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HAPPY HALLOWEEN!

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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**

**Perfection of Vehicle Liens**

In almost all circumstances, courts will recognize a lien as being valid only when it has been "perfected". Perfected means registered with the appropriate governmental agency - DMV, Board of Inland Game and Fisheries, etc.; language on a promissory note that the loan is secured by the vehicle is not enough. Although the result of failed perfection could be harsh (a lost lien), it makes sense; without a registration, no one could ever know who has liens. Understanding this, it is important to have someone in your creditor organization be designated to follow-up on lien perfection to ensure that it is done, to ensure that it is done promptly, and to ensure that it is done right.

What happens when your debtor moves to another state? As long as the creditor holds the original certificate of title reflecting the lien, the creditor will usually be protected. If the vehicle is taken to another state but is never re-registered or re-titled, the original secured creditor who is listed as lienholder on the original certificate of title maintains its perfection. The original secured creditor also maintains its lien if the debtor moves and obtains a new certificate of title with the creditor's name on it. However, what happens if the debtor moves, obtains a new certificate without the lien recorded? There could be a problem. To avoid the possible problem, follow up on your transient debtors like you do your new liens.

**The Fair Debt Collection Practices Act**

It is time again to review the Fair Debt Collections Practices Act (FDCPA),  
*(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

When giving us your delinquent accounts, always include any banking information you may have, such as account numbers or known banking institutions, that could be used to issue garnishments.

## The Fair Debt Collection Practices Act, CONTINUED FROM PAGE 1

Title 15 U.S. §1692. This is a federal law designed to protect consumer debtors from "unscrupulous" collection activities. It defines the practices, the people who are protected, and the people who are restricted.

The most damaging part of the act is the definition of "collector" (as only collectors are covered), and attorneys are included in the definition.

The FDCPA requires collectors to send a demand letter thirty (30) days prior to commencing suit. The letters must contain information including:

1. The principal amount remaining on the debt;
2. The name of the creditor to whom the debt is owed; and
3. The specific language that follows:

Unless you, within thirty days after you have received this notice, dispute the validity of this debt, or any portion thereof, I will assume the debt to be valid.

If you notify me, in writing, within thirty days after you have received this notice, that the debt or any portion thereof, is disputed, I will obtain verification of the debt and mail you a copy of that verification to you.

Upon your written request within thirty days after you have received this notice, I will provide you with the name and address of the original creditor, if different from the current creditor.

The FDCPA further restricts the jurisdictions in which suit can be brought to the city or county in which the debtor resides. In certain circumstances, the matter can be sued upon where the debt was incurred. To eliminate the ambiguity, one idea that I always suggest is that creditors stamp ("this document executed in [name of city or county], Virginia") adjacent to the original signatures of the executed documents, prior to their execution.

The jurisdiction restriction of the FDCPA can be the most costly provision for the creditor, as attorneys, attempting to pass on the economies of consolidating cases, may be unable to do so. Additional trips to court result in additional costs which will, in one way or another (higher percentage fees), be passed on to the creditor. Hence, a wise creditor should invest in an appropriately worded stamp for each site executing such documents.



### 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:

#### DWEN JENKINS



Dwen joined LAW in November, 2015, but has been working in real estate since 2006. Dwen is excited about joining the firm because she loves real estate, and loves to see the smile of each client who is purchasing their dream home. Outside of the office, Dwen enjoys spending time with her husband and her son, Samuel.

## BANKRUPTCY

### Lien Avoidance Case Review: Judicial Liens Larger than Available Exemptions

In the case of Andrews Distributing Co. v. Stanley the United States District Court at Big Stone Gap, Virginia, held that a creditor's lien must be avoided in the amount of the debtors' homestead exemption, but the amount not avoided would remain a lien against the debtors' real property. The District Court's decision overruled a bankruptcy court's decision avoiding the entire lien. The Bankruptcy Court had concluded that the debtors' homestead exemption was impaired by the presence of the creditor's lien, and thus avoided the lien in full. The creditor, on appeal to the District Court, contended that the Bankruptcy Court erred, in that the clear language of Bankruptcy Code §522(f) mandated that the lien be avoided only to "the extent that" it impaired the exemption. The District Court agreed with the creditor and ruled that under the plain meaning of Bankruptcy Code §522(f), only the amount of the judicial lien which impaired the exemption should be avoided. The District Court stated that the Court of Appeals for the 4th Circuit, in strongly worded dicta, had addressed this issue in the case of In re Opperman. The Court of Appeals in Opperman concluded that a lien larger in amount than the exemption available to the debtor did not impair that exemption. Thus, in Andrews the District Court found for the creditor and decided that only that part of a lien which actually interfered with the debtor's homestead exemption may be avoided.

## REAL ESTATE

### Perfecting Mechanic's Liens

In recent editions of *Creditor News* we have been discussing the benefits of using real estate to improve creditors' positions. Last month we began a discussion of the benefits of using mechanic's liens to aid in the collection of your debt.

Virginia Code §§43-4, 43-7 and 43-9 provide for the perfection of the lien by general contractors, subcontractors, and laborers and suppliers. In each section the creditor must file a memorandum of lien at any time after the work is commenced or material furnished, but not later than 90 days from the last day of the month in which he last performs labor or furnishes material, and in no event later than 90 days from the time such building, structure, etc., is completed, or the work thereon otherwise terminated. The memorandum must contain specific information as set forth in the code (and there are forms in the code), and must be filed in the clerk's office in the county or city in which the building, structure etc., or any part thereof is located. The memorandum shall show the names of the owner of the property sought to be charged, and of the claimant of the lien, the amount and consideration of his claim, and the time or times when the same is or will be due and payable, verified by the oath of the claimant, or his agent, including a statement declaring his intention to claim the benefit of the lien, and giving a brief description of the property on which he claims a lien.

In next month's edition we will explore suits to enforce the lien.

We have experienced attorneys and staff who can examine title, file mechanic's liens, and litigate to 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](mailto: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](mailto:ewhitlock@lawplc.com).

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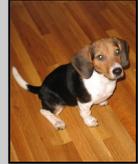
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**Fraudulent Conversion or Removal of Property Subject to Lien or Title  
Lien Avoidance Case Review: Judicial Liens that  
Impair a Homestead Exemption  
Criminal Liability for Misuse of Construction Funds  
Notice of Sale**

AND



"MILES"

THE LEGAL BEAGLE

**FORECLOSURE****Substitute Trustees**

Question: What happens if the trustee under your deed of trust is either unavailable, or, is no longer the person you desire to serve as trustee? Answer: You can appoint a substitute trustee. Under Virginia Code Section 55-59(9), the noteholder, or, the holders of greater than fifty percent of the monetary obligation secured by the deed of trust, have the right and the power to appoint a substitute trustee or trustees for any reason, regardless of whether such right is expressly granted in the deed of trust. The timing of your action is important. The trustee must be empowered before taking action – this occurs when the instrument of appointment has been executed. You do not have to wait for recording. However, as Virginia Code Section 55-59(9) states that the appointment of a substitute trustee shall be recorded before, or at the time of, the recording of the deed conveying the property (such as after a foreclosure).

Question: Can a lender appoint their counsel as trustee? Answer: Yes. Virginia Code Section 26-58 holds that a trustee is not disqualified merely because he is a stockholder, member, employee, officer or director or counsel to the lender.

**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.

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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.

**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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