



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

November 5, 2010

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable John T. Frey, Clerk
Circuit Court of Fairfax County
4110 Chain Bridge Road
Fairfax, Virginia 22030

Dear Mr. Frey:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether § 8.01-435 permits confession of judgment by a third party who has been appointed by an attorney-in-fact whose power of attorney grants “full power of substitution,” or whether such a construction would violate public policy.

Response

It is my opinion that § 8.01-435 does not authorize confessions of judgment by third parties appointed by attorneys-in-fact with “full power of substitution,” and that such confessions would violate public policy.

Applicable Law and Discussion

Section 8.01-435 designates who may confess judgment. It provides that confession of judgment “may be made either by the debtor himself or by his duly constituted attorney-in-fact.”¹ The section further provides, for instances where judgment is confessed by the debtor’s attorney-in-fact, that the note presented “shall *specifically* name *therein* the attorney or attorneys or other person or persons authorized to confess such judgment....”²

When the language of a statute is clear and unambiguous, the statute is to be applied according to its plain meaning,³ and when a statute specifies certain things, the intention to exclude that which is not specified may be inferred.⁴ By its terms, § 8.01-435 authorizes only debtors and their attorneys-in-fact to

¹ VA. CODE ANN. § 8.01-435 (2007).

² *Id.* (emphasis added).

³ *Virginia Polytechnic Inst. & State Univ. v. Interactive Return Serv., Inc.*, 271 Va. 304, 309, 626 S.E.2d 436, 438 (2006).

⁴ The maxim of statutory construction “*expressio unius est exclusio alterius*” (“to include one is to exclude the others”) applies here. *See, e.g., Tate v. Ogg*, 170 Va. 95, 103, 195 S.E. 496, 499 (1938).

confess judgment; there is no mention of unnamed third parties. Moreover, the provision requires the attorney-in-fact to be "specifically" named. The General Assembly could have employed language allowing for substitution of the attorney-in-fact or for the naming of a class of unspecified persons to confess judgment, but instead, § 8.01-435 refers only to debtors and attorneys-in-fact specifically named. Additionally, the provision requires the note itself, not any separate document, to contain the specified name. In sum, the statute indicates that the General Assembly did not intend such broad authorization for the confession of judgments.

In addition, prior opinions of this Office have concluded that the purpose of § 8.01-435 is to act as a limitation on creditors' practices of taking from debtors a general power of attorney authorizing any attorney to confess judgment on the involved instrument in any court.⁵ The limiting language contained in § 8.01-435 was chosen by the General Assembly based upon a "general concern with the possible abuse of confessed judgments, particularly those taken pursuant to a power of attorney waiving the right to due process."⁶

Although the Supreme Court of Virginia has not had occasion to interpret current § 8.01-435, the United States District Court for the Eastern District of Virginia, applying Virginia law, has addressed its scope. In ruling that a confession of judgment clause in a note that named as the attorney-in-fact "any vice president or senior vice president of the Bank" was not sufficiently specific to meet the requirements of § 8.01-435, the court found that the provisions of § 8.01-435 must "be strictly construed to prevent abuse."⁷ In light of the above, I conclude that this decision, although not binding on Virginia courts, is persuasive and represents a correct application of Virginia law and, by its logic, would not permit a confession of judgment provision that left the appointment of an attorney-in-fact to be determined at a later date when a substitution was made by a person other than the debtor.⁸

Conclusion

Accordingly, it is my opinion that § 8.01-435 does not authorize confessions of judgment by third parties appointed by attorneys-in-fact with "full power of substitution," and that such confessions would violate public policy.

With warmest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

⁵ See 1999 Op. Va. Att'y Gen. 27.

⁶ *Id.* (quoting KENT SINCLAIR & LEIGH B. MIDDLEDITCH, JR., VIRGINIA CIVIL PROCEDURE § 14.8, at 626 (3d ed. 1998)).

⁷ *Benton Land Fund, L.P. v. NVMercure Ltd. P'ship*, 849 F. Supp. 1123, 1127 (E.D. Va. 1994).

⁸ Of course, the legal validity of an instrument is a separate question of whether a clerk can refuse to record the instrument. See, e.g., 2006 Op. Va. Att'y Gen. 193, 193 (noting that "[a] clerk's authority to refuse to record an instrument is very limited.").