



December 2022



HAPPY  
HOLIDAYS!

**INSIDE THIS ISSUE:**

A Salute to our Credit Unions	1
Ted's Tips	2
Lien Avoidance Case Review: Avoidance of Exemptions Impaired by a Judicial Lien	2
Law Review: Estate Planning	2
Employee Spotlight: Amanda Brooks	2
Making Owners and General Contractors Personally Liable to Subcontractor, Laborer or Materialman	3
Preview of Next Issue	4
Foreclosure Sale Accounting	4
Firm Attorney Biographies	4

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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**

**A Salute to our Credit Unions**

"People-helping-people". This is the philosophy of our nation's credit unions. Our credit unions quickly tell us that they offer a better means of acquiring reasonably priced financial services for everyone. This philosophy has yielded a great growth in membership.

Having worked as counsel for numerous credit unions over the years, I can attest to the positive force that credit unions are. I can also attest to the benefits that credit unions bring their members. Most credit unions are able to provide a full service of savings, checking, ATM, loans (personal, car, mortgages) and much more.

Many businesses are unaware that although they may be too small to start their own credit union, they are not too small to associate with an existing credit union. Such an association would provide both the credit union and the business with great benefits. The credit union will receive new members and business. The businesses will receive the membership and services of the credit union. I am pleased to serve as a "facilitator" to such associations. Those who are interested should call me at 545-6250. Together we can all benefit from the credit union movement.

*Thank You* 

**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.

## BANKRUPTCY

### Lien Avoidance Case Review: Avoidance of Exemptions Impaired by a Judicial Lien

In the case of Massie v. Yambrose the United States District Court at Harrisonburg, Virginia, decided that where a creditor had obtained a judgment lien that was docketed against real property that the debtor owned with her non-debtor spouse as tenants by the entirety, that lien impaired the debtor's exemption and may be avoided. This decision reversed a bankruptcy court decision. In summary, the District Court decided that although the creditor's judgment lien would not have been enforced against the debtor's property unless and until the tenancy by the entirety dissolved, the lien nevertheless impaired the exemption. The focus of the exception granted in Bankruptcy Code §522(b)(2)(B) was the property itself, not the tenancy. If it was not avoided, the lien could be enforced against the property after the tenancy by the entirety dissolved. This would constitute an impairment of the debtor's exemption; therefore, the District Court ruled that the debtor may avoid the lien pursuant to Bankruptcy Code §522(f)(1). The issue before the Court in Massie was whether the creditor's docketed judgment was a "judicial lien" that "impaired" an exemption to which the debtor would be entitled as a tenant by the entirety, even though the lien could not be enforced while the tenancy survived. Although this was a judgment lien pursuant to Virginia law, that did not determine whether it was a judicial lien as defined by the bankruptcy code. The interest held by the creditor was obtained pursuant to Virginia Code §8.01-458, which clearly qualified as being obtained by judgment or other legal process. The core issue, therefore, was whether there truly was "a charge against or interest in" the property held by debtor and her non-debtor spouse given the invalidity of any lien against property held by tenants by the entirety. For all practical purposes, this question was the same as whether the lien impaired the exemption. If the creditor did not have a charge against or interest in the property, then nothing existed that could impair the exemption. Conversely, if the lien (assuming that it was one) did impair the exemption, then it must have been a charge against or an interest in the property. As a result, for the purposes of the issue involved in this case, the Court assumed that the creditor held a judicial lien in order to decide whether such lien impaired the debtor's exemption. The determinative issue was whether a lien "impaired" an exemption pursuant to Bankruptcy Code §522(f) if it was not capable of being enforced until the basis of the exemption itself disappeared. In this case, the creditor's lien was completely ineffective against the property held by the debtor and her non-debtor spouse as tenants by the entirety, unless and until the tenancy itself dissolved and the debtor was left with an interest in the property other than as a tenant by the entirety. The District Court stated that it was guided in its decision by the 4th Circuit Court of Appeals case of In re Opperman. As applied to Massie, Opperman suggested that the proper question was not whether the basis for the exemption was impaired, but whether the property currently subject to the exemption could become impaired by the lien. This implication was buttressed by the language granting the exemption in Bankruptcy Code §522(b). That section allowed the debtor to exempt from property of the estate the property specified in the remainder of the section. Bankruptcy Code

*(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:

#### AMANDA BROOKS



Amanda has been with the firm since May 2019. She currently focuses on a variety of clerical and administrative duties. Amanda enjoys working on the Creditor's Rights team at Lafayette, Ayers & Whitlock, PLC because it gives her the opportunity to interact and get to know many of our clients. Outside of the office she enjoys spending time with her family and traveling.

**Avoidance of Exemptions Impaired by a Judicial Lien,** CONTINUED FROM PAGE 2

§522(b) further states that such exempt property was any interest in property in which the debtor had, immediately before the commencement of the case, as a tenant by the entirety. In Massie the exemption was granted to the property itself, rather than to the tenancy by the entirety, and the relevant date in determining the exemption was the date that the debtor filed the bankruptcy petition. The exemption was granted to the debtor's interest in the property because on the date that debtor filed her bankruptcy petition, the property was owned by tenants by the entirety, and this was not dependent on how it is owned at any time in the future. As the 4th Circuit implied in Opperman, therefore, the question was whether the creditor's lien could attach to the property, not to the tenancy, thereby impairing the exemption to which the debtor currently is entitled. Absent avoidance of the lien pursuant to Bankruptcy Code §522(f)(1), the lien could attach to the property if the tenancy by the entirety dissolved. If the unity of husband and wife is broken, the tenancy by the entirety would be lost along with it. The debtor's husband could die, or she could divorce him and retain an individual interest in the property. If either of these events occurred, the creditor then would be able to enforce the lien against the property. Although the tenancy could never be impaired, the exemption surely could be. The Court therefore ruled that the creditor's lien impaired an exemption to which the debtor would be entitled but for the lien. Pursuant to Bankruptcy Code §522(f)(1), the Court held that the debtor may avoid the lien.

**REAL ESTATE**

**Making Owners and General Contractors Personally Liable to Subcontractor, Laborer or Materialman**

Virginia Code §43-11 provides a way for owners or general contractors to be made personally liable to subcontractor, laborer or materialman if notice is appropriately given, and if the payer makes payment to the owing party without paying the notifying creditor. Specifically, §43-11 (2) states that:

“...if such subcontractor, or person furnishing labor or material shall at any time after the work is done or material furnished by him and before the expiration of thirty days from the time such building or structure is completed or the work thereon otherwise terminated furnish the owner thereof or his agent and also the general contractor, or the general contractor alone in case he is the only one notified, with a second notice stating a correct account, verified by affidavit, of his actual claim against the general contractor or subcontractor, for work done or materials furnished and of the amount due, then the owner, or the general contractor, if he alone was notified, shall be personally liable to the claimant for the actual amount due to the subcontractor or persons furnishing labor or material by the general contractor or subcontractor, provided the same does not exceed the sum in which the owner is indebted to the general contractor at the time the second notice is given or may thereafter become indebted by virtue of his contract with the general contractor, or in case the general contractor alone is notified the sum in which he is indebted to the subcontractor at the time the second notice is

*(Continued on page 4)*

**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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**ALSO, VISIT ME ON THE WEB:**

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**Confessed Judgment, Power of Attorney, and Required Signatures  
Lien Avoidance Case Review: Avoidance of a Judicial Lien as a Preference  
Using Real Estate to Secure Your Debt  
Sale Price and Delays in Sale**

AND



"MILES"

THE LEGAL BEAGLE

**Making Owners and General Contractors Personally Liable, CONTINUED FROM PAGE 3**

given or may thereafter become indebted by virtue of his contract with the general contractor. But the amount which a person supplying labor or material to a subcontractor can claim shall not exceed the amount for which such subcontractor could file his claim.”

The notices referred to in this code section are commonly referred to in the industry as “42-11 letters”. We have experienced attorneys and staff who can examine title, file mechanic’s liens, and litigate to enforce the same. If you have a need, please call us.

**FORECLOSURE**

**Foreclosure Sale Accounting**

The Code of Virginia requires that the trustee’s accounting be filed with the appropriate commissioner of accounts “within six months after the date of a sale.” The *Manual for Commissioners of Accounts* states that “although the Commissioner does not have specific statutory authority to extend the six month filing date, some courts allow the Commissioner to extend the deadline for good cause shown in *advance* of the filing date.”

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; Juvenile and Family 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 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 (Civil Litigation, Business, Will & Estate Planning, Traffic, Criminal, Military, Juvenile and Family Law). 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 on the Virginia State Bar’s Disciplinary Committee, and is a Virginia State Bar Fee Dispute Arbitrator. 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 part time with the firm in 2008 while a full-time student at Christopher Newport University. Jennifer graduated from CNU magna cum laude in June, 2011 with a BS in business administration. Jennifer graduated from University of Richmond, T.C. Williams School of Law in May 2014 and was admitted to the Virginia State Bar in October 2014. She is the current Treasurer for the Virginia Creditors Bar Association and Treasurer for the Henrico County Bar Association. Jennifer is engaged in a general practice of law with a focus on creditor’s rights.

**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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