

Below is a Newsletter on Judgement Liens and Real Estate.

Our Live in person Construction Law Survival Seminars will start September 16th in Dulles Virginia, with another October 13th in Laurel Maryland. These are large classrooms, so it will be easy to socially distance ten (10) or Twelve (12) feet apart.

We will also have live remote Zoom Construction Law Survival Seminars at no cost to you on Mechanic's Liens in Virginia, Maryland and DC on Wednesday October 13, 2021 and Public & Private Payment Bond Rights Wednesday on October 27, 2021. We hope you can make it!

There is more information [Here](#) and below the Newsletter.

Judgment Liens and Real Estate

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WHAT IS A LIEN?

Liens can be “consensual” or “statutory” or “judicial.” A mortgage is an example of a consensual lien. A mechanic’s lien is statutory. A judgment lien is an example of a judicial lien.

Think about what happened the last time you bought a house. You were asked to sign two sheets of paper. The first was a promissory note. This was your “contract” or unsecured promise to pay. This paper said that you would repay the bank in monthly payments over a period of years. If you fail to keep this agreement, the bank could file suit “on the contract” and obtain a judgment.

The other paper you signed was a mortgage. The mortgage granted the bank a “security interest” or “lien” in a specific piece of property (your house). The mortgage said that if you failed to keep your contract to repay the loan, the bank could sell the “security property” and take the sale proceeds to repay the loan.

The last time you bought an automobile, you probably obtained a car loan and granted a security interest in your new car, very similar to the mortgage on real estate. Your car loan security agreement said that if you failed to keep your car loan payments, the bank could repossess the car and sell it. It is possible to grant a similar consensual security interest in almost any type of property, including equipment or accounts receivable.

A judgment is a “floating lien.” The creditor needs to “attach” this floating judgment lien to specific property of the judgment debtor. Once the judgment lien attaches, it works very much like the consensual lien of a mortgage, a car loan or a security interest in accounts receivable. The creditor can foreclose on the judgment lien property. Accordingly, the judgment creditor needs to find the debtor’s assets, then get the aide of the court to make the judgment lien attach to that asset and then foreclose on that asset.

Priority

Some liens are placed on property purposefully by the property owner, such as a mortgage. Other liens are “involuntary” or “judicial,” including judgment liens.

The general rule is that all liens have priority in the order that they are filed in the land records. The term “first mortgage” or “first trust” generally means that this was the first in time to be filed in the land records. A “second mortgage” is the second in time to be recorded in the land records on that property. If the property is foreclosed, the first lien holder has a “higher priority” to the proceeds of sale and will receive all of the proceeds of sale until paid in full. If there are any sales proceeds left, they go to the second mortgage holder, until the second mortgage holder is paid in full, and so on.

The priority of any type of lien is extremely important and will often determine whether or not the lien holder gets paid. If there is insufficient equity in the property, a lien creditor can be “under secured” and will receive less than their full debt on foreclosure. A lien creditor can also be completely “unsecured,” if there is no equity in the property after the payment of prior liens. A lien with low priority can easily be worthless.

The priority of security interests in personal property is very similar to the priority of liens on real estate. Generally, whichever secured creditor has “perfected” the security interest first will have the first priority. In order to perfect a consensual lien, the secured creditor must have a valid security agreement and, in most cases, file a valid financing statement. Judgment lien creditors must perfect their judgment lien by getting it to “attach” to property. The manner of “attachment” depends on the type of property, as discussed in detail below.

The priorities of various liens on property determine whether or not the liens survive foreclosure. If the first mortgage holder forecloses, then the second and third mortgage holders are eliminated. These inferior lien holders have no security interest in the property after foreclosure. All liens that are “inferior” to the foreclosing lien holder are eliminated, but liens that are “prior” will survive the foreclosure. If a second mortgage holder forecloses, the first mortgage holder would be unaffected. The foreclosure purchaser now owns the property “subject to” the prior first mortgage lien.

A security interest will be helpful to you even if another lender’s lien is prior. First, the security interest will still give you a “hammer” that allows you to quickly get the debtor’s attention. A judgment lien in equipment can empower you to immediately foreclose on equipment, even if the sale is subject to the prior lien. A lien on accounts receivable can allow you to garnish the debtor’s accounts for direct payment.

Second, you may be able to require a superior lender to “marshal assets.” If one lender has a security interest in multiple pieces of property, it cannot destroy another lender’s security interest in just one piece of property, unless it is necessary to collect the debt. In other words, the superior creditor can be required to go against all other property of the debtor, before it goes after the piece of property with a junior security interest. If the debtor becomes insolvent, there will be insufficient assets to pay all of the creditors. Other creditors will attack any lien or security interest that has a weakness, in order to leave more assets for the general unsecured creditors. As a result, the technical rules on lien attachment or perfection must be followed closely.

Asset Searches

The greatest success in enforcing judgments is always when a client can identify assets of the judgment debtor to attach. The most successful creditors will have asset information in their credit file, collected in the ordinary course of business. Just like a bank gets a complete financial statement with a loan application, a creditor should collect as much information as possible early in the business relationship. Even if you are not able to just hand the debtor an application, it is much easier to collect information from your debtor while you are friends.^[1] Credit information should include bank accounts, vehicles and equipment owned and real estate owned. The credit application should also tell you how title to this property is held and identify existing liens on the same property.

It is, of course, important to collect financial information from the account throughout the

relationship. The single most important thing you can do is collect copies of checks received from the debtor. Checks include much information, including addresses, legal name, bank name and bank account number. Even if you do not keep a copy of every check, copies should be made periodically. You may also be able to get copies of checks deposited from your bank. If so, it is less important to make your own copies.

You also know that it is important to qualify each project where you will supply labor or materials. You need to know whether each project is financially viable. You need the identity of the owner, general contractor and other players.[2] You need to evaluate your mechanic's lien and payment bond rights to determine whether you are a secured creditor or unsecured creditor on each project.[3] This type of project information is also important in order to identify assets for judgment enforcement. Even if you do not have mechanic's lien or payment bond rights, every project where you delivered labor or materials may be an account receivable of your judgment debtor that you can attach through garnishment.

A creditor that already has asset information will be able to move faster and at a lower cost to enforce their judgment. It is often necessary, however, to perform an asset search. This is not legal work and can be performed by the client or any number of commercial services that are cheaper than an attorney. Commercial Internet-based services can be very effective at identifying assets at a very low cost. Various private investigators will perform this service, normally at an hourly rate.

Most cities and counties have tax assessment information on the Internet. Personal property tax assessments will identify the vehicles a debtor has registered in the county. Real estate tax assessments will identify real property. Most counties have search engines on their tax assessment roles that can search by owner name or by property address. Most state Department of Motor Vehicles will provide motor vehicle and lien information, including the Virginia Division of Motor Vehicles. You must qualify for information from the Virginia DMV, however. Most legitimate businesses would qualify to get this information but must go through an application process.

ATTACHING JUDGMENT LIEN TO REAL ESTATE

Any lien on any real estate, consensual or judicial, must appear in the county land records to be effective. Once a judgment is "docketed" in the county land records, it constitutes a lien on all real estate owned by the debtor in that county.[4] Once docketed, a judgment lien works very much like a mortgage. The judgment runs interest at the judgment rate. The creditor can foreclose on the judgment lien and auction the property through judicial process.

If the judgment lien has attached to real estate, the judgment creditor will often want to simply be patient and wait. The judgment continues to run interest at the judgment rate of 6% (or the contract interest rate) in the state of Virginia[5] and the judgment rate of 10% (or the contract interest rate) in Maryland[6]. This is currently much higher than market savings or mortgage rates. The real estate will usually continue to appreciate in value. If there is an existing prior mortgage, the judgment debtor will continue to pay it down. As a result of all of these factors, the judgment creditor's position normally becomes stronger with time, once the judgment has attached to real estate.

If the judgment debtor has only personal property and no real estate, the situation is very different. Personal property depreciates with time, can be damaged and can be easily hidden. Real estate is not going anywhere. One of two things will eventually happen with a judgment lien on real estate. If the debtor is financially viable, he will eventually have to pay off the judgment lien in order to sell or refinance the property. One day, the telephone will ring and someone will want to know where to send the check.

If the debtor is insolvent, a prior mortgage holder may eventually foreclose. If there is enough equity in the property, this will also result in payment to the judgment creditor. The property may have already been encumbered by one large mortgage, multiple mortgages or other judgment liens. In this case, it is possible for a judgment lien creditor

to be under foreclosure or completely unsecured. If a prior mortgage holder forecloses in this case, the judgment creditor may get nothing and the judgment lien is eliminated. The only good news is that the judgment lien creditor did not expend additional legal fees in foreclosing on the real estate.

It is expensive to enforce a judgment lien on real estate. This requires a lawsuit involving the property owner, all mortgage holders, all judgment lien holders and anyone else with an interest in the property. A commissioner in chancery or special master often hears the case and must be paid hourly for this purpose. A title search on the property is necessary, and the foreclosure auction must be advertised in the newspaper. It is practically impossible to recover attorney's fees incurred while foreclosing on a judgment lien. It is also impossible to settle such a case by agreement, unless the judgment debtor is solvent. Accordingly, it is often the best strategy for a judgment creditor to simply wait. If judgment creditors are impatient and insist on foreclosing on the judgment lien, this will result in high costs and a lower chance of recovery. Foreclosure is normally a good strategy only if the judgment debtor has the ability to pay the judgment or the judgment is large and there is ample equity in the property.

The judgment will not attach to the real estate unless it is docketed in the name of the property owner. Therefore, it is important to look ahead and know the name of the property owner before filing the lawsuit to obtain a judgment. Common problems involve married names, trade names, middle names and initials. It is normally possible to list a defendant more than once, with variations of their names. Then the judgment will be entered in all variations of the name, and is more likely to attach to property.

FORMS OF OWNERSHIP

Real estate, equipment and other property can be owned by a single individual, a corporation or by other limited liability entities. Multiple people and entities can also own property. In order to enforce your judgment against any type of property, your judgment must be in the same name as the property owner. This is something lawyers and clients need to think about when filing suit. The "caption" on the first page of the lawsuit normally lists the defendant's names. If you win the lawsuit, this caption will normally dictate the names of the defendants on the judgment. If your judgment is in a name different from the property owner, the judgment will not attach until you take an additional step to change the judgment name. It is good to perform asset searches before you file suit to think ahead toward judgment enforcement, starting with obtaining a judgment in the same name as potential enforcement property.

Problems often arise from married names, middle names or initials and trade names. It is often important to list a defendant's name more than once on the lawsuit caption, in order to make sure an eventual judgment will be recorded in all important variations. If a business is operated as a sole proprietorship, then the individual and the "business" are one in the same. If you have judgment in the business name, however, you will have difficulty garnishing a bank account in the individual name and vice versa. It is easy to simply name the same defendant twice in the initial lawsuit, once in the individual name and once in the business name. This will save you a lot of trouble in later enforcement. When property has multiple owners, there are various types of joint ownership. The deed conveying the property into the current owners will normally dictates the type of ownership. The deed or bill of sale will normally say "seller grants and conveys the described real estate to Mr. Smith and Mr. Jones as tenants in common," or "as tenants by the entirety," or "as joint tenants." The normal or default manner of multiple ownership is "tenancy in common." If two people own a property and no legal papers say how they hold title, then they are tenants in common.

Tenants in common each own one half of the property, unless the deed describes some other percentage of ownership or if there is some type of outside agreement. Each tenant owns a one half "undivided interest" in the property. If you obtain a judgment against just one of the property owners, your judgment will attach to the one-half undivided interest of your judgment debtor. You could then foreclose on your judgment lien and sell the one-half undivided interest at a foreclosure auction. The purchaser at the auction would then own an undivided one-half interest in the property, together with the other non-debtor owner. If one tenant in common dies, then that one-half undivided interest passes to their

heirs. Those heirs are then tenants in common with the remaining non-deceased tenant in common.

Property can also be owned as “joint tenants with common law right of survivorship.” This works basically the same as tenants in common, except that if one joint tenant dies, the property automatically passes to the other joint tenant. A judgment against just one of the joint tenants will attach to real estate owned by that joint tenant.

There is a special type of joint tenancy for people who are married to each other. This is called “tenancy by the entirety.” In a tenancy by the entirety, joint action by both tenants is necessary to sell the real estate or create a lien. Therefore, a judgment will not attach unless it is against both husband and wife. For this reason, it is important to get the signature of both husband and wife on any contract with a sole proprietor or on any personal guaranty. You must be careful, however, with the Equal Credit Opportunity Act and any blanket policy requiring spousal signatures.[7]

Even if you have a judgment against only one tenant by the entirety, it would still be important to docket that judgment in all counties where real estate is located. If tenants by the entirety get divorced, ownership of all real estate is automatically converted to a tenancy in common. Any judgments that have already been docketed against one of the tenants would automatically attach to the real estate the moment the divorce decree is entered by the court. Similarly, when one tenant by the entirety dies, full ownership passes to the surviving tenant by the entirety. If you happen to have a judgment docketed against that surviving tenant, your judgment has now attached to the entire real estate.

Other types of property can have the same forms of multiple ownerships. Banks accounts and equipment can be held as tenants in common, joint tenants or as tenants by the entirety.

DOCKETING THE JUDGMENT

In Virginia and Maryland, a judgment in the circuit court will automatically be docketed in the land records of that county.[8] A judgment in the district court, however, is not automatically docketed. The creditor must obtain an abstract of the judgment from the district court and have the judgment docketed in the circuit court land records.

Judgment liens on real estate are also county specific. A judgment docketed in one county will not attach to real estate in another county. Again the creditor must request an abstract of the judgment from the original court of entry and then have that judgment docketed in any county in which the debtor owns real estate. Docketing a judgment in the land records is normally so easy and inexpensive that a judgment creditor will normally want to docket the judgment in all counties in which the judgment debtor will ever possibly obtain an interest in real estate. A judgment lien normally lasts for at least a decade and can normally be extended for decades more.[9] Over the passage of this time, many things can happen causing the judgment to attach to real estate.

Once a judgment is docketed in a county, if the judgment debtor ever buys real estate in that county the judgment lien will immediately attach. Real estate often passes by inheritance. If your judgment debtor’s parents live in a certain county, this is reason enough to have the judgment docketed there. If real estate is owned by tenants by the entirety, a judgment against just one tenant will not attach. However, if the parties’ later divorce or the non-debtor passes away, the judgment will immediately attach. Docketing a judgment is so cheap and lasts so long, it is often worthwhile to docket the judgment in any county in which the debtor, lives, may live in the future or has relatives.

Please call with any questions. More information regarding Enforcement of Judgments is in the Construction Law Survival Manual at <https://fullertonlaw.com/>

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Use the Free Construction Law Survival Manual at <https://fullertonlaw.com/>

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2021 Construction Law Survival Seminars
For More information and to sign up, go [Here](#)
Jointly sponsored by Fullerton & Knowles, P.C.
NACM South Atlantic & Independent Electrical Contractors

Live in person seminars

The Construction Law Survival Seminar

Associated Builders & Contractors s Dulles, VA
September 16th 2021 8:30am -3:30pm

Independent Electrical Contractors s Laurel, MD
December 15th 2021 8:30am -3:30pm

TOPICS COVERED:

Mechanic's Liens

- Time Limits, Notices and Claims to preserve rights in Virginia, Maryland, Pennsylvania and D.C.

Public and Private Payment Bond Rights

- Federal Miller Act, State Little Miller Acts and Private Bonds

Construction Contracts

- How to Write, Review and Revise contracts
- Conduit, Pay when Paid Clauses and Claims Procedures

Just for GCs Construction Law Seminar

Independent Electrical Contractors s Laurel, MD
October 13th 2021 8:30am -3:30pm

Associated Builders & Contractors s Dulles, VA
November 17th 2021 8:30am -3:30pm

The Just for GCs Construction Law Seminar will cover many similar topics. All members of the construction industry are invited and will benefit, but we will consider matters from a general contractor's point of view.

TOPICS COVERED:

- AIA General Contract terms & Writing, Reviewing and Revising General Contracts
- Conduit, Change Orders & Claims, Defects in Plans and Specs
- Differing or Concealed Conditions, No Damage for Delay & Liquidated Damages
- Administering Subcontracts and Sub claims, Preconditions for Payments to Subs

Each seminar participant will receive continental breakfast, lunch, refreshments and the newest edition of the 700 page Construction Law Survival Manual.

Cost of \$99 per attendee.

Seminar starts at 8:30 am. Check-in starts at 8:00 am.

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or visit the website <https://fullertonlaw.com/all-seminars>
for more seminar information and to use the **free 700 page** internet
Construction Law Survival Manual

Remote Zoom seminars at no cost to participants

Wednesday October 6th 2021 9:00am -12pm

Mechanic's Liens

- Time Limits, Notices and Claims to preserve rights in Virginia, Maryland, Pennsylvania and D.C.

Wednesday October 27th 2021 9:00am -11am

Public and Private Payment Bond Rights

- Federal Miller Act and State Little Miller Acts

Visit the website <https://fullertonlaw.com/all-seminars> for more seminar information and to use the **free 700 page** internet **Construction Law Survival Manual**

¹¹ See chapter in Construction Law Survival Manual, Credit Management; section, Collecting Information.

¹² See chapter in Construction Law Survival Manual, Credit Management; section, Collectability; subsection, Qualifying the Project.

¹³ See chapter in Construction Law Survival Manual, Bankruptcy Primer for Creditors; section, Introduction; subsection, The Importance of Security.

¹⁴ Virginia Code §8.01-458 (Michie 1950) and Maryland Rule 2-621.

¹⁵ Virginia Code §6.2-302 (Michie 1950).

¹⁶ Maryland Code §11-107 and Maryland Code §11-106.

- ^[7] See chapter, Credit Management; section, Creditworthiness; subsection, Credit Checks.
- ^[8] Virginia Code §8.01-446 (Michie 1950) and Maryland Rules 2-601, 3-601.
- ^[9] Maryland Code Courts and Judicial Proceedings §11-402; Virginia Code §8.01-458 (Michie 1950).