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HAPPY
THANKSGIVING!

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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

Fraudulent Conversion or Removal of Property Subject to Lien or Title

If a creditor is a lien holder, that creditor should be aware of a lesser known remedy available if a debtor fraudulently sells, removes, or hides the property subject to the lien. Virginia Code §18.2-115 states that a debtor is guilty of larceny if he/she fraudulently sells, pledges, pawns, removes from the premises agreed upon, removes from Virginia, disposes of, or hides the property subject to a lien without the written consent of the owner or lienor or the person in whom the title is, or, if the writing is a deed of trust, without the written consent of the trustee or beneficiary in such deed of trust. Unlike civil fraud, this statute's fraud contemplates an act by a debtor intended to deprive a secured creditor of his collateral by appropriating it to the debtor's own use.

There must be proof that the debtor's fraudulent intent was directed against the lienor or person in whom the title is. The statute also states that failure or refusal to disclose the location of the property or surrender the property shall be prima facie evidence of a violation of this statute. In Lewis v. First National Bank, the Fourth Circuit clarified that even the existence of written permission to remove the collateral is immaterial under this section, as the creditor need not show the lack of such permission to make out a prima facie case.

The final provision of the statute provides that the venue of prosecution against persons fraudulently removing any such property, including motor

(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 a social security number, birth date, and other identifying information that could be helpful for Skiptracing.

Fraudulent Conversion or Removal of Property Subject to Lien or Title , CONTINUED FROM PAGE 1

vehicles, from the Commonwealth shall be the county or city in which such property or motor vehicle was purchased or in which the accused last had a legal residence.

Debtors may argue that the debtor did not actually receive the demand for return of the collateral; however, in *Lewis*, failure to leave a functional forwarding address or contact with the creditor constituted a waiver of the debtor’s right to deny that the demand was made.

Debtors have also argued that criminal charges such as these cause emotional distress or are extreme and outrageous. In *Lewis*, The Fourth Circuit stated that creditors should not be fearful of a debtor’s claim that these charges cause emotional distress. To hold such would render the statute useless, which was not intended by the legislature. The court held that the initiation of criminal proceedings against someone under this section with probable cause is not extreme or outrageous as a matter of law.

BANKRUPTCY

Lien Avoidance Case Review: Judicial Liens that Impair a Homestead Exemption

In the case of *Payne v. Crossroads of Hillsville Assoc., Ltd.* the United States Bankruptcy Court at Abington, Virginia, ruled that a judgment creditor's lien was avoided because it impaired a debtor's homestead exemption. In summary, the Court found as fact that although the creditor docketed its judgment lien against the debtor prior to the debtor's filing of a bankruptcy petition and amended bankruptcy schedule that claimed an exemption in "any future equity" in his home, there were several other liens ahead of the judgment lien, and there was no equity left in the property, which had been sold. In particular, the Court found that at the time of filing the petition, local tax appraisals valued the debtor's property at \$147,500. The evidence also showed that the creditor's judicial lien was subordinate to numerous prior liens, namely: a first deed of trust to a bank in the amount of \$88,362; a second deed of trust to a bank in the amount of \$52,000; a judgment lien in favor of another creditor in the amount of \$2,513; and a judgment lien in favor of yet another creditor in the amount of \$115,473. Also, at the time of filing, this property was subject to past-due taxes in the amount of \$4,500. The total amount of liens, including taxes, senior to that of the creditor's was \$262,848, thus rendering no equity in the debtor's property to support the plaintiff creditor's lien. The debtor sold this real estate for \$185,000. Despite the automatic stay, the creditor's lis pendens caused approximately \$10,000 of the proceeds from the sale to be held by the buyer's attorney pending resolution of this matter. The Court further stated that to aid the debtor in his "fresh start," the bankruptcy code provides that a debtor may avoid the fixing of a judicial lien on an interest of the debtor in property to the extent

(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:
CINDY BLAYLOCK**



Cindy Blaylock has been with the firm since 1995. Among other tasks, Cindy prepares real estate deeds and assists with closings. Cindy enjoys working at Lafayette, Ayers & Whitlock because our clients are good to work with and each day holds new challenges. Outside the office she enjoys spending time with family and friends.

that the lien impairs an exemption to which the debtor would otherwise have been entitled. Thus, a judicial lien must be avoided if it impairs a debtor's exemption. The Court in Payne found that the creditor's judgment lien was not supported by any equity in the debtor's property at the time of the filing of the debtor's petition. To allow such a lien to remain in place would not only impair any exemptions to which the debtor would have been entitled, thus violative of Bankruptcy Code §522(f), but would also undermine the "fresh start" secured to the debtor by the provisions of the bankruptcy code. The Court stated that to the extent the creditor's judicial lien impaired the debtor's exemption, it must be avoided, for, if not, the intended benefit of the homestead exemption itself would be lost. Any remaining portion of the creditor's lien must also be avoided as lacking the supportive equity needed at the time of the filing of the debtor's petition and the debtor's opportunity for a "fresh start" would be frustrated unless he was entitled to avoid the creditor's judicial lien in its entirety. The Court also found it appropriate to note that an alleged lien upon property of a debtor without equity supporting same as of the date the petition is filed was a general unsecured claim discharged by the debtor's discharge order under Bankruptcy Code §727 and enjoined therein from collection. A discharge order provides that any judgment obtained heretofore or hereafter is void as a determination of personal liability of a debtor. A judgment docketed as a lien, not supported by equity, is a judgment only of personal liability, and the dischargeability order specifically enjoins all creditors whose claims are such from seeking collection. The Court also stated the issue of exemptions or exempt property is not the only remedy available to debtors in the area of lien avoidance and nullification. If a judgment or lien on debtors' property has no property or equity support, it is unsecured and discharged by the order of discharge.

REAL ESTATE

Criminal Liability for Misuse of Construction Funds

Virginia Code §43-13 provides that funds paid to a general contractor or subcontractor must be used to pay persons performing labor or furnishing material. Any contractor or subcontractor or any officer, director or employee of such contractor or subcontractor who, with intent to defraud, retain or use the funds, or any part thereof, paid by the owner or his agent, shall be guilty of larceny in appropriating such funds for any other use while any amount for which the contractor or subcontractor may be liable or become liable under his contract for such labor or materials remains unpaid, and may be prosecuted upon complaint of any person or persons who have not been fully paid any amount due them.

The use by any such contractor or subcontractor or any officer, director or employee of such contractor or subcontractor of any moneys paid under the contract, before paying all amounts due or to become due for labor performed or material furnished for such building or structure, for any other purpose than paying such amounts, shall be prima facie evidence of intent to defraud.

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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**A Salute to our Credit Unions
Lien Avoidance Case Review: Avoidance of Exemptions
Impaired by a Judicial Lien
Making Owners and General Contractors Personally Liable
to Subcontractor, Laborer or Materialman
Foreclosure Sale Accounting**



"MILES"

THE LEGAL BEAGLE

FORECLOSURE

Notice of Sale

The Code of Virginia provides specific guidance as to giving notice of a foreclosure sale.

§55-59.1 requires that the written notice of sale contain the time, date and place of the proposed sale, as well as either (i) the instrument number, or, deed book and page number, of the instrument of appointment filed pursuant to §55-59-59 (appointment of substitute trustee), or, (ii) a copy of the executed and notarized appointment of substitute trustee. Personal delivery or mailing a copy of the advertisement by certified or registered mail is sufficient.

§55-59.1 requires the trustee to send written notice of the time, date and place of the sale to (i) the present owner of the property ... (ii) any subordinate lienholder ... (iii) any assignee of such note ... (iv) any condominium unit owner's association that has filed a lien ... (v) any property owner's association that has filed a lien ... (vi) any proprietary lessees' association that has filed a lien.

It is important to know that in addition to the notice required by statute, the note or the deed of trust may contain additional notice requirements. Accordingly, the trustee should examine both of these documents.

§55-59 provides that the notice can be sent by either the trustee or the lender.



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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