CREDITOR NEWS

A NEWSLETTER FOR INDIVIDUALS AND BUSINESSES CONCERNED WITH CREDITOR'S RIGHTS

361ST EDITION

WOW CREDITOR NEWS IS IN ITS 30TH YEAR OF PUBLICATION

April 2022

HAPPY EASTER!

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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

Garnishments Out-of-State

While I have had good results in issuing garnishments out of state, especially when the garnishee is a bank that operates nationwide, success is not always guaranteed. Diversity in jurisdiction does create some issues. A good example of this arose in a case in the United States District Court where the Court granted a debtor's motion to quash a garnishment summons after finding that the debtor's wages were not located in Virginia. The garnishment summons had been issued by a Virginia creditor that was a Virginia hospital. The debtor was a Pennsylvania resident doctor. The garnishee was an Ohio company. The court ruled that the garnishment summons issued by the court was ineffective to garnish the wages not located in Virginia.

Garnishing Joint Accounts

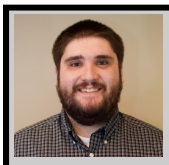
Can a creditor with a judgment against one party to a joint bank account garnish the account? Yes, but the judgment creditor is entitled only to that portion of the account which is attributable to the deposits of the judgment debtor. Virginia Code §6.1-125.3 holds that if the joint account holders are married, then the judgment creditor is entitled to half of the funds in the account, unless one of the married parties proves a different intent by clear and convincing evidence. Upon learning that the bank account is jointly held, the creditor must serve notice to the non-judgment account holder, as well as to the judgment debtor. Courts have ruled, however, that married account holders could attempt to protect bank accounts by asserting that the accounts were exempt from execution if they were held as tenants by the entireties.

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

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

Debtor's Chapter 13 Plan Cannot Favor Student Loans

The U.S. District Court in Alexandria, in the case of Gorman v. Birts, while approving the bankruptcy court's test to consider the debtor's chapter 13 plan, reversed its decision to confirm the plan because it unfairly discriminated against unsecured creditors by proposing to pay the debtor's student loans student loans outside of the plan.

Bankruptcy Code Section 1322(b)(5) permits a plan to provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final plan is due. In Gorman the debtor's student loans would qualify as this type of long term debt.

The parties in Gorman agreed that Bankruptcy Code Section 1322(b)(5) is subject to the unfair discrimination limitation described in subsection (b)(1). By proposing to pay her student loan outside of the plan the debtor in Gorman designated a separate class of unsecured claims. As a result of the proposal, the student loan lender would be paid more than three times as much in dollar amounts as the other unsecured creditors, even though the student loan debt constituted only one-third of the total unsecured debt. Accordingly, the question presented was whether the differential treatment constituted "unfair" discrimination under Bankruptcy Code Section 1322(b)(5).

As the bankruptcy court in Gorman recognized, courts across the country have not settled on a uniform test to assess whether a classification unfairly discriminates within the meaning of the statute. Courts have developed two primary tests to evaluate what constitutes unfair discrimination, neither of which has been adopted by the 4th Circuit (our local circuit). The 8th Circuit's test in the case of In re Lester (a 1991 case) has been widely applied. Bankruptcy courts in this District have also applied a slightly different test from the case of In re Linton (from an E.D. of Virginia bankruptcy court in 2011). The bankruptcy court in Gorman applied a hybrid version of the Lester and Linton cases. The Circuit Court in Gorman found that the proposed test of the bankruptcy court included all of the factors relevant to a reasonable determination and was the proper test to apply in this case. However, the Circuit Court found that the decision of the bankruptcy court in Gorman that the plan did not unfairly discriminate against the non-student loan creditors was clearly erroneous.

Using the non-dischargeable nature of student loans, as cited by the bankruptcy court in Gorman, as a basis for discrimination would eviscerate the detailed priority system of Bankruptcy Code Section 507 and make preferential treatment of student loans the rule rather than the exception. The Circuit Court agreed with the view that there are strong policy considerations underlying the student loan program that would favor preferential treatment of student loan debt; however, that is not the law. By not designating student loans as priority claims under Bankruptcy Code Section 507, Congress chose not to categorically treat them differently. Otherwise, the bankruptcy court in Gorman relied on the debtor's status as a single mother with three children in concluding that

(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:

Ted Whitlock

Ted Whitlock joined the firm in 2010. He currently manages the firm's post judgment collection. Working for LAW challenged him to become a better communicator with coworkers, clients, and debtors. He strives to work effectively with the debtors, but always keeps the clients best interest first. Outside the office Ted enjoys playing music and spending time with his friends.

Debtor's Chapter 13 Plan Cannot Favor Student Loans, CONTINUED FROM PAGE 2

the discrimination was reasonable. The debtor did not point to any case law supporting her view that student loans are properly favored under these circumstances. The Circuit Court found that the bankruptcy court erred in finding a reasonable basis for the discrimination. The court sided with the bankruptcy trustee, who challenged the bankruptcy court's good faith finding by arguing that the debtor had acted in bad faith by failing to pledge her entire disposable income to the plan, instead proposing to retain the disposable income of half of the amount she dedicated to the plan for these creditors. The Circuit Court in Gorman ruled that the bankruptcy court abused its discretion in failing to consider the effect of the disposable income issue on its finding of good faith.

REAL ESTATE

Suit to Enforce Mechanic's Liens

In the last issue of ***Creditor News*** I began a review of the Virginia Property Owners' Act. Under the Act, sellers are required to disclose in their sales contract that the property is located within a development subject to the Act. The Act also requires the seller to retrieve the Disclosure Packet in the Act and provide it to the purchaser. The Disclosure Packet includes the following information: association documents, the name of the association, state of incorporation, register agent's name and address, any other entity/facility to which the owner may owe fees or charges, budget or summary, income/expenses statement or balance sheet for last fiscal year, statement of balance due of outstanding loans, nature/status of pending lawsuits, unpaid judgments (with material impact on association or members or relating to lot being purchased), insurance coverage provided for lot owners including fidelity bond maintained by association, and much more.

The purchaser may cancel the contract within three days if delivered by hand or email, or six days if sent by mail, after receiving the Disclosure Packet or being notified that it is "not available" (meaning: a current annual report has not been filed by the Association with either the SCC or the CICB; or the seller has requested in writing that the packet be provided and it is not received within 14 days; or the association has provided written notice that the Disclosure Packet is not available). Additionally, if the Disclosure Packet is not delivered or the association does not indicate that it is not available, the purchaser may cancel the sale any time prior to closing. If the purchaser received the Disclosure Packet, the owner also has the right to request an update. However, the rights to receive and cancel the contract are waived conclusively if not exercised before settlement.

Failure to provide a Disclosure Packet after a written request for it has been made results in a waiver of any claim to delinquent assessments or violations of association documents up to that point, and the association will be liable to the seller for actual damages sustained up to $1,000 if the association is managed by a CIC Manager or up to $500 if it is self-managed.

In the next two issues of ***Creditor News***, I will discuss the provisions of the Virginia Property Owners' Association Act that provide a memorandum of lien and foreclosure in the event of an owner's default.

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:

Construction Case Garnishments
Denial of Discharge and Sanctions
The Virginia Property Owners' Association Act – Memorandums of Lien
Obtaining Possession after Foreclosure

AND

"MILES"
THE LEGAL BEAGLE

FORECLOSURE

Lost Notes

Virginia Code §55-59.1(B) addresses the situation where the noteholder has lost the original note. With the frequency of sales of notes on the secondary market, the loss of the original note documents occurs more often than might be expected. The Code provides that if the note or other evidence of indebtedness secured by a deed of trust cannot be produced, and, the beneficiary submits to the trustee an affidavit to that effect, the trustee may proceed to foreclosure. However, the beneficiary must send written notice to the person required to pay the instrument stating that the instrument is unavailable and that a request for sale will be made of the trustee upon the expiration of fourteen days from the date of the mailing of the notice. The notice must be sent by certified mail, return receipt requested, to the last known address of the person required to pay the instrument, as reflected in the records of the beneficiary, and shall include the same and the mailing address of the trustee. The notice must also advise the borrower if the borrower believes that he may be subject to claim by a person other than the beneficiary to enforce the instrument, the debtor may petition the circuit court of the county or city whether the property lies for an order requiring the beneficiary to provide adequate protection against any such claim. Failure to give the notice does not affect the validity of the 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; 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.

JENNIFER W. FISCHER ESQUIRE, the Associate Editor of ***Creditor News***, worked concentrates her practice in creditor representation (Collection, Bankruptcy, Real Estate, and Foreclosure), but also Business and Will & Estate Planning. Jennifer holds a BS (2011) in business administration from Christopher Newport University, and a Juris Doctorate (2014) from University of Richmond, T.C. Williams School of Law. She was admitted to the Virginia State Bar in October 2014. She is a board member for the Virginia Creditors' Bar association and the Henrico County Bar Association.

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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