



August 2022



HAPPY
SUMMER!

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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

Parties Liable for Credit Card Debts

The Richmond Circuit Court, in the case of Chevy Chase Savings Bank v. Strong, ruled that a husband who was only an "authorized user" on a bank credit card issued to his wife was not liable to the bank for a \$5,024 cash advance check he wrote on the credit card; only the wife was liable.

In Virginia Code §11-31, Virginia has codified the rule that use by an authorized agent of a cardholder shall be the equivalent of use by the cardholder. That rule, however, does not address the question of the liability of the agent. The court reasoned that while it does not appear that any Virginia Court has addressed the issue, the language used in the statute and case law from other jurisdictions led the Court to believe that the issue was governed by agency law.

The Court stated that it was well established in Virginia that when an agent contracts for a disclosed principal, credit is extended to the principal, and the benefits of the contract are accepted by the principal, there is no personal liability on the agent. In this case, the bank was well aware that the principal was the wife. It extended credit to her based on her application for a card. They were aware that no contract was ever made with husband individually and, therefore, they knew that he was simply an authorized agent.

The Court found that there was no indication in this case that husband exceeded his authority in executing the check against the account, or that he agreed to be personally liable for any debt incurred on his wife's account. Accordingly, the court ruled that the liability for the debts belonged only to wife. The court ruled that the husband was not liable for any portion of the outstanding balance, including the amount of the check that he personally wrote.

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.



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Court records can be used to find addresses if there are recent judgments against the debtor.

BANKRUPTCY

"Tools of the Trade" Exemption

Virginia Code §34-26, the "Poor Debtor's Exemption" section, allows a debtor to claim tools used in the course of his trade or occupation and keep them from creditors in bankruptcy cases. This exemption also applies to collection cases, as the debtor may use this exemption to prohibit post judgment collection by execution on the asset.

In the case of Monticello Arcade L. P. v. Lyall, the United States Bankruptcy Court at Newport News reviewed §34-26 in regard to an architect's Acura automobile. The Bankruptcy Court denied the exemption based upon the classification of the car as a "luxury" car. The Appeals Court reversed and remanded the case with instructions that the Bankruptcy Court focus not upon whether the car is a "luxury" car, but upon whether the car is an "absolute requirement for [debtor] to efficiently and competently perform his work as an architect." Upon the Bankruptcy Court's review, the Court ruled that the architect had demonstrated with his daily calendar and his testimony that the car was used to visit clients, job sites and government offices. The debtor was a self-employed architect in Hampton Roads, had practiced architecture on his own for six years as owner and president of his company. The debtor testified that although he used the vehicle to commute to and from work, the vast majority of the time he used the vehicle for non-commuting business purposes. The debtor also testified that he had to visit job sites in order to interpret plans and in order to understand the scope of the project. The Court noted that there was no evidence that there were alternate means of transportation available for the debtor to accomplish these requirements. Accordingly, the Court, this time around, found that the vehicle was "necessary", and therefor was exempt under Virginia Code §34-26(7).

In the case of White v. Central Fidelity Bank the United States Bankruptcy Court at Roanoke, Virginia, reviewed the language of Virginia Code §34-26 and held that the plain meaning is that property which is "necessary for use in the course of the householder's occupation or trade" qualifies as a "tool" for purposes of exemption. In White the Court noted that in regard to automobiles, the particular facts surrounding the occupation and the necessity of the automobile must be examined. In White, the debtor had both a day and an evening job as a nursing assistant providing home health care in patients' homes, and whose employment contract required that she have an auto as a condition of her employment. Based upon these facts, proof that the creditor's lien was a nonpossessory, non-purchase money lien, and the fact that the creditor's lien impaired the debtor's exemption, the Court held that the lien was avoidable under Bankruptcy Code §522(f).

In the civil/collection case of Hunn v. Zettel the Fairfax County Circuit Court had occasion to review a debtor's claim for an exemption for his BMW car as a "tool of the trade". Unlike the evidence obtained in Lyall which demonstrated the "absolute requirement", in Zettel, no such evidence was presented. Accordingly, the Court denied the debtor's exemption claim in Zettel.

Looking at another case involving tools of the trade, the United States Bankruptcy Court at Newport News, in

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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: SAVANNAH HOLLOMAN



Savannah Holloman joined the firm in November of 2020. She currently focuses on skip tracing. Savannah enjoys working on the Creditor's Rights team at Lafayette, Ayers & Whitlock, PLC because it is never boring, and she gets to learn something new every day. Outside the office she enjoys going to the beach and spending time with family and friends.

"Tools of the Trade" Exemption, CONTINUED FROM PAGE 2

the case of In re Aldrich, upheld the debtors' motion to exempt various items of property, including an inoperable photo enlarger and two photo processors, as "tools of the trade" under Virginia Code §34-26. The Court concluded that these items were exempt under Virginia Code §34-26 and under Bankruptcy Code §522. The Court in Aldrich stated that it reached its conclusion from the plain meaning of Virginia Code §34-26, and from the obvious intention of the Virginia legislature, which substantially broadened the scope of the relevant definitions when it amended Virginia Code §34-26 in 1990. The Court in Aldrich found from the un rebutted testimony that the photo processing equipment was necessary for use in the debtors' occupation involving the family photo processing lab. There was no doubt that the debtors had been in the photo processing business for some time and, in the case of the husband, almost continuously since his retirement from the Air Force. It was likewise absolutely clear from the evidence that the wife was engaged in the photo processing business of a third party at the time of the filing of the petition, and that she too awaited the startup of the family business in order to utilize the exempted tools of the trade, which she was currently utilizing on a part-time basis. Therefore the Court found that both debtors were, or intended to be engaged, in an occupation and trade at the time of the filing of the petition. The Court found it to be sufficient that the husband had the intention of returning to his occupation as a photo processor at the time of the bankruptcy filing, even though he had been precluded from doing so by the contractual relationship with the objecting creditor, who bought out the debtor's earlier photo processing business and implemented a non compete agreement.

REAL ESTATE

Using *Lis Pendens* 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 difference between collecting the funds and incurring a loss. In this edition, we will review the benefits of using *lis pendens* in litigation cases to aid in the collection of your debt.

A *lis pendens* is a legal memorandum which places parties on notice that litigation is pending which affects the title or ownership of real estate. The *lis pendens* is filed in the circuit court of the county or city in which real estate lies.

Virginia Code §8.01-268 B states that "No memorandum of *lis pendens* shall be filed unless the action on which the *lis pendens* is based seeks to establish an interest by the filing party in the real property described in the memorandum...".

Virginia Code § 8.01-268 A provides that a *lis pendens* does not affect a subsequent bona fide purchaser of real estate for valuable consideration until actual notice of such *lis pendens* is properly filed with the required information. Requirements include: the title of the cause, the general object thereof, the court wherein it is pending, the amount of the claim asserted, a description of the property, the name of the person whose estate is

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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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**Child Support Exemption for Garnishment
Sanctions on Improper Fair Debt Claim
Lien Avoidance Case Review: Judicial Liens
Using Mechanic's Liens to Secure an Interest in Real Estate
Trustees in Foreclosure**



"MILES"

THE LEGAL BEAGLE

Using *Lis Pendens* to Secure an Interest in Real Estate, CONTINUED FROM PAGE 3

intended to be affected thereby.

We have experienced attorneys and staff who can examine title, file *lis pendens*, and litigate to enforce the same.

FORECLOSURE

Deeds of Trust

It all starts with the deed of trust. The deed of trust is the primary method of acquiring a lien against real estate in Virginia. With a deed of trust, the owner of the real estate conveys legal title to a trustee, in trust, to secure the noteholder's indebtedness. A deed of trust establishes a lien on the subject real estate upon execution by the grantor and recordation in the land records of the Circuit Court for the jurisdiction (County or City) in which the property is located. While recording the deed of trust is not essential to the validity of the deed of trust between the parties, an unrecorded deed of trust does not establish a lien on the subject real estate as to other creditors and purchasers of the grantor. An unrecorded deed of trust will not provide the beneficiary of the deed of trust with a priority position against other creditors with recorded liens, even if they are subsequent in time.

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.

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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