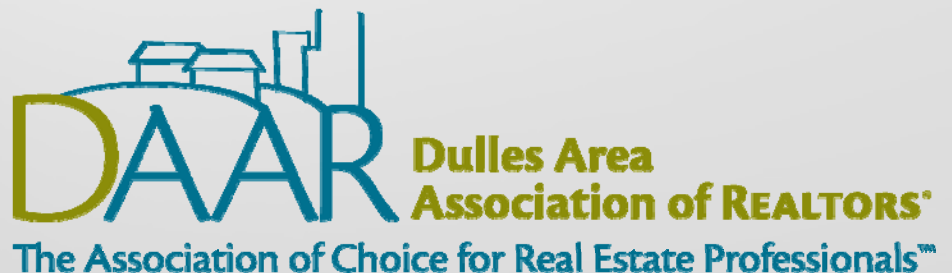


# Judgments & Liens in Virginia: *A Real Estate Agent's Perspective*



# Judgments & Liens in Virginia: A Real Estate Agent's Perspective

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## **I. Background**

When a debtor owes money to a creditor one option for collection is for the creditor to sue the debtor to obtain a judgment. A common misconception is the expectation that when the creditor wins in court the debtor pays up. Often that is not the case. The creditor has to pursue additional legal procedure to collect: garnish wages or a bank account (collecting against intangible personal property); force personal property to be sold (collecting against tangible personal property); or force real estate to be sold (collecting against real property).

If the case was heard in a Virginia Circuit Court, an abstract of the case will be automatically **docketed (recorded)** among the land records in the Circuit in which the case was heard. If the case was heard in Virginia General District Court, or in a federal court, additional steps must be taken to docket the judgment in a Circuit Court record room. One effect of docketing is to have the **lien be good for 20 years**, with the creditor having the option to extend the time for an additional 20 years. (Va. Code § 8.01-251) Another effect of docketing is to have the lien **automatically attach to real estate in that locality** owned by the debtor, whether the property was owned when the judgment was obtained, or whether it was acquired after the judgment was docketed.

Most creditors don't take it any further. Judgments are a problem for real estate agents because title insurance will require the issue to be resolved since the laws of Virginia allow a creditor to potentially force the real estate to be sold to satisfy the debt. Therefore, a judgment is a cloud on title and needs to be addressed. A recorded judgment doesn't give much information:

- Date of judgment;
- Name and address of the creditor;
- Name and address of the debtor;
- Name of attorney for the creditor (if there was one); and
- Amount of the judgment.

Title agents have to determine whether or not the person named in the judgment is the one whose property is being insured in the current transaction. The current owner has to provide information to assist with resolution. Often real estate agents are involved in resolving the matter as well.

## **II. Title issues**

### **1. Is this the same person?**

A title underwriter needs to determine if the judgment debtor is the party to the transaction being insured or another person with a similar name.

Common names such as John Smith or Maria Garcia are particularly difficult.

Middle initials are not determinative of identity, nor are “Jr.”, “Sr.”, “III”, etc. Sometimes “Jr.” will have the same address as dad, but it will not be the same person. Sometimes once dad passes away, “Jr” changes his name to “Sr”. Even if a debtor’s name is misspelled or misindexed, the lien still attaches to the real estate. That is the purpose of title insurance, to insure against reasonable risks, such as misindexing, and to eliminate risks that can be identified. Circuit Court Clerk’s may have liability for misindexing information in the record room.

If it is an older lien and a social security number is on the document, it is possible to eliminate the possible debtor by showing he has a different social security number. This would not be disclosed on the title binder since the identifying numbers indicate it is not the same person. Technology is advancing to the point that social security numbers may be deleted from photocopies/scanned documents. With documents becoming available electronically, this tool may soon be lost with the need for greater privacy protection.

As a general rule, a title agent will report anything found that *may* be your person as “Possible judgment” under Schedule B-1 Items to be paid and released. The title agent may follow the requirement for payment and release with the following language:

“Note: Judgment affidavit required.”

Or

“Note: Continuous Marriage Affidavit required.”

An affidavit should give as much information as possible for the party to say that the person involved is not him. If the judgment is for a large amount then the title agent may want to contact the creditor to get additional information to independently determine the person with whom you are dealing is not the one referred to by the creditor. Due to privacy rules it is often difficult now to get the judgment creditor to give you any information to confirm whether the person with whom you are dealing is the same one against whom the judgment was granted. Whether or not a judgment affidavit is sufficient depends on a number of variables including the amount of the lien, the age, the number of persons who have owned the real estate since the lien was filed, the commonality of the name of the debtor, etc.

If the judgment is against either the husband or wife and does not attach because title is taken as tenants by the entirety, then a continuous marriage affidavit may be required.

**2. If it is the same person, does the lien attach? Tenancy by the entirety issues.**

In Virginia if a judgment is issued by a State court and the owners own the real estate as tenants by the entirety, then a state lien against one of them does not attach to the real estate if they have been continuously married since they took title as tenants by the entirety. For underwriting purposes we require a “continuous marriage affidavit” stating that the parties have not been divorced and remarried.

An IRS lien or judgment issued in a federal court ignores state law giving tenancy by the entirety ownership immunity from collection.

Once the non-judgment spouse dies, the judgment would attach, since the surviving spouse would now own 100% of the real estate.

### 3. **If it is the same person, does the lien attach? Bankruptcy issues**

If a judgment has been obtained against a person and the judgment is docketed in the land records of the Circuit Court, then the person bankrupts his debts, the bankruptcy attorney must go through a **lien avoidance procedure** to cut the lien off from its attachment to the real estate. Think of a barnacle attached to a pier, with the judgment being the barnacle and the real estate you want to insure being the pier. Otherwise, even though the judgment creditor cannot collect from the debtor, he can still collect from the real estate.

Timing of events is critical to determine whether a judgment attaches or not.

Examples when no lien avoidance is ordered by the Bankruptcy Court:

(a) judgment > buy house > bankruptcy > sell/refi = lien attaches

(b) buy house > judgment > bankruptcy > sell/refi = lien attaches

(c) judgment > bankruptcy > buy house > sell/refi = lien does NOT attach.

The judgment, even though still in the land records, if discharged by the bankruptcy, is no longer a personal obligation, the debtor no longer has to pay the debt, therefore it cannot attach to real estate he purchases AFTER the bankruptcy has been discharged. You may need to look at the bankruptcy documents to see that the lien was listed as a debt to be discharged. If it is a standard credit card debt, or hospital bill and it was a Chapter 7 bankruptcy (liquidation) then it will not attach. If it was a Chapter 13 reorganization you need to look at the reorganization plan of the debtor, but it probably does not attach.

Certain judgment debts cannot be bankrupted and will need to be released by the debtor: student loans, most taxes, spousal or child support obligations, fraud, etc. Best course of action for underwriting purposes is to get a copy of the discharge papers and see that the lien you found in the title search has been discharged.

### 4. **Does the judgment always last for 20 years?**

When dealing with most things, be careful about “always” and “never”. The general rule, as stated above, is that judgments last for 20 years from the date of the judgment once docketed in the Circuit Court records. However, the 20 years may be extended for an additional 20 years by filing the appropriate document. And foreign (out of state) judgments last 20 years from the date they are docketed rather than the date of the judgment.

There is also the “**10 year out of title**” rule. The concept here is that if a judgment debtor conveys real estate and it has been more than 10 years since the date of recordation of the conveyance, then the judgment no longer attaches to the real estate. Reason: if the creditor wanted to collect by forcing the real estate to be sold he has had sufficient time to do so.

## 5. What happens regarding judgments when an owner dies?

If an individual dies with a judgment against him, and he owned the property in his own name or as a joint tenant, the lien remains attached to the real estate. Creditors of the decedent's estate have a year after date of death to make a claim against the estate, however, the judgment is controlled by the 20 year rule. Depending on the specific circumstances, such as whether or not you are sure it is the same person, the title insurance underwriter, may be willing to insure over this lien, but a purchaser does not have to accept title insurance in lieu of a clear title.

Often when an individual dies there is no judgment against him, but there will be a judgment against one or more of his heirs. If the person dies intestate, the real estate passes to the heirs by operation of law, as is shown in a list of heirs. If there is a judgment against one of the heirs it attaches at the time of death to his share of the real estate. It will have to be released as to this real estate when the property is sold. The lien only attaches to the percentage interest owned by the debtor heir.

If the decedent dies testate, whether or not a judgment against an heir attaches depends on the terms of the will. Sometimes the will orders the Executor to sell all the real estate and divide the money. If that is the case, and the Executor is the grantor on the deed, then the lien never attached to the real estate. If there is no direction to sell, but the real estate is left to individuals, the lien attaches the same as with intestate heirs, see above. The terms of the will to dictate whether the lien attached or not.

## 6. What about entities that hold title?

A judgment against a:

- (a) **corporation** attaches to real estate owned by the corporation.
- (b) **general partnership** attaches to the real estate owned by the partnership and may attach to real estate owned by the partners.
- (c) **limited partnership** attaches to real estate owned by the limited partnership.
- (d) **limited liability company** attaches to real estate owned by the LLC.
- (e) **trustees** under a trust agreement attaches to the real estate if trustee was sued as trustee under this trust. Judgments against the trustee individually do not attach to the trust real estate.
- (f) **beneficiaries under a trust** will not attach if the trust is a spendthrift trust up to specified dollar limits.

## 7. How does foreclosure affect a judgment?

The effect of foreclosure on a judgment depends on timing. If the deed of trust being foreclosed was a **purchase money interest**, or a deferred purchase money interest, the lien will not attach to the real estate even if the lien was recorded prior to the deed of trust.

If the deed of trust is a refinance, or any other deed of trust, other than a purchase money interest, judgment liens recorded between the recordation date of the deed of trust and the date of foreclosure will not attach to the real estate. The trustee in bankruptcy is obligated to give notice to all junior lienholders of the foreclosure.

A deed in lieu of foreclosure does not affect judgment liens, so they remain attached to the real estate until paid and released of record.

### **III. Title Underwriting Summary**

A title examiner in the record room should report everything found that could possibly affect title to the real estate. A title agency underwriter should determine what attaches to the real estate, and make the appropriate requirements to have title be clear.

(a) If a judgment attaches the following language will be found in Schedule B-1 of the title binder:

“Satisfaction and release of the judgment in favor of (name of judgment creditor/plaintiff) against (name of judgment debtor/defendant, with address, if know) dated (date of judgment), docketed (date recorded) in JB (judgment book number), page (page number) [or instrument number, if applicable], in the amount of \$ \_\_\_\_\_ (amount) plus costs and interest. P.Q. (insert name of plaintiff’s attorney if known, to help track down the amount due)”

(b) If the title underwriter is uncertain this is the same person begin the information above with “Possible Judgment:” Then at the end add: “**Note:** Due to similarity of names we cannot determine whether or not this judgment affects property described herein. If not, property owner is to provide a judgment affidavit and/or other proof satisfactory to the title company.”

(c) If the property is owned as tenants by the entirety: Same language as in A, followed by “**Note:** A continuous marriage affidavit from (insert names of husband and wife) stating they have not been divorced since date they took title to the property, will be satisfactory to remove this requirement.”

### **IV. Lien Chart**

### **V. Questions**

# Virginia Liens and Title Matters in Summary

Title Exception	Time Considerations	Comments
"Alimony" (term not used in VA) See Child and Spousal Support		
Assignment of Rents	Expires when associated Deed of Trust is released of record or expires.	Should get it cancelled separately, but generally doesn't happen.
Attorney's Lien  Va. Code §54.1-3932	Does not attach to real estate until reduced to a judgment	Va. Code §54.1-3932 only applies in cases of tort or contract (divorce/annulment/support with permission of the court). Attorney must have written agreement and give notice to debtor. Rarely seen in Virginia.
Bankruptcy  U.S.C. Title 11	<p>You will most likely see <b>Chapter 7</b> (straight bankruptcies), <b>Chapter 11</b> (full business reorganization with plan for continuance), or <b>Chapter 13</b> (individual debt reorganizations for wage earners).</p> <p>If you find that the owner of the property is in bankruptcy or recently came out of a bankruptcy- <b>STOP AND DO NOT PROCEED FURTHER WITHOUT A BANKRUPTCY COURT ORDER AUTHORIZING THE TRANSACTION, OR AN ABANDONMENT!</b></p> <p><b>As of 2010 you <u>must wait 14 days after a court order before insuring, to determine if an appeal has been filed</u></b></p> <p>There are too many time considerations to enumerate here. Please refer to your underwriting manual or contact your ORT underwriting counsel when you find a bankruptcy.</p>	<ul style="list-style-type: none"> <li>a) Check to see if borrower has filed bankruptcy. Go to <b>pacerc.psc.uscourts.gov</b> the copies are 8 cents each. Each case has a list of all documents filed and court hearings listed in chronological order – Get copies. <b>Check when underwriting AND at settlement or just prior to recordation.</b></li> <li>b) Trustee in <b>Chapter 7</b> bankruptcy should formally abandon the property which will show in a PACER report before we insure.</li> <li>c) In a <b>Chapter 7</b> the Judge may order the sale of the real estate.</li> <li>d) In <b>Chapter 11</b> the debtor must file and the Court must approve a Plan of Reorganization. Prior to such approval there must be an Order approving your transaction. After approval you must examine the Plan to see if the transaction is contemplated and its terms. If confusing, a court order may be necessary.</li> <li>e) <b>In Chapter 13 a court order must approve your specific transaction.</b> In Virginia the Bankruptcy Court has determined that you must have Court approval for a person in Chapter 13 to sell their real estate. Otherwise the transaction is <b>void</b>.</li> </ul> <p>Judgment liens against property before the bankruptcy are still liens against the property after the bankruptcy unless the liens are specifically avoided by court order after proper request by the debtor with consent in writing by everyone or formal notice given to those who did not formally consent! It is critical that the bankruptcy attorney go through the lien avoidance procedures to release the real estate from the liens.</p>

Title Exception	Time Considerations	Comments
<p>Broker's Lien (Commercial)</p> <p>Va. Code §§ 55-526 &amp; 55-527</p>	<p>Broker must file memorandum of lien during time party with whom he has contract owns the real estate</p>	<p>Va. Code §55-526 &amp; 55-527</p> <p>Lien applies to funds due broker because his office obtained a tenant for the commercial building, and a written agreement to pay the broker was signed by Owner. Statute outlines matters necessary to be included in the memorandum.</p>
<p>Broker's Lien (Residential)</p>	<p>n/a</p>	<p>Residential brokers have no lien rights. If one is filed do not ignore but double check basis of lien and contact your ORT underwriter.</p>
<p>Child and Spousal Support</p> <p>Va. Code §16.1-278.15(C)</p> <p>Va. Code §8.01-460</p>	<p>-Spousal &amp; child support liens expire when support obligation is paid in full.</p>	<p>Va. Code §16.1-278.15(C)</p> <p>"... support obligation as it becomes due and unpaid creates a judgment by operation of law." It "... becomes a lien against real estate only when docketed in the county or city where such real estate is located."</p> <p>Va. Code §8.01-460</p> <p>Court has to order or decree support to be a lien on real estate and to be docketed.</p> <p>Note: Normally liens of record are from Virginia Child Support and Enforcement agency. When paid make sure they are released of record.</p>
<p>Condominium Association Dues lien</p> <p>Va. Code §55-79.84</p>	<p>File within 90 days of due date. Bring suit to enforce within 36 months.</p>	<p>Takes priority over subsequent liens. Real estate tax liens and mechanics liens may take priority over this lien.</p>
<p>Deceased Owners</p> <p>a. Dying with a will (testate)</p> <p>b. Dying without a will (intestate)</p> <p>Va. Code Title 64.2</p>	<p>-No time limit on filing a will for probate.</p> <p>- No time limit for filing a list of heirs to begin the administration of an estate.</p> <p>- Creditors of a decedent have one year from date of death to make a claim, or they will be unable to make the claim against the real estate.</p> <p>- Existing judgment is not terminated by death of the debtor. It attaches to the real estate.</p>	<p>- Real estate passes directly to the named beneficiaries in the will, unless the will gives a direction to sell to the Executor, or a power to sale to the Executor.</p> <p>- With intestate circumstances, heirs inherit the property directly, according to the Descent and Distribution of Va. Code (§64.1-1) which has changed frequently over time. Special care must be taken to make sure you are using appropriate rules of intestate inheritance when underwriting.</p> <p>- Deeds with a survivorship element (tenants by the entirety or joint tenants) do not pass through probate.</p>



Title Exception	Time Considerations	Comments
Deed of Trust (mortgage) Va. Code §8.01-241 Va. Code §8.01	10 year statute of limitations after due date stated in Deed of Trust to collect --- Credit line deed of trust statute of limitations is 40 years from date of deed of trust.	If due date is not stated in document, statute of limitations to collect amount due is 20 years from date of deed of trust; 40 years for credit line. §8.01-242.
Financing Statements (UCC Statement) Va Code §8.9A-501, 8.9A-515	5 year statute of limitation Va. Code §8.9A-515  Can be extended for additional 5 year periods.	Given to secure interests in personal property . Personal property that attaches to the real estate, such as new siding, a new roof, or replacement windows, are of concern to us. UUC statements on boats or commercial trade goods are not.  May be filed in the county or city where the property exists AND/OR at the State Corporation Commission. Be sure to check both.
Homeowners Assn. Dues liens  Va. Code §55-516	Must be filed within 12 months of date dues were to be paid. Suit to enforce must be brought within 36 months.	Takes priority over subsequent liens. Real estate tax liens and mechanics liens may take priority over the HOA lien.
Hospital Liens	Inapplicable	See “Judgments: State” Funds due a hospital must be reduced to a judgment and are treated as any other judgment for a debt.
Incarcerated Felons  Va. Code §8.01-2; 53.1-221(D)	No longer under a disability; as of 7/1/07 may sign a deed, power of attorney or other document while incarcerated	Felon no longer treated as a person under a disability during time of incarceration UNLESS a committee has been appointed.
Incompetent Persons, including minors (Persons Under Disability)  Va. Code §8.01-67, et. seq.	During time of disability (incompetency or minority)	Age of majority is 18.  Property of incompetents may be held in trust, OR a durable power of attorney used (not applicable to minors) OR a <i>guardian ad litem</i> must be appointed to represent the interest of the incompetent person.
Judgment liens: Federal  28 U.S.C. §3201	Expire 20 yrs. from judgment date.	28 U.S.C. §3201 These are judgments in favor of the United States (not federal tax liens) or issued by a Federal District Court.  Best Practice: Title examiners should run the names of the purchasers of property, as well as sellers.

Title Exception	Time Considerations	Comments
<p>Judgment Liens: State</p> <p>Va. Code §8.01-458 and 8.01-251</p>	<p>Expire 20 years from date entered, and may be renewed for an additional 20 years ***</p> <p>If real estate has been conveyed to a BFP, the lien is unenforceable 10 years after date of transfer. Known as “10 year out of title” rule. 8.01-251(c)</p>	<p>Judgments issued by a state court.</p> <p>Must be released of record once paid, or if discharged in Bankruptcy, a Lien Avoidance order recorded. Remains a lien until released of record. See “Bankruptcy” above.</p>
<p>Lis Pendens</p> <p>Va. Code §8.01-268, et. seq.</p>	<p>Valid during pendency of suit.</p>	<p>The entire suit file needs to be read carefully especially the final judgment. The <i>Lis Pendens</i> points you to the law suit and is supposed to be filed only when the law suit claims an interest in real property. The <i>Lis Pendens</i> should specifically describe the property being claimed.</p>
<p>Mechanic’s or Materialman’s Liens</p> <p>Va. Code §§ 43-1 to 43-71</p>	<p>Subcontractors and Suppliers for improvements to real estate have up to 123 days AFTER they complete work to file a lien, then 6 months to file suit to enforce the lien.</p>	<p>Rules in Virginia are VERY specific. Sale to a BFP does NOT get rid of this right to file a lien. See “Virginia Mechanic’s Lien Coverage – Underwriting Guidelines” for details.</p>
<p>Minors</p> <p>Va. Code §8.01-67, et. seq.</p>	<p>Under 18 years of age (see ‘Incompetent persons’, above)</p>	
<p>Powers of Attorney</p> <p>Va. Code §55-107; (many other sections also apply)</p>	<p>Current, durable, specific powers of attorney are preferred. However, often people execute general powers of attorney at the time they do their wills or are admitted to a nursing home or health care facility. Ask questions.</p> <p>No statute of limitations, unless termination date stated in the POA.</p>	<ol style="list-style-type: none"> <li>1. Why is it being used? Does it make sense for that person to be operating with a power of attorney?</li> <li>2. Is the Principal out of town? Is he/she incapacitated/incompetent/ incarcerated felon?</li> <li>3. Is it so old that the owner may not have contemplated this particular use? <ul style="list-style-type: none"> <li>- Was it executed when will was done?</li> </ul> </li> <li>4. Does it authorize this particular transaction?</li> <li>5. Does it identify the property?</li> <li>6. Is it executed by the owner of the property and what other proof do you have?</li> <li>7. Is it notarized properly?</li> </ol> <p>Record the original POA. It is a cloud on title if POA is not recorded.</p> <p>Have agent (attorney-in-fact) sign an Agent Certification</p> <p>See Bulletin on the UPOAA – the Uniform Power of Attorney Act.</p>

Title Exception	Time Considerations	Comments
Tax liens – Federal income tax  26 U.S.C. §6323	Expire 10 yrs. + 30 days from date of assessment.	26 U.S.C. §6323 Can be extended by refilling within 30 days of 10 yr s/l. If taxpayer recently went through bankruptcy this time may be extended.  At this time they do not take precedence over purchase money mortgages, but the IRS could issue a new ruling at any time.  They do take priority over tenancy by the entirety. <u>U.S. v. Craft</u> (00-1831) 535 US 274 (2002); 233 F3d 358
Tax liens – State Va. Code §58.1-1805;	20 years	- memorandum of state tax lien given same weight as a judgment
UCC Financing Statements (see “Financing Statements”, above)		
Water/Sewer Bill Liens (municipal liens) Va. Code §15.2-5139 (sewer/water) §15.2-2404 et seq (local improvements) §15.2-104 (municipal liens)	Indefinite; under certain circumstances may be cut off by BFP	Check for past due sewer/ water bills, as well as liens for cutting weeds, etc. There should be a miscellaneous lien index, if these are not indexed with the deeds.  NOTE: These survive foreclosure.

**JUDGMENT AFFIDAVIT**

The undersigned hereby make the following affidavit concerning the property described as:

Lot One (1), GREEN ACRES, as the same appears duly dedicated, platted and recorded in Deed Book 1000 at Page 1234, among the land records of Fairfax County, Virginia.

Mailing Address: 123 Main Street  
McLean, VA 22101

Tax Map No.: 0000 11 2222

1. My name is: John Smith
2. My address is: 123 Main Street, McLean, VA 22101
3. My Social Security Number is: \_\_\_\_\_
4. I do not know of any judgment entered against me that has not been satisfied and/or released of record, in particular the judgment(s) attached as **Exhibit A** and made a part hereof.
5. Any such judgment(s) being docketed in the records of any court are against a person with the same or a similar name as mine.

This affidavit is made for the purpose of establishing a record that I have no knowledge of any judgments filed against me. I understand that New World Title & Escrow is relying on this statement when deciding to insure title to the Property.

\_\_\_\_\_  
John Smith (SEAL)

STATE OF \_\_\_\_\_;  
CITY/COUNTY OF \_\_\_\_\_, to-wit:

The foregoing instrument was acknowledged before me on this \_\_\_\_\_ day of \_\_\_\_\_, 2017, by John Smith.

My commission expires: \_\_\_\_\_

\_\_\_\_\_  
Notary Public