

CORPORATE AND BUSINESS LAW

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INTRODUCTION

The past two years have produced a number of pieces of legislation from the Virginia General Assembly that serve to bring the set of Virginia business entity statutes up to date with its peers around the country. Part I highlights changes to the Virginia Stock Corporation Act (“VSCA”) and the Virginia Nonstock Corporation Act (“VNSCA”). Part II highlights changes to the Virginia Securities Act (“VSA”) and other statutes affecting Virginia business entities. Part III reviews two significant cases that the Supreme Court of Virginia decided over the past two years with respect to Virginia corporate law. Those decisions provided guidance on the concept of a foreign company “transacting business” in Virginia, the ability of a foreign company to maintain a suit in Virginia without properly obtaining a certificate from the Virginia State Corporation Commission (“Commission”) as a registered foreign company, and the survival of the “futility exception” with respect to derivative suits by members of a limited liability company (“LLC”).

I. CERTAIN STATUTORY CHANGES RELATED TO CORPORATIONS AND NONSTOCK CORPORATIONS

A. *Remote-Only Meetings*

In the 2017 legislative session, the General Assembly brought the VSCA up to date with the corporate codes of other states across the nation¹ by granting Virginia stock corporations the ability to

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1. Twenty-four states already allow remote-only participation in certain shareholder meetings. *See, e.g.*, CAL. CORP. CODE § 600(e) (West 2014) (allowing meetings to be conducted by electronic transmissions or electronic video screen communications); DEL. CODE

hold “remote-only” shareholder meetings. Subsequently in 2018, the General Assembly adopted changes to the VNSCA that track the amendments to the VSCA with respect to remote-only meetings for members.

Section 13.1-660.2 of the VSCA (“Remote participation in annual and special meetings”), adopted in 2010, already allowed remote participation of shareholders in meetings that were held in a certain location.² In that case, the board of directors authorized such remote participation “subject to such guidelines and procedures the board of directors adopts”³ and in conformity with verification and participation requirements.⁴ New section 13.1-660.2(C), adopted in 2017, states:

Unless the articles of incorporation or bylaws require the meeting of shareholders to be held at a place, the board of directors may determine that any meeting of shareholders shall not be held at any place and shall instead be held solely by means of remote communication in conformity with subsection B.⁵

Accordingly, so long as a corporation’s articles of incorporation or bylaws do not specify a location for shareholder meetings, a corporation’s board of directors can now determine that a shareholder meeting be held solely through remote communication.⁶ It is important to note that for a remote-only shareholder meeting, the requirements of section 13.1-660.2(A) through (B) must still be satisfied in that the corporation’s board of directors must adopt guidelines for remote participation,⁷ and that the board must also reasonably provide means for both verification and participation of the remote shareholders.⁸ In addition, remote participation is now

ANN. tit. 8, § 211 (2018) (providing for remote communication in meetings of stockholders); FLA. STAT. § 607.0701 (2017) (allowing participation in annual meetings by remote communication); FLA. STAT. § 607.0702 (2017) (allowing participation in special meetings by remote communication); KY. REV. STAT. ANN. § 271B.7-080 (LexisNexis 2012) (providing for remote communication in shareholder meetings by remote communication); MASS. GEN. LAWS ch. 156D, § 7.08 (2016) (allowing remote participation in shareholder meetings); MINN. STAT. § 302A.436 (2011) (allowing remote communications for shareholder meetings).

2. VA. CODE ANN. § 13.1-660.2 (Repl. Vol. 2016).

3. *Id.*

4. *Id.* § 13.1-660.2(B)(1)–(2) (Repl. Vol. 2016).

5. *Id.* § 13.1-660.2(C) (Supp. 2017).

6. *Id.*

7. *Id.* § 13.1-660.2(A) (Supp. 2017).

8. *Id.* § 13.1-660.2(B)(1)–(2) (Supp. 2017).

available to shareholder proxies and not limited to only shareholders.⁹ The participation requirements no longer mandate that remote attendees have the ability “to communicate”; instead, they simply require that the remote attendees have the ability to vote, and either read or hear the proceedings of the meeting.¹⁰

The General Assembly extended the authority for remote-only shareholder meetings to both the annual shareholder meetings¹¹ and the special shareholder meetings.¹² Notices for both annual and special shareholder meetings no longer require a stated location, allowing for remote-only shareholder meetings.¹³

Finally, in the event of a remote-only shareholder meeting, the board is not required to make available at the meeting a list of shareholders entitled to vote.¹⁴ A list is only required if a shareholder meeting is held in a physical location.¹⁵ However, for remote-only shareholder meetings, the production and availability of shareholder lists following notices of the meeting and the record date for voting are still required.¹⁶

Similar to the changes in the Virginia Code for shareholder meetings, effective July 1, 2018, Virginia nonstock corporations may call remote-only annual¹⁷ and special¹⁸ meetings of members; these meetings’ notices are no longer required to state a location.¹⁹ The 2018 amendment to the VNSCA authorizes a nonstock corporation’s board of directors to determine that a member meeting can be held solely through remote communication, so long as the nonstock corporation’s articles of incorporation or bylaws do not require member meetings to be held in a location.²⁰ Accordingly, the

9. Compare *id.* § 13.1-660.2(B)(1) (Supp. 2017), with *id.* § 13.1-660.2(B)(1) (Repl. Vol. 2016).

10. *Id.* § 13.1-660.2(B)(1)–(2) (Supp. 2017).

11. *Id.* § 13.1-654(B) (Supp. 2017).

12. *Id.* § 13.1-655(D) (Supp. 2017).

13. Compare *id.* § 13.1-658(A) (Supp. 2017), with *id.* § 13.1-658(A) (Repl. Vol. 2016).

14. *Id.* § 13.1-651(C) (Supp. 2017).

15. *Id.*

16. *Id.* § 13.1-661 (Supp. 2017).

17. *Id.* § 13.1-838(B) (Cum. Supp. 2018) (providing an exception to the requirement of a location pursuant to section 13.1-844.2(C)); see also *HB 1205 Nonstock Corporations; Members’ Meetings*, VA.’S LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB1205> (last visited Oct. 1, 2018).

18. VA. CODE ANN. § 13.1-839(D) (Cum. Supp. 2018) (providing an exception to the requirement of a location pursuant to section 13.1-844.2(C)).

19. *Id.* § 13.1-842(A)(1) (Cum. Supp. 2018).

20. *Id.* § 13.1-844.2(C) (Cum. Supp. 2018).

remote-only member meetings of nonstock corporations must still satisfy the requirements of verification and participation²¹ that previously applied to remote participation of members in a meeting set at a location.²² In addition, remote participation in any member meeting is now extended to member proxies and no longer restricted solely to members.²³ Finally, the board is not required to make a list of members entitled to vote available at a remote-only member meeting, unlike at a member meeting held in a location.²⁴ The production and availability of member lists is still required following notice of member meetings and setting of the record date, even for remote-only member meetings.²⁵

B. Written Demand for Special Shareholder Meetings of a Nonpublic Corporation

A related amendment to the VSCA regarding special shareholder meetings made it explicitly clear that shareholders with more than twenty percent of a corporation's stock are authorized to make a written demand for a special meeting in a nonpublic corporation with "35 or fewer shareholders of record."²⁶

C. Written Action by Less Than Unanimous Consent of Shareholders of a Public Corporation

The latest Virginia Code section 13.1-657 adds new restrictions to shareholder action with less than unanimous written consent in public corporations. If the articles of incorporation or bylaws allow the holders of thirty percent or fewer of all votes that are entitled to be cast to demand the calling of a special meeting of the shareholders, the shareholders of a Virginia corporation—whose securities are publicly traded—are not entitled to act by less than unanimous written consent.²⁷ However, there is an exception for public corporations whose articles of incorporation, prior to April 2018,

21. *Id.* § 13.1-844.2(B)(1)–(2) (Cum. Supp. 2018).

22. *Id.* § 13.1-844.2 (Repl. Vol. 2016).

23. *Compare id.* § 13.1-844.2(B)(1) (Cum. Supp. 2018), *with id.* § 13.1-844.2(B)(1) (Repl. Vol. 2016).

24. *Id.* § 13.1-845(C) (Cum. Supp. 2018).

25. *Compare id.* § 13.1-845(A)–(B) (Cum. Supp. 2018), *with id.* § 13.1-845(A)–(B) (Repl. Vol. 2016).

26. *Id.* § 13.1-655(A)(2) (Supp. 2017).

27. *Id.* § 13.1-657(B) (Cum. Supp. 2018).

authorized shareholder action by less than unanimous written consent.²⁸

D. *Annual Reports*

The final substantive amendment to the VSCA changes the requirements of domestic and foreign corporations, removing the requirement to itemize by class the authorized number of shares of the corporation in its annual report.²⁹

II. CERTAIN STATUTORY CHANGES RELATED TO THE VIRGINIA SECURITIES ACT AND STATE CORPORATION COMMISSION

A. *Notice and Consent to Service of Process for Public Corporations*

The VSA was amended to allow the Commission to further regulate Virginia corporations whose securities are publicly traded. The Commission may require the filing of a notice with a consent to service of process for any Virginia public corporation whose principal office is located in Virginia, or for whom fifty percent or more of its securities purchasers are Virginia residents.³⁰ Additionally, the Commission may assess and collect a fee of up to \$100 for the filing of this new notice and consent to service of process.³¹

B. *Fees and Deadlines for the State Corporation Commission*

The 2017 legislative session produced a handful of amendments to the State Corporation Commission Act³² that provide the Commission with greater discretion over some fees and clearer language regarding timelines. Section 12.1-17 (“Deposits of funds; means of payment; dishonored payments; receipts for payment”) now provides the Commission with the ability to absorb a portion or all of a charge associated with an amount due.³³ Furthermore, the Commission “may” charge the fees, fixed by rule or order, for

28. *Id.*

29. Compare *id.* § 13.1-775(A)(4) (Cum. Supp. 2018), with *id.* § 13.1-775(A)(4) (Repl. Vol. 2016).

30. *Id.* § 13.1-523.1(B) (Supp. 2017).

31. *Id.*

32. *Id.* §§ 12.1-1 to -43 (Supp. 2017).

33. *Id.* § 12.1-17(B) (Supp. 2017).

“providing records from an electronic data processing system, computer database, or any other structured collection of data.”³⁴ In addition, the reference to “reasonable fees” in section 12.1-21.1(A) (“Fees to be charged by clerk for certain information and certificates”) is now removed.³⁵ As a result, the fees for certificates or for information pertaining to the Uniform Commercial Code or the Commercial Code are “fixed by Commission order or rule.”³⁶ Finally, the language with respect to various deadlines in sections 12.1-39³⁷ (“Appeals generally”), 12.1-40³⁸ (“Method of taking and prosecuting appeals”), and 12.1-41³⁹ (“Petitions for writs of super-sedeas”) is clarified, replacing the ambiguous reference “four months” with the more definitive “120 days.”⁴⁰

III. SELECTED CASES AFFECTING CORPORATE AND BUSINESS LAW

A. World Telecom Exchange Communications, LLC v. Sidya

In *World Telecom Exchange Communications, LLC v. Sidya*,⁴¹ the Supreme Court of Virginia held that a foreign LLC “transacted business” in Virginia when it had an inseparable relationship with its subsidiary LLC that was transacting business in Virginia.⁴² The foreign parent LLC was thus required to obtain a certificate of registration from the Commission prior to entry of the final judgment.⁴³ *World Telecom* involved Tulynet FZ, LLC (“Tulynet”), a private foreign company organized in Dubai, United Arab Emirates, and its wholly owned subsidiary, World Telecom Exchange Communications, LLC (“WTXC”).⁴⁴ Tulynet and WTXC filed suit against Yacoub Sidya in the Fairfax County Circuit Court.⁴⁵ Following a jury trial, the trial court entered a partial final judgment in favor of Tulynet and WTXC in the amount of

34. *Id.* § 12.1-21.2(B) (Supp. 2017).

35. *Compare id.* § 12.1-21.1(A) (Supp. 2017), *with id.* § 12.1-21.1(A) (Repl. Vol. 2016).

36. *Id.* § 12.1-21.1(A) (Supp. 2017).

37. *Id.* § 12.1-39 (Supp. 2017).

38. *Id.* § 12.1-40 (Supp. 2017).

39. *Id.* § 12.1-41 (Supp. 2017).

40. *Compare id.* § 12.1-41 (Supp. 2017), *with id.* § 12.1-41 (Repl. Vol. 2016).

41. *World Telecom Exch. Commc'ns, LLC v. Sidya*, Nos. 160666, 160672, and 160895, 2017 Va. Unpub. LEXIS 19 (July 20, 2017) (unpublished decision).

42. *Id.* at *11.

43. *Id.*

44. *Id.*

45. *Id.* at *1.

\$2,350,000.⁴⁶ On the morning of trial, Sidya moved to dismiss the claims on the grounds that Tulynet, as a foreign company, was conducting business in Virginia without having obtained the appropriate certificate from the Commission in contravention of Virginia Code sections 13.1-758(A) and 13.1-1057(A).⁴⁷

Virginia Code section 13.1-1057(A) prohibits a foreign LLC transacting business in Virginia from maintaining “any action, suit, or proceeding in any court of the Commonwealth until it has registered in the Commonwealth.”⁴⁸ Furthermore, a foreign corporation transacting business in Virginia is prohibited from maintaining “a proceeding in any court in the Commonwealth until it obtains a certificate of authority” from the Commission.⁴⁹

Following the end of Tulynet and WTXC’s case-in-chief, Sidya again moved to dismiss on the above mentioned grounds.⁵⁰ In response, the counsel for Tulynet and WTXC conceded that WTXC “conducted business in Virginia” and, therefore, “[would] be required’ to obtain a certificate of registration.”⁵¹ However, counsel argued that Tulynet, as the parent company, was not required to obtain a certificate of registration because it was not transacting business in Virginia.⁵² The trial court again denied the motion to dismiss on the ground that a party may obtain a certificate of registration at any time “prior to entry of the final judgment.”⁵³

At the trial’s conclusion, Sidya renewed his motion to dismiss.⁵⁴ Tulynet and WTXC contested the motion, questioning whether Tulynet needed to obtain the certificate of registration as a foreign company while also representing that Tulynet was working to obtain the proper certificate to file before any final order.⁵⁵ The trial court again denied Sidya’s motion to dismiss and entered a verdict and a partial final judgment against Sidya.⁵⁶ However,

46. *Id.*

47. *Id.* at *2.

48. *Id.* (quoting VA. CODE ANN. § 13.1-1057(A) (Repl. Vol. 2016)).

49. *Id.* (quoting VA. CODE ANN. § 13.1-758(A) (Repl. Vol. 2016)).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at *3.

54. *Id.*

55. *Id.*

56. *Id.*

Tulynet never obtained a certificate of registration from the Commission prior to final judgment.⁵⁷

Sidya appealed on the grounds “that the trial court erred as a matter of law by allowing Tulynet to litigate its claims to final judgment without first obtaining” a certificate of registration from the Commission.⁵⁸ The supreme court agreed and found that holding dispositive of the consolidated appeals.⁵⁹

The court reasoned that, pursuant to Virginia Code sections 13.1-758(A) and 13.1-1057(A), neither a foreign corporation nor a foreign LLC⁶⁰ may maintain any proceeding in Virginia courts before first obtaining a certificate of registration from the Commission.⁶¹ Furthermore, a parent corporation that has a subsidiary acting as an agent and conducting business in Virginia is, itself, transacting business in Virginia.⁶² The supreme court went on to clarify the meaning of maintaining a certificate by stating: “Though an entity need not obtain [a certificate of registration] prior to instituting the proceeding, we have consistently interpreted these provisions to require the party to obtain ‘a certificate from the State Corporation Commission before the trial court enter[s] its final order.’”⁶³

The supreme court examined the evidence presented by Tulynet and WTXC at trial and during appeal, including a commingling of operations, services, and officers,⁶⁴ as well as the filing of a joint complaint,⁶⁵ WTXC serving as agent to receive notices under contracts,⁶⁶ and references to the two entities “collectively” as WTXC.⁶⁷

57. *Id.*

58. *Id.*

59. *Id.*

60. Reference is made to section 13.1-758(A) because Tulynet argued on appeal that it was not a foreign limited liability company but instead a “foreign corporation with limited liability” due to the fact that it can issue shares. *Id.* at *4 n.3.

61. *Id.* at *3–4.

62. *Id.* at *4; see *Rock-Ola Mfg. Corp. v. Wertz*, 249 F.2d 813, 816 (4th Cir. 1957); *Questech, Inc. v. Liteco, AG*, 735 F. Supp. 187, 188 (E.D. Va. 1990); *Thaxton v. Commonwealth*, 211 Va. 38, 43–47, 175 S.E.2d 264, 268–70 (1970).

63. *World Telecom*, 2017 Va. Unpub. LEXIS, at *5 (quoting *Nolte v. MT Tech. Enters., LLC*, 284 Va. 80, 91, 726 S.E.2d 339, 345 (2012)); see also *Video Eng’g Co. v. Foto-Video Elecs., Inc.*, 207 Va. 1027, 1029–31, 154 S.E.2d 7, 8–10 (1967); *Phlegar v. Va. Foods, Inc.*, 188 Va. 747, 751–52, 51 S.E.2d 227, 229–30 (1949).

64. *World Telecom*, 2017 Va. Unpub. LEXIS, at *6–7.

65. *Id.* at *7.

66. *Id.* at *10.

67. *Id.* at *8.

Accordingly, the court found an “inseparable relationship” between Tulynet and WTXC⁶⁸ and, therefore, concluded that Tulynet did, in fact, transact business in Virginia.⁶⁹ Thus, Tulynet was required to obtain a certificate of registration from the Commission prior to entry of the final judgment.⁷⁰ The court vacated the trial court’s entry of partial final judgment in favor of Tulynet and ordered the trial court to enter a final judgment dismissing Tulynet’s claims against Sidya.⁷¹

B. Davis v. MKR Development, LLC

Davis v. MKR Development, LLC presented the Supreme Court of Virginia with a “conundrum” involving competing canons of statutory construction.⁷² The court had to determine whether the General Assembly’s amendments to the Virginia Limited Liability Company Act in 2011 abolished the “futility exception,” requiring a plaintiff to first make a demand for the LLC to take action before bringing a derivative action.⁷³ The court held that the 2011 amendments to Virginia Code section 13.1-1042 did not abolish the futility exception that was established in case law preceding enactment of the statute.⁷⁴

Melvin Davis Sr. founded the Melvin L. Davis Oil Company (“Davis Oil Company”) and subsequently sold the company stock to his three children: Kaye, Melvin Jr., and Rex.⁷⁵ Melvin Davis Sr. and his wife, Dorothy, also founded Woodside Properties as a Virginia LLC to own the real estate that the Davis Oil Company leased to receive rental income.⁷⁶ Dorothy owned seventy-two percent of Woodside Properties, whose operating agreement appointed MKR Development, LLC (“MKR”) as its manager.⁷⁷ The managers of MKR were Kaye, Melvin Jr., and Rex.⁷⁸

68. *Id.* at *9.

69. *Id.*

70. *Id.* at *11.

71. *Id.*

72. *Davis v. MKR Dev., LLC*, 295 Va. 488, 490, 814 S.E.2d 179, 180 (2018).

73. *Id.* at 490, 814 S.E.2d at 180.

74. *Id.* at 490, 814 S.E.2d at 180.

75. *Id.* at 490, 814 S.E.2d at 180.

76. *Id.* at 490–91, 814 S.E.2d at 180.

77. *Id.* at 491, 814 S.E.2d at 180.

78. *Id.* at 491, 814 S.E.2d at 180.

On May 13, 2014, Dorothy filed a complaint against MKR, Melvin Jr., and Rex, alleging that, among other things, they had “breached their fiduciary duties towards Woodside Properties.”⁷⁹ In her complaint, Dorothy alleged “that as of December 31, 2011, Woodside Properties should have received \$1,374,147 in rent under the lease” with Davis Oil Company, but Woodside Properties’ bank account only had \$35,000.⁸⁰ Dorothy asserted that the funds were misappropriated for improper purposes and Melvin Jr. and Rex refused to provide payment upon Dorothy’s request.⁸¹ Dorothy did not make a demand on MKR, Melvin Jr., or Rex, since “such demand would have been a futile, wasteful, and useless act.”⁸² Dorothy requested that MKR be removed as manager of Woodside Properties.⁸³ Defendants responded by filing a plea in bar and demurrer contending “that the complaint was barred because Dorothy had not made ‘a proper demand as required by’” Virginia Code section 13.1-1042.⁸⁴ The trial court agreed with the defendants and dismissed the complaint without prejudice.⁸⁵ Dorothy appealed from the trial court’s decision.⁸⁶

The supreme court reviewed this question de novo as it was one of statutory construction.⁸⁷ The court took the nature of a derivative suit under analysis, noting that it provides the individual shareholder the ability to protect the interest of the corporation from bad actors with bad intentions.⁸⁸ However, the court noted that to prevent abuse of this shareholder remedy, equity courts require that before filing suit, a shareholder must first request that the board or managing body of the company institute proceedings on behalf of the company against the wrongdoers, and the managing body must refuse or decline to do so.⁸⁹ Alternatively, the court distinguished the futility exception wherein, if the shareholder can allege “that it is reasonably certain that a suit by the corporation would be impossible, and that a demand to sue would be useless”

79. *Id.* at 491, 814 S.E.2d at 180.

80. *Id.* at 491, 814 S.E.2d at 180.

81. *Id.* at 491, 814 S.E.2d at 180.

82. *Id.* at 491, 814 S.E.2d at 180.

83. *Id.* at 491, 814 S.E.2d at 180.

84. *Id.* at 491–92, 814 S.E.2d at 180.

85. *Id.* at 492 & n.2, 814 S.E.2d at 180 & n.3.

86. *Id.* at 492, 814 S.E.2d at 180.

87. *Id.* at 492, 814 S.E.2d at 180.

88. *Id.* at 492, 814 S.E.2d at 181.

89. *Id.* at 492, 814 S.E.2d at 181 (quoting *Mount v. Radford Tr. Co.*, 93 Va. 427, 431, 25 S.E. 244, 245 (1896)).

because the bad actors control the decision on such shareholder requests, then the shareholder need not make such a demand on the company.⁹⁰

In an attempt to codify the futility exception from case law with respect to Virginia LLCs, Virginia Code section 13.1-1042, prior to the 2011 amendments, provided that a plaintiff could bring a derivative action “if an effort to cause those members or managers to bring the action is not likely to succeed.”⁹¹ However, in 2011, the General Assembly amended the statute by removing the above mentioned futility exception language and inserting a new provision as follows:

B. No member may commence a derivative proceeding until:

1. A written demand has been made on the limited liability company to take suitable action; and
2. Ninety days have expired from the date delivery of the demand was made unless (i) the member has been notified before the expiration of 90 days that the demand has been rejected by the limited liability company or (ii) irreparable injury to the limited liability company would result by waiting until the end of the 90-day period.⁹²

Accordingly, the defendants argued on appeal that the 2011 amendments abolished the futility exception, and the current statute requires a member to make a demand and wait ninety days prior to commencing a derivative suit.⁹³ The court acknowledged that the general rule presumes that a substantive change in law is intended to amend an existing statute.⁹⁴ However, the court noted two obstacles to the straightforward interpretation of section 13.1-1042.

First, section 13.1-1044, which sets forth the pleading requirements for derivative suits, states that “the complaint shall set forth with particularity . . . the reasons for not making the effort” to secure commencement of the action by a member or manager with

90. *Id.* at 492–93, 814 S.E.2d at 181 (quoting *Mount*, 93 Va. at 431, 25 S.E. at 245).

91. *Id.* at 493, 814 S.E.2d at 181 (quoting Act of Mar. 12, 1991, ch. 168, 1991 Va. Acts 212, 223 (codified as amended at VA. CODE ANN. § 13.1-1042 (Cum. Supp. 1991))).

92. *Id.* at 493–94, 814 S.E.2d at 181 (quoting Act of Mar. 22, 2011, ch. 379, 2011 Va. Acts 548, 549 (codified as amended at VA. CODE ANN. § 13.1-1042 (Repl. Vol. 2011))).

93. *Id.* at 494, 814 S.E.2d at 182.

94. *Id.* at 494, 814 S.E.2d at 182 (quoting *Virginia-American Water Co. v. Prince William Cty. Serv. Auth.*, 246 Va. 509, 517, 436 S.E.2d 618, 622–23 (1993)).

authority.⁹⁵ Dorothy argued that if a demand is required under section 13.1-1042, then that would render the language in section 13.1-1044 superfluous.⁹⁶ The court agreed, stating that it “ordinarily resist[s] a construction of a statute that would render part of a statute superfluous.”⁹⁷

Second, section 13.1-1001.1(A) provides that “the principles of law and equity supplement this chapter” except where they are “displaced by particular provisions.”⁹⁸ The text of the amended section 13.1-1042 does not expressly disclaim the futility exception, but rather remains silent on the subject.⁹⁹ Furthermore, the court reasoned that derivative suits generally, and the futility exception, specifically, were developed in equity, and thus constitute principles of equity which are expressly embraced through section 13.1-1001.1(A).¹⁰⁰

The supreme court concluded that the 2011 amendment merely replaced an express textual provision providing for the futility exception with an incorporation by reference to a rule drawn from case law rather than abrogating the futility exception.¹⁰¹ Accordingly, the supreme court held that the circuit court erred in dismissing the derivative suit, reversed the judgment, and remanded with instructions to reinstate the plaintiff’s complaint.¹⁰²

95. *Id.* at 494, 814 S.E.2d at 182 (quoting VA. CODE ANN. § 13.1-1044 (Repl. Vol. 2016)).

96. *Id.* at 494, 814 S.E.2d at 182.

97. *Id.* at 494, 814 S.E.2d at 182.

98. *Id.* at 495, 814 S.E.2d at 182 (quoting VA. CODE ANN. § 13.1-1001.1(A) (Repl. Vol. 2016)).

99. *Id.* at 495, 814 S.E.2d at 182.

100. *Id.* at 495, 814 S.E.2d at 182.

101. *Id.* at 495, 814 S.E.2d at 182.

102. *Id.* at 495–96, 814 S.E.2d at 182–83.