



December 2021



HAPPY
HOLIDAYS!

INSIDE THIS ISSUE:

| | |
|----------------------------------------------------------|---|
| Acceleration of Demand Notes | 1 |
| Retention of Collateral in Chapter 7 Cases | 1 |
| Ted's Tips | 2 |
| Law Review: Estate Planning | 2 |
| Employee Spotlight: Amanda Brooks | 2 |
| Docketing Judgments to Secure an Interest in Real Estate | 3 |
| Preview of Next Issue | 4 |
| Deed in lieu of Foreclosure | 4 |
| Firm Attorney Biographies | 4 |

Edward S. Whitlock, III, Esquire
Lafayette, Ayers & Whitlock, PLC
CrossRidge Professional Park
10160 Staples Mill Road, Suite 105
Glen Allen, Virginia 23060
804-545-6250
Direct: 804-545-6251
Fax: 804-545-6259
ewhitlock@lawplc.com
<http://www.lawplc.com>



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

Acceleration of Demand Notes

The Twentieth Judicial Circuit examined a debtor's assertion that the note's "detailed enumeration of events consisting default was inconsistent with a demand note", and that since the note was not a demand note, the creditor must demonstrate "good faith" in accelerating repayment of the note. The case was NationsBank of Virginia, N.A. v Barnes. The Court examined Virginia Code §8.3A - 108(a), which states that a note is payable "on demand" if it says it is payable on demand or states no time for payment. The Court found that the note in this case was a form with a box "on demand" checked, with no time set for repayment, only a provision requiring monthly payments of interest. The Court ruled that the note was unambiguous and clearly a demand note, and that no showing of "good faith" was required before requesting payment on the note. Despite the favorable result for the creditor, great care should always be taken to clearly identify payment demand terms.

BANKRUPTCY

Retention of Collateral in Chapter 7 Cases

The United States Bankruptcy Court at Richmond, in the case of Tidewater Finance Co. v. Cooper, ruled that where the debtors had fallen behind in their payments but were not in default in paying for their vehicle at the time they filed their petition or at the date of a hearing on relief from stay, the creditor on the vehicle was not entitled to relief from the stay, and that the debtors could retain the collateral and continue to make payments pursuant to the contract.

(Continued on page 2)

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

Email addresses can be used to find a debtor's online accounts. Facebook accounts can be especially exciting and rewarding.

Retention of Collateral in Chapter 7 Cases, CONTINUED FROM PAGE 1

In Cooper Judge Tice noted that there was a split among the U.S. Circuit Courts regarding the correct interpretation of 11 U.S.C. §521 (2). Some Circuits have held that a debtor who desires to retain exempt or abandoned property has only two choices: redemption or reaffirmation. While most Circuit Courts have determined that relief from automatic stay should be denied and that creditors could not compel debtors to redeem the collateral or reaffirm the debt as long as the debtors are current on their payments.

Judge Tice stated that our Circuit Court (the 4th Circuit Court) follows the majority view and has decided that a debtor who is not in default can retain collateral after discharge without reaffirming, redeeming, or surrendering the collateral. Judge Tice stated that the 4th Circuit Court determined that Bankruptcy Code §521 (2)(A) is a procedural provision merely to inform the lien creditor of the debtor's intention. Judge Tice noted that in the case of In Re: Belanger the Court did not specify from which date the debtor's default is to be measured – the filing date, the date of the creditor's motion, the hearing date, or simply default at any time.

Judge Tice further noted that in the case of Am. Nt'l Bank & Trust Co. v. DeJournette, arising out of the U.S. District Court for the Western District of Virginia, the Court determined that a defaulted debtor should be treated differently, and that a debtor who defaulted after filing does not have the option to retain the collateral, and must choose among the Bankruptcy Code §521 (2)(A) options of surrender, redeem or reaffirm.

Judge Tice opined that the situation in DeJournette could be distinguished from that in Cooper. In DeJournette, the debtors were delinquent at the date of the filing of their bankruptcy petition. As of the date of the hearing, the DeJournette debtors had paid payments to bring them current on their loan; however, the debtors did not pay the late charges or legal fees and costs associated with their prior arrearage.

In Cooper the debtors were not in default when they filed their Chapter 7 bankruptcy petition because they were within the contractual grace period, nor were they in default on the date of the preliminary hearing on relief from stay. While there was a time in between debtor's bankruptcy filing and the date of the hearing where the debtors fell behind in their payments, they were current as of the hearing date.

In Cooper Judge Tice found that the creditor failed to demonstrate any real harm or risk of financial loss resulting from the continuation of the stay. The debtors were current in their monthly payments and had adequate insurance on the vehicle. Thus, allowing the debtors to remain in possession of the vehicle in exchange for payment of the monthly installment placed the parties in the same position as they were prior to the debtors' bankruptcy filing. Further, if the debtors failed to make their monthly payments, the creditor could elect to repossess.

The result of Cooper is a bitter one for creditors – unless the debtor is in default at the time of the

(Continued on page 3)



LAW REVIEW OF THE MONTH:

ESTATE PLANNING

The firm has extensive experience in estate planning. We welcome the opportunity to discuss wills, trusts, living wills (Declarations for Natural Death) and other planning matters.

EMPLOYEE OF THE MONTH:

AMANDA BROOKS



Amanda has been with the firm since May 2019. She currently focuses on a variety of clerical and administrative duties. Amanda enjoys working on the Creditor's Rights team at Lafayette, Ayers & Whitlock, PLC because it gives her the opportunity to interact and get to know many of our clients. Outside of the office she enjoys spending time with her family and traveling.

Retention of Collateral in Chapter 7 Cases, CONTINUED FROM PAGE 2

bankruptcy filing, or, sometime thereafter, the debtor can retain the collateral and simply keep paying without the requirement of a reaffirmation agreement. This could result in the debtor using the collateral for a number of years, diminishing its value, and then walking away from the debt and leaving the creditor with worthless collateral.

REAL ESTATE

Docketing Judgments to Secure an Interest in Real Estate

In previous editions of *Creditor News* we have been discussing the benefits of using real estate to improve creditors' positions. As I have emphasized, properly securing debts through real estate could make the difference between collecting the funds and incurring a loss. In this edition, we will review the benefits of docketing judgments to aid in the collection of your debt.

Docketed judgments create a lien against the debtor's real estate in the county or city in which the lien is docketed. Accordingly, make sure that you know where your debtor owns, or may own (e.g., through future purchase or inheritance), real estate. Once recorded, the lien will take priority in line with the date of recording (with some limited exceptions). Depending upon your debtor's problems, you may have equity to cover your lien. Obviously you will want to "get in line" sooner rather than later to give you the best chance of collection.

Once a lien is in place, it must be addressed at any sale or refinance of the real estate. The lien must also be addressed in bankruptcy -- if the debtor does not file a motion to strip the lien, the lien will survive a bankruptcy discharge.

If all other collection measures are unsuccessful, you can consider bringing a creditor's bill, which is an action to force the sale of real estate to satisfy a judgment under Virginia Code §8.01-462:

Jurisdiction to enforce the lien of a judgment shall be in equity. If it appears to the court that the rents and profits of all real estate subject to the lien will not satisfy the judgment in five years, the court may decree such real estate, any part thereof, to be sold, and the proceeds applied to the discharge of the judgment.

Although creditor's bills may be costly, given the right judgment it is an effective collection tool. Determining what judgments are "right" requires experience and good judgment.

We have experienced attorneys and staff who can seek judgment and then docket and enforce the same.

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.



Name _____
Title _____ Company _____
Address _____
City _____ State _____ Zip _____
Telephone _____ Fax _____
Email _____

ALSO, VISIT ME ON THE WEB:

-  <http://facebook.com/edward.s.whitlock.iii>
-  <http://www.linkedin.com/in/edwardswitlockiii>
-  <http://twitter.com/EdwardWhitlock3>
-  <http://edwardswitlocklawplc.blogspot.com/>
-  <http://lawplc.com>



NEXT ISSUE - FROM ME TO YOU:

**Attorney's Fees on Collection Accounts
Fighting Chapter 7 Abuse
Using Homeowner Association Liens to
Secure an Interest in Real Estate
Advertisements of Sale**



"MILES"

THE LEGAL BEAGLE

FORECLOSURE

Deed in lieu of Foreclosure

In certain cases it may be more practical for the lender to seek or accept from the borrower a deed in lieu of foreclosure rather than incur the expense of foreclosure – this is at the lender’s discretion. If the lender agrees, in return for voluntarily surrendering the property, the borrower will seek either partial or complete satisfaction of the debt.

Considerations. Before accepting the deed in lieu of foreclosure, the lender must consider many matters:

- Value of the property vs. the amount of the debt.
- Other debts on the property. A deed in lieu of foreclosure does not extinguish prior or junior liens or encumbrances. Thus the lender, in accepting the deed, accepts the property with the liens. It is possible for the lender to structure the deed in lieu of foreclosure so that it does not release the deed of trust so as to preserve a future foreclosure to extinguish subordinate liens.



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.

CREDITOR NEWS© 2021. This newsletter is prepared and published by Edward S. Whitlock, III, Esquire, and is provided free of charge. The information contained in this Newsletter is general in nature. It is intended to be helpful but does not, and is not meant to, replace consultation with an attorney in connection with a legal problem. Readers needing legal advice should retain competent legal counsel.