



October 2021



HAPPY HALLOWEEN!

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Lafayette, Ayers, & Whitlock, PLC is a full-service creditor's rights firm. While many attorneys do "collections", few attorneys have the trained expertise and staff to represent creditors in all four areas of Creditor's Rights—Collections, Bankruptcy, Real Estate and Foreclosure. We do, and, we represent credit unions, banks, loan companies, homeowner associations, doctor's offices, landlords, small businesses and individuals. In *Creditor News* we will explore all four areas of Creditor's Rights.



COLLECTIONS

Equal Opportunity Credit Act - Part 1

In the next two editions of *Creditor News* we will begin a review of The Equal Opportunity Credit Act. Over the last few years debtors have been utilizing the Equal Opportunity Credit Act, 15 U.S.C. §1691 ("the ECOA" or "the Act"), to avoid adverse action against them on seemingly valid creditor suits. The litigation that has arisen gives good cause to review lending policies for ECOA compliance.

The ECOA was enacted in 1974 to prohibit discrimination by lenders on the basis of race, color, national origin, sex, marital status, age, religion and welfare status. The statute was originally aimed at discrimination against married women who were often denied credit unless they could get their husband's signatures. The statute, in many respects, has been taken to many illogical extremes.

Lenders who violate the statute can be sued for actual damages, punitive damages up to \$10,000, and costs and attorney's fees. Punitive damages can be awarded even if there are no actual damages, and even if the lender did not have a specific intention to discriminate. In practice, this means that the Act could be used in a counterclaim, not just a defense. In regard to a counterclaim, there is a two year statute of limitations for suits under the Act, which will usually have passed by the time a legal action by the creditor has begun. Most courts have ruled that the two year statute of limitations does not apply when the Act is raised as a defense.

There are many potential issues that have been raised under the Act; listed on the next page are those which have been cited most frequently.

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CREDITOR'S RIGHTS — IT IS MY FOCUS !

Creditors hear too much about debtors' rights - creditors need to fight back! Bankruptcy laws are primarily drawn to protect debtors. The Fair Debt Collection Practices Act also protects debtors, and limits creditors' activity. Both laws prescribe punishments for violations.

I believe that creditors deserve due process and consideration. I work hard to protect our clients' rights through collection activities, civil litigation, and bankruptcy practice. To be competitive, I offer retainer plans and several fee options. To be accessible, I promise prompt and consistent communication.

I would greatly appreciate the opportunity to meet with any prospective client to review your needs and services. Please schedule your appointment by calling me at (804) 545-6251.





TED'S TIPS

When giving us your delinquent accounts, always include any banking information you may have, such as account numbers or known banking institutions, that could be used to issue garnishments.

Equal Opportunity Credit Act - Part 1, CONTINUED FROM PAGE 1

1. Requiring the signature of a spouse. Under federal regulations, "[A] creditor shall not require the signature of an applicant's spouse ... on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested."(12 C.F.R. §202.7(d)(1)). There have been many cases litigated regarding this. The Virginia Supreme Court found that a bank violated the Act when a husband sought a loan for his construction company and the bank required his wife's signature as a guarantor, even though the husband was individually creditworthy, the wife had no interest in the company and was not a joint applicant, and the bank made no inquiry into her credit standing. The Court made these factual findings, but the company, ultimately, did not have assets to cover the debt. When the husband's construction company defaulted on the loan, after the husband died, the bank sought recovery from the wife and the husband's estate. When the Court found that this violated the Act, it ruled that there could be no recovery against the wife, as "Contracts executed in violation of law cannot be enforced....To deny [the wife] the right to use the ECOA violation defensively would be to enforce conduct that is forbidden by the Act." Debtor's attorneys are using this defense in foreclosure proceedings to prevent summary judgment on the foreclosure, stall for time, release a spouse from liability, and force the lender to defend against a complex and expensive federal claim.

2. Asking for information about a spouse or former spouse, unless the applicant is relying on the spouse's income or lives in a community property state (Virginia is not - it is a Common Law state).

3. Asking for sources of an applicant's income without saying that the applicant does not have to mention alimony or child support unless he or she wants the lender to consider it when it decides whether to extend credit.

4. Taking race, sex or national origin into account when making a credit decision (although a bank can consider immigration status).

5. Using statistics to judge the reliability of income from alimony, child support, pensions or welfare. Even if child support payments are statistically unreliable, a bank must consider whether the individual applicant has consistently received payments in the past.

6. Ascribing a negative value to an applicant's age unless it relates to a "pertinent element of creditworthiness," such as the length of time the applicant has until retirement or the adequacy of security where a mortgage term exceeds the applicant's life expectancy.

7. Requiring certain types of life insurance before issuing a loan.

8. Basing a credit decision on the area in which the applicant lives, such as the fact that a white applicant lived

(Continued on page 3)



LAW REVIEW OF THE MONTH:

REAL ESTATE

The firm has a distinguished and diverse real estate practice.

The firm represents buyers and sellers in residential and commercial closings, individuals desiring a refinance of their mortgage, creditors in closing first or second mortgages, as well as equity lines, and creditors in foreclosures. We also represent commercial landlords in both rental delinquency and bankruptcy cases.



EMPLOYEE OF THE MONTH:

DWEN JENKINS

Dwen joined LAW in November, 2015, but has been working in real estate since 2006. Dwen is excited about joining the firm because she loves real estate, and loves to see the smile of each client who is purchasing their dream home. Outside of the office, Dwen enjoys spending time with her husband and her son, Samuel.

Equal Opportunity Credit Act - Part 1, CONTINUED FROM PAGE 2

in a largely black area.

9. Changing the terms of a credit account without notifying the borrower within 30 days and including a boiler plate notice concerning the borrower's rights under the ECOA.

10. Asking about an applicant's intentions to have children.

11. Asking for the applicant's title (Mr., Mrs., Ms., etc.) without stating that providing this information is optional.

In a future issue, we will look at potential defenses that have been raised by lenders.

BANKRUPTCY

Bankruptcy - What can we do for you

Creditors need to know that having aggressive representation in bankruptcy cases is just as important as having a good plan. We can help. We have aggressive counsel and trained support staff.

In Chapter 7 cases, even in supposedly "no asset" cases, there are concerns about security interests, homestead deeds, fraud and abuse, and reaffirmation agreements. Our "second opinion" and review of your cases could result in new hope for otherwise hopeless cases.

In Chapter 13 cases there are concerns about amount of assets, manner of funding, percentage payments for unsecured debts and allowable expenses. Do not assume that the debtor's first plan is set in stone - let us assert your interest.

We would be pleased to meet with you to review your representation needs. Our work can be done on a flat fee basis, an hourly fee basis, or pursuant to a retainer agreement.

REAL ESTATE

Using Real Estate as a Collection Tool

Collecting money owed can be a job. Having more tools to do the work is good! Securing your debt with real estate is a great tool. Each month in *Creditor News* we will explore ways that use this tool. Articles will include such topics as: Deeds of Trust, Foreclosure, Docketing Judgments, *Lis Pendens*, Recording Mechanic's Liens, Suits to Enforce Mechanic's Liens, Foreclosing on Mechanic's Liens, Recording Homeowners Association Liens, Foreclosing on Homeowners Association Liens and more.

We have experienced attorneys and staff who can examine title, do real estate closings, seek judgment and docket and enforce the same, and prepare and enforce statutory liens, such as those for litigation, homeowner's associations and mechanic lien situations. Please call me so that we can discuss how we can help you.

QUESTIONS AND ANSWERS:

Please feel free to let me know if there are topics that you would like to address.



If you have not already done so, and if you would like to continue receiving *Creditor News*, free of charge, please call me at 545-6251 email me at ewhitlock@lawplc.com, or complete the form adjacent and mail it to me at Lafayette, Ayers & Whitlock, PLC, CrossRidge Professional Park, 10160 Staples Mill Road, Suite 105, Glen Allen, Virginia 23060. Please let me know whether you would prefer to have a mailed copy or an emailed copy. Copies of previous Editions of *Creditor News* are available by calling Eddie at (804) 545-6251 or emailing at ewhitlock@lawplc.com.

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**Equal Opportunity Credit Act—Part 2
Dischargeability - Money Judgment
Homeowner Associations – Damages Caused by Common Area Tree
Foreclosure Sale Deficiency Actions**

AND



"MILES"

THE LEGAL BEAGLE

FORECLOSURE

Default

Question: When is a loan in default? Answer: Under one or more of several circumstances. The most common way that a borrower is in default is monetary – e.g., the borrower fails to make a required payment. However, default can be for a non-monetary reason as well, such as:

1. Failure to pay taxes.
2. Failure to pay insurance.
3. Failure to remove or bond over mechanic's liens.
4. Failure to perform requirements unique to the loan.

If you have questions about default, please call Eddie at 545-6251.



LAFAYETTE, AYERS & WHITLOCK, PLC's practice areas include (in addition to **CREDITOR REPRESENTATION** in Collection, Bankruptcy, Real Estate and Foreclosure matters) Alcoholic Beverage Control and Administrative Law; Real Estate, Commercial and Residential Settlements and Title Insurance; Wills, Trusts, Family and Estate Planning, and Probate Administration; Business, Corporate, LLC and Partnerships; Personal Injury; Civil Litigation; Traffic and Criminal cases; Military Law; Juvenile and Family Law; Zoning and Land Use Planning; Condominium, Homeowner and Property Owners Associations; Mediation and Arbitration.

EDWARD S. WHITLOCK, III, ESQUIRE ("Eddie"), the editor of *Creditor News*, is a Richmond native with a concentrated practice in creditor representation. His practice focuses on creditor's rights (Collection, Bankruptcy, Real Estate and Foreclosure), but also includes the general practice of law (Civil Litigation, Business, Will & Estate Planning, Traffic, Criminal, Military, Juvenile and Family Law). Eddie holds a B.A. (1984) in Political Science, and a Juris Doctor (1987) from the University of Richmond. He is the former Chief of Admin/Military Law for the 329th Support Group (Area) in the Virginia Army National Guard. Eddie is the former President of both the Henrico County Bar Association and the Virginia Creditors' Bar Association. He is on the Virginia State Bar's Disciplinary Committee, and is a Virginia State Bar Fee Dispute Arbitrator. He is also a former director of Henrico CASA, and a former adjunct professor of criminal law at J. Sargeant Reynolds Community College.

JENNIFER W. FISCHER ESQUIRE, the Associate Editor of *Creditor News*, worked part time with the firm in 2008 while a full-time student at Christopher Newport University. Jennifer graduated from CNU magna cum laude in June, 2011 with a BS in business administration. Jennifer graduated from University of Richmond, T.C. Williams School of Law in May 2014 and was admitted to the Virginia State Bar in October 2014. She is the current Treasurer for the Virginia Creditors Bar Association and Treasurer for the Henrico County Bar Association. Jennifer is engaged in a general practice of law with a focus on creditor's rights.

MICHAEL P. LAFAYETTE, ESQUIRE concentrates his practice in real estate, business and ABC law. He represents clients in both commercial and residential real estate transactions. Michael is a frequent speaker at real estate conferences, writes curriculum for real estate continuing education courses, and is legal counsel to the Richmond Association of Realtors. Michael graduated from Bradford College in 1986 with a B.A. in Administration and Management, and a law degree from the University of Richmond in 1989.

TRAVIS P. HUGHES, ESQUIRE is Michael Lafayette's Senior Associate attorney. Travis focuses his practice on business, real estate law, and estate planning. He is a Hanover County native and has worked as an Assistant Commonwealth's Attorney for the County of Tazewell and Hanover County. Travis is the current Vice President of the Hanover Bar Association. In his free time, Travis enjoys spending time with his German shorthaired pointer, Khaleesi, and training Brazilian Jiu Jitsu.

GLENN E. AYERS, ESQUIRE concentrates his practice in all aspects of real estate law including commercial and residential settlements, litigation, zoning and land use planning; life and estate planning including domestic partnerships, wills, trusts, trust services, and probate administration; business, corporate, and LLC formation and representation; Personal Injury litigation; Condominium, Homeowners, and Property Owners Associations; and Mediation and Arbitration services. The Norfolk, Virginia native is a 1977 graduate of Virginia Tech (BS, Business Administration/Public Administration) and received his Juris Doctor from George Mason University in 1980. He is a former Supreme Court of Virginia Hearing Officer.

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