann. § 55-226.2(E) (LexisNexis Supp. 2005) (providing that tenants and owners retain private right of action resulting from breach of rental agreement or lease terms); Va. Code Ann. § 56-235.8(G)(2) (LexisNexis Repl. Vol. 2003) (providing that person who suffers loss from certain violations may initiate action to recover damages); § 56-593(B)(1) (LexisNexis Repl. Vol. 2003) (providing that person who suffers loss from certain violations may initiate action to recover damages); Va. Code Ann. § 62.1-44.22 (LexisNexis Repl. Vol. 2001) (providing that owner holding certificate does not constitute defense in civil action involving private rights). *Compare* 1998 Op. Va. Att'y Gen. 87, 88 (noting that when General Assembly intends statute to impose mandatory requirements, it knows how to express its intention).

¹⁷ See *Woodfin v. Overnite Transp. Co.*, 199 Va. 165, 166-67, 98 S.E.2d 525, 526 (1957); *see also Washington*, 245 Va. at 359-60, 429 S.E.2d at 33.

¹⁸ *Woodfin*, 199 Va. at 167, 98 S.E.2d at 526; *Mears v. Colonial Beach*, 166 Va. 278, 282, 184 S.E. 175, 176 (1936); *Turner v. Hicks*, 164 Va. 612, 615, 180 S.E. 543, 544 (1935); *Long's Baggage Transfer Co. v. Burford*, 144 Va. 339, 353, 132 S.E. 355, 359 (1926).

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