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HAPPY START OF THE FOOTBALL SEASON!

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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

Creditor Can Be Sued for Auto Repossessor's 'Breach of Peace' Although He was a Contractor

The Georgia Court of Appeals, in Fulton v. Anchor Savings Bank, ruled that a bank could be sued for an auto repossessor's "breach of peace" even though the repossessor was an independent contractor who worked for a company hired by the bank. Although there is apparently no Virginia case on point, several state courts have so ruled.

The Georgia Court of Appeals, in the case of General Finance Corp. v. Smith, relied upon a legal principal from the Restatement (Second) of Torts. §424 of the Restatement holds that a principal cannot delegate to a contractor "the manner of performance of duties imposed by the contract, ordinance or statute". In Georgia, the state statute prohibited intimidation during a self-help repossession.

The problem with this ruling for creditors is obvious: creditors must be very careful in who they choose to do their work - at least until Virginia adopts a different ruling.

The Importance of Docketing Judgments

If the creditor has obtained a judgment in the General District Court, the creditor should ensure that an abstract is recorded in the Circuit Court where the debtor's real property is located. Docketing perfects a lien against the debtor's real estate in that jurisdiction. Docketing also provides creditors with the right to force the sale of the real property to satisfy the debt. Judgments obtained in the Circuit Court, however, are automatically docketed, but only in that locality, pursuant to Virginia Code §8.01-446. If the debtor owns realty in another jurisdiction, the creditor should have the abstract of the judgment docketed in the Circuit Court of that jurisdiction in order to perfect a lien.

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





TED'S TIPS

Each county and city publishes real estate assessment data that includes records of current and previous owner information. This is especially helpful when verifying addresses or checking whether a debtor still owns a property.

BANKRUPTCY

Post Discharge Mortgage Statement Held Not to Be a Violation

The U.S. District Court in Charlottesville, in the case of Pearson v. Bank of America affirmed a bankruptcy court decision which held that the bank did not violate the discharge injunction against creditor action under bankruptcy code section 524(a) by sending monthly statements.

In Pearson, although the debtor had obtained a Chapter 7 discharge for her debt with the bank, she continued to receive a routine monthly statement from her Bank of America mortgage that provided principal balances, estimated payments, payment instructions and information on how payments would be posted.

The language in the opening section of the Mortgage Statement clearly stated that the debtor's loans had been discharged, that such discharge insulated debtor from any efforts by anyone to collect this discharged debt as a personal liability, and that the debtor could not be pressured to pay this debt. The Mortgage Statement's opening section referenced the fact that some homeowners become concerned after receiving statements and therefore assured the debtor that such letters were sent as a courtesy, and were not a demand for payment.

The statements also provided that no monthly statements would be sent in the future if the debtor would simply make one toll-free telephone call to an identified number.

Considering all of the facts, the court held that the statements did not represent a violation of the discharge injunction.

REAL ESTATE

The Virginia Property Owners' Association Act – Foreclosing on Memorandums of Lien

In previous issues of *Creditor News*, I discussed the provisions related to filing a memorandum of lien under the Virginia Property Owners' Association Act.

The Act provides: "At any time after perfecting the lien pursuant to this section, the property owners' association may sell the lot at public sale, subject to prior liens." In order to conduct a nonjudicial foreclosure, the association must comply with the statutory requirements.

The association must give notice to the lot owner prior to advertising the sale. The notice must include notice of: "(i) the debt secured by the perfected lien; (ii) the action required to satisfy the debt secured by the perfected lien; (iii) the date, not less than 60 days from the date the notice is given to the lot owner, by which the debt secured by the lien must be satisfied; and (iv) that failure to satisfy the debt secured by the lien on or

(Continued on page 3)

LAW REVIEW OF THE MONTH:

BUSINESS LAW

The firm has extensive experience in the representation of small business, whether corporations, limited liability companies, partnerships or sole proprietorships. The firm has participated in the buying, selling, and financing of numerous businesses, working closely with clients, attorneys and accountants to obtain the desired result. This experience, coupled with a broad background, gives our firm the ability to provide the multi-faceted representation which is so vital to today's smart business person.

EMPLOYEE OF THE MONTH:

DONNA EDMONDSON



Donna Edmondson rejoined the firm in October 2012 (she was with us from 2006 -2009 before venturing into title insurance work). In total, Donna has been working in real estate since 1999. We are excited to have her, and, we are glad to have her experience in title insurance. Donna enjoys working at LAW because of the daily challenge of real estate and helping our clients with their real estate transactions. Outside the office she enjoys reading and fixing up her house.



Foreclosing on Memorandums of Lien, CONTINUED FROM PAGE 2

before the date specified in the notice may result in the sale of the lot.” The notice must also inform the lot owner of the right to bring a court action in the circuit court of the county or city where the lot is located to assert the nonexistence of a debt or any other defense of the lot owner to the sale.

If the lot owner (i) satisfies the debt secured by lien that is the subject of the nonjudicial foreclosure sale and (ii) pays all expenses and costs incurred in perfecting and enforcing the lien, including but not limited to advertising costs and reasonable attorneys' fees, then the sale is discontinued. However, if after 60 days and the lot owner has not made those payments, the association may appoint a trustee for the sale and advertise the sale. In addition to advertising the sale, the association must give written notice of the time, date and place of any proposed sale in execution of the lien, and including the name, address and telephone number of the trustee. That notice must be at least given to the owner, lienholders and their assigns by certified or registered mail 14 days prior to the sale.

The association must advertise the sale in a newspaper in the city or county where the property will be sold. The advertisement must be in a section with legal notices or where the property being sold is generally advertised for sale. The advertisement must describe the property by address and general location and have information for the representative or an attorney who can respond to inquiries about the property with their name, address, and telephone number. The advertisement must be in the newspaper for four successive weeks, but if the lot is located in a city or county immediately contiguous to a city, publication of the advertisement for five different days is sufficient. The sale then must be held on any day after the last advertisement but not earlier than 8 days after the first advertisement and not more than 30 days after the last advertisement.

Failure to comply with these and other requirements in the statute will render the sale of the property voidable by the court. The law firm of Lafayette, Ayers & Whitlock, PLC, represents homeowner’s associations and can handle memorandums of lien and foreclosure procedures.

FORECLOSURE

Sale Price and Delays in Sale

The trustee is under a duty to “use all reasonable diligence to obtain the best price.”

If the trustee determines that in order to fulfill his fiduciary duty to realize the highest price for the property, a recess is necessary, he or she should recess the sale. Arguably, the recess is within the scope of the discretion afforded trustees in the conduct of the foreclosure sale. For example, if a bidder who previously advised the trustee of his interest in bidding on the property is delayed, the trustee, in his discretion, may recess the sale to a later hour on the same day to allow the bidder to attend the sale. If the trustee fails to accommodate the bidder

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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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NEXT ISSUE - FROM ME TO YOU:

**Equal Opportunity Credit Act - Part 1
Bankruptcy - What can we do for you
Using Real Estate as a Collection Tool
Default**

AND



"MILES"

THE LEGAL BEAGLE

Sale Price and Delays in Sale, CONTINUED FROM PAGE 3

and the property is sold for a price less than the bidder was willing to pay, the trustee may have breached his duty to "use all reasonable diligence to obtain the best price." A decision by the trustee to recess the sale, however, should not impair the sale by making it impossible or impracticable for the bidders to appear and bid at the recessed sale.

The postponement of a foreclosure sale to a different day is not a recess and is governed by statute. Virginia Code §55-59.1(D) provides that the trustee, in his discretion, may postpone the sale to a different day, and no new or additional "notice" must be given. Presumably, the "notice" referred to in this section is notice of the postponement. The trustee needs only to announce at the sale that it has been postponed. §55-59.2(D) provides that if the sale is postponed, the trustee must advertise the "new" sale in the same manner as the original advertisement. Read in conjunction, these sections require the trustee who postpones the foreclosure to re-advertise the sale in the same manner as the original sale was advertised. Although the secured obligation will not need to be accelerated again, all other aspects of the foreclosure must be completed. Effectively, a postponed sale is a new sale in which the trustee must complete all acts that he or she completed in the first sale.



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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