Underwriting Judgment Liens in Virginia

Description

Welcome to the first installment of the 3-part series.

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INTRODUCTION

Judgment liens are the most common title defect to address when evaluating title work. But *common* does not mean *simple*â??judgment liens can be tricky, especially considering the variety of contexts in which they occur. Furthermore, some rules relating to judgment liens have changed in recent years. Failure to address judgment liens appropriately can disrupt client relations and may create a claim on your E&O policy as well as for the title insurance company insuring the transaction, as coverage against involuntary liens is basic to both lendersâ?? and ownerâ??s policies.[1]

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BACKGROUND

What Is A Judgment?

The term *judgment* may be used interchangeably with *decree* and includes orders or awards.[2] Often such orders or awards are made by courts, but not alwaysâ??judgments can also be made by *confession*. In other words, in any lawsuit a defendant may agree with the plaintiff to have a judgment entered against him without the court rendering such judgment.[3] Additionally, a debtor may confess a judgment to a creditor irrespective of a suit pending.[4] Note, however, that if a judgment is made by confession, the Virginia Code sets forth special rules that must be followed for the judgment (and resulting judgment lien) to be valid.[5]

What Is A Judgment Lien?

A *lien* is liability *in rem**[6]*â??in other words, a right that a creditor has against its debtorâ??s property.[7] A *judgment lien,* by extension, is â??a right given the judgment lien creditor to have his claim satisfied by the seizure of the land of his judgment debtorâ?• and â??a right to levy on any such lands for the purpose of satisfying the judgment.â?•[8] Its basis is found in statutes only and not in any common law principles.[9]

How Is A Judgment Lien Created?

State court judgments rendered in Virginia are not liens on real property until they are docketed in the clerkâ??s office of the county or city where such land is situated.[10] Land located in other jurisdictions remains unburdened by the judgment lien until it is docketed in those jurisdictions.[11]

Judgments rendered in the circuit court of appeals or a district court of the United States within Virginia may be docketed in the same manner as state court judgments rendered in Virginia.[12]

Judgments rendered in other states may be domesticated and docketed as if they were entered by a Virginia court using the procedures set out in the Uniform Enforcement of Foreign Judgments Act.[13] Such procedures may also be used for judgments originating from a court of the United States.[14]

Judgments rendered in other countries can be recognized in Virginia by following the procedures set forth in the Uniform Foreign-Country Money Judgments Recognition Act.[15] Once recognized, such a judgment is enforceable in the same manner and to the same extent as a judgment rendered in Virginia.[16] Note, however, that some â??foreign-countryâ?• judgment cannot be domesticated, such as judgments for taxes, fines or penalties, or judgments rendered in connection with domestic relations.[17]

A judgment by confession may create a lien by simple docketing, but if the credit was extended for personal, family, or household purposes, a judgment by confession shall not be a lien against the real property of the judgment debtor until the expiration of the 21-day period of notice to the judgment creditor that the confessed judgment has been entered against him.[18]

How are Judgments Docketed?

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Judgments are docketed by either copying the wording of the judgment order verbatim or by abstracting the information therefrom into a book or into fixed fields of an electronic data storage system.[19] Whether recorded in a well-bound book or on electronic media, any abstracted judgment docketed should contain the following information: (i) the date and amount of the judgment, (ii) the time from which it bears interest, (iii) the costs, (iv) the full names of all the parties thereto, including the address, date of birth and the last four digits of the social security number, if known, of each party against whom judgment is rendered, (v) the alternative value of any specific property recovered by it, (vi) the date and the time of docketing it, (vii) the amount and date of any credits thereon, (viii) the court by which it was rendered and the case number, and (ix) when paid off or discharged in whole or in part, the time of payment or discharge and by whom made when there is more than one defendant.[20] If the judgment was made by confession, the clerk shall also enter in such docket the time of day at which such confession was made, or when such confession was received by the clerk to be entered of record.[21] And the clerk shall also record the name of the plaintiffâ??s attorney, if any.[22]

Noteâ??error or omission in the entry of the address or addresses or the social security number or numbers of each party against whom judgment is rendered shall in no way affect the validity, finality or priority of the judgment docketed.[23]

Note further that recording a judgment in this manner is not sufficientâ??a judgment is not considered docketed against any defendant unless and until it is *indexed* by the clerk in the name of such defendant.[24] It may be stamped as â??receivedâ?• by the Clerk and put into an inbox available for public inspection, but until the judgment is actually indexed it does not become a lien on the subject property.[25]

To What Does A Judgment Lien Attach?

Once docketed, the judgment â??shall be a lien on all the real estate of or to which the defendant in the judgment is or becomes possessed or entitledâ?• in the jurisdiction where the judgment is docketed.[26]

Note that the statute creates a lien on â??all the real estate.â?• While the Virginia Code does not offer a definition of â??real estate,â?•[27] the Virginia Supreme Court has interpreted that phrase to include

â??any interestâ?• of real estate.[28]

What sort of real estate interests are in view for judgment liens? Letâ??s begin with the three types of estates: *fee simple*, *life estate,* and *leasehold estate*.

A *fee simple* title is the highest estate known to the law and necessarily implies absolute dominion and control over the land.[29] It is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater estate or interest in land.[30] Certainly, this type of estate is in â??all real estateâ?• as that term is used in the judgment lien statute, and this hardly needs citation or support. But what about the other two?

A *life estate* is like a fee simple title but limited by the measure of oneâ??s life. The one holding a life estate is called a life tenant. Normally, a life estate is measured by the life of the life tenant, but it doesnâ??t have to be. A life estate can be measured by another personâ??s life, in which case it is called a life estate *pur autre vie* (a phrase of French origin, meaning *for anotherâ??s life*). Once the measuring life terminates, so do the rights of the life tenant with fee simple interest of the subject property normally vesting in one or more *remaindermen,* who have a contingent interest. Whether a judgment lien attaches to a contingent interest, see *Judgments Liens and Contingent Interests*, below. As for life estate interests, a few Virginia cases have recognized that such interests are subject to judgment liens.[31]

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A *leasehold estate* is created by a lease. The property interest of a leasehold is the right to *possess* the subject property. A lease is a conveyance of lands or tenements[32] (usually in consideration of a rent or other annual or periodical recompense) for life, for years, or at will, but always for a time less than the lessor has in the premises.[33] The one who owns the subject property is the *landlord* or *lessor*, and the one who leases the property is the *tenant* or *lessee*. During the lease term the tenant is substantially the owner of the property, having the right of possession, dominion, and control over it.[34]

At common law, a leasehold interest was regarded as only a chattel interest (personal property), and therefore not subject to the lien of a judgment.[35] While there seem to be no Virginia cases on point that recognize a judgment lien attaching to a leasehold interest, the Virginia Code recognizes that a leasehold interest is an estate in land,[36] and Virginia courts have subjected leasehold interests to other liens.[37]

CONTEXTS AND CONSIDERATIONS

Having laid a foundation of what judgment liens are all about, itâ??s now time to explore how judgment liens behave in a variety of contexts.

Judgment Liens and Property-Specific Liens

Once recorded in the land records, some liens affect all property owned by the judgment debtor in that jurisdiction, while other liens are property specific. Examples of the former include child and spousal support liens,[38] mechanicsâ?? liens,[39] Virginia income tax lien,[40] and Virginia estate tax liens.[41] Examples of the latter include condominium association dues liens,[42] homeowners association dues liens,[43] sewer/water liens,[44] local improvements liens,[45] and municipal liens.[46]

The key point to remember here is that judgment liens affect â??*all the real estate* of or to which the defendant in the judgment is or becomes possessed or entitled.â?•[47] Even if the underlying action is

a property-specific lien, once that lien is reduced to a judgment and recorded, it affects *all the real estate* owned by the judgment debtor in that jurisdiction.

Judgment Liens and After-Acquired Property

The statute authorizing judgment liens is clear: â??Every judgment . . . shall be a lien on all the real estate . . . to which the defendant in the judgment . . . becomes possessed or entitled.â?•[48] To illustrate, if a creditor records a judgment against John in the Fairfax County Land records, and John later purchases real property in Fairfax County, the judgment become a lien on Johnâ??s property the moment he owns it. This much is simple.

What may not be so simple is the priority of that judgment lien considering the after-acquired property doctrine. As commonly understood, the doctrine states that if a seller conveys property he does not own, but later acquires valid title to that same property, the newly acquired title passes to the original buyer. To illustrate:

- Bob owns Lot 36 of GREENWOOD subdivision in Fairfax County.
- Bob sells his lot to Ellen, but the deed of conveyance mistakenly recites Lot 38, not Lot 36.
- Since Bob does not own Lot 38, Ellen receives nothing. â??You cannot convey what you do not own.â?•
- Thinking that she owns Lot 36, Ellen then sells her lot to George. The deed of conveyance recites the correct Lot 36, but George receives nothing because Ellen does not own Lot 36.
- George refinances and this error in the chain of title is discovered. Bob executes a corrective deed to Ellen, reciting the correct lot number. Valid title immediately passes through Ellen to George.

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This seems simple enough, but what if there is a sizable judgment recorded against Ellen that was missed in the Ellen to George transfer? Is there a judgment lien on title? Perhaps the issue could be avoided if Bob executed a quitclaim deed directly to Georgeâ??a great question for your underwriter!

To make matters even more complicated, consider the after-acquired property doctrine. The complication can be appreciated by reading the codification of the doctrine in Va. Code Â§ 55.1-310 (Conveyance of property not owned but subsequently acquired):

When a deed purports to convey property, real or personal, describing it with reasonable certainty, that the grantor does not own at the time of the execution of the deed, but subsequently acquires, such deed shall, as between the parties, have the same effect as if the title that the grantor subsequently acquires were vested in him at the time of the execution of such deed and thereby conveyed.

The key to the complication is the phrase, â??as between the parties,â?• as illustrated by the Virginia Supreme Court case of *Deutsche Bank Nat. Trust Co. v. Arrington*.[49] The simplified facts of that case are as follows:

- 2005: Plucky conveys Property to Riemenschneider. Deed recorded.
- 2006: Plucky executes Deed of Trust to Deutsche Bank to secure loan with Property, but Plucky does not own Property.
- 2008: Deutsche Bank records Deed of Trust (outside chain of title).
- 2009: Plucky executes Deed of Trust to Arrington, but Plucky does not own Property.
- Later in 2009: Riemenschneider re-conveys Property back to Plucky.

- Even later in 2009: Arrington records her Deed of Trust (within chain of title).

Here, it may be tempting to conclude that when Riemenschneider re-conveyed the property back to Plucky, then we just go back in the chain of title and walk it forward: Pluckyâ??s Deed of Trust to Deutsche Bank becomes valid, then Pluckyâ??s Deed of Trust to Arrington become valid in second lien position.

The Virginia Supreme Court, however, held the opposite: the Arrington Deed of Trust had priority over the Deutsche Bank Deed of Trust. The phrase â??as between the partiesâ?• means that the after-acquired property doctrine limits its effect between the partiesâ??in this case, between Plucky and Deutsche Bank. When a grantor purports to convey propertyâ??without holding titleâ??to a grantee, the grantor cannot thereafter deny that title has actually passed to the grantee. It is not meant to disrupt the rights of third parties, like Arrington.

The Court continued by observing that a lien, like a Deed of Trust, only affects third parties when â??duly admitted to record,â?• which means in part to be recorded within the chain of title so that it provides effective constructive notice to those who research the title. Because the Deutsche Bank Deed of Trust was recorded outside the chain, it was not duly admitted to record and therefore had no effect on Arrington as a lienholder of another deed of trust.

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How is all this related to our discussion on judgment liens? The main takeaway is this: do not confuse the after-acquired property doctrine as codified in Virginia Code Â§ 55.1-310 with the fact that judgment liens affect after-acquired property of the judgment debtor according to Va. Code Â§ 8.01-458. Judgment liens do not have to be â??duly admitted to recordâ?• by being recorded in the chain of title. However, that is not to say that the after-acquired property doctrine has no effect on judgment liens. This doctrine may affect the *priority* of judgment liens as to other liens, like deeds of trust.

Judgment Liens and the Simultaneous Death Act

The Simultaneous Death Act states that if co-owners to property (including spouses) die within 120 hours of each other, each is legally treated as having predeceased the other, and any property with survivorship rights is divided into equal shares rather than passing by survivorship.[50]

To illustrate, if a judgment creditor recorded a judgment against Spouse#1, it would not attach to property held by Spouse#1 and Spouse#2 as tenants by the entirety. If Spouse#1 dies, vesting title in Spouse#2, so also dies the hopes of the judgment creditor as well. But if Spouse#2 dies within 120 hours of the death of Spouse#1, property does not pass according to survivorship rules, but each spouse is treated as predeceasing the other, and the creditorâ??s judgment attaches to one-half of the real estate owned as tenants by the entirety.

Judgment Liens and Fraudulent Conveyances and Voluntary Conveyances

A *fraudulent conveyance* is a transfer of real estate with the intent to defraud creditors. Such a transfer is void.[51] It makes no difference if the judgment debt was contracted before or after the transfer, but the intent to defraud must be proven, and if the transfer was for value, the granteeâ??s participation in the fraud must also be shown.[52] However, bona fide purchasers for value without notice of the fraud are protected.[53]

A *voluntary conveyance* is a transfer made in which the consideration is recited to be nothing, or not recited at all, or recited to be upon consideration of marriage, or recited to be consideration not otherwise deemed valuable in law.[54] Such a transfer is also void, but here the judgment debt must have been contracted at the time of the conveyance.[55]

To illustrate both concepts, suppose you are examining a title report for a sale transaction. The chain of title reveals that Gary bought the property 4 years ago, and then 2 months ago he recorded a Deed of Gift to himself and his wife, Glenda, as tenants by the entirety. And then 1 month ago, a judgment against Gary alone was recorded for $30,000.

We know from our discussion on tenancy (above) that judgments against one spouse do not attach. But if the deed putting Glenda on title was either a fraudulent conveyance or voluntary conveyance, the transfer to Glenda could be voided, and the judgment would attach. It would be hasty on these facts to dismiss the judgment against Gary based on the protections afforded tenants by the entirety. Further analysis is warranted.

A creditor seeking to void either a fraudulent conveyance or a voluntary conveyance must file a *lis pendens*, so a title examiner should be on notice of current litigation.[56] If successful, such transfer may be rendered void, thereby allowing a judgment to attach that was previously outside the chain of title. But again, if the lis pendens was against Gary alone, it would be hasty on these facts to conclude that it would have no effect on the property. Further analysis is warranted.

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[1] ALTA Ownerâ??s Policy (2021) Covered Risk 2; ALTA Homeownerâ??s Policy (2021) Covered Risk 7; ALTA Loan Policy (2021) Covered Risk 2.

[2] Va. Code Â§Â§ 8.01-2(2) and8.01-426.

[3] Va. Code Â§ 8.01-431.

[4] Va. Code Â§ 8.01-432.

[5] Va. Code Â§ 8.01-431 *et seq.*; *see also AAA Disposal Services, Inc. v. Eckert,* 267 VA. 442, 443 (2004) (â??We conclude that such a confession of judgment is not valid in light of the plain terms of Code Â§ 8.01-431 requiring that a plaintiff be willing to accept a judgment for the principal and interest contained in a confession of judgment.); *Benton Land Fund, L.P. v. NVMercure Ltd. Partnership*, 849 F.Supp. 1123, 1128 (E.D.Va. 1994) (â??These statutes reflect a general concern with the possible abuse of confessed judgments, particularly those taken pursuant to a power of attorney waiving the right to due process.â?•)

[6] *In rem* is Latin for *against the thing*.

[7] *Fairbanks, Morse & Co. v. Town of Cape Charles,* 144 Va. 56 (1926); *Hardy v. Norfolk Mfg. Co.,* 80 Va. 404 (1885).

[8] *Jones v. Hall*, 177 Va. 658, 664 (1941).

[9] *In re Snyder*, 57 B.R. 438, 440 (W.D.Va. 1985) (â??Judgment liens are purely statutory creaturesâ?•).

[10] Va. Code Â§ 8.01-458.

[11] *Murphyâ??s Hotel Co. v. Benet*, 119 Va. 157 (1916).

[12] Va. Code Â§ 8.01-447.

[13] Va. Code Â§ 8.01-465.1, *et seq*.

[14] Va. Code Â§ 8.01-465.1.

[15] Va. Code Â§ 8.01-456.13:11, *et seq*.

[16] Va. Code Â§ 8.01-465.13:6.

[17] Va. Code Â§ 8.01-465.13:2(B); *see also Taylor v. Aids-Hilfe Koln e.V.*, 301 Va. 352 (2022).

[18] Va. Code Â§Â§ 8.01-434 and 8.01-433.

[19] Va. Code Â§ 8.01-449(A).

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[20] Va. Code Â§ 8.01-449.

[21] Va. Code Â§Â§ 8.01-431 and 8.01-449.

[22] Va. Code Â§ 8.01-449.

[23] Va. Code Â§ 8.01-449(C).

[24] Va. Code Â§ 801-450.

[25] *R.C. Lee Carpet & Title, Inc. v. Curtas Forest Products, Inc.*, 34 Va. Cir. 111 (1994).

[26] Va. Code Â§ 8.01-458.

[27] *In re Baek*, 661 B.R. 126, 133 (E.D. Virginia 2024).

[28] *Leasing Serv. Corp. v. Just.*, 243 Va. 441, 443 (1992).

[29] *Wickouski v. Swift*, 203 Va. 467 (1962).

[30] *Smith v. Smithâ??s Exâ??r,* 122 Va. 341 (1918).

[31] *Moore v. Bruce*, 85 Va. 139 (1888) (remaindermen are not necessary parties defendant to a bill to subject a life estate to the lien of a judgment); *Brauer v. Brauer*, 215 Va. 62 (1974) (divorced wifeâ??s final judgment for arrearages in alimony was a lien on divorced husbandâ??s real property, including his life estate in his deceased motherâ??s real estate); *Umbarger v. Watts*, 66 VA. 167 (1874) (appeal from bill filed to subject defendantâ??s life estate to a lien of a confessed judgment); *Martin v. Martin*, 167 Va. 206 (1936); *Moore v. Peirce*, 1 Va.Dec. 698 (1889); *Tebbs v. Lee*, 76 Va. 744 (1882).

[32] A *tenement* is a multi-occupancy building, like an apartment.

[33] *Smith v. Payne*, 153 Va. 746 (1930) (citing *Minor on Real Property*).

[34] *Hannan v Dusch*, 154 Va. 356 (1930).

[35] CJS Judgments Â§ 779.

[36] *See* Va. Code Â§ 55.1-101(B) (describing lease agreement as an â??estate in landâ?•).

[37] *Garrett v. Ancarrow Marine, Inc*., 211 Va. 755 (1971) (mechanicâ??s lien); *Hoffman v. First Nat. Bank of Boston*, 205 Va. 232 (1964).

[38] Va. Code Â§ 16.1-278.15(C); Va. Code Â§ 8.01-460.

[39] Va. Code Â§ 43-4.

[40] Va. Code Â§ 58.1-1805.

[41] Va. Code Â§ 58.1-908.

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[42] Va. Code Â§ 55.1-1966.

[43] Va. Code Â§ 55.1-1833.

[44] Va. Code Â§ 15.2-5139.

[45] Va. Code Â§ 15.2-2404 *et seq*.

[46] Va. Code Â§ 15.2-104.

[47] Va. Code Â§ 8.01-458.

[48] Va. Code Â§ 8.01-458.

[49] 290 Va. 109 (2015).

[50] Va. Code Â§ 64.2-2200 *et seq.*

[51] Va. Code Â§ 55.1-400.

[52] *Haynes v. Bunting*, 152 Va. 395 (1929).

[53] *Id*.; Va. Code Â§ 55.1-400.

[54] Va. Code Â§ 55.1-401.

[55] *Id*.

[56] *Id.*

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