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THE LEGAL PAD

Practice of Excellence

JULY 2012

A Newsletter of Current Business and Legal Matters

In This Issue:

"Hidden Liens" Issue Returns to the Fore

By Nan E. Hannah

On May 10, 2012, Fidelity National Title Group issued an "Open Letter to Approved Attorneys of Fidelity National Title, Chicago Title, and Commonwealth Land Title" in which they notified closing attorneys that beginning June 15, 2012, those title insurance companies will no longer cover mechanic's and materialmen's liens in North Carolina. The letter is now in wide circulation and creating quite a stir both politically and practically. The main question now is "what will the banks do?"

So, what is the issue and why might you care? Anyone purchasing a house on which construction has been performed in the 120 days before closing, and whose title insurance policy is issued by one of the companies referenced above, will not be protected from a subsequent lien filed by someone who contracted directly with the previous owner. Such liens relate back to the date of first performance and cannot be waived by the owner at closing, so once filed, the lien attaches to the real property and if unpaid could result in an order for the sale of the real property in order to pay the lien debt. Therefore, the new owner who paid for the house at closing could pay again for whatever the lien balance might be.

Why would banks care? Because the lender for the purchaser would find itself in second position behind the lien claimant(s) and could find itself with its collateral up for Sheriff's sale to satisfy a lien.

Why now? The title insurance companies have been adamant for the last several years that if the legislature did not remove the threat of the "hidden lien", that is the lien which can be filed post-closing but relates back to a date pre-closing, then they would stop covering such liens. They sought to address this issue via Senate Bill 803 in the 2009 legislative long session and then joined the efforts of the Construction Law Section which resulted in House Bill 489 in the 2011 long session. However, as H489 worked its way through the legislative study committee, the legislators decided that the "hidden lien" issue was too complex and controversial to be addressed at this time. The report of the study committee suggested that this topic did need to be addressed but that it required further study, suggesting that the 2013 long session would be appropriate. The title industry is not willing to accept another one to two years of exposure.

The timing of this move, on the eve of the legislature's return to Raleigh, may suggest an effort to force the legislators to take up the issue immediately as part of the lien law revision process which came from the study committee.

For the time being, anyone purchasing a house needs to ask some pointed questions regarding what is covered by their title insurance policy and what work was done on their house in the 120 days prior to closing. ■

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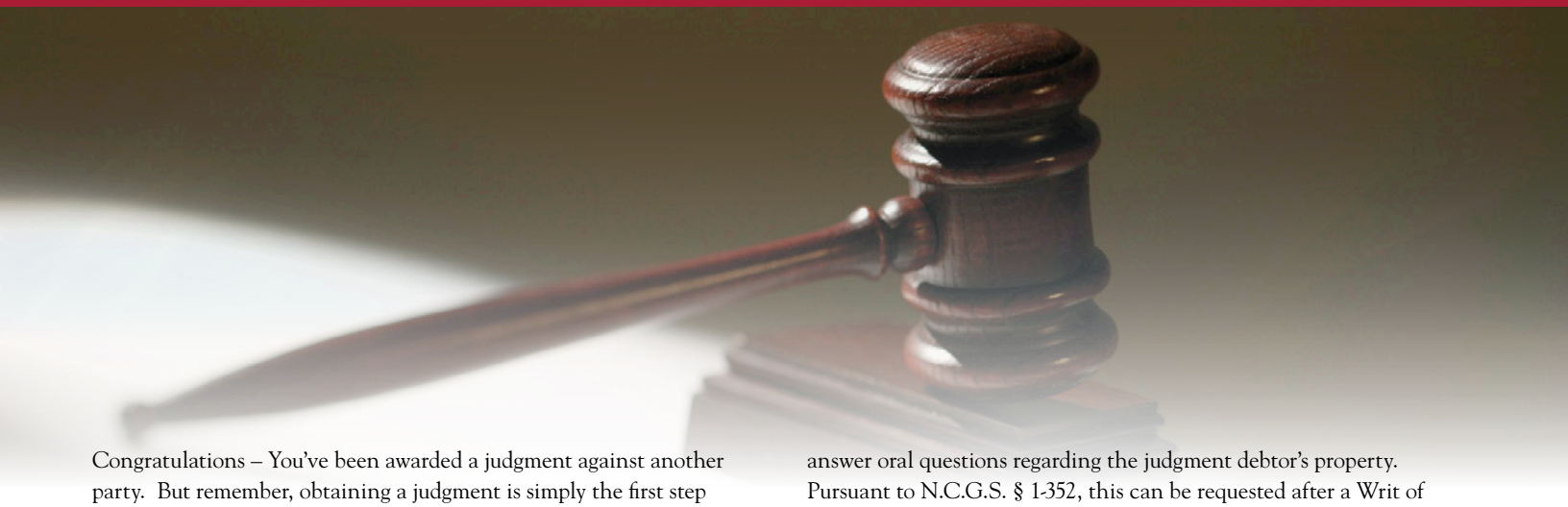
Post-Judgment Collection: Tools of the Trade

By Cody R. Loughridge



Congratulations – You've been awarded a judgment against another party. But remember, obtaining a judgment is simply the first step in the process. The next step is to turn that judgment into actual monetary relief because the Court will not act on its own to collect the money you've been awarded. Generally speaking, the collection process begins by having a Writ of Execution (and, depending on the nature of the judgment debtor, a Notice of Right to Have Exemptions Designated) issued and placed in the hands of the Sheriff of the County where the judgment debtor resides or has property. The Sheriff will then attempt to locate and levy against assets of the judgment debtor to be sold to satisfy your judgment. Unfortunately, all too often the Sheriff will return the Writ of Execution unsatisfied; meaning, they were unable to locate sufficient assets of the judgment debtor to satisfy the judgment. Now what?

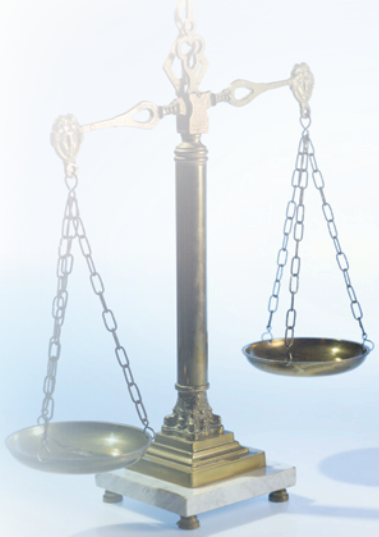
Thankfully, the North Carolina General Statutes provide multiple methods of post-judgment collection that can assist in turning a paper judgment into tangible recovery. Broadly, these post-judgment tools are called Supplemental Proceedings. Common post-judgment Supplemental Proceedings employed to discover assets of a judgment debtor, for the purpose of satisfying a judgment, are Supplemental Interrogatories, Supplemental Examinations and Asset Transfer Restriction Orders.

Supplemental Interrogatories: Once the Sheriff has returned a Writ of Execution as unsatisfied, the judgment creditor, under N.C.G.S. § 1-352.1, may prepare and serve on the judgment debtor written interrogatories (a/k/a questions) to the judgment debtor regarding the judgment debtor's property. The judgment debtor is then required to respond to the Supplemental Interrogatories within 30 days of service of the Interrogatories. A judgment creditor can issue Supplemental Interrogatories at any time the judgment remains unsatisfied and within three years from the time of issuing a Writ of Execution. Should the judgment debtor fail to respond to the Supplemental Interrogatories, the judgment creditor can petition the Court for an Order requiring compliance. Failure to comply with any Order may be punished by the Court as contempt, unless the judgment debtor can show cause for the non-compliance with the Court's Order.

Supplemental Examinations: Once a Writ of Execution is returned partially or wholly unsatisfied, a judgment creditor can petition the Court for an Order requiring that the judgment debtor appear and answer oral questions regarding the judgment debtor's property. Pursuant to N.C.G.S. § 1-352, this can be requested after a Writ of Execution has been returned and within three years from the time of issuance of the last Writ. Should a judgment debtor fail to appear for the Supplemental Examination, the judgment creditor can petition the Court for an Order compelling the judgment debtor to appear and show cause as to why the judgment debtor failed to appear for the Supplemental Examination. Judgment debtor's failure to show cause for the failure to appear for the Supplement Examination can be subject to civil contempt of Court.

Asset Transfer Restrictions: Technically, a judgment does not attach to the personal property of a judgment debtor until the Sheriff levies on that piece of personal property. So, in an effort to avoid a judgment debtor transferring assets post-judgment, a judgment creditor can petition the Court to forbid the judgment debtor from transferring, disposing and/or interfering with property which is not exempt from the execution. A Court's Order restricting transfers of property can appear as: an order restricting the transfer of property in the judgment debtor's possession, an order restricting the transfer of property of judgment debtor in the possession of a third party, an order assigning the judgment creditor certain rights against the personal property of judgment debtor, or an order regarding payments by debtors of judgment debtor to judgment creditor.

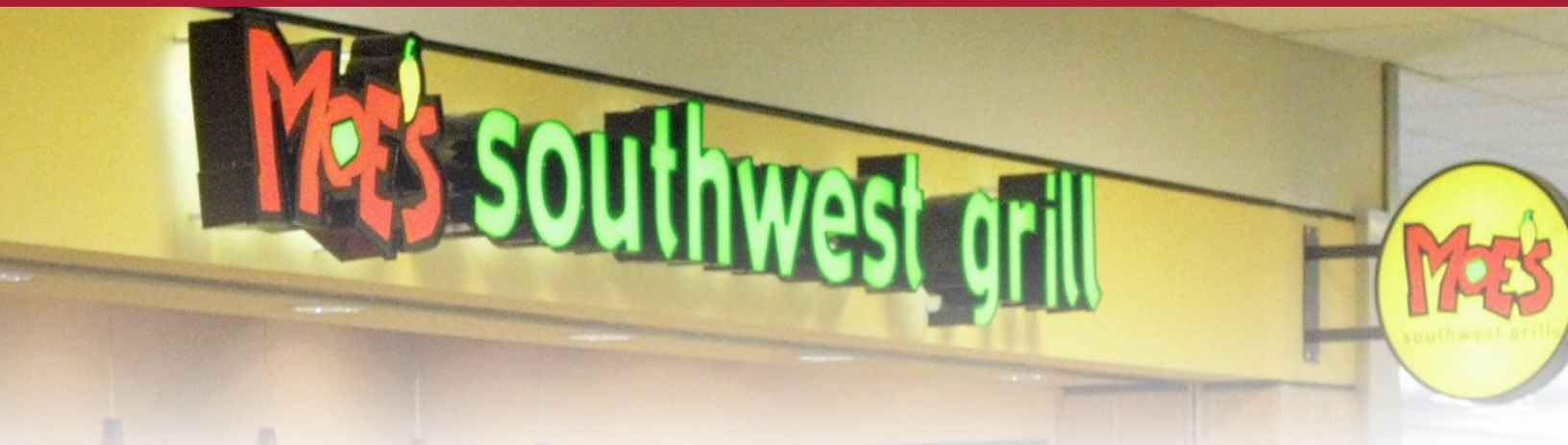
Post-judgment collection can be a time consuming and sometimes difficult undertaking. For more information regarding post-judgment collection tools and tips, please feel free to contact our firm. ■



"Welcome to Moe's" Racketeering Claims Alleged Against Moe's

(What Lesson Can We Learn?)

By James R. Vann



In a lawsuit currently pending in the United States District Court for the Northern District of Georgia, a Federal District Court Judge ruled in April of 2012 that franchisees may use racketeering claims against Moe's Southwest Grill. The lawsuit was filed by franchisees who alleged that the franchisor had been taking money from the franchisees through a deceptive kickback scheme involving the supply chain for the company. The lawsuit is not finalized as of this date but it still can serve to teach us how to proceed in handling business issues.

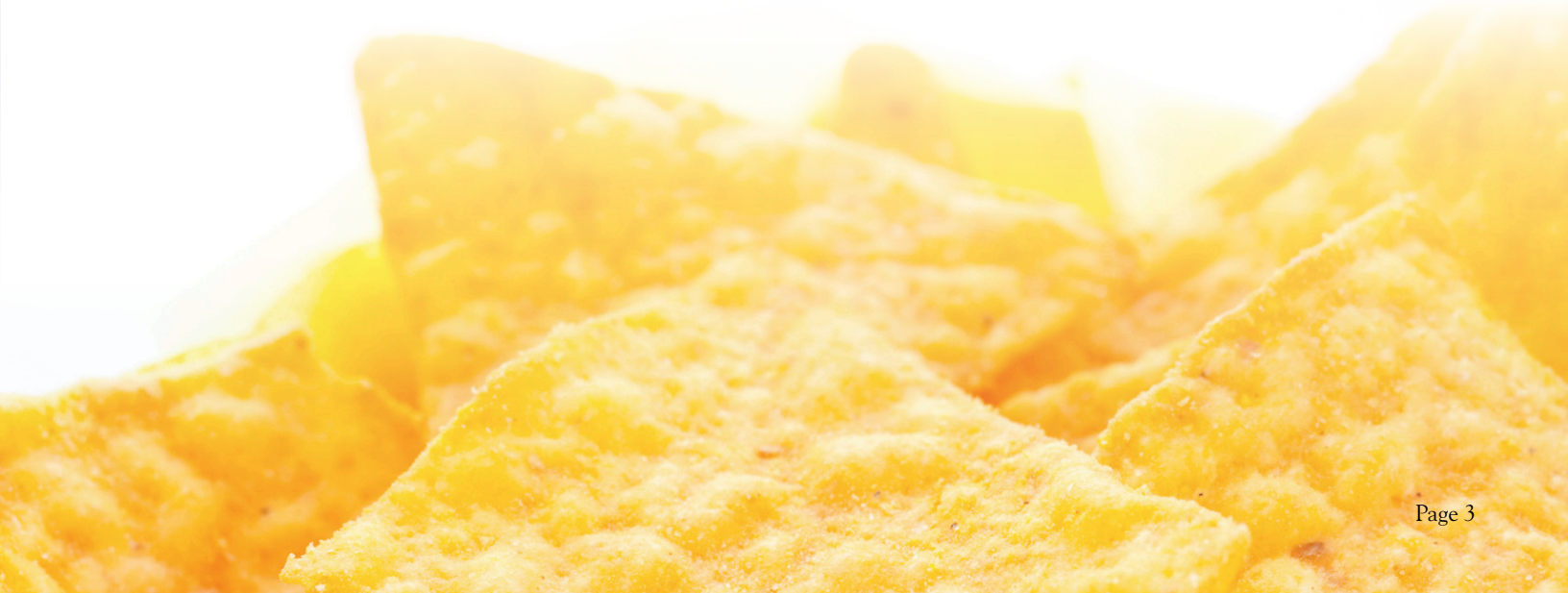
Racketeering is generally defined as "an organized conspiracy to commit the extortion or coercion, or attempts to commit extortion or coercion. From the standpoint of extortion, it is the obtaining of money or property from another, without his consent, induced by the wrongful use of force or fear". (Black's Law Dictionary) The definition of racketeering can get much more complicated but the above is a general definition sufficient enough for the understanding of the current allegations of the franchisees.

The attorney for the franchisees stated that the case "is just another example of greedy franchisors using the supply chain as a vehicle to earn hidden royalties".

The real issue which the franchisees disagreed with was that the franchisor allegedly earned money off the supply chain without disclosing it based upon the franchisee's purchases of supplies. Thus, the franchisees filed suit for fraud, breach of contract and now racketeering claims among other claims. The franchisees have alleged that the franchisor created a scheme to sell food supplies to the franchisees (the Moe's store owners) and in doing so, had other companies involved; this provided profit to the franchisor based upon the food sold to the franchisees without disclosing this to the franchisees or potential franchisees.

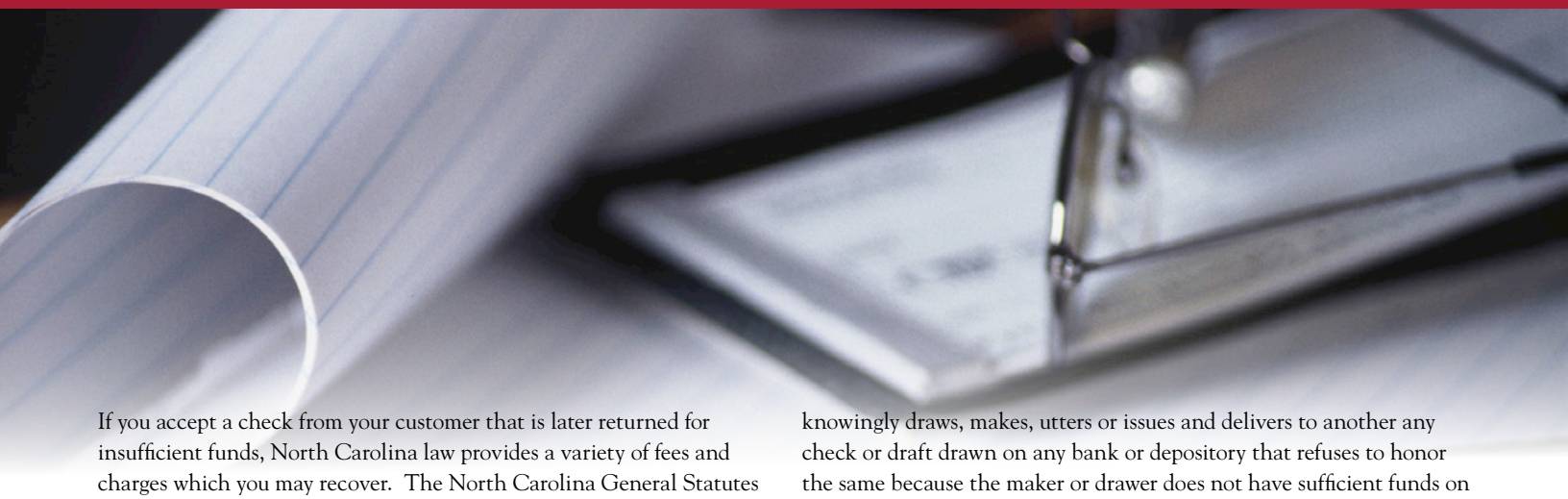
This case will likely be a good case for business owners to review and follow in order to learn how to handle similar issues in the future.

Take Away Thus Far: As business owners and/or executive level officers, it is important to understand the dealings between vendors, customers, and related businesses. In today's business climate, most every business is looking for opportunities to improve revenue. Increasing revenue and ultimately increasing profit for a business is a good thing. In every business setting, the executive officers need to understand the relationships between the parties, the owners, the pricing structure, etc. to insure that the relationship and business connections are properly set up. Likewise, there may be times when disclosure is required between parties to insure that all the parties fully understand the contractual relationship between the companies. ■



What Fees Can You Recover for a Returned Check?

By: Vann & Sheridan Attorneys at Law



If you accept a check from your customer that is later returned for insufficient funds, North Carolina law provides a variety of fees and charges which you may recover. The North Carolina General Statutes provides that a creditor who receives a check which is returned for insufficient funds may recover not only the principal amount of the check but also processing fees and bank service fees.

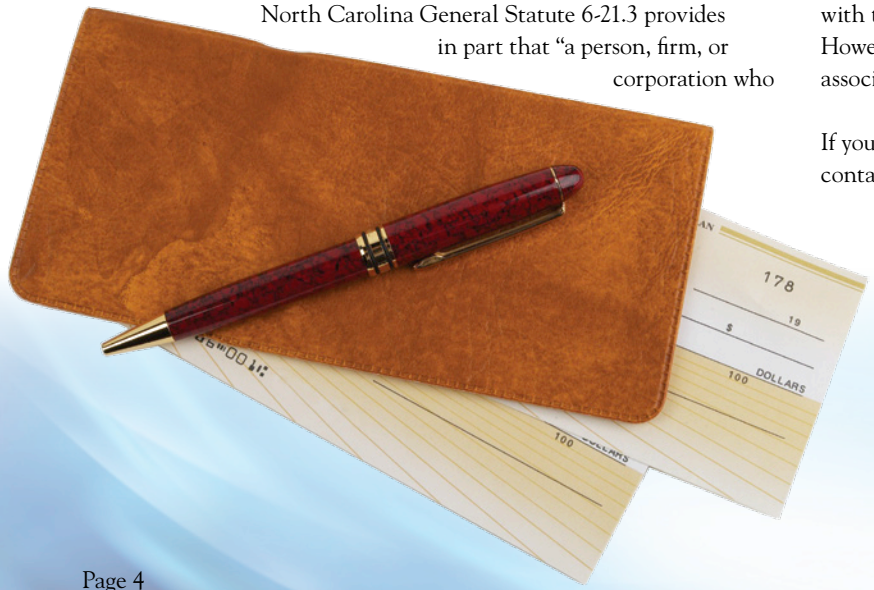
Processing Fee

North Carolina General Statute 25-3-506 provides for the collection of a processing fee for returned checks. The statute provides in part that a person who accepts a check in payment for goods or services may charge and collect a processing fee, not to exceed twenty-five dollars ($25.00), for a check on which payment has been refused by the bank of the check writer because of insufficient funds or because the check writer did not have an account at the bank.

Bank Service Fees

North Carolina law also allows for the recovery of the bank service fee which is charged to the creditor for the customer's returned check.

North Carolina General Statute 6-21.3 provides in part that "a person, firm, or corporation who knowingly draws, makes, utters or issues and delivers to another any check or draft drawn on any bank or depository that refuses to honor the same because the maker or drawer does not have sufficient funds on deposit in or credit with the bank or depository with which to pay the check or draft upon presentation" that such check writer shall be liable for any bank service fee charged by the bank for such returned check.



Possible Treble Damages and Criminal Charges

North Carolina law also provides a process whereby the creditor may notify the check writer of the returned check and give notice to the check writer that if the check is not fully paid according to the statute, the check writer may be liable for three times the amount of the check but not to exceed $500.00 or be less than $100.00.

There is also the possibility of submitting the check to the District Attorney for prosecution of the returned check as criminal activity. Depending upon the amount of the check and facts surrounding the issuance of the check, many times having the District Attorney involved for the criminal charges creates a great incentive to have the check paid faster. The creditor may elect to proceed simultaneously with the criminal charges and civil remedies referenced above. However, the creditor may only recover the check amount plus associated fees and charges one time from the check writer.

If you have any questions regarding this process, please feel free to contact our firm. ■

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