

Sometimes Construction Can Turn Criminal



I have discussed the fact that [an action for civil fraud is almost impossible to maintain](#) in the Commonwealth of Virginia. However, a recent case from the Commonwealth of Virginia Court of Appeals reminds us all that in some circumstances the Virginia General Assembly has seen fit to make certain actions by contractors will open them up to criminal charges and possible jail time.

In [Testerman v. Commonwealth](#), the Court of Appeals considered [Virginia Code § 18.2-200.1](#) which states:

If any person obtain from another an advance of money, merchandise or other thing, of value, with fraudulent intent, upon a promise to perform construction, removal, repair or improvement of any building or structure permanently annexed to real property, or any other improvements to such real property. . .

will be subject to felony charges for fraud and larceny.

In Testerman, the defendant took an advance of \$1800.00 for the purchase of materials to be used in the renovation of the bathroom in the home of the Kinney's. Testerman then failed to either perform the work or return the advance. A jury convicted him under the above-referenced section of the Virginia code. On appeal, Testerman argued that he did not in fact promise to perform construction, but only promised to purchase materials with the advance.

The court did not buy into this argument. Instead, it found that the acceptance of an advance for materials *for use in the performance of promised construction* does in fact fall within the statute. However, had Testerman merely promised to purchase materials, without stating that they would be used in the construction of the Kinney's home, he would not have fallen within the meaning of this section of the Virginia Code. Therefore, Mr. Testerman's conviction was upheld.

The lesson of this case is obvious for contractors and [their attorneys](#). The lesson is simply this: don't take an advance toward *any construction activities* unless you, as a contractor, use that advance toward even possibly promised construction. If you cannot do so, return the money and walk from the project. The Testerman case is one that illustrates that homeowners will interpret the purchase of materials as part of construction under any construction contract regardless of the method that a contractor uses for its accounting.

Remember, be careful in your accounting and your dealings with homeowners because sometimes construction can turn criminal.

Please check out my [Construction Law Musings Blog](#) for more on Virginia construction law and other topics.