

**Business Law Monthly Practice Tip**  
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Possible defense to garnishment of retainer held in your escrow account.

*Marcus, Santoro & Kozak v. Wu*, 274 Va. 743; 652 S.E.2d 777 (2007).

1. **Facts of the Case.** By now I'm sure you are aware of the *Marcus* case and its troubling ramifications for lawyers. In that case a judgment creditor successfully collected an unpaid judgment from funds held as retainers in the trust accounts of two law firms.
2. **Supreme Ruling.** The Supreme Court held that the law firms were obligated to pay to the judgment creditor the amount of the retainer held in their respective trust accounts as of the date that the writ of *feri facias* was placed in the hands of the Sheriff, because that was the date that the lien arose "on all the personal estate of or to which the judgment debtor is . . . possessed or entitled." Va. Code § 8.01-501.
3. **Possible Defense.** A footnote in the *Marcus* opinion may suggest a defense that was not raised in the case. On the last page of the opinion, in footnote 7, the Court says the following:

No issue was raised below regarding any other defect in the notice of the lien of *feri facias*, such as a claim of lack of due process, or that the firms had a lien interest of their own under Code Section 54.1-3932 or otherwise. 274 Va. 743, 758.

4. **Did the Law Firms Have a Lien?** Clearly, Va. Code § 54.1-3932 does not apply. But what about the court's suggestion that the firms may have had a lien interest of their own, "otherwise"? There is case law in Virginia suggesting that a lawyer has a common law lien on monies held as a retainer in his trust account. See, 2A Michie's Jurisprudence, *Attorney and Client*, Section 51, page 744, where it is stated: "In addition, an attorney in Virginia may have a common law possessory lien, which is his right to retain the property or money belonging to his client until his fees are paid; such a lien depends upon possession, and if he voluntarily parts with possession, the lien ceases."

Therefore, there is the strong suggestion that in a situation where an attorney has money in his escrow account as a retainer, the attorney has a common law right to retain that money belonging to his client until his fees are paid. The common law lien should come ahead of the judgment lien.