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TWISTING SLOWLY, SLOWLY IN THE WIND: THE EFFECT OF DELAY ON A SURETY'S OBLIGATIONS IN VIRGINIA

Michael J. Herbert*

I. INTRODUCTION

It is a commonplace among lawyers that the surety, especially the uncompensated surety, is a favorite of the law whose obligations are strictly construed, and with whose sacred rights no designing creditor dare tamper with impunity. In fact, a more reliable maxim might be that "the [surety's] lot is not a happy one." While at common law any change in the obligation of the principal to the creditor discharges the surety, this rule, in many respects, is quite meaningless; and, even where meaningful, easily circumvented. The consent of the surety to a change in the obligation generally precludes discharge, even when the consent is prospec-

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1. In this article, the term surety is used in the broad sense of the RESTATEMENT OF SECURITY § 82 (1941): "[S]uretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform." As such, the term includes guarantors and most, if not all, endorsers of negotiable instruments. See infra notes 123-39 and accompanying text.


3. See infra notes 5-7 and accompanying text; see also Croughton v. Duvall, 7 Va. (3 Call) 69, 74 (1801) in which the court finds itself suffused with affection for both the surety and the creditor:

[S]ureties are so far favored in equity, that the court will never extend relief against them, further than, by their contract, they are bound at law; but fair creditors are also favorites in that court, and will not be deprived of their legal rights, without some fraud, or neglect in doing what they were bound to do.


5. E.g., Kirschbaum v. Blair, 98 Va. at 40, 34 S.E. at 896; Blanton v. Commonwealth, 91 Va. 1, 20 S.E. 884 (1895). See also U.C.C. § 3-606 (1977) (provisions concerning impairment of recourse and collateral). Note that all citations in this article to the UCC follow the official text, from which there are no material variations in the relevant Virginia text. VA. CODE ANN. § 8.1-101 (Added Vol. 1965). It should also be noted that, at least at common law, this rule applies with somewhat less force to a compensated surety, who is discharged only if the change in the principal's duty materially increases the surety's risk. See RESTATEMENT OF SECURITY § 128(b)(i) (1941).

tive, open-ended, and buried in the fine print of the document evidencing the obligation. Even if the surety has the temerity to refuse consent, an appropriate recitation by the creditor of the ritual "reservation of rights" formula will generally serve to keep the surety bound since, with such a reservation, the surety's recourse against the principal is not terminated.

Moreover, the surety is least protected from what may be the greatest danger it faces: delay by the creditor. The failure of the creditor to pursue the defaulting principal promptly will frequently serve to increase the surety's risk. However, the common law rules providing for discharge of the surety upon a change in the underlying obligation ordinarily do not apply unless the creditor makes a binding agreement which affects the assured obligation, or the collateral. Under most circumstances, such an

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7. See U.C.C. § 3-606 comment 2 (1977): "Consent may be given in advance, and is commonly incorporated in the instrument . . . ." Note, however, that under the UCC, an open-ended consent to extension of time "authorizes a single extension for not longer than the original period" of the obligation. Id. § 3-118(f).

8. E.g., Exchange Bldg. & Inv. Co. v. Bayless, 91 Va. 134, 140-41, 21 S.E. 279, 282 (1895); U.C.C. § 3-606(1)(a) (1977). Note that under the UCC, a mere reservation of rights does not prevent the surety from being discharged because of an unjustified impairment of collateral. Id. § 3-606(1)(b).

9. This is true if we assume, as is probably often the case, that due to the principal's financial difficulties, the creditor originally decided not to sue the principal and subsequently sued the surety when those difficulties increased.

10. E.g., Fidelity & Casualty Co. v. Lackland, 175 Va. 178, 189-90, 8 S.E.2d 306, 310 (1940); Coleman v. Stone's Ex'r, 85 Va. 386, 388, 7 S.E. 241, 241-42 (1888); Croughton v. Duvall, 7 Va. (3 Call) at 73-74. While, in the words of Croughton, "[t] was certainly unkind in Croughton, not to sue when he was requested by the surety, which was . . . a breach of his moral duty . . . .", this unkindness did not discharge the surety. Id. at 74. A limited exception to the rule that mere inaction does not trigger discharge exists for guarantees of collection; the Restatement, at least, requires that the creditor use due diligence in pursuing the principal as a condition of suit against the guarantor. RESTATEMENT OF SECURITY § 130(2) (1941). No such distinction explicitly appears in the UCC's provisions setting out the contract of the guarantor under a collection guaranteed contract. See U.C.C. § 3-416(2) (1977). However, it appears that Virginia recognizes this distinction and requires that due diligence be exercised by the creditor in pursuing the principal prior to suit against the guarantor of collection. See United States v. Houff, 202 F. Supp. 471 (W.D. Va.), aff'd, 312 F.2d 6 (4th Cir. 1962); Cobb v. Vaughan & Co., 141 Va. 100, 126 S.E. 77 (1925). Since the UCC is silent on this issue, the old common law rule presumably is still in effect. See U.C.C. § 1-103 (1977). The distinction drawn by the rule is rooted in the limited nature of the collection guaranteed contract, under which pursuit of the principal is a condition precedent to suit against the guarantor. See infra notes 150-53 and accompanying text.

agreement would have to be supported by consideration. In consequence, it is generally true that mere inaction by the creditor is not, in itself, sufficient to trigger discharge of the surety. This is true even if the inaction is at the debtor’s request, or due to the creditor’s friendship with the principal, so long as no definite and binding agreement to extend is made. It is also true if the principal would have been able to pay at maturity, but subsequently became insolvent. Moreover, in Virginia the surety remains liable even after the statute of limitations has barred the creditor’s claim against the principal. In short, the creditor who smiles benignly upon the default of the principal can, insofar as the case law is concerned, still mercilessly pursue the surety.

In theory, mere inaction by the creditor does not prejudice the surety. Upon the maturity of the obligation, the surety can compel performance by the principal. The surety can also elect to pay the obligation to the creditor, subrogate its rights to the creditor’s


13. E.g., Fidelity & Casualty Co. v. Lackland, 175 Va. at 189, 8 S.E.2d at 310; Ward v. Bank of Pocahontas, 167 Va. at 179, 187 S.E. at 494-95; Humphrey v. Hitt, 47 Va. (6 Gratt.) 509, 523 (1850); Croughton v. Duvall, 7 Va. (3 Call) at 73-74. See also RESTATEMENT OF SECURITY § 130 (1941). But see J. WHITE & R. SUMMERS, supra note 11, § 13-14, at 525-26 (surety can claim discharge when, without his consent and without an “express reservation of rights,” the creditor and debtor have entered into an agreement to extend time for payment).

14. Fidelity & Casualty Co. v. Lackland, 175 Va. at 189-90, 8 S.E.2d at 310-11.

15. See, e.g., Coleman v. Stone’s Ex’r, 85 Va. at 387, 7 S.E. at 241.

16. Updike’s Adm’r v. Lane, 78 Va. at 132, 137 (1883).

17. Weems v. Carter, 30 F.2d 202, 203-04 (4th Cir. 1929) (applying Virginia law); Manson & Shell v. Rawling’s Ex’rs, 112 Va. at 384, 387-88, 71 S.E. 564, 566 (1911). However, in Fidelity & Casualty Co. v. Lackland, 175 Va. at 187-88, 8 S.E.2d at 309-10, the court, in dicta, seemed uncertain about whether this rule applied in Virginia.


19. E.g., Croughton v. Duvall, 7 Va. (3 Call) at 73. See generally, 2 J. STORY, EQUITY JURISPRUDENCES, ch. XXIV, § 1168, at 539 (14th ed. 1918). With regard to traditional practice in Virginia, see 2 C. ROBINSON, THE PRACTICE IN THE COURTS OF LAW AND EQUITY IN VIRGINIA 133-34 (1835) and 2 H. TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 461 (1837). Interestingly, Tucker states that prior to the notice statute discussed in this article, quia timet could be used to compel the creditor to proceed against the principal. Id. Tucker cites no authority for this proposition, and apparently no reported case in Virginia supports it. However, Story also states that quia timet could be used to force the creditor to act, citing precedents from New York and England. 2 J. STORY at 539 n.4. See also Humphrey v. Hitt, 47 Va. (6 Gratt.) at 524-25 (dicta).
rights against the principal, 20 and sue the principal for reimbur-
sement. 21 Unfortunately, the rights of exoneration, subrogation and
reimbursement appear to provide far more protection than they
do. Obviously, these rights are not adequate to protect the surety
from the most significant disaster with which it is threatened by
the creditor’s delay, the insolvency of the principal. If the principal
becomes insolvent, it is obviously impossible for the surety to ob-
tain any effective relief through exoneration, reimbursement or
subrogation. Also, the pursuit of any of these rights requires that
the surety undertake considerable expense and additional risk. If
the surety wishes to obtain reimbursement and subrogate its rights
to the creditor’s, the surety must first pay the creditor and then, in
most circumstances, sue the principal. The surety risks both the
monies it has paid to the creditor and the further expenses it will
incur in the litigation. Although exoneration does not require that
the surety first pay the creditor, as a practical matter, the delays
inherent in litigation may force the surety to reach an accommoda-
tion with the creditor prior to the time that its demand for exonera-
tion can be ruled on by a court. In any event, the surety must
ordinarily bear the costs of suing the principal.

The notion that mere delay does not injure the surety is thus
largely artificial. It probably can be assumed that the creditor’s de-
lay ordinarily occurs because the principal is suffering economic
hardship. Indeed, in some reported cases, the creditor forbore col-
lection precisely because it knew that the principal was in serious
difficulty. 22 It can perhaps also be assumed that creditors are will-
ing to give such forbearance because there is always the surety to
fall back on. 23 The creditor thus consciously and intentionally in-
creases the surety’s risks—risks which cannot be effectively, or at
any rate cheaply, reduced by pursuing exoneration or
reimbursement.

21. E.g., Fidelity & Casualty Co. v. Lackland, 175 Va. at 188-89, 8 S.E.2d at 310;
Croughton v. Duvall, 7 Va. (3 Call) at 73.
23. In Wright’s Adm’r v. Stockton, Justice Carr cited this as a reason for the enactment
of the notice statute:
[T]he mischief this statute was made to remedy, was, that a creditor having his debts
secure, and being careless whether he made it out of the real debtor, or the surety,
would often delay to sue till the debtor became insolvent, and the whole burden was
thrown on the surety, nor had he any mode of protection but by the tedious and
expensive proceeding of a bill quia timet in equity.
32 Va. (5 Leigh) 153, 158-59 (1834) (emphasis in original).
Apparently with the problem of the indolent creditor in mind, Virginia enacted two statutes in 1794 which considerably extended the rights of sureties with regard to both their principals and the creditor.\textsuperscript{24} The first of these, the “notice statute,” gave a surety, upon the maturity of the assured obligation, the right to compel the creditor to pursue its remedies against the principal.\textsuperscript{25} The sec-

\begin{itemize}
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Chap. 8—An ACT concerning debtors and their securities:
\begin{enumerate}
\item Whereas in many instances creditors have delayed to commence actions on bonds, bills, or promissory notes, executed to them for tobacco or money, until the principal debtor or debtors of such creditors either becoming insolvent or migrating from this commonwealth, the innocent securities of such debtor or debtors have been ultimately compelled to discharge the amount of the money or tobacco due by such bill, bond, or note, without the possibility of being afterwards reimbursed by such principal debtor or debtors: For remedy whereof,
\begin{enumerate}
\item Be it enacted by the general assembly, That when any person or persons shall hereafter become bound as security or securities by bond, bill, or note, for the payment of money or tobacco, and shall apprehend that his or their principal debtor or debtors is or are likely to become insolvent, or to migrate from this commonwealth, without previously discharging such bond, bill, or note, so that it will be impossible or extremely difficult for such security or securities after being compelled to pay the amount of the tobacco or money which may be due by such bond, bill, or note, to recover the same back from such principal debtor or debtors, it shall and may be lawful for such security or securities, in every such case, provided an action shall have accrued on such bond, bill, or note, to require by notice in writing of his or their creditor or creditors, forthwith to put the bond, bill, or note, by which he or they may be bound as security or securities as aforesaid, in suit; and unless the creditor or creditors so required to put such bond, bill, or note, in suit, shall in a reasonable time commence an action on such bond, bill, or note, and proceed with due diligence in the ordinary course of law to recover a judgment for, and by execution to make the amount of the tobacco or money due by such bond, bill, or note, the creditor or creditors so failing to comply with the requisition of such security or securities, shall thereby forfeit the right which he or they would otherwise have to demand and receive of such security or securities the amount of the money or tobacco which may be due by such bond, bill, or note.
\item Any security or securities, or in case of his or their death, then his or their executors or administrators, may in like manner and for the same cause make such requisition of the executors or administrators of the creditor or creditors of such security or securities, as it is herein before enacted may be made by a security or securities of his or their creditor or creditors; and in case of failure of the executors or administrators, so to proceed, such requisition as aforesaid being duly made, the security or securities, his or her executors or administrators, making the same, shall have the same relief that is herein before provided for a security or securities when his or their creditor or creditors shall be guilty of a similar failure.
\item Provided always, That nothing in this act contained shall be so construed as to affect bonds with collateral conditions, or the bonds which may be entered into by guardians, executors, administrators, or public officers.
\item And provided also, That the rights and remedies of any creditor or creditors against any principal debtor or debtors, shall be in no wise affected by this act. Anything therein to the contrary, or seeming to the contrary, notwithstanding.
\item This act shall commence and be in force from and after the first day of March,
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ond, which will not be discussed further in this article, gave a surety against whom, or against whose co-surety, execution had issued the right to proceed summarily against the principal. It is not entirely clear what prompted this legislation. The Preamble to the first statute refers to “many instances” in which creditors have delayed to commence actions on bonds, bills, or promissory notes ... until the principal debtor or debtors of such creditors either becoming insolvent or migrating from this commonwealth, innocent securities of such debtor or debtors have been ultimately compelled to discharge the amount ... due by such bill,

which shall be in the year of our Lord, one thousand seven hundred and ninety-five.

1 S. SHEPHERD, STATUTES AT LARGE OF VIRGINIA, ch. 8, at 293-94 (Richmond 1835) [hereinafter cited as SHEPHERD’S STATUTES].

26. Chap. 9—An ACT supplementary to the act, intituled, “An act to empower securities to recover damages in a summary way.”

1. Be it enacted by the general assembly, That in all cases where execution hath been or shall hereafter be awarded or issued in any of the courts of record within this commonwealth, against any person or persons as security or securities, his, her, or their heirs, executors, or administrators, upon any bond, obligation, or recognizance upon which by the laws of this commonwealth execution can be so awarded or issued without judgment, and the amount of such bond, obligation or recognizance, or any part thereof, or the debt or damages due by reason thereof, or any part thereof, hath been paid or discharged under the said execution issued thereon by such security or securities, his, her, or their heirs, executors, or administrators, upon any bond, obligation, or recognizance, or any part thereof, or the debt or damages due by reason thereof, or any part thereof, hath been paid or discharged under the said execution issued thereon by such security or securities, his, her, or their heirs, executors, or administrators, to obtain judgment by motion against such principal obligor or obligors, recognizor or recognizors, his, her, or their heirs, executors, or administrators, in any court where such execution may have been awarded or issued against such security or securities, his, her, or their heirs, executors, or administrators.

2. And be it further enacted, That where the said principal obligor or obligors, recognizor or recognizors, have or hereafter shall become insolvent, and there have been, or shall be two or more securities jointly bound with the said principal obligor or obligors, recognizor or recognizors, in any such bond, obligation, or recognizance, and execution shall be awarded or issued thereon against one or more of such securities, and his or their legal representatives, it shall and may be lawful for the court in which such execution was awarded or issued, upon motion of the party or parties, his or their legal representatives, against whom execution hath been awarded or issued as aforesaid, to award or issue execution against all and every of the obligors and recognizors, and their legal representatives, for their and each of their respective shares and proportions of the said debt or damages due by reason of the said obligation or recognizance: Provided always, That no judgment shall be obtained or execution awarded or issued by motion as aforesaid, unless the party or parties against whom the same is prayed, shall have ten days previous notice in writing thereof.

3. All judgments entered, and executions awarded and issued by virtue of this act, shall be enforced under the like regulations with judgments under the act, intituled, “An act to empower securities to recover damages in a summary way.”

4. This act shall commence and be in force from and after the passing thereof.

SHEPHERD’S STATUTES, supra note 25, ch. 9, at 295.
bond, or note without the possibility of being afterwards reimbursed . . . . 27

Virginia’s notice statute was apparently the first enactment of its kind 28 and was, for a period of time, almost unique. 29 Curiously, however, this particular protection given to the surety upon delay has become known as the “Pain v. Packard” doctrine. 30 This name derives from a somewhat similar common law right which was tardily created by New York in 1816. 31 The statute differs significantly from the common law rule, 32 which is not recognized in Virginia. 33 The name, however, has stuck; Pain v. Packard it was, Pain v. Packard it is likely to remain.

Pain v. Packard itself required merely "a special request, by the surety, to proceed to collect the money from the principal [and] . . . loss of the money, as against the principal, in consequence of [the creditor’s] neglect." 34 Virginia’s statute however, is much more technical, as are similar statutes in other states. 35 Although the statute has been tinkered with repeatedly over the years in its present form it remains very similar to the original enactment. 36 To-

27. Id. ch. 8, at 293-94.
28. Apparently, the earliest statutes regarding this matter were enacted in Alabama, Arkansas, Georgia, Illinois, Indiana, Missouri, Ohio, Tennessee, Texas, and Virginia. 1 T. Parsons, A TREATISE ON THE LAW OF PROMISSORY NOTES AND BILLS OF EXCHANGE, ch. VII, 237-38 n.r (Philadelphia 1869). Of the jurisdictions enumerated, only Georgia and Virginia were states in 1794. Georgia’s statute was enacted in 1826 (Laws 1826, Cobb’s 1851 Digest 595). See also Comment, The Doctrine of Pain v. Packard, 37 YALE L.J. 971, 972 (1927) (stating that “contrary to the general impression, the [Pain v. Packard] doctrine was first formulated by a Virginia statute in 1794.”). No authority is cited in the Comment for this statement.
29. However, in 1801 Tennessee adopted a statute apparently modeled on that of Virginia. Tenn. Laws 705 (Scott 1821). See also Comment, supra note 28, at 972 n.4.
30. E.g., Comment, supra note 28, at 971.
32. For example, the statute requires written notice. See infra note 37 and accompanying text. The original Pain v. Packard rule did not. Comment, supra note 28, at 977-78.
33. Croughton v. Duvall, 7 Va. (3 Call) at 72-74.
35. See generally Comment, supra note 28, at 977-79.
36. The current version reads:

§ 49-25. Surety may require creditor to sue.—The surety, guarantor or endorser, or his committee or personal representative, of any person bound by any contract may, if a right of action has accrued thereon, require the creditor or his committee or personal representative, by notice in writing, to institute suit thereon, and if he be bound in a bond with a condition, or for the performance of some collateral undertaking he shall also specify in such requirement the breach of the condition or undertaking for which he requires suit to be brought. Such written notice shall also notify the creditor, his committee or personal representative, that failure to act will result in the loss of the surety, guarantor or endorser, his committee or personal representative as security for the debt in accordance with § 49-26 of the Code of Virginia.
day the law requires that the surety, guarantor or endorser make written demand on the creditor to institute suit against the debtor. The notice can be given at any time after a "right of action" has accrued on the underlying contract. The notice must inform the creditor that failure to proceed against the principal as required under the statute will result in discharge of the surety. As indicated, notice imposes upon the creditor the obligation to institute suit on the underlying obligation. Suit must be brought "within 30 days after such requirement" against every party to "such contract" who is resident in Virginia and not insolvent. The action must be prosecuted "with due diligence to judgment and by execution." The creditor's failure to comply with these requirements causes a forfeiture of "his right to demand of such surety . . . or . . . his co-sureties . . . the money due . . . or the damages sustained . . . ." The statute is deceptively simple. In fact, there are a number of significant ambiguities in the text, few of which have been adequately addressed by the Virginia Supreme Court. The relative paucity of cases is puzzling in light of the law's antiquity and the presumed frequency of suretyship contracts. It may be, however, that sections 49-25 and 49-26 of the Virginia Code, and the breadth of their potential application, are not widely known or understood.

§ 49-26. Effect of failure of creditor to sue.—If such creditor, or his committee or personal representative, shall not, within thirty days after such requirement, institute suit against every party to such contract who is resident in this State 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, guarantor or endorser or his estate, and of his cosureties and their estates, the money due by any such contract for the payment of money, or the damages sustained by any breach of the collateral condition or undertaking specified as aforesaid; but the conditions, rights and remedies against the principal debtor shall remain unimpaired thereby.

38. Id.
39. Id.
40. Id. § 49-26 (Repl. Vol. 1980).
41. Id.
42. Id.
43. Id. This phrase creates a slight but insignificant ambiguity regarding the application of the forfeiture provision to co-guarantors and co-endorsers.
44. For example, attorneys representing endorsers of negotiable instruments may not realize the significance of the notice statute's applicability to them. See infra notes 120-37 and accompanying text. But see infra note 144.
II. Surety's Obligations

It should first be emphasized that the courts have repeatedly held the Virginia notice statute to be the exclusive means by which a surety can claim discharge because of mere delay. A series of cases during the late nineteenth century illustrates this principle very well. In each of these cases, the underlying obligation was more than twenty years old when suit was commenced against the surety. In part, the delay had been caused by the Civil War and the Reconstruction and, because of the stay law period (period from April 17, 1861 to January 1, 1869, during which the running of the statute of limitations was suspended), the limitations period which then applied to the obligations assured did not run for many years. However, it is equally true that in each case the creditor had a substantial period of time before or after the stay law period in which to bring suit against a debtor. Indeed, given the extraordinary lapse of time it is not surprising that in every case, the sureties were dead and the actions were taken against their estates.

In none of these cases did the court find the defense of laches sufficient; however, dicta in two cases suggests that, in proper circumstances, a laches defense might be available. The court noted that there was a sufficient excuse for the delay in each case. In the last of this group of cases, however, the court seems to hold that laches could never be a defense in an action by a creditor against a surety. Modern rulings unequivocally confirm this.

45. E.g., Alexander's Heirs v. Byrd, 85 Va. 690, 8 S.E. 577 (1889); Coleman v. Stone's Ex'r, 85 Va. 386, 7 S.E. 241 (1888); Coles' Adm'r v. Ballard, 78 Va. 139 (1883); Updike's Adm'r v. Lane, 78 Va. 132 (1883).
46. Alexander's Heirs v. Byrd, 85 Va. 690, 8 S.E. 577 (demand obligation created in 1849; suit against surety commenced in 1874); Coleman v. Stone's Ex'r, 85 Va. 386, 7 S.E. 241 (demand obligation executed in 1861; suit against surety commenced in 1886); Coles' Adm'r v. Ballard, 78 Va. 139 (demand obligation created in 1844; suit against surety commenced in 1877); Updike's Adm'r v. Lane, 78 Va. 132 (suit on bond payable in 1847 not barred when brought in 1876).
47. See, e.g., Updike's Adm'r v. Lane, 78 Va. at 135.
50. In Updike's Adm'r v. Lane the court states that there were “ample excuses” but is reticent about what they were. 78 Va. at 138. In Coles' Adm'r v. Ballard the creditor had received regular interest payments for 28 of the 33 years the obligation was outstanding. 78 Va. at 140.
51. Alexander's Heirs v. Byrd, 85 Va. at 699, 8 S.E. at 581. Even Alexander's Heirs vacil-
only the surety who has given the required written notice to the creditor can be discharged because of the creditor’s delay in pursuing the principal. "The statute makes it the business of the sureties to keep a watch upon their principal: the creditor is not obliged to move, till he receives notice . . . ." What exactly is meant “by notice in writing, to institute suit thereon”? At least one case has imposed strict limitations on the content of the notice, although theoretically courts are to follow a rule of substantial compliance with the statutory requirements. Edmonson v. Pott’s Administrator can be interpreted as saying that the notice given the creditor by the surety must unequivocally call for the commencement of litigation against the principal and other parties; a mere indication of the surety’s wish that the creditor take such action is insufficient to trigger the creditor’s obligation to act under the notice statute. Gregory, the administrator of the surety’s estate, had written to the creditor on two occasions concerning the assured obligation. The administrator had also “frequently talked” with Faulkner, the president of the bank that held the note, formerly the decedent’s attorney. The evidence was ambiguous concerning the content of these letters and conversations. The administrator variously characterized them as requests to “[bring] suit against Mr. Cogbill [who seems to have been a co-

lates on this issue. The case may be interpreted to say that the relatively short time gap between the cessation of payments by the principal and commencement of legal proceedings to recover the debt precluded the laches defense. Id. at 698, 8 S.E. at 581.

52. Fidelity & Casualty Co. v. Lackland, 175 Va. at 188-89, 8 S.E.2d at 310; Ward v. Bank of Pocahontas, 167 Va. at 179, 187 S.E. at 495.


56. Edmonson v. Potts’ Adm’r, 111 Va. 79, 82, 68 S.E. 254, 256 (1910).

57. Id. at 82-83, 68 S.E. at 256.

58. Id. at 80-82, 68 S.E. at 255-56. The decedent, Potts, had signed the note in question as an endorser along with Harris and Cogbill; all were apparently accommodation endorsers, a type of surety. See infra notes 121-23 and accompanying text.

59. Edmonson v. Potts’ Adm’r, 111 Va. at 80-81, 68 S.E. at 255.
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60. Id. Contra infra note 67.
61. Edmonson v. Potts' Adm'r, 111 Va. at 81, 68 S.E. at 255.
62. Id.
63. Id.
64. Id.
65. Id. at 82, 68 S.E. at 256.
parties to the obligation, not merely the principal—this should not matter. In any event, the court did not give Cogbill’s status as a mere co-surety as its reason for finding the notice inadequate, and, in fact, Cogbill may not have been a mere co-surety. The court said only “neither was the direction or request in the letter to bring suit against Cogbill, one of the parties to the note, a clear and explicit requirement to sue upon the note.” It is not clear whether the court is requiring one, or all, of three possible courses of action; first, that the surety must demand that the creditor pursue the principal, second, that the surety demand that the creditor pursue all parties, or third, that a request “to sue” is insufficient and the notice must be worded as a request “to sue on the note.” It is difficult to justify so stringent a rule. It can be safely assumed that the creditor knows the principal owes it money and that ordinarily creditors are not averse to suing principals who are in default. Accordingly, any notice which reasonably indicates the surety’s wish that the creditor do what it would ordinarily do—sue the principal—should suffice. A more persuasive rationale may be that Cogbill was apparently not solvent at the time of the demand upon the creditor, and the statute only requires that solvent parties be sued. Moreover, there is some indication that the

66. See infra notes 74-79 and accompanying text.

67. At one point, the case refers to Potts as having “paid Mr. Coghill his share of the note,” Edmonson v. Potts Adm’r, 111 Va. at 80, 68 S.E. at 255, which could be read to mean either that Cogbill was to have assumed Potts’ liability or that Cogbill was in some way a principal who directly received some of the money evidenced by the note. The note was payable by Mecklenburg Live Stock Company to Potts, who endorsed it with Cogbill and a third man, Harris.

68. Id. at 82, 68 S.E. at 256 (emphasis in original).

69. Arguably, adoption of this principle would not have changed the outcome in Edmonson, because the party the administration wished to be sued was not a principal. Under normal circumstances, however, a creditor would pursue all solvent, resident parties; thus, any demand reasonably indicating the surety’s desire that the creditor do this should be adequate under the notice statute.

70. It must be noted, however, that many cases in other states have examined the specificity required in the notice given to the creditor; it is a fair generalization that a high degree of clarity is required. E.g., Williams v. Zimmerman, 124 W. Va. 458, 20 S.E.2d 785 (1942) (notice “to collect” on a note held inadequate under West Virginia’s notice statute, a lineal descendant of Virginia’s statute). See generally Comment, The Doctrine of Pain v. Packard, 37 YALE L.J. 971, 979 n.42 (1928); Annot., 30 A.L.R. 1285 (1924). As the Yale Comment notes, this hardly comports with the notion that sureties are “favored creatures of the courts.” Comment, supra, at 982. But then, very little suretyship law does.

71. This point, like most others in the case, remains a rustic obscurity; however, we are informed that at the time the administrator asked the bank to sue the luckless Cogbill, “Mr. Cogbill had already gotten into his troubles.” Edmonson v. Potts’ Adm’r, 111 Va. at 81, 68 S.E. at 255.

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The creditor receiving the notice faces several problems. First, whom must it sue? Second, what is meant by prosecuting the suit with "due diligence"? Third, what is meant by prosecuting the suit "by execution"?

The first question has been most recently addressed by a decision of the Court of Appeals for the Fourth Circuit in *Colonial American National Bank v. Kosnoski*. In that case, Colonial American National Bank ("Colonial") advanced credit to Edward G. Frye, John Barbour Frye, and the Frye Building Company. The obligations were evidenced by documents signed variously by the Frys, Frye Building Company, and the Frys' spouses, Ruth Townes Frye and Ernestine C. Frye. Prior to the consummation of the loans, Kosnoski, an investor in Frye Building Company, executed a guarantee agreement assuring payment of $150,000. After the obligations fell into default, suit was brought against Kosnoski on this guarantee. After suit was filed, Kosnoski gave notice to Colonial to sue each maker, guarantor, and endorser of the obligations. This the bank failed to do. Since Ruth Townes Frye was the only party to any of the transactions who was, at the time, a solvent Virginia resident, the question became whether Colonial's failure to sue her triggered the forfeiture provisions of section 49-26. The court ruled that it did.

The implications of the case are significant. Although the exact status of the spouses was somewhat ambiguous, it is clear that

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73. Edmonson v. Potts' Adm'r, 111 Va. at 81, 68 S.E. at 255.
74. 617 F.2d 1025 (4th Cir. 1980).
75. Id. at 1027.
76. Id.
77. Id.
78. Id. at 1026.
79. Id. at 1027. See also Edmonson v. Potts' Adm'r, 111 Va. 79, 68 S.E. 254 (1910).
80. Both signed a loan agreement that required the obligation to be "personally guaranteed" by the spouses, among others. The court glosses over the question of whether Ruth Townes Frye ever entered into an actual contract of guaranty with the bank. Colonial Am. Nat'l Bank v. Kosnoski, 617 F.2d at 1026-27.
they were not viewed as principals by any party to the transaction. However, the majority interpreted the requirement of section 49-26 that the creditor "institute suit against every party to such contract" to mean that suit must be brought against not only the principal, but also other sureties, guarantors, or endorsers of the underlying obligation. It should be noted that the court did not discuss whether this would be true in the absence of an express demand by the surety giving notice that parties other than principals be sued by the creditor, since the demand made by Kosnoski explicitly demanded that the bank sue the guarantors.

One judge dissented from the opinion, primarily on the grounds that the spouses were neither principals with regard to the primary obligation, nor was their contractual relationship vis-à-vis Kosnoski similar to a principal/surety relationship. The dissent seems to miss the point. It is quite possible that the notice statute was originally intended solely to protect sureties with regard to principals. When the statute was amended in 1849, however, a provision was added requiring the institute of suit against "every party to such contract." It is thus logical to infer that the statute, as amended, encompasses persons other than the principal. Perhaps more importantly, the goal of the statute, which is to protect sureties against a creditor's delay, cannot be fully effectuated un-

81. Id.
82. Id. at 1027.
83. A requirement that the notice explicitly demand that the creditor sue co-sureties should not be imposed since section 49-25 merely refers to the right of "any person bound by any contract" to demand that the creditor "institute suit thereon." Va. Code Ann. § 49-25 (Repl. Vol. 1980). There is no express requirement that the notice include the names of the persons to be sued; nor is there any reason to imply such a requirement, since presumably the creditor knows who they are. Section 49-26 states that the creditor must "institute suit against every party to such contract." Id. § 49-26 (Repl. Vol. 1980). It does not say that the creditor need only sue the parties expressly named in the notice. However, cases from other states hold to the contrary. E.g., W. T. Rawleigh Co. v. Moore, 196 Ark. 1148, 121 S.W.2d 106 (1938). See generally Annot., 30 A.L.R.4th 285 (1984). Some of these cases, including W. T. Rawleigh Co., can be distinguished, since the statutes they interpreted referred to suit against the principal, not on the contract. W. T. Rawleigh Co. v. Moore, 196 Ark. at ___, 121 S.W.2d at 108.
85. This is indicated by the preamble to the original enactment, which refers to the danger of principals' "either becoming insolvent or migrating from this commonwealth . . . ." See supra note 25.
88. This reasoning is espoused by the majority. Colonial Am. Nat'l Bank v. Kosnoski, 617 F.2d at 1027.
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less co-sureties are also sued. The Colonial American National Bank dissent turns largely upon the phrase “to the contract” which it reads as referring to the obligation assured. It reasons that since the surety does not assure the obligation of a co-surety, the statute should not apply.

The reasoning of the dissent, however, is rather artificial. A co-surety may very well find itself liable for the entire obligation if the obligations of the co-sureties are joint and several. If each surety assures the entire debt, the creditor may exercise virtually unlimited discretion in selecting which co-surety or co-sureties it will sue. Of course the surety may pay the creditor and pursue its right of contribution against co-sureties, but, as a practical matter, the same problems which impinge upon the surety’s rights against the principal also adversely affect its rights against co-sureties. If a previously solvent, but now insolvent co-surety is unable to make contribution to the co-surety who paid the obligation because of the creditor’s failure to pursue the co-surety diligently, the right of contribution joins the rights of exoneration, subrogation and reimbursement as yet another faded memento of the courts’ purported tenderness toward sureties. And, as is true with those rights, in seeking contribution the surety must undertake the risk of paying the creditor and/or the expense of suing the co-surety. Since these problems are virtually identical to those faced by the surety with regard to the principal, the formalistic distinctions between the surety/principal and co-surety/co-surety relationship are largely irrelevant and should not be read into a statute which is amenable to a more realistic interpretation. Put simply, the majority’s position best effectuates the statutory purpose, and nothing in the language of the statute precludes this reading of it. It is also significant that sections 49-25 and 49-26 of the Virginia Code are remedial statutes, and, as such, are to be construed liberally.

A more telling objection to Colonial American National Bank is

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89. Id. at 1027-38 (Murnaghan, J., dissenting).
90. Id.
91. Restatement of Security § 144 (1941).
92. Of course, since each co-surety is liable for the entire obligation assured, the creditor may pursue each one independently.
93. Restatement of Security § 149 (1941).
94. “[T]he object of the statute being protection to the sureties, we must to that end give it a liberal construction . . . [looking to] . . . the object and reason of the law . . . .” Wright’s Adm’r v. Stockton, 32 Va. (5 Leigh) 153, 159 (1834).
that it imposes an excessive penalty upon the creditor for failure to join parties who could have been just as readily joined by the defendant. The case itself involved notification given after the guarantor, Kosnoski, had been sued by the creditor. 95 Colonial apparently could have joined Ruth Townes Frye as a defendant but failed to do so. Once the suit was filed, however, Kosnoski could also have impled her as a third party defendant. 96 Under these circumstances, it is difficult to justify imposing a forfeiture upon the creditor. The purpose of the notice statute is to protect the surety against the creditor's delay in pursuing other parties. In the co-surety situation, the risk is that the surety will not be able to effectively obtain contribution from the co-surety. Since Kosnoski could have effectuated his right of contribution by impleading Ruth Townes Frye, and could have done so as quickly and cheaply as Colonial could have by amending its complaint to join her as a defendant, there was no logical reason to penalize Colonial so severely. Its "fault" was merely its initial failure to join a party, and the resultant loss of all rights against Kosnoski was too extreme a sanction. 97 It is somewhat difficult to justify this rule under the literal wording of the notice statute. However, an appeal to the statute's remedial purpose, which is clearly accomplished in this situation by impleader, and an appeal to the tradition of interpreting the notice statute in accordance with its purpose, 98 might per-

95. Kosnoski was sued on December 8, 1977, and gave notice to the bank to sue the other parties on February 15, 1978. Colonial Am. Nat'l Bank v. Kosnoski, 617 F.2d at 1027.

96. The surety, Ruth Townes Frye, could have been sued by Kosnoski for contribution.

[A]t any time after commencement of the action a defending party, as the third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. FED. R. Civ. P. 14(a). See also VA. R. Ct. 3:10A, which is substantially identical.

97. It should be noted, however, that under the Colonial Am. Nat'l Bank rule, all co-sureties are probably necessary parties, or more accurately "persons to be joined if feasible." FED. R. Civ. P. 19; see also VA. R. Ct. 3:9A. The simple reason for this rule is that, since failure to pursue any co-surety would lead to the discharge of all co-sureties, the absence of any co-surety would preclude the court from providing "complete relief . . . among those already parties." Hence, the surety may either implead the other parties or force the creditor to amend and name the other parties as co-defendants. The co-sureties are probably not indispensable parties, since the court could limit the relief granted by conditioning the creditor's rights against each surety upon ultimate compliance with the notice statute. In any event, it is very unlikely that an indispensable party problem could arise, since generally the only sureties who could not be joined would be non-residents who do not have to be sued under the notice statute anyway.

98. E.g., Yuille's Adm'r v. Wimbish's Adm'r, 77 Va. 308 (1883); Wright's Adm'r v. Stockton, 32 Va. (5 Leigh) 153 (1834).
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The question of what constitutes "due diligence" has been left almost entirely unresolved by the courts. Early versions of the notice statute did not set an absolute time limit within which suit had to be filed, but merely required that it be filed within a reasonable time. Only a few cases discussed whether suit had been timely filed. This issue has been resolved by the imposition of a requirement that suit be filed within thirty days. However, the retention of the due diligence requirement after the imposition of an absolute time limit for filing suit indicates that "due diligence" refers to more than the mere timeliness of the action. Given the remedial purposes of the statute, it is logical to assume that the due diligence requirement imposes a significant duty of care on the creditor. The creditor must insure that all viable legal and equitable remedies against the principal are sought, that the attorneys hired by the creditor are competent, and that all reasonably necessary expenses are undertaken in conducting the litigation against the principal. It is unclear whether the creditor's presumed due diligence duty to obtain competent counsel should be measured by a negligence standard or by an absolute standard. In other words, should the creditor suffer a forfeiture because of the malpractice of its own attorneys? If the standard is merely one of negligence, the creditor would suffer the forfeiture only if its selection of the attorney was negligent. On the other hand, if the obligation were absolute, even the creditor who carefully selected an attorney would suffer a forfeiture should the attorney prove to be inept. The creditor would then be left with only a malpractice action against the attorney. The negligence standard seems more appropriate; after all, the risk against which the surety is protected is inaction by a creditor confident of its surety's solvency, not against the more remote risk that a creditor, actively and in good faith seeking collection, would accidentally hire an incompetent attorney.

A final interpretive issue with regard to the creditor is the meaning of the phrase "prosecute . . . by execution." Obviously, this means that the creditor must pursue post-judgment collection pro-

100. Some general support for this proposition can be found in analogous cases requiring due diligence against the principal as a condition precedent to recovery on a collection guaranteed contract. See Fidelity & Casualty Co. v. Lackland, 175 Va. 178, 8 S.E.2d 306 (1940).
ceedings unless there are no significant assets subject to seizure.\footnote{101}{In most cases, such a requirement would mean that the creditor need not sue even the principal, who presumably would be insolvent.} The phrase “by execution” is, however, somewhat ambiguous. In Virginia, execution refers merely to the first stage of post-judgment proceedings regarding personalty.\footnote{102}{See generally D. Rendleman, Enforcement of Judgments and Liens in Virginia 41-167 (1982).} Intangible personal property located anywhere in Virginia is subject to the lien of execution immediately upon delivery of the \textit{fiere facias} (fi. fa.) writ to the sheriff in the county where the judgment was taken.\footnote{103}{Va. Code Ann. § 8.01-501 (Repl. Vol. 1984).} With regard to tangible personal property, the procedure is a bit more complex. The judgment creditor can execute on tangible personal property by delivering the \textit{fi. fa.} writ to the sheriff of the county in which the personalty is located;\footnote{104}{Id. § 8.01-466.} however, delivery does not create an execution lien.\footnote{105}{D. Rendleman, supra note 102, at 59-60.} The lien is created only by the sheriff’s actual levy on tangible property in that county.\footnote{106}{Va. Code Ann. § 8.01-478 (Repl. Vol. 1984).} Moreover, the mere creation of the execution lien does no more than that; it does not, by itself, satisfy the judgment debt. With regard to intangibles, the creditor must further pursue garnishment,\footnote{107}{See generally D. Rendleman, supra note 102, at 106-67.} whereas for tangibles, a sheriff’s sale is necessary.\footnote{108}{Id. at 90-93.}

A literal reading of this provision appears to say that in order to meet its obligations, the creditor would only have to obtain a judgment and execute upon personal property, leaving real property and, in effect, tangible personal property, untouched. Moreover, the creditor then could slink back into contented slumber and permit the principal to fritter away its assets. The surety would be left in the same position as it was before. This obviously would be an absurd result. A far better reading of this provision is that the creditor must undertake the types of reasonable collection efforts which it would undertake in the absence of the suretyship agreement.\footnote{109}{After all, the purpose of the notice statute is to preclude a creditor from relying unfairly on the surety. See supra note 23.} This would include garnishment of intangible property, sale of tangible personalty and, in appropriate cases, the creation and foreclosure of a judgment lien on real estate.\footnote{110}{Should the principal seek protection under the Bankruptcy Code, 11 U.S.C. §§ 101-}
tion for such a requirement is the "due diligence" standard; mere passive execution is hardly "diligent." A more significant justification is found in the purpose of the notice statute, which is intended to prevent a creditor from showing unreasonable mercy to a debtor merely because there is still a surety available to sue. It is highly unlikely that a rational creditor would fail to pursue vigorously all the debtor's significant unencumbered non-exempt assets if there were no other way to get paid. A desultory collection action should thus trigger forfeiture. Conversely, the creditor should not be required to pursue property of trivial value at disproportionate expense. The test should be a simple one: did the creditor act much as it would were there no surety? If so, there should be no forfeiture. 111

IV. WAIVER AND CONSENT

Creditors should note that the notice statute can be neutralized by extending the time in which the principal has to pay the obligation. The surety's right to give notice arises only when "a right of action has accrued" on the assured obligation. 112 Although there are no Virginia cases directly on point, apparently once a binding extension agreement is made, the surety loses its power to require the creditor to sue. Also, as noted previously, if the surety has consented to the extension, 113 or if the creditor has properly reserved rights against the surety, 114 the surety will remain bound.

Can the surety also waive its rights under the notice statute? It is not uncommon to find provisions consenting to extensions of time lurking in the boilerplate of an instrument encompassing a suretyship contract, 115 and such provisions are usually upheld under the Uniform Commercial Code. 116 In effect, courts assume

111. This would adequately effectuate the purposes of the law set out in Wright's Adm'r v. Stockton, 32 Va. at 170-72, 5 Leigh at 158-59. Virtually the only useful Virginia case on this problem, Harrison's Ex'r v. Price's Ex'r, 66 Va. 477, 25 Gratt. 553 (1874), can be read to support this approach. In Harrison's Ex'r, the creditors were excused from executing on the judgment because the stay law precluded them from doing so. Significantly, they vigorously sought issuance of the ft. fa. Id. at 480, 25 Gratt. at 561-62.
113. See supra notes 6-7 and accompanying text.
114. See supra note 8 and accompanying text.
115. Indeed, the UCC practically encourages this practice. See supra note 7.
116. Id.
that the consent or waiver is voluntary and knowing, and have not yet used unconscionability to void boilerplate waivers. Given the traditional willingness of courts to let the surety casually sign away all its suretyship rights, it may well be that the rights under the notice statute will be equally fragile. Thus, by inserting one line of fine print: “and all endorsers, guarantors and sureties, waive their right to require the creditor to institute legal proceedings on this obligation against the other parties to this obligation,” a creditor may be able to gut the notice statute. What little case law exists in other states generally upholds such waiver provisions if the provisions are drafted in a reasonably clear manner. While it is true that widespread use of standard waiver provisions would seriously weaken or even nullify the surety’s rights under the notice statute, it is difficult to view that effect as substantially different from the well-accepted evisceration of the surety’s other rights. In other words, since a reasonably clear waiver/consent provision which is not unconscionable is effective as to impairments of recourse or collateral, it should also be effective as to the notice statute. The only possible counter-argument is that notice statute rights should receive special protection because they are the surety’s realistic protection against favoritism by the creditor toward the principal, as opposed to the collateral/recourse, waiver/consent provisions, which merely give the creditor needed flexibility. This is highly unconvincing, because impairments of recourse or collateral can also occur as a result of favoritism. It would be far more logical to re-examine the entire waiver/consent question under the rubrics of good faith and unconscionability.

117. It is not known whether such a waiver clause is being widely used in Virginia; at least one Virginia form book includes model provisions for guaranty and accommodation party contracts which do not include explicit waivers of rights under the notice statute, although some contain general language which could be construed as a waiver of those rights. See 3 J. Edmonds, Virginia Practice, Uniform Commercial Code Forms Annotated 515-20 (1968). It should be noted that this type of provision will not make a note or draft non-negotiable. U.C.C. § 3-112(1)(e) (1977).


119. See supra notes 5-7 and accompanying text.

120. There is nothing intrinsically objectionable about a surety waiving its rights; the problem is that many waivers probably are unintentional because the waiver is buried in obscure boilerplate. The following is a typical example of provisions in a guaranty contract which gut the guarantor’s rights:
V. RELATIONSHIP OF THE NOTICE STATUTE TO ARTICLE 3 OF THE UNIFORM COMMERCIAL CODE

A final problem which has never been explored in case law is the relationship of the notice statute to the provisions of Article Three of the Uniform Commercial Code. Three issues are presented. First, do the benefits of the statute extend to parties other than "accommodation parties"? Second, how do the provisions of the statute relate to the Uniform Commercial Code's provisions on the liability of endorsers? Third, has the statute been superseded with regard to guarantors by the provisions of section 3-416 of the Uniform Commercial Code that define two types of contract obligations undertaken by guarantors?

The first of these questions relates fundamentally to the scope of the statute, which refers to "the surety, guarantor or endorser." However, under the Uniform Commercial Code, there are two types of endorsers—accommodation endorsers and nonaccommodation endorsers. The accommodation endorser is one "who signs the instrument . . . for the purpose of lending his name to another party to it." Put very simply, the accommodation endorser is a surety, signing for the purpose of lending its credit to another party. However, this is not the only reason for endorsing a negotiable instrument. Negotiable instruments are also endorsed

No renewal or extention [sic] of the instrument, no release or surrender of any security for the instrument, nor release of any person, primarily or secondarily liable on the instrument, no delay in the enforcement of the payment of the instrument, and no delay or omission in exercising any right or power under the instrument shall affect the liability of the undersigned. The liability of the undersigned on this guaranty shall be direct and not conditional or contingent on the pursuit of any remedies against any maker, endorser, or any collateral held as security for the payment of the above instrument. The undersigned expressly waive presentment, protest, demand, notice of dishonor or default, notice of acceptance of this guaranty, and notice of any kind with respect to the above instrument or the performance of the obligations under the instrument.

1. R. ANDERSON, UNIFORM COMMERCIAL CODE, LEGAL FORMS § 2094, at 580-81 (2d ed. 1974). It is unlikely that most guarantors understand much of its meaning. The courts' tendency to ignore this reality unfortunately finds support in the UCC. See supra note 7.

121. Article Three of the UCC governs negotiable instruments and contains provisions governing the contract of an endorser (§ 3-414), the contract of an accommodation party (§ 3-415) and the contract of the guarantor (§ 3-416).


123. As noted below, accommodation endorsers are clearly sureties. Non-accommodation endorsers also may be sureties. See infra notes 128-30 and accompanying text.


125. See supra note 1; see also J. WHITE & R. SUMMERS, supra note 11, § 13-12, at 516.
to negotiate them to a subsequent holder\textsuperscript{126} or to place restrictions upon the transferee.\textsuperscript{127} Should an endorser who has not endorsed as an accommodation party, and is not merely a surety in the traditional sense, enjoy the benefits of Virginia Code sections 49-25 and 49-26? Generally, the best answer to this question is yes. Obviously, the statute itself does not distinguish between endorsers and accommodation endorsers. More importantly, all endorsers, or at least all endorsers who do not sign “without recourse,”\textsuperscript{128} are in some sense sureties. Except where the endorser signs without recourse, the “endorser engages that upon dishonor and any necessary notice of dishonor \ldots he will pay the instrument according to its tenor at the time of his endorsement \ldots .”\textsuperscript{129} The endorser is a secondary party who becomes liable only if the drawee, in the case of a draft,\textsuperscript{130} or the maker, in the case of a note,\textsuperscript{131} dishonors

\begin{itemize}
  \item \textsuperscript{126} If a negotiable instrument is made in “order” form, such as “pay to the order of John Smith,” it must be endorsed to be negotiated. U.C.C. § 3-202 (1977). The person who receives the instrument by negotiation is defined as a holder by section 3-202(1). \textit{Id.}
  \item \textsuperscript{127} A restrictive endorsement, as defined in section 3-205, can have the effect of limiting further negotiation of the instrument by requiring that a condition be met prior to payment. \textit{See generally, J. White \& R. Summers, supra note 11, § 13-10, at 513-15.}
  \item \textsuperscript{128} Under U.C.C. § 3-414(1) (1977), the endorsement contract is not made by an endorser who uses the words “without recourse.” Consequently, such an endorser does not have secondary contractual liability on the instrument. It is thus at least arguable that the “without recourse” endorser ought not to be treated as a surety, either in general or for the purpose of the notice statute. However, even this endorser can be liable on the instrument under the transfer warranties contained in U.C.C. §§ 3-417(2) and 4-207(2) (1977). In many circumstances, the making of these warranties could fit the endorser under the very broad definition of a surety contained in the Restatement. \textit{See supra} note 1. For example, under U.C.C. §§ 3-417(2)(a) and 4-207(2)(a), the endorser warrants that “he has a good title to the instrument \ldots .” This warranty will be breached anytime there is a break in the chain of title (as by a forged endorsement). \textit{See J. White \& R. Summers, supra note 11, § 15-5, at 597-98. All of the endorsers after the break in the chain of title will be liable to each subsequent endorser and other holder for breach of the same warranty, because liability runs to all subsequent transferors of the instrument, if the transfer is by endorsement. \textit{See U.C.C. § 3-417(2); see also J. White \& R. Summers, supra note 11, § 15-5, at 597-98. Thus, while the holder of the instrument could sue any of the endorsers after the break in the chain of title, if it does not sue the first endorser who breached the warranty of good title, the endorser it does sue can then sue that first endorser and, if that endorser is solvent, impose the ultimate loss upon it. In this circumstance, the fundamental structure of a suretyship relation remains. \textit{See supra} note 1. Thus, only the endorser who signs without recourse and who is the first endorser breaching a warranty of transfer cannot credibly be considered a surety, at least in the very broad Restatement sense of that term. \textit{Id.}
  \item \textsuperscript{129} U.C.C. § 3-414(1) (1977).
  \item \textsuperscript{130} The party who orders the draft to be paid is a drawer; the party who is to pay in the first instance is the drawee. \textit{J. White \& R. Summers, supra note 11, § 13-9, at 501-02.}
  \item \textsuperscript{131} The primary party on a note is the maker. U.C.C. § 3-413(1) (1977); \textit{J. White \& R. Summers, supra note 11, § 13-7, at 498-99.}
\end{itemize}
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the instrument by failing to pay or accept.132 The assumption of the parties to the transaction is that the drawee or maker will pay the instrument. It is the failure of the drawee or maker to do so that gives the holder133 the right to pursue the endorser. This is very similar to the situation of a guarantor.134 Further, as a practical matter the situation of the endorser resembles that of the surety, who in the traditional view was technically a primary obligor,135 but who will ordinarily be pursued only after the principal is in default.136 Moreover, unless otherwise agreed, all endorsers have the right under the Virginia Code to recover monies paid on the instrument from prior endorsers137 and from the primary obligor.138 Thus the "suretyship paradigm"—an obligation which two parties owe but for which only one is ultimately responsible, is met.139 There is no reason to exclude nonaccommodation endorsers from the coverage of the notice statute.

A further difficulty arises, however, with regard to the question of which parties the creditor must sue. A simple example illustrates the difficulty. A, the maker of a note, transfers the note to B, who endorses it to C, who endorses it to D, who endorses it to E. A dishonors the note and E sues B.140 Under article three, C and D are ordinarily "subsureties" of B.141 This is significant because it

133. The holder, the person to whom the instrument was negotiated, ordinarily is the person who has the right to enforce payment on the instrument. U.C.C. §§ 3-202(1), -301 (1977).
134. See infra note 149 and accompanying text.
136. Although under the traditional concept of suretyship, the creditor can pursue the surety immediately upon default of the principal, it is reasonable to assume that this is rarely done. Moreover, although the endorser is technically a secondary party, there is no requirement that the holder of a negotiable instrument sue the maker or drawer prior to the liability of the endorser. All that § 3-414(1) requires is that there be "dishonor and any necessary notice of dishonor and protest . . ." U.C.C. § 3-414(1) (1977). Even these relatively minor prerequisites can be excused in a number of circumstances. Id. § 3-511. As a practical matter, the endorser's situation differs only slightly from that of a primary party, unless of course, the requirements of dishonor and notice are not met or excused.
137. U.C.C. § 3-414(2) (1977). In effect, later endorsers are subsureties of earlier endorsers. See infra note 141.
138. Upon payment of the instrument, the endorser may obtain the instrument and then sue the maker or drawer on its contract under U.C.C. § 3-413 (1977).
139. See supra note 1.
140. E may do so because the contract of the endorser under U.C.C. § 3-414(1) (1977), and the warranties of the endorser under U.C.C. §§ 3-417(2), 4-203(2) (1977) run to all subsequent holders of the instrument.
141. U.C.C. § 3-414(2) (1977); see also Restatement of Security §§ 145-148 (1941).
means that \( C \) and \( D \) have no obligation whatsoever to \( B \).\(^{142}\) In other words, if \( E \) is successful in its suit against \( B \), \( B \) can seek reimbursement only from \( A \) and cannot seek any form of indemnification or contribution from \( C \) or \( D \). However, if \textit{Colonial American National Bank}\(^{143}\) is read literally, \( B \) would be able to require \( E \) to sue not only \( A \), but \( C \) and \( D \) as well (assuming that \( C \) and \( D \) were solvent Virginia residents).\(^{144}\) Moreover, the policy objection raised above to the result in \textit{Colonial American National Bank} (that the defendant could have impled the co-sureties) would not apply. \( B \) would not have the right to implead \( C \) and \( D \) because they do not owe him any part of the obligation.\(^{145}\) Adding to the absurdity, if judgment were taken by \( E \) against \( C \) and \( D \), \( C \) and \( D \), through their right of recourse against prior endorsers, could then obtain payment in full from \( B \).\(^{146}\)

Application of the \textit{Colonial American National Bank} rule in such a situation seems absurd; the rule would require the plaintiff to join two defendants who would not bear ultimate liability under any circumstances. Whatever the result of the creditor's action against the subsequent endorsers \( C \) and \( D \), \( B \) would ultimately bear the entire liability unless \( A \) were solvent and suable. It should be noted, however, that until the Virginia Supreme Court adopts this salutary rule,\(^{147}\) any attorney representing an endorser in \( B \)'s situation should make demand upon the creditor to sue the subsequent endorsers—not because they might eventually owe money to \( B \) (they will not) but because the creditor foolishly might fail to sue them. With \textit{Colonial American National Bank} in hand, \( B \) might find a painless way out of awkward litigation.

A final problem with regard to the Uniform Commercial Code is the fact that section 3-416 defines two types of guaranty contracts. The first is the "payment guaranteed" contract, under which "the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to the holder to any

\(^{142}\) U.C.C. § 3-414(2) (1977); \textit{see also} \textit{Restatement of Security} § 145 (1941).

\(^{143}\) 617 F.2d 1025 (4th Cir. 1980).


\(^{145}\) This is a prerequisite to impleader under \textit{Fed. R. Civ. P.} 19(a) and \textit{Va. R. Ct.} 3:10.

\(^{146}\) U.C.C. § 3-414(2) (1977).

\(^{147}\) The court may never have the opportunity to do so; reported suits on endorsers' contracts seem to be rare, judging from the scant annotations in 4A \textit{Uniform Commercial Code Case Digest} § 3-414 (1982).
other party." The second type of guaranty is the "collection guaranteed" contract under which

the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker . . . to judgment and execution has been returned unsatisfied, or after the maker or accepter has become insolvent or it is otherwise apparent that it is useless to proceed against him.149

It should be obvious that one presumably unintended effect of sections 49-25 and 49-26 of the Virginia Code, (if they supercede section 3-416 of the Uniform Commercial Code), is to permit the guarantor under the payment guaranteed contract to change, at will, the terms of the guaranty. If the guarantor has an unlimited right to invoke the notice statute, virtually the only payment guaranteed contracts that will exist are those signed by guarantors who have expressly waived their rights under the notice statute, or whose attorneys do not realize that upon default, a critical provision of the contract, i.e. the ability of the creditor to immediately and unconditionally pursue the guarantor, can be eliminated.150

After the notice under section 49-25, the creditor must "institute suit against every party to the contract who is resident in this state and not insolvent and prosecute the same with due diligence to judgment and by execution . . . ."151 This is almost identical to the prerequisites for the guarantor's liability under the collection guaranteed contract.152

149. Id. § 3-416(2) (1977).
150. It could be argued that merely by entering into a payment guaranteed contract, the guarantor has waived its rights under the notice statute. But see infra note 155.
152. There is a very slight difference in that the collection guaranteed contract makes judgment and execution a prerequisite to the obligation of the guarantor, whereas section 49-26 of the Virginia Code may be interpreted as extinguishing the preexisting obligation of the guarantor. In other words, the first is written as a condition precedent creating liability, and the second as a condition subsequent extinguishing it. In practice, this may not make much difference. Since the failure to pursue judgment and execution under section 49-26 would extinguish the obligation of the surety, any judgment granted against any surety would have to be reopened if no judgment were obtained against the principal, or if appropriate collection proceedings were not completed. Indeed, to avoid the awkward position of reopening the judgment against the surety (and ordering the creditor to return to the surety any monies it had obtained pursuant to its judgment on the suretyship contract), perhaps the courts should not grant judgment or allow collection against the surety until the judgment and execution requirements of the notice statute are met. It is even difficult to justify
Clearly these two statutory provisions cannot be totally reconciled. The Uniform Commercial Code was enacted in Virginia long after the notice statute. This may suggest that the Virginia legislature intended to modify the provisions of sections 49-25 and 49-26 with regard to negotiable instruments. On the other hand, the notice statute has been amended since the initial enactment of the Uniform Commercial Code and although the amendments were not relevant to this issue, they may reflect legislative intent to limit the scope of section 3-416(1) of the Uniform Commercial Code. The most probable explanation, of course, is that the legislature was entirely unaware of the conflict and had no intention one way or the other.

Certainly the policy underlying the notice statute applies with equal force to guarantors as to other sureties. On the other hand, it is difficult to justify a statute which distinguishes between two creditors on the basis of poor legal advice. The one relevant Virginia case indicates that the courts have not been troubled by, or conscious of, this conflict. While either interpretation does some requiring the surety to defend on the merits prior to the time that the proceedings required under section 49-26 are completed. Although there are no cases on point, it is arguable that the court ought not even hear the case against the surety until the action against the principal has been concluded. However, one implication of Colonial Am. Nat'l Bank may be that the obligations of all sureties should be tried simultaneously. Since that case required that the creditor proceed to judgment and execution against all parties, including all co-sureties, the only way of ensuring that the condition subsequent with regard to any surety (i.e., not suing/executing) is not triggered, is to consolidate the actions against all of them. Presumably this is accomplished by requiring that the creditor join all sureties under the "necessary party" rules of Fed. R. Civ. P. 19 or Va. R. Cr. 3:9A(2). See supra note 97.
damage to a statutory scheme, the better reading is that sections 49-25 and 49-26 of the Virginia Code do supersede section 3-416(1) of the Uniform Commercial Code for the simple reason that the policies underlying the statute do apply, and the legislature surely did not intend to override the notice statute by enacting the Code’s section 3-416. The payment guarantor is well advised to demand that the creditor proceed against the principal and other sureties after default.

VI. Conclusion

In Virginia the surety has one potentially valuable tool with which to avoid the dangers of delay: the notice provisions of sections 49-25 and 49-26. None of the surety’s other rights upon delay are cheap enough or sure enough to find regular use. If the surety has not previously waived its rights under the statute, the surety can at least ensure that the principal and the co-sureties (if solvent and within the Commonwealth) will be sued. This can be accomplished at minimal cost and at no risk. At worst, the surety can obtain delay; at best, should the creditor fail to pursue the principal or one of the other parties, the surety may obtain complete relief from its obligation. Those representing sureties should routinely make demand under the notice statute; those representing creditors should just as routinely insert appropriate waiver provisions in contracts of suretyship.

notice statute. This case can be distinguished because Washington’s notice statute refers only to sureties, whereas Virginia’s expressly includes guarantors. Id. at ___, 402 P.2d at 344. However, the court states that the statute does not apply precisely because it would force the creditor to first sue the principal; it thus would “require the creditor to do what the guarantor of payment had expressly agreed that the creditor need not do.” Id. The problem with this reasoning is that the guaranty in question, as is true of many guarantees, in no way expressly spelled out the right of the creditor to pursue the guarantor immediately upon default. Id. at ___, 402 P.2d at 345-46. Ambiguous guaranty contracts are presumed to be guarantees of payment. U.C.C. § 3-416(3) (1977). The guarantors bound by such contracts probably have no idea that this rule exists or what it entails. Most guarantors probably assume that they are secondary parties. The fiction that sureties read and understand the boilerplate of their contracts is surpassed by the fiction on which Amick rests: Amick assumes that the world is teeming with experts in the obscurities of commercial law. Would it were so. But since it is not, there is no logical reason to deprive a guarantor of its rights under the notice statute unless the express terms of the contract of guaranty clearly waive rights of notice.

157. See also U.C.C. § 1-103 (1977) (“Unless displaced by the particular provisions of this act, the principles of law and equity . . . shall supplement its provisions.”).

158. This is by no means a trivial limitation, since it means that a creditor who has the wit and bargaining power to incorporate a waiver in the surety’s contract renders the notice statute virtually meaningless.