

**OP. NO. 04-051**

**OATHS, AFFIRMATIONS AND BONDS: RELIEF OF SURETIES.**

**CORPORATIONS: VIRGINIA NONSTOCK CORPORATION ACT.**

**UNIFORM COMMERCIAL CODE-SECURED TRANSACTIONS:  
PERFECTION AND PRIORITY.**

**CIVIL REMEDIES AND PROCEDURE: PERSONAL  
JURISDICTION IN CERTAIN ACTIONS.**

**Foreign corporation authorized to transact business in  
Virginia, with principal place of business outside  
Commonwealth and no assets in Virginia, is not 'resident in'  
Commonwealth.**

The Honorable Harry B. Blevins  
Member, Senate of Virginia  
September 1, 2004

### **Issue Presented**

You ask whether a foreign corporation authorized to transact business in Virginia, but which has a principal place of business outside the Commonwealth and no assets in Virginia,<sup>1</sup> is "resident in this Commonwealth," as that phrase is used in § 49-26.

### **Response**

It is my opinion that a foreign corporation authorized to transact business in Virginia, but which has a principal place of business outside the Commonwealth and no assets in Virginia, is not "resident in this Commonwealth," as that phrase is used in § 49-26.

### **Background**

You relate that a corporation is incorporated in one state, has its principal place of business in another state, and is qualified to conduct business in Virginia. This foreign corporation served as the general contractor on a construction project in Virginia. A dispute between the corporation and a subcontractor ensued, and the subcontractor filed suit against the corporation's bonding company ("surety") in connection with the project. The surety demanded that,

pursuant to §§ 49-25 and 49-26, the subcontractor name the corporation as a party in the lawsuit. The subcontractor refused to add the corporation based on the fact that the corporation is not resident in the Commonwealth of Virginia.

## **Applicable Law and Discussion**

### **A. Relevant Statutes**

Section 49-25 provides that "[t]he surety ... of any person bound by any contract may, if a right of action has accrued thereon, require the creditor ..., by notice in writing, to institute suit thereon." Section 49-25 further provides that "[s]uch written notice shall also notify the creditor ... that failure to act will result in the loss of the surety ... as security for the debt in accordance with § 49-26."

Section 49-26 states:

If such creditor ... shall not, within thirty days after such requirement, institute suit against every party to such contract *who is resident in this Commonwealth* and not insolvent and prosecute the same with due diligence to judgment and by execution, he shall forfeit his right to demand of such surety ... the money due by any such contract for the payment of money .... [Emphasis added.]

Neither § 49-25 nor § 49-26 defines "resident in" as that term is used in § 49-26.

Predecessor statutes to §§ 49-25 and 49-26 required a creditor to institute suit upon receiving notice from a surety that his principal "was likely to become insolvent, or to migrate from the commonwealth."<sup>2</sup> It appears that the original intent of this statute was to protect a surety's ability to recover assets of a debtor who the surety fears will either become insolvent or leave the Commonwealth.<sup>3</sup> Given the purpose underlying the statute, i.e., protecting a surety's ability to recover assets a principal/debtor may have in the Commonwealth, it follows that the phrase "resident in this Commonwealth"<sup>4</sup> limits the obligation of a creditor to institute suit only against those debtors who are located within, or have assets located in, Virginia.

### **B. Other Virginia Statutes Which Provide Guidance**

#### **1. Virginia Stock Corporation Act**

The Virginia Stock Corporation Act<sup>5</sup> does not designate whether a corporation is "resident in this Commonwealth."<sup>6</sup> Instead, the Act distinguishes between "domestic corporations"<sup>7</sup> and "foreign corporations."<sup>8</sup>

## **2. Uniform Commercial Code**

The Uniform Commercial Code, as adopted by Virginia, sets forth a mechanism for determining the location of a debtor. Pursuant to § 8.9A-307(e), "[a] registered organization ... is organized under the law of a state [and] is *located* in that state." (Emphasis added.) Under this analysis, the foreign corporation is not "located" in Virginia; instead, it is "located" in the state in which it was incorporated.

### **C. Case Law**

#### **1. Attachment**

In a case involving the attachment of a foreign corporation's property, the Supreme Court of Virginia has stated:

Nothing is better established by all the cases and text writers on the subject of corporations, than that a corporation can have no legal existence outside of the boundaries of the sovereignty by which it was created. While it may, by its agents, transact business anywhere, unless prohibited by its charter or prevented by local laws, it can have no residence or citizenship except where it is located by or under the authority of its charter.... "It exists by force of the law (creating it), and where that ceases to operate, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter, but it may, by its agents, transact business anywhere, unless prohibited by its charter or excluded by local laws."<sup>[9]</sup>

These principles have been cited with approval in subsequent decisions addressing attachments.<sup>10</sup> It is important to note, however, that these principles were set forth within the context of determining whether an entity was a "foreign corporation,"<sup>11</sup> and not whether the entity was resident in the Commonwealth.

## **2. Long-Arm Jurisdiction**

The concept of residence arises in the application of § 8.01-328.1, Virginia's "long-arm statute."<sup>12</sup> Supreme Court cases applying this statute have considered whether courts may assert jurisdiction over a nonresident under the "long-arm statute."<sup>13</sup> These cases, however, do not typically address the meaning of the term "resident."

Nevertheless, another possible interpretation of the term "resident in"<sup>14</sup> could involve minimum contacts similar to those required for long-arm jurisdiction. When interpreting a statute, "every part is presumed to have some effect and is not to be disregarded unless absolutely necessary."<sup>15</sup> This principle dictates that every word in § 49-26 be given meaning. If the General Assembly had not included in § 49-26 the phrase "resident in," a creditor instituting suit pursuant to this section would still be bound by the long-arm statute's limitations. An interpretation equating "resident in" to minimum contacts would render the phrase meaningless, because the minimum contacts limitation is already imposed on creditors who proceed under § 49-26. Because the General Assembly elected to add the phrase "resident in" to § 49-26, it must have intended the phrase mean something more than minimum contacts.

Given that the legislative purpose underlying § 49-26 is protecting a surety's ability to recover assets a principal/debtor may have in the Commonwealth, and that the General Assembly must have intended the phrase "resident in" to mean something more than minimum contacts, it is my opinion that a foreign corporation authorized to do business in Virginia, but which has its principal place of business outside the Commonwealth and no assets in Virginia, is not "resident in this Commonwealth" for the purposes set forth in § 49-26. Therefore, the subcontractor is not required to institute suit against the corporation pursuant to § 49-26.

### **Conclusion**

Accordingly, it is my opinion that a foreign corporation authorized to transact business in Virginia, but which has a principal place of business outside the Commonwealth and no assets in Virginia, is not "resident in this Commonwealth," as that phrase is used in § 49-26.

<sup>1</sup>Your request does not state that the corporation in question has assets in Virginia. The analysis set forth in this opinion may differ if the corporation has assets in the Commonwealth.

<sup>2</sup>Wright's Adm'r v. Stockton, 32 Va. (5 Leigh) 153, 158 (1834) (interpreting 1 Rev. Code ch. 116, § 6, 7, 8 (1819)).

<sup>3</sup>See *id.* at 159.

<sup>4</sup>Va. Code Ann. § 49-26 (LexisNexis Repl. Vol. 2002).

<sup>5</sup>Va. Code Ann. §§ 13.1-601 to 13.1-800 (Michie Repl. Vol. 1999 & LexisNexis Supp. 2004).

<sup>6</sup>Section 49-26.

<sup>7</sup>Section 13.1-603 (LexisNexis Supp. 2004) (defining "domestic corporation" as corporation organized under Virginia Stock Corporation Act, which has become domesticated "by virtue of articles of incorporation, amendment, or merger" filed with State Corporation Commission)

<sup>8</sup>*Id.* (defining "foreign corporation" as corporation organized under laws other than laws of this Commonwealth).

<sup>9</sup>Cowardin v. Universal Life Ins. Co., 73 Va. (32 Gratt.) 445, 447-48 (1879) (citations omitted).

<sup>10</sup>See *D.S. Cook & Son Mining Co. v. Thompson*, 110 Va. 369, 371, 66 S.E. 79, 80 (1909); *Bus. Data Solutions, Inc. v. ISC Sys. Div., Inc.*, 26 Va. Cir. 107, 108 (1991).

<sup>11</sup>Section 8.01-534(A) provides that "[i]t shall be sufficient ground for an action for pretrial levy or seizure or an attachment that the principal defendant or one of the principal defendants

"1. Is a *foreign corporation*, or is *not a resident of this Commonwealth*." (Emphasis added.)

<sup>12</sup>Section 8.01-328.1(A) provides that "[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:

"....

"2. Contracting to supply services or things in this Commonwealth[.]"

<sup>13</sup>See *Glumina Bank v. D.C. Diamond Corp.*, 259 Va. 312, 527 S.E.2d 775 (2000); *Witt v. Reynolds Metals Co.*, 240 Va. 452, 397 S.E.2d 873 (1990); *Danville Plywood Corp. v. Plain & Fancy Kitchens, Inc.*, 218 Va. 533, 238 S.E.2d 800 (1977).

<sup>14</sup>Section 49-26.

<sup>15</sup>*Jeneary v. Commonwealth*, 262 Va. 418, 430, 551 S.E.2d 321, 327 (2001) (quoting *Commonwealth v. Zamani*, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998)).

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