

January 2022



HAPPY NEW YEAR!

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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

Attorney's Fees on Collection Accounts

Creditors rightfully expect their debtors to pay the attorney's fees that result from collection procedures. Courts, however, normally refuse an award of attorney's fees unless the debtor has executed a document awarding such costs in the event the account is turned over to an attorney for collection. Many creditors utilize a standard form contract, or note, which has such a provision. Because many forms are multi-state, and because states' laws vary, most standard forms provide for "reasonable attorney's fees". Traditionally, most courts in Central Virginia have interpreted "reasonable" to be the equivalent of 25% of the principal amount of the judgment, regardless of the actual legal fees charged, whether hourly or contingency. However, these days may be coming to an end due to court rulings!

The Virginia Supreme Court, in the case of Coady v. Strategic Resources, Inc., ruled that an award of attorney's fees rests within the sound discretion of the trial court. In the case of J. R. Mullins, et al. v. Richlands National Bank, the Virginia Supreme Court ruled that the trial court must determine the reasonableness of attorney's fees when disputed. In the case of Chawla v. BurgerBusters, Inc., the Virginia Supreme Court ruled that a party requesting an award of attorney's fees must establish a *prima facie* case that the fees requested are reasonable. In the case Schlegel v. Bank of America, N.A., et al., the Court denied the request for attorney's fees, citing the "test" to be used. It is as follows: In determining


(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.

Attorney's Fees on Collection Accounts, CONTINUED FROM PAGE 1

whether a party has shown the reasonableness of the fees, the fact finder may consider the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

With all of this said, you could win a contested trial on the merits, but be forced to present an "expert witness" (i.e., another attorney) to testify to the reasonableness of your attorney's fees! To avoid this problem, and, to insure at least a fighting chance of obtaining at least the 25%, or even 33 1/3rd % (which most attorneys charge in percentage collection cases), creditors should make certain that their forms specify "____% attorney's fees", or amend the standard form to "____%" and have the debtor initial adjacent to the change.

It is important to note that the judicial award of attorney's fees is made upon the entry of judgment. If creditors take their own judgment, no attorney's fees will be awarded, even though the judgment may eventually be turned over to an attorney for collection. In this case creditors, not the debtor, will bear the full cost of collection. Accordingly, I recommend that creditors timely turn over all accounts to their attorney for prompt action.

BANKRUPTCY

Fighting Chapter 7 Abuse

The Eight Circuit Court of Appeals in U.S. Trustee v. Ronald M. and Rhonda J. Harris holds that debtors filing for bankruptcy under Chapter 7 may be disqualified from filing if they have the ability to repay all or part of their debts pursuant to a Chapter 13 plan. The Appellate Court held that a bankruptcy court may dismiss a Chapter 7 filing under the substantial abuse provision of the bankruptcy code if the debtor could qualify to file under Chapter 13.

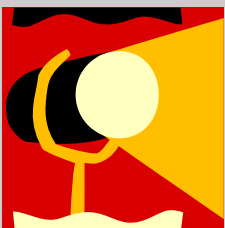
Creditors should utilize this in the fight to curb abusive filings of Chapter 7 petitions, and in the pursuit of debt reaffirmations.

REAL ESTATE

Using Homeowner Association Liens to Secure an Interest in Real Estate

In recent 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

(Continued on page 3)



LAW REVIEW OF THE MONTH:

LEGISLATIVE ACTION

The firm will track any legislative matter, or draft and advocate your legislative proposal before the Virginia General Assembly. In recent years, debtors have received legislative benefits in both the Virginia General Assembly and the United States Congress. The firm believes that it is time for creditors to have their day.

EMPLOYEE OF THE MONTH:

HEATHER TAYLOR



Heather Taylor has worked with Eddie since April, 1997. She currently focuses on creditor litigation and other general law matters. Heather enjoys working on the Creditor's Rights team at Lafayette, Ayers & Whitlock, PLC because it assists our clients. Outside the office Heather enjoys spending time with family and friends.

Using Homeowner Association Liens to Secure an Interest in Real Estate, CONTINUED FROM PAGE 2

difference between collecting the funds and incurring a loss. In this edition, we will review the benefits of using homeowner association liens to aid in the collection of your debt.

Virginia Code §55-516 provides for special procedures for the collection of homeowners association dues. This code section allows associations to place a lien on the land for unpaid assessments, as well as give associations a priority over certain other debts. To perfect the lien, however, it must be filed before the expiration of twelve months from the time the first such assessment became due and payable. This filing must be by a memorandum filed in the circuit court of the county or city where the development is located. The memorandum must contain the information specified in the statute. Before filing the lien, written notice must be sent to the property owner by certified mail giving at least ten days prior notice that a lien will be filed. Suit to foreclose on the lien must be brought within thirty six months of filing. We will review foreclosure suit procedures in the next issue.

FORECLOSURE

Advertisements of Sale

The Code of Virginia provides specific guidance as to advertisements for foreclosure sales. The sale must be properly advertised or it will be void upon order of the court.

Virginia Code §55-59.2 states that if the deed of trust provides for the number of publications of the advertisements, no other or different advertisement shall be necessary, provided that: if the advertisement is inserted on a weekly basis, it shall be published not less than once a week for two weeks, and, if such advertisement is inserted on a daily basis, it shall be published not less than once a day for three days, which may be consecutive days. If the deed of trust provides for advertising on other than a weekly or daily basis, either of these statutory provisions must be complied with in addition to the provisions of the deed of trust. If the deed of trust does not provide for the number of publications for the advertisement, the trustee shall advertise once a week for four consecutive weeks; however, if the property, or a portion of the property, lies in a city or county immediately contiguous to a city, publication of the advertisement may appear five different days, which may be consecutive. In either case, the sale cannot be held on any day which is earlier than eight days following the first advertisement or more than thirty days following the last advertisement.

Advertisements must be placed in the section of the newspaper where legal notices appear, or, where the type of property being sold is generally advertised for sale. The trustee must comply with any additional advertisements required by the deed of trust.

(Continued on page 4)

QUESTIONS AND ANSWERS:






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

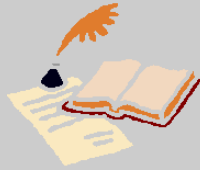


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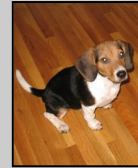
ALSO, VISIT ME ON THE WEB:

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-  <http://www.linkedin.com/in/edwardswitlockiii>
-  <http://twitter.com/EdwardWhitlock3>
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Debt Collections: You Need a Plan, From the Beginning
Protecting your security in "Workouts"/ Lien Avoidance:
Non-Purchase Money Security Interest
Homeowners' Association Wins Damages on Owner Violations
Deposits

AND



"MILES"

THE LEGAL BEAGLE

Advertisements of Sale, CONTINUED FROM PAGE 3

Virginia Code §55-59.3 requires advertisements to describe the property to be sold at foreclosure; however, the description does not have to be as extensive as in the deed of trust – substantial compliance is sufficient so long as the rights of the parties are not affected in any material way. The statute does require the property to be described by street address, and, if none, the general location of the property with reference to streets, routes, or known landmarks. A tax map number may be used, but is not required

Virginia Code §55-59.2 requires the advertisement to state the time, place and terms of the sale. If the deed of trust provides for the sale to be conducted at a specific place, the trustee must comply with this term. If there is no mention in the deed of trust, §55-59(7) provides that the auction may take place at the premises, or, in front of the circuit court building, or, such other place in the city or county in which the property or the greater part of the property lies. In addition, the sale could be held within the city limits of a city surrounded by, or contiguous to, such county. If the land is annexed land, the sale could be held in the county of which the land was formerly a part.

The statute provides that the advertisement shall give the name or names of the trustee or trustees. In addition to naming the trustee, the advertisement must give the name, address and telephone number of the person who may be contacted with inquiries about the sale. The contact person can be the trustee, the secured party, or his agent or attorney.

LAW 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; 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 law 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 (Business and Will & Estate Planning). 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 the chair of the Virginia State Bar's Fee Dispute Resolution Program, and a former member of the Virginia State Bar's Disciplinary Committee. He is a board member of the Henrico Economic Development Authority. He is the Vice President of Home Loans for KOVAR Corporation. He is also a former director of Henrico CASA, and a former adjunct professor of criminal law at J. Sargeant Reynolds Community College.

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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.

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