RECENT DEVELOPMENTS IN LOUISIANA LAW

RELATING TO

SECURITY DEVICES, TITLE MATTERS AND OTHER ISSUES OF INTEREST TO BANKS

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I. Chapter 9 security interests.

A. Accounts.

1. **<u>Swift Energy Operating, L.L.C. v. Plemco-South, Inc.</u>, 2014-968 (La. App. 3d Cir. 2/4/15); 157 So. 3d 1154, 85 UCC Rep. Serv. 2d 715.** An oil field services firm entered into a factoring and security agreement by which it granted a factoring company a security interest in all of its accounts receivable. The factoring company gave notice to the plaintiff, which was an account debtor of the assignor, that all of its accounts receivable had been assigned to the factoring company, but the plaintiff's accounts payable supervisor who received this notice refused to sign an acknowledgment that the factoring company requested, indicating that she did not have the authority to do so. She also informed the factoring company that it should process its request through another department within the plaintiff, which did have such authority. However, the factoring company did not do so. Subsequently, the plaintiff made payment solely to the assignor. After the factoring company informed the plaintiff that it should have made payment to the factoring company, the plaintiff filed suit for declaratory judgment regarding its liability under the factoring agreement. The factoring company reconvened seeking a money judgment for the amount that had been paid in violation of the notice it had given to the plaintiff.

   The trial court granted summary judgment in favor of the plaintiff, finding that R.S. 10:9-406(a) applies only to assignments of accounts and not to the granting of a mere security interest. The court of appeal affirmed, but on other grounds. Though the terms "assignment" and "transfer" are not defined in Chapter 9, the Official Revision Comments make clear that an assignment can include the granting of a security interest. However, the court concluded that the factoring company had not given proper notice of the assignment to the plaintiff. Though it was undisputed that the factoring company had notified the plaintiff's accounts payable supervisor, it was also undisputed that two weeks earlier, that the accounts payable supervisor had received an email from a representative of the oil field services firm asking her to expedite payment, but not mentioning any assignment to the factoring company.

   The factoring company's argument was essentially that the burden was on the accounts payable supervisor, not the factoring company, to forward the documents to the correct department and that notice to her constituted notice to the plaintiff. Citing R.S. 10:1-205(27), the court pointed out that notice to an organization is effective from the time that it is brought to the attention of the individual conducting the transaction in question and in any event from the time it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable procedures for communicating significant information to the person conducting the transaction and there is reasonable compliance with those procedures. Due diligence does not require an individual acting for the organization to communicate information unless communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information. The court found that the plaintiff had maintained reasonable procedures for communicating significant information through its departmentalization policy, and the factoring company was timely made aware of the proper department for delivery of the required notice. Had the factoring company followed the instructions given by the plaintiff's accounts payable supervisor, notice would have been effected to the appropriate department before payment was made.

2. **<u>Lili Collections, LLC v. Terrebonne Parish Consolidated Government</u>, 2014-1541 (La. App. 1st Cir. 6/18/15); 175 So. 3d 434.** A professional services firm agreed to perform work for the parish government under a contract that prohibited assignment by either party without the permission of the other. When the parish government failed to pay amounts allegedly due under the contract, the professional services firm assigned its rights and causes of action to the plaintiff, which filed suit against the parish government for recovery of amounts due under the contract. The trial court granted the parish government's exception of no right of action, and the court of appeal affirmed.

The court observed that the petition alleged a breach of contract but did not indicate that the parish government had violated any provision of the Uniform Commercial Code. According to the opinion, the plaintiff claimed that the agreement between the professional services firm and the parish government "amounted to a secured transaction, triggering Chapter 9 of the Uniform Commercial Code regarding secured transactions, thereby rendering the non-assignment clause ineffective." The trial court had found that the entirety of Chapter 9 is inapplicable when "another statute or the constitution of this state expressly governs the creation, perfection, priority, or enforcement of a security interest created by this state or governmental unit of this state." The trial court was persuaded by the parish government's argument that Attorney General's opinion 02-0165 had concluded that Chapter 9 of the UCC was limited by R.S. 39:1410.60 and Article VII, Sections 8 and 14 of the Louisiana Constitution, which specifically prohibits the assignment of the debt to the plaintiff. (Note: Attorney General Opinion 02-0165 actually opines that Chapter 9 of the UCC applies to equipment lease purchase and equipment installment payment agreements entered into by political subdivisions; however, seizure of public property in the enforcement of a security interest would violate constitutional prohibitions).

Regardless of the validity of this argument, the court of appeal found that there was no right of action based simply upon the petition itself, which sought damages based on a breach of contract rather than for payment of a secured debt. The actual issue is whether the plaintiff was in privity of contract with the defendant. Under C.C. art. 1984, rights and obligations are assignable unless the law or the terms of the contract prohibit it. This agreement specifically prohibited assignment. Thus, the plaintiff never had privity of contract with the parish and therefore had no right of action.

B. General intangibles.

Southern Audio Services, Inc. v. Carbon Audio, LLC, 2015 WL 6551820 (M. D. La. 2015). In a breach of contract dispute, the licensor of a trademark filed suit to enjoin the licensee from selling, or licensing any other party to sell, the licensee's products until certain royalty payments were made. The contract between the parties prohibited the licensee from offering any of its products without the trademark until these royalty payments were made. The licensee's secured lender, which had foreclosed on all of the licensee's assets, intervened, asserting that the injunction would impair its lawful interests. The licensor then filed an amended complaint naming the secured party as a defendant, asserting both a breach of contract claim and a revocatory action against the secured party, which responded with a Rule 12(b)(2) and 12(b)(6) motion to dismiss. The court denied the motion.

Insofar as the secured party was contesting the court's personal jurisdiction over it, the court held that the secured party had consented to the personal jurisdiction of the court through its intervention.

On the secured party's motion to dismiss, the court observed that, at the time of the assignment of the trademark to the secured party, it was allegedly aware of the underlying contract, which provided that any assignee would be bound by its terms and conditions. Because the secured party was bound by the terms of the contract, the licensor asserted that the secured party, like the licensee, breached the obligation to pay royalties and breached the obligation to refrain from selling certain products until minimum royalty payments were made. Brushing aside the secured party's argument that it had properly foreclosed pursuant to Section 9-622 of the "Uniformed Commercial Code" and that it had not expressly assumed in writing any contractual obligations of its debtor, as required by C.C. art. 1821, the court held that the plaintiff's well-pleaded factual allegations plausibly gave rise to an entitlement to relief for breach of contract against the secured party.

On the revocatory action claim, the secured party argued that the licensor was in effect seeking to unwind, through the use of the Civil Code revocatory action articles, a foreclosure that occurred in Oregon under Oregon law between two Delaware entities. Moreover, the secured party argued that the fact that the secured party had a security interest, whether or not perfected, defeated the licensor's claim even if Louisiana law applied, and that in any event the plaintiff had not claimed that the value of the assets the secured party received exceeded the value of the debt that was extinguished. The court refused to dismiss the revocatory action claims, finding that under the plaintiff's well-pleaded facts the secured party accepted transfers from the licensee at a time when the licensor was owed money under the contract, and the plaintiff's well-pleaded factual allegations therefore plausibly gave rise to an entitlement to relief. The plaintiff's complaint alleged that the licensee "made transfers of money or other property of value to [the secured party] that either left [the licensee] insolvent or worsened [its] existing insolvency."

C. Proceeds.

M&M Financial Services, Inc. v. Hayes, 2014-1690 (La. App. 1st Cir. 6/5/15); 174 So. 3d 1172, 86 UCC Rep. Serv. 2d 797. The holder of a security interest in a motor vehicle brought a damage suit directly against a tortfeasor whose fault caused the vehicle to be damaged in a collision. Because the vehicle was uninsured at the time of the accident, the defendant claimed that the secured party was barred from relief by Louisiana's "no pay, no play" law, R.S. 32:866. The trial court granted summary judgment in favor of the secured party and denied the defendant's cross-motion for summary judgment. The court of appeal reversed.

The secured party's argument that R.S. 32:866 bars recovery only by "an owner or operator" who does not maintain required liability insurance fails to consider the derivative nature of the secured party's claim. When collateral is damaged in an accident, the security interest attaches to the proceeds of the collateral, which include claims arising out of the damage to the collateral and insurance payable by reason of the damage. This protection, however, is limited to a security interest in the debtor's claim, and the UCC does not create an independent cause of action for the secured party against a third party. Thus, the court of appeal reversed summary judgment in favor of the secured party and rendered summary judgment in favor of the defendant.

II. Mortgages and other contractual security devices affecting immovables.

A. Collateral mortgages.

Cadlerock Joint Ventures Co., Inc. v. J. Graves Scaffolding Co., Inc., 49,475 (La. App. 2d Cir. 11/19/14); 152 So.3d 1079, writ denied, 2015 WL 1810194 (La. 4/2/2015). In the record of executory foreclosure proceedings, the original creditor filed the original hand notes and collateral mortgage note, all of which had been executed by the borrower. Two years after the executory process sale was completed, the original creditor sold the hand notes to the plaintiff, which, nearly six years later, filed a motion to substitute itself as party plaintiff in the executory process suit and withdrew the original notes from the record. A few weeks later, it filed in another court a suit for deficiency judgment against the borrower and guarantors, who responded with an exception of prescription. The trial court sustained the exception, finding that the suit was abandoned three years after the sheriff's sale and that the five-year prescriptive period began to run on that date. The court of appeal affirmed.

The plaintiff argued that prescription was continuously interrupted by the pledge of the collateral mortgage note under the constant acknowledgment rule. The defendants' argument was that, once the property encumbered under the collateral mortgages was sold, the collateral mortgage note ceased to exist and was no longer subject to a pledge that could interrupt prescription. This argument was based upon the holding of the Supreme Court in Diamond Services Corp. v. Benoit, 780 So.2d 367 (La. 2001), buttressed by an argument that the possession of an empty and valueless obligation is not the type of pledge that interrupts prescription. Since the facts of Diamond Services involved a third-party pledge and the Supreme Court had not addressed whether its rationale could be extended to the situation where the maker of the collateral mortgage note and hand note are the same, the court chose not to rest its ruling on that argument but rather on the plaintiff's failure to "reconstitute" the pledge of the collateral mortgage note after the conclusion of the executory proceedings. If an executory suit has been concluded by a sheriff's sale and the creditor has not withdrawn the collateral mortgage note from the clerk of court within five years, prescription operates.

The court rejected the plaintiff's assertion that the pledge of the collateral note continued upon the institution of the executory process suit and the filing of the note into the suit record. According to the court, the privilege imparted by the pledge, or the pledge itself, exists only when the note has been actually put and remains in the possession of the creditor or a third person agreed upon by the parties. Possession is relinquished by the pledgee upon the filing of the suit, and the clerk is not a third person agreed upon by the parties who might continue the pledge in force. Thus, prescription was interrupted by the partial payment received from the sheriff's sale and began to accrue on that date. In reaching this holding, the court cited the pledge articles of the Civil Code, apparently believing that they apply to the granting of a security interest in a collateral mortgage note.

B. Authorization.

Nine-O-Five Royal Apartment Hotel, Inc. v. Atkins, 2014-0325 (La. App. 4th Cir. 10/8/14); 151 So.3d 739. A closely-held corporation controlled by three sisters contracted a loan from the lender under a promissory note signed by all three of them. The corporate resolution authorizing this loan was signed by one of these sisters as corporate secretary. Four years later, the lender made a personal loan to that sister, who purported to secure her personal loan by executing a mortgage on the corporation's property. At the time of execution of this mortgage, the sister who contracted the loan submitted a resolution, signed by her as the alleged secretary of the closely-held corporation, purportedly clothing her with the authority to act on behalf of the corporation in executing the mortgage, even though she had actually held no corporate office in the corporation for nineteen years and there had been no actual board meeting authorizing her to act. Neither of the other two sisters signed the resolution. Several years later, the other two sisters learned of the existence of the mortgage when they received a call from the lender advising that the mortgage was in default. The corporation then filed a petition for mandamus seeking a declaration that the mortgage was invalid. After a trial, the trial court held the mortgage to be invalid, and the court of appeal affirmed.

The lender's defense was based primarily upon an argument that the three sisters, in contracting the earlier loan from the lender, had expressly held out the sister who signed the mortgage as the corporate secretary, suggesting that she had the apparent authority to execute the mortgage. Alternatively, the lender argued that the corporation had ratified the unauthorized mortgage by failing to repudiate it within a reasonable period of time and in accepting the benefits of the mortgage after learning of its existence. As the trial court held, C.C. Art. 2996 provides that an agent must have express authority to encumber immovable property and to contract a loan. A mortgage may be established only by written contract. Under C.C. Art 2993, when the law prescribes a certain form for an act, a mandate authorizing the act must be in that form. Thus, any authority granted by the corporation for the signing of the mortgage must also have been in writing. The doctrines of apparent authority and agency by estoppel may bar a principal from asserting the defense of lack of written authority if a third person can show a change of position in reasonable reliance on the representation of the principal. In this case, the evidence confirmed that at no time did the corporation or the two corporate officers represent or manifest to the lender that the sister who signed the mortgage was authorized to do so. The lender had failed to establish that its reliance on the alleged "previous representations" was reasonable. A due diligence inquiry by the bank to the Louisiana Secretary of State or even perusal of its corporate database would have confirmed that the sister who signed the mortgage had not been an officer or director of the corporation for many years. Moreover, the documents that had been previously executed in connection with the prior loan bore the signatures of all three sisters and did not confer any authority on the sister who signed the mortgage to act alone to bind the corporation.

The court also rejected the lender's claim that the corporation had tacitly ratified the mortgage by accepting the benefit of the use of part of the proceeds of the later loan to pay off a loan owed by the corporation. The corporate officers did not know of the existence of the mortgage until being advised that there was a default. There was no evidence of any correspondence or communication whereby either of the other two sisters communicated anything to the bank that could be construed as a ratification. The fact that the sister who contracted the loan may have used some of the money to pay off a prior mortgage did not validate the mortgage she contracted. The court also rejected the lender's argument that the corporation had ratified the mortgage by failing to repudiate it and continuing to accept its benefits. All benefits of the unauthorized act were disbursed by the bank long before the corporation acquired knowledge of the unauthorized mortgage. Moreover, the fact that the two corporate officers, after learning of the existence of the mortgage, continued to allow the other sister to make payments on her own loan did not support a theory of ratification. Finally, the court rejected the lender's argument that the invalid mortgage should be validated on the basis of unjust enrichment; mortgages cannot be created by equitable considerations.

C. Simulation.

<u>308 Holding Company, LLC v. Equity Trust Company</u>, 2014-903 (La. App. 3d Cir. 3/11/15); 160 So. 3d 587. Expecting to receive a commission of several million dollars from the sale of property in Mexico, a real estate agent prevailed upon her broker to advance her $700,000 in these commissions so that she could meet the deadline under a purchase agreement for her purchase of a home in Lafayette. The broker agreed to making the $700,000 advance, conditioned upon the real estate agent's agreement to repay $1,000,000 from the future commissions. The broker indicated that he would arrange for his IRA account to fund the advance, and the agent executed a mortgage in favor of the IRA custodian on the residence she purchased in Lafayette. Despite the agent's having paid $1,000,000 to the broker, the mortgage was never removed from the public records, and no demand was made for further payment on the mortgage. Several years later, the agent and her son became aware that the mortgage was still in existence, and the agent's son contacted the broker, who indicated that he had not paid off the mortgage despite having received the funds from the agent. The broker explained that he needed to keep the mortgage in place and requested a substitute mortgage on the son's house. In an attempt to indulge the broker and continue their profitable business association, the son agreed to the request and granted a mortgage upon this second house. Ultimately, the relationship among the parties became "contemptuous," and four years later the agent and her son filed a petition to cancel the mortgage. Several months afterward, the IRA custodian sought to foreclose the mortgage by executory process.

The trial court found the mortgage was a simulation and dismissed the custodian's petition for executory process. The court of appeal affirmed. Under C.C. art. 2025, a simulation is a contract which by mutual agreement does not express the true intent of the parties. Whether an act is simulated is an issue of fact, and because a resolution of a simulation dispute depends upon factual findings, an appellate court reviews the trial court's findings for manifest error. The trial court was presented with two versions of why the mortgages came into existence and the reasons for the $1,000,000 paid to the broker. The trial court rejected the broker's version of the facts that, since the agent was getting a huge windfall, "[i]t's only right that I get something out of it." The trial court obviously found credible the agent's explanation that she and her son sought to indulge the broker's continued recordation of the simulated mortgage because of the potential to earn future commissions from dealings with him. The court found unpersuasive the IRA custodian's argument that there was "no conceivable purpose" for the agent to agree to pay $300,000 for the $700,000 loan. The agent testified that she agreed to accept the broker's prohibitive terms because there was no other way to remain in the home where she resided with her elderly parents. Once the $1,000,000 was repaid to the broker, it was reasonable to assume that the substitute mortgage on the other residence was executed to maintain the agent's agreement to continue to allow the broker to cover this investment, thus allowing him to convince the IRA custodian that it held a secured investment. The transaction was confected to look like a secured investment, so that the broker could get funds out of his IRA. Once the repayment to the broker occurred, there was no other obligation to be secured by the mortgage.

D. Insurance proceeds.

1. **First Bank and Trust v. Scottsdale Insurance Company, 2015 WL 3409473 (E. D. La. 2015).** Following a fire loss to mortgaged property, the insurer issued a check in the amount of the fire loss payable to the mortgagor and mortgagee and delivered these checks to the mortgagor. Apparently, the mortgagor and mortgagee could not agree upon a division of the proceeds, and the mortgagor refused to endorse them. The mortgagee then brought suit against the insurer, claiming that, as loss payee, it had a direct cause of action against the insurer for the amounts due under the policy and was entitled to be paid directly and not through a jointly payable check. The insurer filed a Rule 12(b)(6) motion to dismiss, contending that it had satisfied all of its duties by issuing the jointly payable check.

   Although the parties initially argued over whether the loss payable clause was a simple loss payee clause or standard or union loss payee clause, they ultimately agreed that this distinction was immaterial, since there was no policy defense that was being asserted against the mortgagor. The court denied the motion to dismiss, finding that the cases cited by the insurer were distinguishable because they did not address whether the insurer had a duty to determine how much was owed to each payee and to issue checks accordingly. Based primarily upon the holding of the Louisiana Second Circuit in Durbin v. Allstate Insurance Co., 267 So. 2d 779 (La. App. 2d Cir. 1972), to the effect that a mortgagee is entitled to the proceeds of a policy to the extent of his mortgage debt and holds any surplus for the benefit of the mortgagor, the court held that the relevant inquiry was not whether the insurer attempted to pay the mortgagee in accordance with its interests, but whether the mortgagee was actually paid. This interpretation is consistent with the plain language of the mortgagee clause at issue here, which requires payment to the mortgagee and mortgagor "as their interests appear." The insurer was obligated to actually make payment to the plaintiff in accordance with its interests, and not simply to attempt to do so. Where the attempt is unsuccessful, the insurer has not discharged its policy obligations. Thus, the mortgagee has plausibly stated a claim for the proceeds.

2. **First Bank and Trust v. Scottsdale Insurance Company, 2005 WL 7015419 (E. D. La. 2015).** The same day that the court denied the insurer's motion to dismiss in the preceding case, the insurer filed a motion for leave to file a third-party complaint and cross-claim for interpleader against the mortgagee and mortgagor. Several months later, it filed a motion for leave to deposit the funds into the registry of the court, followed by a motion for summary judgment asking for a ruling holding that the interpleader action was proper, dismissing the insurer as a disinterested stakeholder, enjoining

the other parties from filing any action against the insurer, denying the mortgagee's claim for judicial interest, and granting the insurer attorneys' fees.

In opposition to the motion for summary judgment, the mortgagee contended that the insurer should be required to pay interest at the legal rate of 4% per year under C.C. art. 2000. Rejecting this contention, the court agreed with the insurer that R.S. 10:3-310(b)(1) provides that, if a note or uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken. R.S. 10:3-420 provides that if a check is payable to more than one payee, delivery to one of the payees is deemed to be delivery to all of the payees. Accordingly, the court found that the insurer, in delivering the check to the mortgagor, constructively delivered it to all payees and, under R.S. 3:310(b)(1), the delivery to one payee suspended the insurer's obligation. Thus, the insurer was not required to pay legal interest. The court also found that the insurer was not responsible for interest as a plaintiff in-interpleader because any delay in its deposit of the funds into the registry of the court was reasonable. Although the insurer could not be said to have acted diligently in depositing the funds or instituting the interpleader action, the court found that it had not acted unreasonably so as to merit an award to the claimants of legal interest. The insurer had in fact requested leave to deposit the funds and was waiting for court approval for doing so.

On the other hand, the court denied the insurer's request for attorneys' fees in filing the interpleader. It was not until the court dismissed the insurer's motion to dismiss that it requested leave to file a complaint for interpleader, and it did not file a motion to deposit the funds until several months later. Although this conduct was not unreasonable, it could not be said that the insurer had acted with diligence as a disinterested stakeholder and therefore it was not entitled to attorneys' fees. Finally, the court denied the insurer's request for injunctive relief since it had not met the burden of showing irreparable injury would result in its absence. The mortgagee agreed that the insurer was entitled to dismissal from the interpleader action and to an injunction and the mortgagee had stated that it had no intent to proceed against the insurer once the case was finally resolved. The insurer had also not identified any pending litigation or any reason why litigation pertaining to the checks at issue would be filed in the future. Accordingly, the insurer's motion for an injunction was denied.

E. Bonds for deed.

1. **<u>Southeast Business Associates, LLC v. Smith</u>, 2014-1624 (La. App. 1st Cir. 6/5/15); 2015 WL 3613132.** The plaintiff and defendant entered into an agreement providing that plaintiff would sell an immovable to the defendant at a stipulated price payable in monthly installments over five

years, with the entire remaining balance due at the expiration of five years. The agreement further provided that an act of sale was to be passed no later than thirty days after all of the terms and conditions of the agreement had been satisfied. Approximately a year before the final maturity date, the plaintiff filed a rule for eviction claiming that the defendant owed past due rent. After a hearing, the trial court signed a judgment ordering the defendant to vacate the premises within 24 hours. The court of appeal reversed.

A bond for deed is a contract to sell real property in which the purchase price is to be paid by the buyer to the seller in installments and in which the seller, after payment of the stipulated sum, agrees to deliver title to the buyer. Louisiana courts have recognized the difference between a lease with an option to purchase (in which there is an option to give additional consideration in order to purchase the leased item at the end of the contract term) and a conditional sale disguised as a lease, such as a bond for deed contract (in which there is an obligation to pay the full price regardless of whether the option is exercised or not). This contract was a bond for deed, since it consistently referred to the transaction as a sale and recited the parties' intent to transfer ownership following satisfaction of the terms and conditions of the contract. Because it was a bond for deed contract, the plaintiff was required to provide 45 days' advance notice of cancellation under R.S. 9:2945.

2. **<u>Keyes v. Brown</u>, 2014-0821 (La. App. 4th Cir. 1/28/15); 158 So. 3d 927.** The parties entered into a "rent-to-own purchase agreement" by which the plaintiff agreed to sell a residence to the defendant in exchange for rental payments of $750 per month "for the ownership and title transfer of the estate which cost (sic) a grand total of $100,000 in 2013 dollars and balance will be adjusted for inflation beginning in 2015, then annually." The agreement provided that rent paid late would incur a $25 late penalty and, if not received the following month, eviction proceedings would ensue. Several months later, alleging that rent was several months overdue, the plaintiff filed a rule to show cause why possession of the property should not be returned to him. Attached to the rule was an affidavit from the plaintiff attesting to the posting of a five-day eviction notice. At trial, the defendant admitted that her payments were always late and were made in violation of the contract. The trial court ordered the defendant to vacate the property within 48 hours, and the court of appeal affirmed.

The defendant argued that the agreement was a bond for deed contract and that the plaintiff was therefore required to give a 45-day notice to the defendant under R.S. 9:2945. Rejecting this argument, the court observed that, while appearing to have certain characteristics of a bond for deed contract, this agreement failed to meet the requirement that title will transfer with the last payment by the buyer, which is fundamental to a bond for deed contract. Accordingly, the contract did not meet the definition of a bond for deed contract. It also was not a lease with an option to purchase, nor an option to buy or sell. The agreement was ambiguous at best and lacked the elements of a nominate contract, though it was similar to a credit sale with owner financing. Regardless of how the transaction was characterized, the plaintiff had the right to regain possession of the property upon the buyer's default. The defendant was not entitled to the 45-day curative period provided for under the bond for deed statute, nor were the provisions of the Code of Civil Procedure for evicting a lessee applicable, since the agreement was not a lease. Since the defendant admitted that her rent payments were always late and that she never paid the $25 late payment fee, both of which violated the agreement, the trial court's judgment of eviction was proper under the circumstances.

III. Private Works Act claims and privileges.

A. Claims against non-contracting owners.

1. **<u>Gasaway-Bankston v. C. P. Land, LLC</u>, 2014-1749 (La. App. 1st Cir. 6/5/15); 2015 WL 3548099.** In order to generate cash, a developer sold part of a development to a buyer, with the agreement that the developer would later repurchase the property from the buyer at an enhanced price. The repurchase never occurred, but, while title was in the buyer, the developer entered into a contract with the plaintiff architectural corporation to provide architectural services for construction of improvements on the property. The developer did not pay the balance owed to the architectural firm, which then filed a statement of privilege against the immovable. After becoming aware that the buyer, rather than the developer owned the immovable, the architectural firm filed suit against both the buyer and the developer seeking preservation of its privilege and enforcement of the architectural contract. The architectural firm also alleged that its services enhanced the value of the immovable and that the buyer, as the owner of the immovable, was liable for that enhancement. While the suit was pending, a title company filed a request to have the architectural firm's privilege cancelled because it had failed to file a timely notice of lis pendens. The suit was submitted to the trial court for decision based on stipulations, and the trial court dismissed the architectural firm's claim against the buyer. The court of appeal affirmed.

   The claims against an owner under the Private Works Act are limited to the owners who have contracted with the contractor and the privilege affects only the interest in the immovable enjoyed by that owner. If an owner does not personally contract with a contractor, there is no liability on the part of that owner. Since the buyer did not contract with the architectural firm, it had no obligation to the architectural firm and its ownership interest in the property was not affected by a privilege in favor of the architectural firm. Thus, the court did not need to decide the effect of the architectural firm's failure to file a notice of lis pendens, because the privilege never affected the buyer's property. The court of appeal also held that the trial court had properly refused recovery against the buyer under an unjust enrichment theory. Under C.C. art. 2298, an unjust enrichment remedy is unavailable if the law provides another remedy for the impoverishment. In this case, the architectural firm received a judgment against the developer for the full amount owed under the contract. This was the remedy to which the architectural firm was entitled, and the fact that the architectural firm may be unable to collect on the judgment does not create an unjust enrichment cause of action against the buyer.

2. **<u>Cajun Constructors, Inc. v. EcoProduct Solutions, LP</u>, 2015-0049 (La. App. 1st Cir. 9/18/15); 2015 WL 5474883, ___ So. 3d ___ (not yet released for publication in the permanent law reports).** The owner of a large industrial plant entered into an agreement with EcoProduct by which the owner leased approximately five acres of its plant to EcoProduct for the construction of a facility that would be engineered, designed, constructed and owned by EcoProduct. The agreement was not recorded. EcoProduct then contracted with the plaintiff for the construction of the facility. When EcoProduct failed to pay the plaintiff, it timely filed a statement of claim or privilege against the owner's property and brought suit against both the owner and EcoProduct asserting a number of claims, including a claim against the owner for personal liability under the Private Works Act. The trial court granted the owner's motion for summary judgment, and the court of appeal affirmed.

   Under R.S. 9:4806(B), the claim against an owner under the Private Works Act is limited to the owner who contracted with the contractor and owners who have agreed in writing to the price and work of the contract of a lessee. Despite the arguments of the plaintiff that the contract between the owner and EcoProduct was in actuality a building contract, the contract was a lease. Since the owner did not contract with the plaintiff and did not agree in writing to the price and work of the plaintiff's contract with EcoProduct, it had no liability under the Private Works Act. Moreover, the fact that the agreement was not recorded did not override the provisions of the Private Works Act in determining whether the plaintiff had a privilege against the owner. The public records doctrine does not alter the statutory definitions of "owner" and "contractor" found in the Private Works Act and the fact that the agreement between the owner and EcoProduct was not recorded did not make the owner liable under the Private Works Act. Because the agreement was unrecorded, it was without effect as to third persons, such as the plaintiff; however, the unrecorded agreement did not contemplate any rights or effect as to third parties. To hold the owner liable for EcoProduct's failure to pay its contractors would undermine the statutory provisions of the Private Works Act.

B. Res judicata.

<u>Ted Hebert, LLC v. Infiniedge Software, Inc.</u>, 2013-2052 (La. App. 1st Cir. 9/19/14); 2014 WL 4669188. When a subcontractor was not paid for a larger lift station that it had installed at the request of the project engineer, it filed suit against the owner claiming unjust enrichment. The owner filed exceptions of no right and no cause of action, urging that the subcontractor's remedy was governed by the Private Works Act and that the subcontractor had failed to file suit within the one-year period provided by the Private Works Act. After the trial court denied these exceptions, the court of appeal granted supervisory writs and issued a one-paragraph opinion to the effect that the judgment of the trial court denying the exception was reversed but without stating that the plaintiff's suit was dismissed. While the writ application was pending, the plaintiff had filed an amended petition asserting that the owner had authorized the project engineer to instruct the plaintiff to install the larger sewer lift station and that these actions created an independent contract between the owner and the plaintiff for the installation of that substation. After the court acted on its writ application, the owner filed a peremptory exception of *res judicata*, which was sustained by the trial court but reversed by the court of appeal.

The Private Works Act provides that the extinguishment of a claim or privilege does not affect other rights that the claimant may have against the owner, contractor or surety and that any claims granted by the Act or in addition to other contractual or legal rights the claimant may have for the payment of amounts owed to him. Accordingly, although the plaintiff's claims under the Private Works Act were perempted, there was still a viable cause of action for breach of contract. *Res judicata* did not apply in this case because neither the trial court's original ruling denying the owner's exceptions nor the court of appeal's action on the writ contained decretal language dismissing all of the plaintiff's claims. A final judgment must contain decretal language.

Though the court disagreed that *res judicata* operated, it recognized that the writ action may nonetheless constitute "law of the case." However, there was no indication that the court of appeal had considered the breach of contract claim when it ruled on the earlier writ application. Thus, the exception of *res judicata* could not be sustained on the basis of the law of the case doctrine.

C. Pay-if-paid clauses.

<u>Tymeless Flooring, Inc. v. Rotolo Consultants, Inc.</u>, 2014-1392 (La. App. 4th Cir. 5/20/15); 172 So. 3d 145. A subcontract provided that the subcontractor would be paid "subject to the conditions following, after payment by the Owner for Subcontractor's work." When the subcontractor sued for amounts due, the contractor responded with an exception of prematurity on the ground that the owner had not yet paid the contractor the amounts due to the subcontractor. The trial court sustained the exception of prematurity, but the court of appeal reversed.

There is a vast difference between "pay-when-paid" and "pay-if-paid" clauses in construction subcontracts. The pay-when-paid clause governs the timing within which the general contractor must remit payments to its subcontractor, but under this type of provision the general contractor must in any event make payment to the subcontractor within a reasonable time, even if the general contractor does not receive payment from the owner. Under the more restrictive "pay-if-paid" clause, the provision dictates whether payment obligations exist at all. To create an enforceable "pay-if-paid" clause, the parties' intent to do so must be explicitly expressed in their agreement, by either expressly stating that payment to the contractor is a condition precedent to payment to the subcontractor, that the subcontractor is to bear the risk of the owner's non-payment, or that the subcontractor is to be paid exclusively out of a fund the sole source of which is the owner's payment to the subcontractor. The subcontract in this case did not satisfy these requirements. It contained, therefore, a "pay-when-paid" clause, and the court of appeal remanded the suit for the trial court to determine whether a reasonable time for the contractor to pay had elapsed.

IV. Other privileges on immovables.

A. Vendor's privileges.

Board of Supervisors of Louisiana State University v. Bickham, 2014-0975 (La. App. 4th Cir. 3/11/15); 163 So. 3d 119. In an expropriation proceeding filed by LSU, the holder of a vendor's privilege on the expropriated property intervened to seek a jury trial on the issue of just compensation. Though it did not oppose the intervention, LSU argued that the holder of the vendor's privilege had no right of action to seek a determination of the amount of just compensation. The trial court sustained LSU's exception of no right of action, finding that the property owners had failed to challenge the amount of compensation and the holder of the vendor's privilege was not a proper party to do so. The court of appeal reversed, holding that under Article 1, Section 4 of the Louisiana Constitution any party in interest may demand a jury trial to determine the amount of just compensation.

LSU's argument was based upon R.S. 19:150, which grants "any defendant" the right to apply for a trial to determine the market value. Since the holder of the vendor's privilege was a mere intervenor and not a defendant, LSU argued that he had no standing to apply for a trial on this issue. However, the court found persuasive the arguments made by the holder of the vendor's privilege that his right to a trial emanated from the Constitution, which provides that in all expropriations *a party* has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. An examination of the debates surrounding the adoption of this language at the Constitutional Convention of 1973 reveals that the drafters intended "a party" to be inclusive of any party. This finding was predicated primarily upon arguments of one of the delegates to the Constitutional Convention that use of the word "the owner" would in effect be denying a lessee his right to compensation. Both mortgages and vendors' privileges fall within Title 19's definition of property, and Title 19 allows any party in interest the right to intervene and petition the court for disbursement of that portion of the just compensation attributable to the value of the mortgage or privilege. The holder of the vendor's privilege in this case was, therefore, a "party" to these expropriation proceedings and accordingly had standing under the Constitution to seek a determination on the issue of just compensation. In reversing the trial court's holding, the court distinguished its prior ruling in this case at 107 So. 3d 12, which had held that the holder of the vendor's privilege had no right of action to annul the expropriation on constitutional grounds on account of LSU's failure to provide him with notice of the quick taking. The court explained that the prior decision had held merely that the holder of the vendor's privilege had no right of action to set aside the judgment of expropriation and that any statements in that opinion about his right to receive damages or his right to seek a determination of just compensation were purely dicta.

B. Condominium assessments.

<u>In the matter of Green, 793 F. 3d 463 (5th Cir. 2015)</u>. Affirming a ruling of the bankruptcy court, the court held that a condominium privilege is a statutory lien, not a consensual security interest, and therefore is not subject to the anti-modification provision of 11 U.S.C. §1322, which prohibits the modification of the rights of holders of claims secured only by a security interest in real property that is the debtor's principal residence. Under the Bankruptcy Code, a "security interest" means a lien that is "created by an agreement." Under Louisiana law, there are two types of security devices that pertain to immovable property: privileges and mortgages. The condominium declaration does not satisfy the creation requirements of either. A privilege is a nonconsensual device that arises as a matter of law. A privilege arises only if and to the extent that the law says it does. Thus, the condominium association's attempt in its declaration to grant itself a privilege is ineffective, since a privilege arises only by law and thus can never be created by the consent of the parties. The condominium declaration also could not have created a mortgage, which requires a written contract signed by the mortgagor, stating the amount secured and describing the immovable property. Because a privilege arises by operation of law, it is, by definition, a statutory lien under the Bankruptcy Code. Accordingly, the anti-modification provision of 11 U.S.C. §1322 did not apply.

C. Governmental privileges.

<u>Diamond Properties Holdings, Inc. v. St. Tammany Parish</u>, 2014-0881 (La. App. 5th Cir. 12/23/14); 2014 WL 7332106. A property owner was cited for violations of parish ordinances relating to high grass, accumulation of junk and harborage of vermin. Determining that the property owner had violated these ordinances, an administrative hearing officer imposed a $450 fine. The judgment of the administrative hearing officer also provided that the property owner would be assessed a fine in the amount of $50 per day per violation from the date of the judgment up to a maximum of 180 days. Though the property owner paid the amount of the $450 fine, it apparently did not bring its property into compliance, and the parish then determined that the total debt due was the maximum penalty of $15,000. The parish gave notice to the property owner that the delinquent amount would be added to the taxes and the property would be sold at tax sale if the amount was not paid. After a tax sale was held the following year, the property owner filed a petition for declaratory judgment and for writ of mandamus seeking to have the tax collector remove the improperly assessed charge from the tax bill and to cancel the tax sale. The parish filed exceptions of unauthorized use of summary proceedings, improper cumulation of action, prematurity and peremption, all of which were sustained by the trial court. The court of appeal reversed.

The basis of the exception of prematurity was that the property owner's petition requested the court to change records before having the administrative judgment vacated. The basis for the exception of peremption was that the property owner had failed to timely appeal the prior administrative judgment. The court of appeal disagreed. Though R.S. 13:2575(C) provides that fines are secured by a lien and privilege upon the property if they are recognized in a judgment that has become final and also allows the amount to be included on the next annual ad valorem tax bill, the hearing officer in this case had imposed only a $450 fine, and this was the only sum certain due and payable in accordance with the judgment. The non-compliance penalties did not begin to accrue until after the date of the judgment, and the court rejected the parish's argument that the administrative judgment was final as to penalties that had not yet even begun to accrue at the time the judgment was signed. In order for the lien and privilege contemplated by R.S. 13:2575(C) to arise, the judgment assessing the fines must be final.

V. Suretyship.

A. **<u>N&F Logistic, Inc. v. Cathay Inn International, Inc.</u>, 14-835 (La. App. 5th Cir. 4/15/15); 170 So. 3d 275.** In a suit on open account, a trade creditor obtained a default judgment against two guarantors under a guaranty agreement that contained only one signature, which was illegible. The court of appeal reversed. A contract of guaranty is equivalent to a contract of suretyship, which must be express and in writing. In this case, there was only one signature on the document, and there was no printed name under the signature to indicate exactly who signed the document. Thus, the guaranty did not, by itself, constitute sufficient proof that the defendants expressly agreed to be personal guarantors for their corporation. C.C.P. art. 1702(B)(3), which dispenses with proof of signatures in suits on open accounts, promissory notes or other negotiable instruments, does not apply to a personal guaranty, which is neither a negotiable instrument nor an open account.

B. **<u>First American Bank and Trust v. Geaux Development Group, LLC</u>, 2014-0565 (La. App. 1st Cir. 1/7/15); 2015 WL 94827.** At the time of a 2006 mortgage loan, ten guarantors signed pro-rata guaranties. A year later, when the loan was renegotiated, guaranties were executed by only six of the original ten guarantors. The borrower defaulted a few years after that, and the bank brought suit against these six guarantors, who filed a compulsory reconventional demand alleging that the bank's renegotiation of the loan had increased their potential virile share liabilities to their direct detriment without their consent and through fraud. Specifically, the guarantors contended that they were not made aware at the time of the renegotiation that four of the original guarantors were not executing guaranties. The guarantors also alleged that the bank's actions amounted to fraud and that the bank was therefore indebted to them for attorneys' fees. The trial court granted summary judgment in favor of the bank on both the main demand and the reconventional demand, and the court of appeal affirmed.

In a suit on a promissory note, the plaintiff must merely produce the note in question to make out a prima facie case, and the burden then shifts to the defendant to prove any affirmative defenses. The bank's affidavit of correctness of account was sufficient to establish a prima facie case showing its entitlement to summary judgment for the amounts due under the note.

Fraud, as applied to contracts, is the cause of an error concerning a material part of the contract created or continued by artifice and with the intent to obtain an unjust advantage or cause a detriment or loss to the other party. While fraud may result in some circumstances from a party's silence or inaction, mere silence or inaction without fraudulent intent does not constitute fraud. R.S. 6:1124 provides that a financial institution is not deemed to be acting as a fiduciary or to have fiduciary obligations to its customers, in the absence of a written agency or trust agreement by which the financial institution specifically agrees to act and perform in the capacity of a fiduciary. In this case, the guarantors produced no evidence to show that the bank had a duty to disclose any information concerning the other guarantors on the renegotiated loan. They also failed to establish the existence of any special relationship that would impose upon the bank a duty to disclose this information. Though the guarantors claimed that the bank had breached a duty of "good faith and fair dealing," the documents executed in connection with the loan contained no contractual provision imposing such a duty, and the guarantors had failed to set forth any statutory or jurisprudential authority for the imposition of any such duty in commercial transactions.

Moreover, the guaranties specifically provided that the bank could release any one or more of the guarantors, without notice to the other guarantors and without impairing or releasing any of the guarantors' obligations or liabilities. Thus, according to the plain and unambiguous wording of the guaranties, the guarantors contractually agreed that the bank in its discretion had the right to release any guarantor it chose from the obligations arising under either loan and could do so without notice to the other guarantors. Signatures to obligations are not mere ornaments, and parties who sign obligations must expect to be held liable according to their tenor. These guarantors were presumed to have read the guaranties they executed in connection with the renegotiated loan and were bound by their clear and unambiguous terms. Based on similar reasoning, the court of appeal found that the trial court had correctly granted judgment in favor of the bank on the reconventional demand.

VI. Executory process.

A. Requirements for use of executory process.

1. **<u>U.S. Bank National Association v. Dumas</u>, 2012-1902 (La. App. 1st Cir. 4/13/14); 144 So.3d 29, <u>writ denied,</u> 147 So. 3d 1119 (La. 8/25/14).** One day before a scheduled executory process sale, a residential mortgagor filed

a petition to enjoin the seizure and sale of the property. Although C.C.P. art. 2752 prohibits the granting of a temporary restraining order to arrest the seizure and sale of immovable property, the mortgagor obtained an ex parte "stay order" prohibiting the sheriff from proceeding with the sale. After a hearing, the trial court granted a preliminary injunction.

In reversing the trial court's action, the court of appeal rejected a long litany of perceived defects alleged by the mortgagor. The mortgagee properly filed with its executory process petition a copy of the mortgage certified by the clerk of court. Contrary to the mortgagee's arguments, Bank of New York Mellon v. Smith, 71 So.3d 1034 (La. App. 3d Cir. 2011), a case involving a lost mortgage note, does not stand for the proposition that the only certified copy that may be produced is one certified by the same notary before whom the mortgage was initially executed.

The mortgagor also attempted to seize upon other language in Bank of New York Mellon to the effect that the confession of judgment in the mortgage involved in that case did not contain the phrase "if the obligation is not paid at maturity." Rejecting this contention, the court pointed out that the court in Bank of New York Mellon did not attribute any substantive consequences to the omission of that phrase and based its ruling on other grounds. In the mortgage in this case, the mortgagor confessed judgment for all sums secured by the mortgage. Moreover, by its terms, the paragraph in which the confession of judgment appeared is applicable only in the event of acceleration of the promissory note which, under another paragraph of the mortgage may occur only upon failure of payment. These provisions are sufficient to satisfy the requirements for confession of judgment under C.C.P. art. 2632.

The mortgagor's third asserted defect was that the petition failed to allege that the mortgagee was the holder or owner of the promissory note, claiming that the mortgagee had failed to satisfy any of the essential requirements of R.S. 10:3-301, which defines a person entitled to enforce an instrument as the holder of the instrument, a non-holder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce it pursuant to Section 3-309 or 3-418(d). Rejecting this contention, the court pointed out that a holder is defined, in part, as the person in possession of a negotiable instrument that is payable either to bearer or to an identified person who is the person in possession. With its foreclosure petition, the mortgagee presented the original note which had been endorsed to its order. These allegations satisfied the requirements of Section 3-301.

The mortgagee's next contention was based upon discrepancies in the name of the plaintiff as shown on the endorsement on the original promissory note ("RFMSI 2005 S7"), when an affidavit from a purported expert in foreclosure and mortgage documentation examination opined that the plaintiff was a trust actually named "RFMSI Series 2005 S-7 Trust." The court held that the plaintiff in its capacity as a trustee was the payee of the promissory note and was in possession of it and therefore was the proper plaintiff in the proceeding. Since a trust is a relationship rather than an entity, purported discrepancies in the name of the trust did not affect the procedural right of the plaintiff, as trustee, to enforce the promissory note. In a related contention, the mortgagor argued, based on an affidavit from an expert in mortgage securitization analysis, that the promissory note was transferred to the trust after the "closing date" and is therefore null and void. Rejecting this contention, the court observed that no statute or jurisprudence in Louisiana suggests that the acquisition of a promissory note and mortgage after the closing date of a trust prevents the trustee from enforcing the note and mortgage.

The mortgagor also claimed that he was not provided notice of the transfer of the promissory note until foreclosure in violation of both the Truth-in-Lending Act, 15 U.S.C. §1641, and the Real Estate Settlement Procedures Act, 12 U.S.C. §2601. The Truth-in-Lending Act does not provide that the failure to give the notice is a defense to payment of the debt or otherwise prevents the creditor from invoking foreclosure proceedings if the borrower defaults. The RESPA provision requires that a loan servicer notify the borrower in writing of any assignment, sale or transfer of the servicing of the loan. The mortgagor provided no evidence of any transfer made for loan servicing and thus failed to make a prima facie showing that he was entitled to a RESPA notice. Moreover, an individual's remedy for a violation of this RESPA provision is a claim for actual damages. RESPA does not prevent the assignee from using executory process to enforce the mortgage. As an aside, the court pointed out that C.C. art. 2643 provides that an assignment of a right is effective against the debtor only from the time that he has actual knowledge or has been given notice of the assignment. Service of a petition to enforce an assigned obligation is sufficient notice under C.C. art. 2643, particularly in this case where the mortgagor does not allege that he failed to pay the note because of any uncertainty or confusion concerning the assignee's identity.

Another argument advanced by the mortgagor was that the bank was obligated to furnish corporate resolutions confirming the authority of those individuals who endorsed the promissory note on behalf of prior holders to do so. This contention was based primarily upon <u>First Guaranty Bank v. Baton Rouge Petroleum Center</u>, 529 So.2d 834 (La. 1987), in which the Supreme Court had held that a creditor seeking to use executory process was required to offer authentic evidence of a corporate resolution authorizing the execution of the mortgage. According to the court, <u>First Guaranty Bank</u> is distinguishable because in the present case the mortgagor is challenging only the authority of corporate representatives to endorse a promissory note. R.S. 10:3-308(a) provides that in any action with respect to an instrument, the authenticity of and the authority to make each signature on the instrument is admitted unless specifically denied in the pleadings. Even then, the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial. Under this provision, the authority for those signing on behalf of prior endorsers is presumed and the mortgagee was not required to present a corporate resolution to prove the authority of the corporate representatives to endorse the promissory note.

Another of the mortgagor's contentions was that the endorsements did not qualify as signatures because they were made by stamps rather than being handwritten. R.S. 10:1-201(37) defines the word "sign" to include any symbol executed or adopted with present intention to adopt or accept a writing. Following a decision in which the North Carolina Supreme Court had construed this provision to mean that the UCC does not limit a signature to a long-hand writing of an individual person's name, the court found that a stamped signature indicated an intention to adopt or accept a writing for the purpose of negotiating a promissory note. The stamped signature was therefore deemed authentic pursuant to R.S. 9:4422.

Yet another contention rejected by the court was that, since the mortgage had been executed in favor of MERS and MERS never assigned the mortgage, the note and mortgage had become "split" with the effect that the plaintiff could not foreclose on the property. The mortgage identified MERS as the mortgagee but explained that MERS was acting solely as a nominee for the identified lender who was the holder of the promissory note secured by the mortgage. A mortgage is an accessory obligation to the debt it secures under C.C. art. 3282. Louisiana law is well-established that the transfer of a note identified with a mortgage also transfers the mortgage itself. The out-of-state cases cited by the mortgagor provide no authority for departing from Louisiana law that an assignment of the note also transfers the mortgage securing repayment of the note.

The court also rejected the mortgagor's argument that the verification was defective because it was signed by counsel and based upon records provided to the affiant by the secured party kept or obtained in the ordinary course of business. As the mortgagor conceded, C.C.P. art. 2634 does not require a petition for executory process to be verified, though the Code of Civil Procedure does permit certain matters to be established by verification or affidavit. The mortgagor's specific complaint in this case was that the verification did not affirm that the endorsers' signatures are genuine; however, those signatures are presumed genuine under R.S. 9:4422. Thus, the claim that the deficiencies in the verification precluded the use of executory process was without merit.

The mortgagor also contended unsuccessfully that there was no authentic evidence of the endorsements and transfers of the note, citing an 1884 case requiring authentic evidence of transfers. However, the necessary evidence to establish a signature on an instrument is now governed by R.S. 9:4422, which provides that all signatures on an instrument are presumed to be genuine and no further evidence is required of those signatures for executory process. In this case, the original note had been endorsed to the mortgagee and the note reflected on its face that the mortgagee had the right to enforce the instrument.

A related contention was based on a statement in the affidavit of an expert in foreclosure and mortgage documentation to the effect that she is "currently investigating the person who signed one of the endorsements and that person had instructed document custodians in thousands of foreclosure cases to apply her stamped endorsement after foreclosure proceedings had been commenced and a consumer had challenged the chain of title." The court found that this could not possibly apply in the present case because the endorsed note was presented at the time the executory process petition was filed.

Judge Whipple dissented, believing that the trial court's preliminary injunction was supported by the two affidavits outlining numerous perceived issues with the chain of title, the stamped endorsements of the note that were not done by authentic act and the lack of notice to the defendant of the transfers of the note.

2. **Bank of New York Mellon v. Smith, 2015-0530 (La. 10/14/15), ___ So. 3d ___, 2015 WL 5972570.** Shortly after executory proceedings had been filed against his client, counsel for a residential mortgagor wrote to the lender indicating that executory process was improperly supported since only a copy of the promissory note was attached to the petition for executory process and since the attorney for the foreclosing creditor had received a copy of the original promissory note containing an unsigned stamp stating that the mortgage note had been paid and cancelled. Nonetheless, the foreclosing creditor's attorney did not stop the foreclosure, and, a few weeks later, the sheriff's office delivered a notice of constructive seizure to the mortgagor, who, on the basis of a fear that she would be evicted from her house over the holidays, moved her children out of the house and sought an injunction to stop the seizure. The mortgagor also filed a reconventional demand against the creditor alleging wrongful seizure, conversion and federal due process violations under 42 U.S.C. §1983. The trial court granted the mortgagor's request for a preliminary injunction and ordered the creditor to convert the suit to an ordinary proceeding. Instead, the suit was ultimately dismissed, and a successor creditor later filed another suit seeking to enforce the mortgage by ordinary proceedings. In this suit, the mortgagor asserted a third-party demand against the prior creditor and its law firm. Among the allegations was a claim that the mortgage was not in authentic form because it was executed before only one witness.

In a prior opinion in this case published at 71 So. 3d 1034, the Third

Circuit reversed the trial court's action in sustaining the defendants' exceptions of no cause of action. In that opinion, the court of appeal found that the mortgagor's allegations were sufficient to establish that the seizing creditor and its counsel were state actors subject to liability for seizure of the home under §1983. After remand, the mortgagor added the individual attorney who had represented the original creditor as a defendant. When she reached a settlement with the creditors, who were dismissed from the suit, she reserved her claims against this attorney and his law firm. The trial court then granted a motion for summary judgment filed by the attorney and his law firm, but the court of appeal reversed in an opinion published at 159 So. 3d 108, finding there to be genuine issues of material fact as to whether the attorney intentionally took measures that resulted in an invasion of the mortgagor's property interest, despite being put on notice that executory proceedings were improper. The Supreme Court granted certiorari and reversed.

To state a claim under §1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law. The United States Supreme Court has explained that a private party can be characterized as a state actor for purposes of §1983 if he jointly participates with state officials in the seizure of property. However, mere private misuse of a state statute does not fall within the scope of conduct that can be attributed to the state. A petitioner presents a valid cause of action under §1983 to the extent that he challenges the constitutionality of a state statute; he does not insofar as he alleges only misuse or abuse of the statute by a private party. In this case, the mortgagor conceded that she was not attacking the constitutionality of the executory process statute but instead was alleging an abuse or misuse of the seizure provisions resulting in an unconstitutional seizure of her property. Under these circumstances, there was no unconstitutional seizure of the mortgagor's property. Rather, she was given sufficient opportunity to contest the actual seizure of her property and in fact she succeeded in obtaining an injunction to prevent the sale of her property.

With respect to the claim that the attorney acted recklessly in proceeding with executory process after the mortgagor's counsel had warned the foreclosing creditor that executory proceedings were not properly supported, the court held that the physical absence of a witness in the execution of a mortgage is a latent defect that is not chargeable to an attorney petitioning for executory process. It was not until after the executory process suit was filed that the mortgage was determined not to be in authentic form because of a deficiency that was not obvious on its face. At the time the executory process suit was filed, the mortgage, as an authentic act, was presumed to be valid.

Louisiana subscribes to the traditional, majority view that an attorney acting on behalf of a client does not owe a legal duty to his client's adversary. A non-client, therefore, cannot hold his adversary's attorney personally liable for either malpractice or negligent breach of a professional obligation. However, intentionally tortious actions, ostensibly performed for a client's benefit, will not shroud an attorney with immunity. In this case, however, there was no evidence that the attorney acted with specific intent to harm the mortgagor, and his actions, at most, were negligent.

Note: In its opinion at 159 So. 3d 1088, the Third Circuit not only addressed the state actor issue on which it was ultimately reversed by the Supreme Court, but also discussed a contention by the mortgagor that the trial court had erred in failing to apply the law of the case doctrine to give conclusive effect to certain findings that had allegedly been made by the Third Circuit in its earlier opinion published at 71 So. 3d 1034. That opinion, which found that the mortgagor had stated a cause of action, contained certain observations suggesting that the confession of judgment in the mortgage was defective because it did not contain the words "if the obligations are not paid at maturity." After remand, the mortgagor amended her petition to allege the legal insufficiency of the confession of judgment in the mortgage as a basis for liability. In rejecting the mortgagor's argument that law of the case applied, the court observed that its earlier opinion had noted that it was not deciding the merits of the case. Moreover, the individual attorney was not added as a defendant until two years later, and the law of the case doctrine could not bind anyone who was not a party to the litigation at the time the prior decision was rendered. Thus, the court of appeal held that the trial court had not erred in refusing to apply the law of the case doctrine.

3. **Sabine State Bank and Trust Company v. Robert A. Woodard, 15-00624 (La. App. 3d Cir. 9/17/2015).** In the unpublished granting of a writ application filed by an executory process plaintiff, the Third Circuit, citing U.S. Bank National Association v. Dumas, 144 So. 3d 29 (La. App. 1st Cir. 4/13/14) held that the mortgage being enforced included provisions sufficient to constitute a confession of judgment and found that the trial court erred when it denied the mortgagee's request to proceed with foreclosure by executory process.

4. **Federal National Mortgage Association v. Duong, 14-689 (La. App. 5th Cir. 2/11/15); 167 So. 3d 920, 85 U.C.C. Rep. Serv. 2d 825.** Executory proceedings were instituted upon a residential mortgage securing a mortgage note that had been assigned by an endorsement in which a blank had been left for insertion of the name of the assignee. Before the sheriff's sale occurred, the mortgagor sought an injunction, arguing that the endorsement on the note was incomplete and insufficient to support the use of executory process. The trial court denied the request for an injunction, and the property was sold at sheriff's sale. A month later, the mortgagor filed an amended petition seeking damages and return of the property. The trial court granted summary

judgment in favor of the mortgagee, and the court of appeal affirmed.

The mortgage note was originally order paper, because it was payable to a specified payee. When that payee endorsed the note without filling in the name of the person to whom it was endorsed, this endorsement constituted a blank endorsement under R.S. 10:3-205(b), which provides that an instrument endorsed in blank becomes payable to bearer and may be negotiated by transfer of possession alone. Thus, the mortgage note was properly negotiated when the seizing creditor came into possession of the note. Since that creditor thus became the holder of the note, it had the ability to enforce it through executory process. The mortgagor's reliance on Hong Kong Importers, Inc. v. American Exp. Co., 301 So. 2d 707 (La. App. 4th Cir. 1974)(holding that an instrument payable to order that does not list a payee is incomplete and cannot be negotiated until a payee is filled in the blank) was misplaced, since that case was decided prior to Louisiana's enactment of the Uniform Commercial Code governing negotiable instruments.

B. Keepers.

Union Federal Credit Union v. Thornton, 49,529 (La. App. 2d Cir. 1/28/15); 162 So. 3d 414. In executory proceedings, the sheriff seized four semi-trucks and three flatbed trailers. There was no keeper provision in the security agreement, and the vehicles were stored on the lot of the towing company, which, with the consent of the sheriff's office, was appointed as keeper. Because of bankruptcy proceedings, the vehicles remained in storage for 689 days. The towing company submitted a bill of $36.00 per day per vehicle, or a total of nearly $154,000. The sheriff filed a motion to tax costs, requesting that the court issue an order compelling the secured party to pay all outstanding costs associated with the seizure and sale of the vehicles. Ultimately, the trial court awarded $2,700 in towing fees and an additional $9,700 in storage fees. Both the seizing creditor and the sheriff appealed.

The court of appeal affirmed, except that it amended the judgment to allow the sheriff to apply the creditor's deposit against other fees rather than against the storage costs. Under the manifest error rule, the court of appeal could not say that the amount awarded was clearly wrong and unreasonable, particularly since the vehicles were parked in an open field. Nevertheless, the court found it "remarkable and inexcusable" that the secured party's "dilatory process and inaction in the foreclosure occurred over such a lengthy period of time," leaving the property in storage for so long. Thus, the court rejected the creditor's arguments concerning the excessiveness of the trial court's award of $9,700 in storage fees. The creditor was in control of the proceedings, "and its inaction will not be rewarded at the expense of the sheriff." The court also found that the sheriff had the same power to decline the further storage expense at any time, and he did not act in that regard, thereby leaving the matter with the trial court to decide a reasonable storage fee.

C. Availability of executory process in federal court.

1. **<u>Goldman Sachs Bank USA v. Moreno</u>, 2015 WL 5519407 (W. D. La. 2015).** When a creditor instituted an executory process foreclosure in federal court, the court denied the request for the issuance for a writ of seizure and sale and instead issued a ruling requiring the plaintiff to demonstrate that relief by executory process is available in federal court. In this opinion, the court held that the mortgagee had done so. Citing Fifth Circuit precedent involving a summary Georgia confirmation proceeding of the exercise of a power of sale, the court indicated that the reasoning of the Georgia case justified the court in adhering to Louisiana's system of executory process. Strictly applying the Federal Rules of Civil Procedure would frustrate the purpose of Louisiana executory proceedings, by permitting the defendant to convert a summary proceeding into a plenary trial between the parties, thereby modifying the creditor's substantive right to a speedy sale of the encumbered property. Moreover, strict adherence to the Federal Rules would invite forum shopping, because it would provide debtors with an incentive to remove actions to federal court in order to take advantage of the considerable delays that federal litigation would afford.

2. **<u>Bank of Jackson Hole v. Robinson</u>, 2015 WL 1198543 (W.D. La. 2015).** In response to an executory process suit filed in federal court, the defendants filed a motion to enjoin the sale alleging, among other things, that the mortgage in question was not an authentic act and that the bank could not seek relief by executory process because Federal Rule of Civil Procedure 64 cannot be used to award final relief. The plaintiff then filed a motion for leave to file an amended complaint converting the action into one for money judgment instead of one for executory process, thereby mooting any concerns over whether it could pursue relief via executory process. The defendants opposed this motion, on the ground that the plaintiff could not rely on La. C.C.P. art. 2644 to convert the action into one for monetary relief. The district court upheld the magistrate judge's order to the effect that, while La. C.C.P. art. 2644 did not apply, Federal Rule of Civil Procedure 15(a) did apply to permit amendment of a complaint unless futile, i.e., unless it would fail to state a claim upon which relief could be granted. The court also upheld the magistrate judge's findings that the defendants' arguments were a veiled attempt to have the case summarily decided on the merits through an objection to an amendment to the complaint.

D. Post-sale attack in state court.

1. **See <u>Bank of New York Mellon v. Smith</u>, 2015-0530 (La. 10/14/15), ___ So. 3d ___, 2015 WL 5972570, discussed <u>supra</u>.**

2. **<u>Chase Home Finance, LLC v. Fox</u>, 2014-489 (La. App. 3d Cir. 11/5/14) 150 So.3d 603.** At an executory process sale, the collateral was sold for two-thirds of appraised value to a third-party purchaser. The seizing creditor, which was not present at the sale, notified the sheriff's office afterward that

it disputed the sale and that the sheriff should not issue a sheriff's sale deed in favor of the purchaser. The purchaser then filed a writ of mandamus against the sheriff and, in response, the creditor filed a motion to annul the sheriff's sale. The court of appeal affirmed the trial court's judgment annulling the sheriff's sale.

Under C.C.P. Art. 2338, when the seizing creditor is not present, the property cannot be sold for less than the amount necessary to satisfy his writ plus costs. In response to the third-party purchaser's attempt to rely on Reed v. Meaux, 292 So. 2d 557 (La. 1973), which purportedly protects the rights of a third-party purchaser at an executory process sale, the court noted that, after that case was decided, R.S. 13:4112 was enacted to provide that no suit may be set aside to enjoin an executory process sale after the sheriff has filed the proces verbal or the sale into the conveyance records. It follows, therefore, that an executory process sale can be attacked where the property is sold to a third party provided that the attack is made prior to the recordation of the proces verbal or the recordation of the sale.

3. **Lake Air Capital II, LLC v. Perera, 2015-0037 (La. App. 4th Cir. 5/13/15); 172 So. 3d 84.** For three months after a residential executory process foreclosure was filed, the defendants took no action until less than one week before the scheduled sheriff's sale, when they filed a Chapter 13 bankruptcy proceeding. Afterward, the defendants defaulted on their plan, and the bankruptcy court ultimately granted the mortgagee's motion to have the stay lifted. The mortgagee then reset the scheduled sale for several months in the future. Less than one week before the rescheduled sale, the defendants filed a motion with the bankruptcy court to reinstate the stay. The bankruptcy court declined this request on the Monday before the sale, and the following afternoon, less than twenty-four hours before the sale, the defendants filed a petition for injunction. The court set the hearing on the request for a preliminary injunction for one week past the scheduled sheriff's sale, explaining that it could not hold a hearing less than two days after service of notice of the hearing. The sheriff's sale then went forward as scheduled, but the defendants failed to vacate the property and eviction proceedings were instituted against them. In defense of the eviction proceedings, the defendants argued that they had been denied due process as a result of the trial court's failure to hold a hearing on their request for an injunction prior to the sheriff's sale. After the trial court granted a judgment of eviction ordering the defendants to vacate the property, the defendants appealed, claiming that the trial court had erred by not ruling that the sheriff's sale of the property was a nullity conducted in violation of the defendants' due process rights.

The court of appeal affirmed, rejecting the defendants' contention that C.C.P. art. 2752 and 3602, when read and applied together, are confusing, ambiguous and unconstitutional. The court recognized that C.C.P. art. 2752 expressly prohibits the issuance of a temporary restraining order to arrest the seizure and sale of immovable property. C.C.P. art. 2752 also requires that the injunction proceeding comply with the mandatory requirements set forth in C.C.P. art. 3602, which precludes a trial court from setting a preliminary injunction hearing less than two days after service of notice of the hearing. There was indeed an opportunity for a hearing on a petition for injunctive relief if the defendants had timely requested one. The record was devoid of any evidence that would explain why the defendants, despite having knowledge for months of the imminent sale of the property, took no action to arrest the sale until asking the bankruptcy court to reinstate the stay less than one week before the scheduled date, nor why they then waited until less than two days before the sheriff's sale before seeking injunctive relief in the executory proceedings. The defendants' claim that their due process rights had been violated for lack of an opportunity to be heard bordered on the disingenuous.

4. **<u>Chase Home Finance, LLC v. Vance</u>, 15-115 (La. App. 5th Cir. 10/14/15); ___ So. 3d ___, 2015 WL 6080950 (not yet released for publication in the permanent law reports).** After a residential executory process foreclosure had been completed and the sheriff's sale deed filed, the mortgagor filed a suit to enjoin the seizing creditor from evicting her. The basis for this suit was a claim that the seizing creditor had lacked standing to bring the executory process suit. The trial court denied the plaintiff's request for a preliminary injunction, and the court of appeal affirmed.

    Under R.S. 13:4112, no action may be instituted to set aside an executory process sale by reason of an objection to form or procedure, or by reason of a lack of authentic evidence, after the sale has been filed in the conveyance records. A sale may be attacked, by direct action after the sale has been completed, for substantive defects that strike at the foundation of the executory proceeding, if the mortgagee is the adjudicatee at the foreclosure sale and is still in possession of the property. In this case, the mortgagor filed no petition to enjoin the sale before it occurred, took no appeal from the judgment seizing the property, and filed no direct action to annul the sale after the foreclosure sale. In this suit, the mortgagor cannot raise defects of form or procedure in the foreclosure proceeding because the sheriff's sale deed has been recorded. In addition, she cannot raise a claim of a substantive defect by seeking injunctive relief against a potential or actual eviction proceeding by the new owner.

5. **<u>Carter v. First South Farm Credit, ACA</u>, 49,531 (La. App. 2d Cir. 1/14/15); 161 So. 3d 928.** In executory proceedings, an attorney at law was appointed to represent the defendants who were former residents of Louisiana but at the time of the foreclosure were Texas residents. After the foreclosure was completed, the mortgagors filed a petition for wrongful seizure and conversion, claiming that they did not receive notice of the seizure and sale until after the sheriff's sale and that the mortgagee had failed to meet the burden necessary for the appointment of a curator. The

mortgagors also alleged that the curator failed to perform her duties because she did not file an answer to the petition for executory process, did not assert any defenses on their behalf and did not contact them prior to the sale. The mortgagors also alleged that the mortgagee knew of their whereabouts yet failed to contact them prior to the sale. In response to this suit, the mortgagee reconvened for a deficiency judgment and asserted a cross-claim against the curator. The trial court granted summary judgment in favor of the mortgagee, and the court of appeal affirmed.

The court first rejected the mortgagors' claim that appointment of a curator for them was improper since their whereabouts were known, even though they were non-residents of Louisiana. C.C.P. art. 5251 defines "absentee" to mean a non-resident who has not appointed an agent for service of process in this state. The mortgagors were absentees under this definition because they had moved to Texas without appointing an agent for service of process in Louisiana. Whether their whereabouts were known was irrelevant. Thus, the appointment of a curator was proper.

The court also rejected the mortgagors' claims that the mortgagee should have served them by certified mail under the Louisiana Long-Arm Statute. C.C.P. art. 2641 provides that all demands and notices required to be served upon a defendant in an executory proceeding shall be served upon the attorney at law appointed by the court to represent him. Since the mortgagors were absentees and a curator was appointed for them, this article applied specifically to this executory proceeding, rather than the provisions of the Long-Arm Statute.

The court also rejected the mortgagors' asserted claims under 42 U.S.C. §1983 that they were deprived of a constitutional right by the failure of notice of the proceedings as required by <u>Mennonite</u>. The court found that the due process requirements were adhered to by the mortgagee, its attorney and the trial court. Under C.C.P. art. 5098, the curator's alleged failure to communicate with the mortgagors did not affect the validity of the proceedings. Similarly, the court rejected a contention that the mortgagee was barred from a deficiency judgment by its alleged failure to provide the mortgagors with notice of seizure. The curator represented the interest of the mortgagors, and service upon the curator constituted service upon the mortgagors.

E. Post-sale attack in federal court/<u>Rooker-Feldman</u> doctrine.

1. **<u>Truong v. Bank of America, N.A.</u>, 717 F. 3d 377 (5th Cir. 2013).** After a state court foreclosure sale, the mortgagor brought a diversity action against the mortgagee in federal court, alleging violations of the Louisiana Unfair Trade Practices Act in connection with the mortgage foreclosure proceeding. The district court dismissed the action on the basis of the <u>Rooker-Feldman</u> doctrine. The court of appeals affirmed, but for different reasons.

The purported violations of the Unfair Trade Practices Act included a claim that the foreclosing creditor lacked standing to seek executory process because the note attached to the foreclosure petition had not been not properly endorsed to it and, in addition, the lender had misled the plaintiff into believing that it would process her application under the Home Affordable Modification Program and had falsely told her that no sale would be scheduled until that process was completed. She also alleged that the affidavit submitted with the foreclosure petition was not authentic evidence because the person signing it was a known "robo-signer" who had not reviewed any documents concerning the mortgagor and was not authorized to give such testimony. Finally, the plaintiff alleged that the foreclosing creditor had failed to include all necessary authentic evidence required by Louisiana law.

Addressing first the applicability of the Rooker-Feldman doctrine, the court noted Supreme Court precedent that the doctrine is a narrow one and applies when the federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court and seeks relief from a state court judgment based on that decision. On the other hand, the Rooker-Feldman doctrine does not apply when a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party. In this case, the plaintiff was alleging that the foreclosing creditor had misled the state court into believing that the evidence submitted with its executory process petition was authentic when it was not and had misled her into foregoing her opportunity to dispute authenticity of the evidence in state court proceedings. These are independent claims over which the district court had jurisdiction, because the plaintiff did not seek to overturn the state court judgment and the damages sought were for injuries caused by the bank's actions, not injuries arising from the foreclosure judgment. Although damages recoverable through an independent claim might be limited by preclusion principles, the Rooker-Feldman doctrine does not turn all disputes about the preclusive effects of judgments into matters of federal subject-matter jurisdiction. With regard to the defendants' contention that the Rooker-Feldman doctrine bars claims that are "inextricably intertwined" with the state court judgment, the court observed that the defendants had conceded that the labels "independent claim" and "inextricably intertwined" are mutually exclusive, and since the court had already found that the claims were independent, the defendants' invocation of the "inextricably intertwined" label was unavailing.

Nonetheless, even though the district court had jurisdiction to hear the plaintiff's suit, her claims seeking a declaration that the defendants had lacked the necessary authentic evidence to support the use of executory process were properly dismissed under Louisiana preclusion principles. Because the issuance of a writ of seizure and sale required a Louisiana judge to determine that the executory process evidence was authentic, the object of her declaratory judgment action claim has already been decided in a judicial proceeding and, if the authenticity was to be challenged, it had to be done in an injunction proceeding in the court that ordered the writ to be issued.

The court also held that the damage claims asserted by the plaintiff on account of alleged Unfair Trade Practice Act violations could not be asserted against these defendants because they were exempted as a "federally insured financial institution" under R.S. 51:1406. In reaching this holding, the court rejected the plaintiff's claims that courts "routinely find exceptions to bank exemptions under state unfair and deceptive trade practice statutes," as well as her arguments that the defendants did not act in their capacities as banks but rather as mortgage servicer and bond trustee. The court held that it could not look behind the text of the statute in an effort to give effect to its spirit, nor could the court hold that the exemption is overbroad.

2. **Beavers v. CitiMortgage, Inc., 2015 WL 2383810 (E. D. La. 2015).** The day after the state district court denied her petition to enjoin a residential executory process foreclosure, the mortgagor filed suit in federal court claiming that the foreclosing creditor had conspired with others to defraud her and the general public by including false information in the note and mortgage, specifically the indication that MERS was the mortgagee. The relief sought was a judgment cancelling the note and mortgage, granting the mortgagor "sole title" to her house and awarding damages.

In granting the foreclosing creditor's Rule 12(b)(6) motion to dismiss, the court found that it could consider the state court record both because the foreclosure proceeding was referenced in the mortgagor's complaint and because the federal court was empowered to take judicial notice of state court records. Though the Rooker-Feldman doctrine barred the mortgagor's claims that sought to modify the foreclosure judgment, the court nonetheless had jurisdiction over the mortgagor's remaining claims. Federal courts do not lack jurisdiction to hear suits merely because the plaintiff's requested relief is inconsistent with a state court decision. In such a case, the court should apply state law *res judicata* principles rather than Rooker-Feldman. The court then held that all of the mortgagor's remaining claims were barred by principles of *res judicata*. Although the mortgagor added additional parties to her federal suit, including MERS, Fannie Mae and the seizing creditor's law firm, all of the defendants shared an identity of interest such that they could raise the defense of *res judicata*. The scope of the *res judicata* effect of an executory process judgment is limited to those claims that allege the debt was legally enforceable or had become extinguished, since those are the only defenses that could have been raised in the state court proceedings. In this case, all of the mortgagor's claims ultimately rested on the asserted unenforceability of the note and mortgage and were therefore precluded by the state court foreclosure judgment.

3. **Coleman v. Barclays Capital, PLC, 2015 WL 5823385 (E. D. La. 2015).** A few months after recording an assignment in its favor of a residential

mortgage note, a creditor filed executory proceedings on the mortgage securing the note. The mortgagor sought to enjoin the sale and also filed a reconventional demand asserting wrongful use of executory process and violations of the Unfair Trade Practices Act. Afterward, the parties entered into a settlement which allegedly contemplated that the mortgagor would be granted a loan modification. However, the creditor subsequently denied the modification and proceeded to sheriff's sale. Shortly afterward, the mortgagor filed for Chapter 13 bankruptcy relief. In the bankruptcy proceedings, the creditor filed a motion to dismiss, which was denied by the bankruptcy court. The district court affirmed in part and reversed in part.

The court first rejected the creditor's contention that the Rooker-Feldman doctrine deprived the bankruptcy court of subject matter jurisdiction over the mortgagor's damage claims, which were based on alleged actions of the creditor in misleading the state court into thinking that executory process was proper and causing the mortgagor to forego an opportunity to raise objections in the state court proceedings. The court also found that those claims were not barred by either *res judicata* or collateral estoppel. Though some of the claims might have existed at the time of the foreclosure proceedings, others clearly did not, such as the claim of breach of the settlement agreement. Nor did collateral estoppel bar the mortgagor's claims, since the issues that formed the basis of the mortgagor's claims were not actually litigated in state court.

The court also upheld the bankruptcy court's rejection of the creditor's contention that the mortgagor's claims were barred by the Louisiana Credit Agreement Statute, though on other grounds. The bankruptcy court had cited Whitney National Bank v. Rockwell, 661 So. 2d 1325 (La. 1995) for the proposition that the Credit Agreement Statute does not address, one way or the other, protection of unsophisticated borrowers or whether there is any exception for fraud or other equitable theories. The district court held that, although the bankruptcy court's reliance upon Rockwell may have been misplaced, the Credit Agreement Statute nonetheless did not apply. The Credit Agreement Statute defines a "credit agreement" as an agreement to lend or forebear payment of money or to otherwise extend credit or make any other financial accommodation. Here, the parties allegedly agreed to reach a compromise in a lawsuit, not specifically to extend credit. Thus, the agreement "does not fall under the purview of the Credit Agreement Statute, and need not have been in writing."

The court also rejected the mortgagor's claim that the creditor lacked standing to file the foreclosure action because its assignment was fraudulent. Even assuming the falsity of the assignment, the creditor would not have been deprived of standing to pursue the executory process based on the lack of authenticity of the assignment.

To the extent that the mortgagor was attempting to "unwind and vacate" the foreclosure sale, those claims, which sought to nullify a state court judgment, were barred by Rooker Feldman Finally, the court found that the bankruptcy court had erred in failing to dismiss claims for violation of the automatic stay. The adjudication at the sheriff's sale had occurred prior to bankruptcy, and the mortgagor's ownership of the home was transferred at that moment, rather than at the time of the ministerial action in executing the act of sale. To the extent that the mortgagor was arguing that continued possession of the home by the creditor after the bankruptcy filing violated the automatic stay, those claims were dependent on an assertion of nullity of the state court foreclosure and were therefore barred by the Rooker-Feldman doctrine.

4. **Deal v. Bank of New York Mellon, 2014 WL 3513228 (W. D. La. 2014).** After a foreclosure upon a residential mortgage through executory process, the mortgagor filed a suit for wrongful eviction in federal court, claiming that the foreclosing creditor did not have a proper assignment of the mortgage note. The court held that the mortgagor's claims were barred by *res judicata*, since he had failed to enjoin or appeal the executory process proceedings in state court. The court also held that the mortgagor had no claim under the Louisiana Unfair Trade Practices Act, which specifically exempts federally insured lending institutions.

5. **Cavalier v. Nationstar Mortgage, LLC, 2015 WL 4429247 (M. D. La. 2015).** In a residential mortgage foreclosure by executory process, the mortgagor, alleging fraud by the mortgagee's counsel, sought an injunction. However, the mortgagor failed to post bond as required by the court, with the result that the property was then sold at sheriff's sale. The mortgagor then filed a devolutive appeal, which was dismissed as abandoned because the mortgagor failed to file a brief. After the mortgagee arranged for a writ of possession to issue, the mortgagor then filed a new suit for damages, injunction and annulment of the sheriff's sale, and the mortgagee removed this suit to federal court.

The court granted the mortgagee's Rule 12(b)(6) motion to dismiss on the ground that the mortgagor's claims were barred by *res judicata*. Though the state court judgment authorizing the writ of seizure and sale did not state that the state court had considered and rejected the mortgagor's arguments, the legal effect of silence of the judgment with respect to a demand that might have been allowed under the pleadings is a rejection of that demand, having the effect of *res judicata*. The allegation of fraud was brought before the state court, which nonetheless issued the order for the seizure and sale of the property. Thus, the mortgagor's fraud allegation was barred by *res judicata*. Her claim for damages was also barred by *res judicata* because it was premised upon the same allegation of fraud raised in the state court proceedings. When an order of executory process has become final and non-appealable, the doctrine of *res judicata* precludes recovery of damages for wrongful seizure of property.

6. **<u>Bombet v. Donovan</u>, 2015 WL 1276555 (M. D. La. 2015).** Because insured reverse mortgages are available only when both of the borrowers at least 62 years of age, the plaintiff in this case conveyed her interest in her home to her husband, who then entered into a reverse mortgage transaction. A few years later, the husband died, and the reverse mortgagee filed an executory process suit and concluded a seizure and sale of the property. The wife then brought a wrongful foreclosure claim against the mortgagee in federal court. The creditor moved to dismiss under Rule 12(b)(1) on the basis of a lack of subject matter jurisdiction, citing the <u>Rooker-Feldman</u> doctrine. The court granted the motion, rejecting the plaintiff's argument that there was no state court "judgment" of foreclosure in this case.

The Fifth Circuit and Louisiana federal district courts have held that the <u>Rooker-Feldman</u> doctrine is applicable to a state court's order of seizure and sale, notwithstanding the lack of the word "judgment" in the state court's order. Federal courts have routinely applied the <u>Rooker-Feldman</u> doctrine in cases where a plaintiff has sought review of a state foreclosure judgment. There is no "fraud exception" to the <u>Rooker-Feldman</u> doctrine, and the court therefore lacked subject matter jurisdiction over the mortgagor's wrongful foreclosure claim. The court also rejected the mortgagor's contention that, because this reverse mortgage is subject to federal regulations, only a federal court has jurisdiction to determine if a violation of the governing regulations renders the mortgage invalid. While HUD may have violated a federal regulation when it insured this reverse mortgage, that violation did not render the mortgage contract legally unenforceable or invalid. Once the loan was consummated, an independent contractual relationship was created between the borrowing spouse and the mortgagee, and interpretation of federal regulations had no impact on the contractual relationship between the parties.

7. **<u>Macziel v. JPMorgan Chase Bank, N.A.</u>, 2014 WL 3166715 (W. D. La. 2014).** Where the plaintiff's twenty-one count complaint filed to attack an executory process sheriff's sale was "too incoherent, bizarre and unfounded to infer that any further amendment would provide facts sufficient to state a claim," the court dismissed the complaint with prejudice for failure to comply with Rule 8(a) and Rule 9(b). Before doing so, the court first discussed the <u>Rooker-Feldman</u> doctrine, and the difficulty in deciding whether "a state adjudication and a later federal action are so intertwined that the latter would amount to a review of the former," but nonetheless concluded that the court could not divine enough facts, much less make sense of the relief requested, with which to discern whether the claims asserted in the complaint were inextricably intertwined with the state court judgment.

8. **<u>Cormier v. Green Tree Servicing, LLC</u>, 2014 WL 6909608 (W.D. La. 2014).** Contending that the mortgaged property was located in a flood zone, the mortgagee obtained flood insurance without the mortgagor's consent. The mortgagee then applied the mortgagor's payments to an escrow account

to recover the flood insurance cost, rather than to the principal and interest owing under the loan, and filed a petition for executory process on the basis of an asserted default by the mortgagor in paying the loan. The mortgagor paid the mortgagee $30,000 to stop the mortgage foreclosure and, a few months afterward, filed a state court action asserting causes of action under the Unfair Trade Practices Act, the Flood Disaster Protection Act and the Fair Debt Collection Practices Act. The mortgagee removed the suit to federal court and filed a motion to dismiss.

As both parties conceded, there is no private cause of action under the Flood Disaster Protection Act, and there is no cause of action against a regulated financial institution under the Unfair Trade Practices Act. Thus, those claims were dismissed. With respect to the claims under the Fair Debt Collection Practices Act, the court rejected the mortgagor's contentions that the creditor had styled itself as a "debt collector" and therefore could be sued under that act. Self-identification as a debt collector is insufficient to overcome the rule that mortgage lenders are not debt collectors within the meaning of the act. With respect to the mortgagor's claims based on the foreclosure, the court held that those claims were not barred by *res judicata*. The mortgagor was neither challenging the authenticity of the documents used in the foreclosure suit nor asserting that the debt was legally unenforceable or extinguished; instead its claims were based on the actions of the creditor in the foreclosure proceeding. Although a failure to object to foreclosure functions as a waiver of the right to attack the propriety of the foreclosure itself, a plaintiff's claims for damages arising out of the creditor's actions are not waived. The inability of the plaintiffs to bring their claims for damages within the foreclosure suit is sufficient extraordinary circumstances to justify relief from *res judicata* in this case.

F. Federal question jurisdiction.

<u>Ouber v. JPMorgan Chase Bank, N.A.</u>, 2015 WL 5138494 (M. D. La. 2015). In response to a state court executory process foreclosure, the mortgagor filed a petition to enjoin the sale. The petition for injunction was dismissed without prejudice, allegedly in exchange for an agreement by the mortgagee to amend the mortgagor's payment plan. An executory process sale was apparently nonetheless conducted without further notice to the mortgagor, and shortly afterward the mortgagor filed in state court a suit for damages and for annulment of the sale, naming as defendants both the mortgagee and the sheriff. Among other claims, the mortgagor alleged that the actions of the defendants were under color of state law and resulted in an illegal taking of property in violation of the Fifth and Fourteenth amendments of the U.S. Constitution. The mortgagee removed this suit to federal court on the basis of both federal question jurisdiction and diversity of citizenship, alleging that the non-diverse sheriff was a mere nominal party.

The court denied the mortgagor's motion to remand. Since the mortgagor alleged that the defendants, including the sheriff, violated her substantive due process rights by failing to provide sufficient notice of the sale of the property, she had stated a federal claim giving the court federal question jurisdiction. Moreover, the court could exercise supplemental jurisdiction over all the mortgagor's state law claims. Nevertheless, the court then embarked upon a consideration of whether diversity jurisdiction existed. When a homeowner is seeking recovery for damages resulting from the seizure and sale of his home, the amount in controversy is measured not by the value of the home but by the plaintiff's equity in the home. In this case, the mortgagee had failed to demonstrate that the mortgagor's equity in the home exceeded the $75,000 amount in controversy requirement. Accordingly, it was not necessary for the court to decide whether the sheriff's role in the foreclosure sale was ministerial and therefore whether the sheriff could be considered a nominal party to the action.

VII. Ordinary process foreclosure/collection actions.

A. Default judgment.

1. **<u>Capital One Bank v. Young</u>, 15-70 (La. App. 5th Cir. 9/23/15); ___ So. 3d ___, 2015 WL 5662676.** In a suit to collect a delinquent credit card balance, the bank obtained a default judgment against the card holder after filing into the record an affidavit of correctness of account, a copy of the customer agreement and billing statements for the previous several months. The cardholder filed a timely motion for new trial, claiming that the evidence submitted was insufficient to support a default judgment. After the trial court denied the motion for new trial, the court of appeal reversed.

   A judgment of default must be confirmed by proof of the demand sufficient to establish a prima facie case. In order to establish both the existence and the validity of the demand for a sum due on open account, a plaintiff must present evidence of the account itself and an affidavit or testimony attesting to its correctness. An affidavit of correctness establishes the validity of the account and eliminates the necessity of taking testimony for that purpose. The existence of the claim, however, is supported by a statement of the account or invoices. It is crucial that an itemized statement of the account, showing all debits and credits which result in the balance due, be produced, for only in that way can the sum due on the account be mathematically documented. In this case, the affidavit submitted in support of the default judgment was insufficient to make a prima facie showing. Although the bank submitted billing statements reflecting the balances allegedly due, it did not submit any itemized statements, invoices or other records reflecting purchases made or payments applied or otherwise indicating the debits and credits to the account that had produced the balance allegedly owed.

2. **<u>American Thrift & Finance Plan, LLC v. Barnes</u>, 2014-0170 (La. App. 1st Cir. 9/24/14); 2014 WL 4742355.** In an ordinary process suit to enforce a "chattel mortgage" on an automobile, the creditor alleged that the debtor

was originally indebted for $27,000, but was entitled to a credit in the amount of $8,000, leaving a net balance of $19,000 owing. To confirm a default judgment, the creditor submitted a collection manager's affidavit indicating the balance owed was $19,000. A proposed judgment in the same amount was also submitted. The affidavit was altered at some point by the addition of a handwritten notation that the indebtedness of $19,000 was subject to a credit of $8,000. The proposed judgment was also modified when the proposed award of $19,000 was struck through and replaced by $11,000. After receiving the altered and signed judgment, the creditor appealed, asserting that the trial court erred by reducing the principal amount of the judgment and altering the collection manager's affidavit. The court of appeal vacated the judgment.

C.C.P. art. 1702(C) requires the plaintiff to submit a proposed final default judgment to the trial court, and the court is authorized to either sign the judgment or direct that a hearing be held. Without a hearing, article 1702(C) does not provide for the entry of a judgment that is materially different from the proposed judgment submitted by the plaintiff. In light of the uncertainty surrounding the changes to the judgment and the supporting affidavit, justice required a remand for a hearing to consider the plaintiff's request for confirmation of the default judgment.

B. Summary judgment in suits on notes.

1. **<u>First Bank and Trust v. Proctor's Cove II, LLC</u>, 13-802 (La. App. 5th Cir. 9/24/14); 150 So. 3d 418, <u>writ denied</u>, 157 So. 2d 1110 (La. 1/9/2015).** In an ordinary process foreclosure, the creditor was granted summary judgment. The defendants appealed, contending that at least one genuine issue of material fact remained in dispute and that the trial court had impermissibly weighed the evidence in violation of summary judgment law. The court of appeal reversed the summary judgment.

   In support of its motion, the creditor had attached certain affidavits, deposition testimony and documentary evidence, but failed to introduce any of the documentation into evidence. At the time of the hearing on the motion for summary judgment, C.C.P. art. 966 provided that only evidence formally introduced and admitted into evidence at the hearing on a summary judgment motion could be considered by the court. Because the creditor did not have any documentation admitted for purposes of summary judgment, it had failed to meet its burden of proving that there were no genuine issues of material fact as to whether the defendants defaulted on the promissory note and owed an outstanding balance. Judge Wicker concurred, pointing out conflicts within the Fifth Circuit, and also within the Third Circuit, as to whether the 2013 amendment to C.C.P. art. 966 (providing that evidence attached to a motion for summary judgment is deemed admitted for purposes of the motion unless excluded in response to an objection made in writing) should be retroactively applied.

2. **<u>Whitney Bank v. Nafel</u>, 2015 WL 1457528 (M. D. La. 2015).** In a suit on a promissory note with a prayer for recognition of a multiple indebtedness mortgage and an assignment of leases and rents, the court partially granted the creditor's motion for summary judgment. Where suit is brought for collection of a promissory note and guaranty, the plaintiff may simply produce the note sued upon to make out a prima facie case. Once that occurs, the burden shifts to the defendant to establish the non-existence or extinguishment of the obligation. In this case, the creditor had made out prima facie case by producing the note, and the burden then shifted to the defendants to prove any defenses.

The court rejected most of the defenses the defendants offered. The fact that forced-placed insurance on the collateral may have produced insurance proceeds from the fire loss of the collateral was immaterial, because the mortgagor was not a third-party beneficiary of the policy and the debts the mortgagor owed were unaffected by whatever forced-placed policy may have been in effect. The court also rejected a claim that the forced-placed insurer and the mortgagor's own insurer were indispensable parties because they "may be affected by this matter." Those insurers were not parties to the loan documents at issue, nor do they have any rights or obligations thereunder. Another defense rejected by the court was that the mortgagors had detrimentally relied on the creditor's assertion that payments were not necessary after the fire loss because there was insurance coverage in place from which the creditor would obtain payment on the loans. Even if these allegations were true, they were based on a verbal agreement that is barred by the Louisiana Credit Agreement Statute. Finally, the court found that countervailing affidavits produced by the defendants stating that a payment history attached to their affidavit was correct based on "information and belief" was insufficient to oppose summary judgment because it was not based on personal knowledge.

However, because the creditor had offered no evidence to support the amount owed for reasonable attorneys' fees, the court denied summary judgment on its claim for attorneys' fees without prejudice. The court also denied summary judgment on the creditor's claim of entitlement to insurance proceeds that had already been paid to the mortgagor, because those proceeds may have been paid as a business loss payment rather than for the loss of the collateral itself, and the bank did not provide evidence to show that the latter was the case.

3. <u>PNC Bank v. Irvin Family Limited Partnership</u>, 2015 WL 6456566 (M. D. La. 2015). In three consolidated cases involving an ordinary process mortgage foreclosure, a suit against a title insurer and a reformation action against certain parties that claimed interests in the mortgaged property, the court granted summary judgment in favor of the lender against the borrower and guarantors for the amounts due under the note. According to the court, no reasonable doubt had been established about the validity of the note or the duties of the borrower or guarantors under the note as a matter of law. Only property rights of the mortgaged property remain unresolved and disputed. Though those faults may be connected to the note, they "do not infect the Note proper," nor preclude summary judgment in the plaintiff's favor.

In reaching this holding, the court also found that a pre-negotiation agreement, in which the defendants had made certain admissions, was admissible into evidence. Not only did the agreement waive the benefit of Federal Rule of Civil Procedure 408, by indicating that the agreement was admissible in any proceeding to enforce the agreement set forth therein, but Rule 408 applies only to statements made during a settlement negotiation and does not "sweep into its ambit an unambiguous agreement so as to set forth a framework for parties' prospective negotiation." While the substance of the parties' negotiations is protected by Rule 408, this written contract, whose drafting and signing predated the commencement of any formal negotiations, is not.

C. Amended/supplemental pleadings.

Harris v. Union National Fire Insurance Company, 2014-1603 (La. App. 1st Cir. 6/18/15); 175 So. 3d 1008. After their home was totally destroyed by fire, the plaintiffs brought suit against their insurance company seeking payment of the $40,000 amount of the policy plus penalties and attorneys' fees, for a total amount not exceeding $75,000. A week later, the plaintiffs amended their petition to add their mortgagee as a defendant, contending that the mortgagee had engaged in predatory lending and fraudulent practices for requiring inadequate amounts of insurance. The amended petition alleged that the total amount of damages sought against all defendants did not exceed $75,000. Over a year later, the plaintiffs again amended their petition to allege that the total amount of damages sought against all defendants would exceed $75,000, and the trial court signed an ex parte order permitting the amended petition to be filed. The defendants responded with an ex parte motion to strike the second amended petition, which the trial court granted. When the plaintiffs then moved to vacate that ex parte order, the trial court signed a judgment vacating the prior order dismissing the second amended petition and imposing sanctions on the defendants for having frivolously filed the motion.

The court of appeal remanded for a contradictory hearing to determine whether the second amended petition was in fact an amended petition or a supplemental petition. In doing so, the court recognized that the suit, as originally pleaded, was not removable to federal court since the amount in controversy did not exceed $75,000. Because the action had now been pending in state court for more than a year, the action was no longer removable unless the defendants could demonstrate that the plaintiffs failed to disclose the amount in controversy in order to prevent removal. There is a distinction in Louisiana law between an amended pleading and a supplemental pleading. The former, which can be granted ex parte, involves matters that occurred before the original complaint was filed, which were either overlooked by the pleader or were unknown to him, while a supplemental pleading covers issues or causes of action that have arisen after the filing of the original petition. Under C.C.P. art. 1155, a pleading may be supplemented on motion of a party upon reasonable notice and upon such terms as are just. Thus, if the second amended petition constituted a supplement to the previously amended petition, the procedural requirements were not met, as no motion was filed as required by C.C.P. art. 1155. In contrast, if the amendment was an amended pleading, then the procedural requirements for filing were satisfied.

D. Judicial estoppel.

1. **Hancock Bank of Louisiana v. C&O Enterprises, LLC, 2014-0542 (La. App. 1st Cir. 12/23/14), 168 So. 3d 595, writ denied, 171 So. 3d 251 (La. 5/22/15).** In its Chapter 11 reorganization, the mortgagor executed a replacement promissory note in favor of the bank in substitution of the notes that had existed before bankruptcy proceedings were initiated. When the mortgagor defaulted under the replacement note, the bank filed ordinary foreclosure proceedings, to which the mortgagor responded with affirmative defenses of estoppel, contributory negligence, fraud, fraud in the inducement, breach of contract, discriminatory lending, predatory lending, bad faith, negligent misrepresentation and intentional misrepresentation. The trial court granted the bank's motion for summary judgment, and the court of appeal affirmed.

   Despite the defenses raised by the mortgagor in its answer, it listed the bank's debt in its reorganization proceedings and at no time in those proceedings did it contest the debt or list any claims that it might have against the bank relative to the loan. Thereafter, the mortgagor executed a replacement promissory note in accordance with the bankruptcy court's reorganization plan. The doctrine of judicial estoppel prohibits parties from deliberately changing positions according to the exigencies of the moment. The doctrine "is intended to prevent the perversion of the judicial process and prevents playing fast and loose with the courts." The mortgagor in this case acknowledged its indebtedness to the bank throughout the bankruptcy proceedings and agreed to pay the bank in accordance with its plan of reorganization. The mortgagor executed the replacement note, again acknowledging its debt. At all times, the mortgagor was aware of the facts that it now claimed to form the basis of its defenses to the suit. Having consistently acknowledged its liability on the note in the bankruptcy proceedings, the mortgagor was judicially estopped from advancing a different position in this suit.

   The court also rejected the mortgagor's argument that the trial court erred in failing to permit additional discovery before granting summary judgment. Though summary judgment should be considered only after adequate discovery, there is no absolute right to delay action on a summary judgment motion until discovery is complete. In this case, the bank filed its petition six months before its motion for summary judgment. The mortgagor did not seek discovery until two months later, after the originally scheduled hearing date on the motion for summary judgment and just twenty-one days before the rescheduled hearing date. The bank responded to the mortgagor's discovery request by forwarding three compact disks with the requested documents. The mortgagor did not attempt to take any depositions. Accordingly, the mortgagor had had a fair opportunity to conduct discovery, and the trial court did not abuse its discretion in declining to permit additional discovery before granting summary judgment to the bank.

2. **<u>Combs v. CitiFinancial, Inc.</u>, 2014 WL 4387312 (W. D. La. 2014).** Several years after a bankruptcy plan was confirmed in the plaintiffs' Chapter 13 proceedings, the plaintiffs brought suit against a mortgage lender claiming that the plaintiffs had never received any consideration for the mortgage and as a result were forced to file bankruptcy. No such potential claim had been disclosed to the bankruptcy court. The court granted the creditor's motion to dismiss under Rule 12(b)(6).

Although the defendant did not raise the issue of judicial estoppel, the court found that the plaintiffs were in fact judicially estopped since their position was clearly inconsistent with the position they had taken in the bankruptcy proceedings. The bankruptcy court had accepted the plaintiffs' previous position in confirming the bankruptcy plan and granting the plaintiffs a discharge. The plaintiffs did not act inadvertently since they were well aware of the facts underlying the claims before they presented to the bankruptcy court that they had no claims. It was clear that the plaintiffs possessed the requisite motivation to conceal the claims, because doing so would allow them to recovery of a windfall on the undisclosed claims to the prejudice of their creditors.

E. Defenses.

1. Res judicata.

<u>Alpine Meadows, L.C. v. Winkler</u>, 49,490 (La. App. 2d Cir. 12/10/14); 154 So. 3d 747. A vendor filed suit to rescind the sale of a golf course on account of non-payment of the purchase price. The suit also sought to cancel a mineral lease that the vendee had granted. The petition failed to mention an allonge that had changed the payment terms of the vendee's note, even though the vendor and its attorney had first-hand knowledge of the allonge. After the missing allonge was brought to the trial court's attention, it granted summary judgment in favor of the vendee, on the ground that the vendor would be unable to prove that the vendee had failed to pay any part of the purchase price. The court of appeal affirmed in a prior decision, finding that, by failing to state in its petition the actual price as modified by the allonge, and by failing to amend its petition to state the true facts, the vendor would be unable to satisfy its evidentiary burden at trial. The vendee then filed a suit against the vendor for malicious prosecution and for declaratory judgment that a foreclosure threatened by the vendor was barred by *res judicata*. The vendor responded with a reconventional demand for the amounts due under the allonge, asserting that certain language in the court of appeal's earlier opinion had preserved the vendor's right to bring foreclosure proceedings on the allonge.

The trial court denied the vendee's exception of *res judicata* and also denied motions for summary judgment filed by both parties, but, in ruling on a motion for sanctions filed by the vendee based upon the vendor's failure to disclose the existence of the allonge, the trial court reduced the principal amount of the debt by one-third and ordered that the reduced principal be paid over time in monthly installments at a reduced interest rate. The trial court also ordered the vendor to pay the vendee $175,000 in attorneys' fees. The trial court's imposition of sanctions was based upon a finding that the vendor "in a scheme motivated by greed [had] enlisted the judiciary in its scheme to obtain an unwarranted and unconscionable result, all inconsistent with the law and evidence and our honorable system of justice." The vendor appealed the sanctions judgment, and the vendee appealed the trial court's denial of the exception of *res judicata*. In the meantime, the vendor filed yet another suit against the vendee and the mineral lessee for a declaration that the mineral lease was invalid. All of the defendants in this third action filed exceptions of *res judicata*, which were sustained by the trial court.

On appeal, the court of appeal agreed with the vendee that the foreclosure action to collect the unpaid purchase price owing under the allonge was barred by the final judgment rendered in the first suit. The court first addressed the vendor's assertion that the following language in the Second Circuit's earlier opinion preserved its right to bring suit on the allonge:

> "Such a dismissal does not mean that the [vendee is] relieved of any payment to [the vendor] under the Allonge. Indeed, the primary effect of this dismissal with prejudice is that [the vendor] is barred from bringing suit against the [vendee] arising from the same occurrence stated in this litigation. In other words, [the vendor] cannot make the same claims based on the same circumstances against the [vendee]. However, we do not take it to mean that [the vendor] is forever barred from filing suit against the [vendee], even under the Allonge. The dismissal with prejudice only prevents Alpine Meadows from bringing suit against the [vendee] raising these same claims on these same facts and circumstances. It does not relieve the [vendee of its] obligations under the Allonge and credit sale, nor does it prevent [the vendor] from filing suit against the [vendee] in the event they breach their obligations as to [the vendor] at some other time."

According to the Second Circuit's present opinion, that language was an "advisory opinion that must be considered as pure *obiter dicta* and not binding on either the lower court of this court." Moreover, this language was not an express reservation of rights. The prior judgment dismissing the vendor's claims was a valid and final judgment, thus satisfying the first two requirements of *res judicata*. The third requirement of identity of parties was also satisfied. With respect to the fourth requirement, the transaction or occurrence that was the subject matter of the first suit was the credit sale of a golf course. The original mortgage note and the allonge were part and parcel of the transaction by which the golf course was sold. The allonge merely modified the obligation under the original note. The claims asserted by the vendor in the three suits were separate causes of action arising out of the same transaction or occurrence, namely, the credit sale. The first suit was to rescind the sale and thereby cancel the mineral lease because of non-payment; the reconvention in the second suit was to foreclose because of the vendee's failure to pay the purchase price under the allonge; and the third suit was for declaratory judgment based on alleged breaches of the credit sale. This is exactly the type of piecemeal litigation that the doctrine of *res judicata* is intended to prevent. The causes of action asserted by the vendor in the second and third suits should have been raised in the first. Against the vendor's contention that exceptional circumstances justified relief from the rule of *res judicata*, the court held that whatever exceptional circumstances existed were of the vendor's own making, by initially filing suit without mentioning that the obligation sued upon had been modified by the allonge.

With respect to the motion for sanctions, the court rejected the vendor's argument that the trial court's judgment erroneously impaired the obligations of contracts in violation of the Louisiana Constitution by rewriting the contract to reduce the principal amount of the debt and to change the interest rate. Those cases that hold that a trial court may not rewrite a contract between the parties deal with the trial court's interpretation of contracts, not the imposition of sanctions. After concluding that the vendor's actions in violation of C.C.P. art. 863 were intentional, deceptive, malicious, egregious, a fraud on the court and a "veritable attack on our system of justice," the trial court correctly determined an appropriate sanction to be a limitation on any prospective recovery to which the vendor might be entitled.

2. Prescription.

a. **<u>Occidental Properties Ltd. v. Zufle</u>, 14-494 (La. App. 5th Cir. 11/25/14); 165 So. 3d 124.** The mortgage in favor of the plaintiff secured a promissory note that matured on September 1, 1998. On August 17, 1998, the parties entered into an amendment of the note and mortgage extending its maturity date to September 1, 2008, with monthly payments apparently due before that date. On September 8, 2003, the plaintiff filed suit by ordinary process to enforce the mortgage, alleging that it had accelerated the note on account of the mortgagor's default. That suit was dismissed as abandoned in 2010, and in 2011, the plaintiff filed a second ordinary process foreclosure and obtained a judgment for the balance of the debt with recognition of its mortgage. After a writ of fieri facias issued to seize the property, the holder of a judicial mortgage upon the property intervened, claiming that the plaintiff's mortgage was no longer enforceable because the debt it secured was prescribed as more than five years had run since the plaintiff's acceleration of the note. After intervening, the judicial mortgagee filed an exception of prescription, which was sustained by the trial court and affirmed on appeal.

Since the suit was filed within five years after the maturity of the note, the note had not prescribed on its face and the burden therefore remained with the judicial mortgagee to show that the note had prescribed. The trial court took judicial notice of the prior lawsuit that had alleged the acceleration. In opposition, the plaintiff sought to attach affidavits establishing that the mortgagor had made payments after the acceleration. The trial court properly excluded these affidavits as inadmissible hearsay. C.C.P. art. 931, which permits evidence to be introduced at the trial of a peremptory exception, requires competent, legal evidence. A sworn affidavit is hearsay and is therefore not competent evidence unless its use is specifically authorized by statute. Since there is no statutory exception permitting the use of affidavits in the trial of a peremptory exception of prescription, the trial court properly sustained the judicial mortgagee's objection to the introduction of the affidavits as hearsay. The trial court also did not abuse its discretion in denying the plaintiff's motion for a new trial so that it could present live witness testimony, since the plaintiff had three opportunities within which to produce witnesses for purposes of the exception but chose instead to present inadmissible hearsay affidavits.

b. **<u>Lucky Coin Machine Company v. J.O.D. Inc.</u>, 14-562 (La. App. 5th Cir. 12/23/14); 166 So. 3d 998.** Over the course of several years, a video poker operator lent money to a corporation that operated a bar. Each advance was represented by a separate promissory note, all of which were signed by the corporation and its sole shareholder beneath words indicating that "the undersigned agrees to be liable in solido and as personal guarantor on the indebtedness reflected in this demand note." Payments were originally made on these notes through withholding of video poker revenues, but payments ultimately became sporadic. Approximately six months after the last payment, the video poker operator filed suit to collect the unpaid balances of the notes. After a trial on the merits, the trial court rendered judgment in favor of the video poker operator and against both the corporation and its shareholder in solido. The court of appeal affirmed.

The defendants argued that the trial court had erred in failing to sustain their peremptory exception of prescription as to two of the notes that were executed more than five years before the suit was filed. In opposition, the video poker operator argued that all of the promissory notes "were accounted for as one debt, and the payments were applied to the oldest note." The court of appeal held that the trial court did not err in finding that the amount owed was for one "consolidated and continuing debt" and therefore the trial court was not manifestly erroneous in finding that none of the debt had prescribed. The guarantor also argued that he should not be held liable for all of the notes as a personal guarantor, because those that he had guaranteed had been paid in full. Rejecting this contention, the court held that all of the promissory notes had been signed by him as guarantor "per the 'in solido' language used in the agreement." The court then addressed what appears to have been a related contention that the payment should have been imputed to the debts that had been personally guaranteed. Finding that the trial court correctly imputed the payments under C.C. art. 1868 first to interest-bearing debt before non-interest-bearing debt, the court rejected this contention as well.

3. Litigious redemption.

<u>Regions Bank v. St. James Hotel, L.L.C.</u>, 2013-1628 (La. App. 4th Cir. 6/04/14); 144 So. 3d 50, <u>writ denied,</u> 151 So. 3d 585 (La. 10/10/2014). In response to a suit for the unpaid balance of a promissory note, the maker of the note answered denying liability. While the suit was pending, a third party successfully negotiated with the holder of the note to purchase it at a substantial discount. A few days after the purchase, the maker tendered the amount of the purchase price that the assignee had paid, but the tender was rejected. The maker then initiated a concursus proceeding, depositing the full balance amount claimed by the assignee into the registry of the court but contending that only $250,000 was in dispute. The assignee then filed an unopposed motion to withdraw the undisputed amount. The assignee contended that it was entitled to be paid not just the amount paid to the original holder of the note but also the assignee's cost of borrowing funds from another lender to finance its purchase of the note and $140,000 paid to an investment banking company to assist in the negotiations with the original holder of the note. On cross-motions for summary judgment, the trial court ruled in favor of the maker, holding that its liability was limited to the amount that the buyer had paid for the note plus legal interest from the date of purchase until the date of tender. The judgment also ordered the cancellation of all mortgages securing the note.

Upon the buyer's devolutive appeal, the court of appeal first considered the maker's motion to dismiss the appeal on the ground that the buyer's actions in withdrawing the money from the registry of the court and cancelling all mortgages constituted a voluntary participation in the judgment depriving the third party of the right to appeal. The court denied this motion, finding that, in the absence of a suspensive appeal, complying with a judgment that has become executory does not make one's actions voluntary. Nonetheless, the court affirmed the ruling of the trial court. The maker was entitled to extinguish the obligation by paying the exact amount the buyer had paid to the original holder, there being no support in the law to permit the buyer to recoup what it paid to third parties in connection with the purchase of that litigious right. The court also held that the proper rate of interest is the legal interest rate (rather than the default interest rate provided under the note) from the date of the assignment until the maker deposited the money into the registry of the court (rather than until the money was withdrawn, as the buyer contended). Under C.C.P. Art. 4658, after deposit of money into the registry of the court, the plaintiff is relieved of all liability for the money deposited, including future interest.

4. Failure of consideration.

a. **Corona v. MRC Realty Inc., 2014-0543 (La. App. 1st Cir. 3/6/15); 2015 WL 997190.** In connection with the purchase of an immovable, the purchaser signed a note in favor of the seller for $562,000 and granted the seller a mortgage upon the property as security for that note. The title company handling the closing, which was owned by the sister of the buyer, supplied additional financing to the purchaser, and received a second mortgage on the property. When the mortgage in favor of the seller was not paid, the seller filed an executory process foreclosure, and the title company intervened claiming that its mortgage was superior to that held by the seller. The title company's argument was that the seller's note was unenforceable for absence of any legal cause, because the seller did not lend anything to the buyer and there was no check from the seller to the buyer in the amount of the note. According to the title company's argument, because the note was null, the mortgage as an accessory right was also invalid. The trial court ruled in favor of the seller, and the court of appeal affirmed.

The title company failed to recognize that the buyer purchased a valuable immovable and as part of the consideration executed a note in favor of the seller. The title company's argument that, because a check was not written out to the buyer and the buyer therefore received no advantage, was without merit.

b. **Lilly Lyd, L.L.C. v. Graham, 14-594 (La. App. 5th Cir. 12/30/14); 167 So. 3d 829.** After acquiring a property that was burdened with an existing mortgage, a non-profit corporation contacted a loan broker for assistance in obtaining refinancing. The loan broker arranged for a lender to provide a "hard money loan", without disclosing that he was the owner of this lender. To evidence this loan, the principal of the non-profit corporation executed a $128,000 promissory note in favor of the lender and then arranged for her non-profit corporation to convey the property to the lender with an assumption of the existing mortgage. Finally, the lender executed an option agreement by which it granted the non-profit corporation the option to repurchase the property for an amount that was equal to the amount of the promissory note. However, the option agreement made no reference to the note and did not state that the maker's obligation to pay the note would be extinguished upon exercise of the repurchase option. A few weeks after the closing occurred, the maker of the note realized what had occurred and complained to the loan broker, who agreed to retransfer title to the property. The non-profit corporation then proceeded with the renovation of the property, receiving advances totaling $27,000 over the succeeding months. However, the lender never did retransfer title and ultimately sold the property to a third person. The lender then brought suit against the maker for the full amount of the $128,000 promissory note.

After a bench trial, the trial court rendered judgment in favor of the maker, dismissing the lender's claims on the ground that the promissory note was unenforceable due to a lack of cause and consideration. The court of appeal affirmed. In a suit on a promissory note, the payee who produces the note sued upon makes out a prima facie case and is given the presumption that the instrument was given for value, unless the maker casts doubt upon the reality of the consideration. If the maker does so, then the ultimate burden shifts to the payee to prove consideration by a preponderance of the evidence. The trial court determined that the presumption in this case was rebutted by evidence that the lender had acquired ownership of the property and that the non-profit corporation never received any of the loan proceeds. Although the lender pointed to the $27,000 that the non-profit corporation had received, the court found that these were received as payment for services rendered by the non-profit corporation as a general contractor, not as the "lendee." Moreover, the repairs to the property all inured to the benefit of the lender as the property owner. Thus, the trial court was not manifestly wrong in concluding that the note was unenforceable due to a lack of consideration.

F. Nullity of judgment.

1. **<u>First Bank and Trust v. Simmons</u>, 2014-1210 (La. App. 4th Cir. 4/22/15); 165 So. 3d 1025.** After a default judgment was rendered against a non-resident guarantor based upon service under the Louisiana Long-Arm Statute, the guarantor filed a separate suit in the same court against the bank and its chairman of the board alleging that the guarantor had never received notice of the collection suit and that the guaranty was not intended to secure the

loan that was the basis of the default judgment. Thus, the guarantor argued that the guaranty was unenforceable and that the judgment was null and void and sought damages from the bank. The bank responded with exceptions of no cause of action and *res judicata* based upon the Louisiana Credit Agreement Statute and the prior default judgment, respectively. Several months later, the guarantor filed yet another suit against the bank alone seeking to annul the judgment based on a "vice of form" (the bank's alleged failure to comply with the requirements of the Long-Arm Statute) and a "vice of substance" (that the guarantor did not guarantee the loan that was the subject matter of the default judgment). The guarantor obtained an ex parte order to transfer this second suit from the division to which it had been randomly allotted to the same division that had rendered the default judgment. The trial court in the division in which the default judgment had been rendered then granted, after hearing, the guarantor's motion to consolidate the collection suit with the second suit and issued a preliminary injunction enjoining the enforcement of the judgment.

Through several writ applications and an appeal, the bank argued that the transfer and consolidation of the cases was inappropriate because, under C.C.P. art. 253.2, a case can be transferred to another division of the same court only when (i) the parties consent, (ii) the transfer is for consolidation for trial, and (iii) a Supreme Court rule permits the transfer. Rejecting the bank's arguments, the court of appeal found that a Supreme Court rule—mainly, the appendix to Louisiana District Court Rule 9.3 in which CDC App. 9.3 appears—authorized the transfer. CDC App. 9.3 provides for transfer to the earlier case in the division in which the original case was allotted "whether or not such earlier case is still pending." According to the court, that rule, unlike C.C.P. art. 1561 (which governs consolidation for purposes of trial), does not require that the earlier suit be pending and susceptible of being consolidated for purposes of trial. The court also rejected the bank's contention that a district court's enactment of local rule cannot override C.C.P. art. 253.1, which requires random allotment. The bank's argument was belied by the Supreme Court's promulgation of Louisiana District Court Rule 9.3, which provides that the method of allotment for each district court is set forth in the Appendix 9.3. The court also found that the law did not require the Supreme Court to adopt a uniform rule, but instead required only uniform procedures.

The court of appeal found, however, that the trial court had erred in denying the bank's exception of lis pendens against the guarantor's second suit. Contrary to the trial court's finding, the guarantor's first suit was an ordinary suit in which a nullity claim was asserted, albeit cumulated with a damages claim. The trial court seemed to conclude that, because the petition in the guarantor's first suit sought relief in addition to nullity of the judgment, the second suit should be stripped of anything other than the demand for nullity of judgment. However, as the bank observed, this holding did not strip the first suit of its demand that the judgment be annulled, nor did it explain why two lawsuits, both seeking nullity of the same judgment, could be allowed to proceed. Accordingly, the trial court should have granted the exception of lis pendens to the second suit.

2. **St. Tammany Federal Credit Union v. Torregano, 2014-1652 (La. App. 1st Cir. 9/21/15); 2015 WL 5567027.** After obtaining a deficiency judgment following an executory process sale, the creditor filed a motion to authorize garnishment proceedings against the wages of a person whom the judgment debtor married after judgment had been rendered against her. The trial court authorized the garnishment, and the court of appeal affirmed. All of the husband's arguments in opposition to the motion for garnishment were based upon an attack upon the deficiency judgment, such as a claim that the appraisals on the seized collateral were "extremely limited" and that the advertisements for the sale of the property lacked a sufficiently detailed description. He also asserted that he was never served with notice of the executory proceeding. According to the court, none of the husband's arguments addressed the issue presented by the motion seeking authorization for the garnishment, i.e., whether the judgment creditor was authorized by law to cite him as a third-party garnishee by virtue of his salary comprising community property jointly owned by himself and his wife. C.C. art. 2345 provides that a separate or community obligation may be satisfied during the community property regime from community property and from the separate property of the spouse who incurred the obligation. Because the judgment debtor and her husband had a community property regime, the garnishment of his salary was appropriate. C.C.P. art. 2411, which permits a third party to file an opposition to garnishment proceedings, does not allow an attack seeking to invalidate the underlying money judgment.

VIII. Mennonite issues.

A. Invalidity of tax sales for lack of proper notice.

1. **Surcouf v. Darling, 2015-0278 (La. App. 4th Cir. 10/21/15); ___ So. 3d ___ (not yet released for publication in the permanent law reports).** After notices of an impending tax sale sent to the property owner were returned "unable to forward," the property was advertised for tax sale and then sold to a tax sale buyer, who ultimately obtained a default judgment against the property owner quieting title to the property. Several months later, the property owner filed suit against the tax sale buyer to annul the tax sale. Though the property owner had notified his mortgagee of the address in California to which he had moved, the tax collector did not give notice of the tax sale to the mortgagee, who would have either shared the address with the tax collector or itself paid the taxes. The tax collector introduced an affidavit from a subcontractor as to the efforts it generally undertook to perform skip trace services and as to a telephone call notice campaign it used to reach tax debtors, but this evidence was not specific to the property owner involved in this case. The trial court granted partial summary judgment in

favor of the property owner holding the tax sale to be null, and the court of appeal affirmed.

Both the Fourteenth Amendment to the United States Constitution and the Louisiana Constitution require notice before a tax debtor's property may be taken. In this case, the tax sale buyer argued that the property owner's constitutional right to notice was satisfied when he received the petition to confirm tax title filed nearly four years after his property was sold at tax sale and that this post-tax sale notice cured any deficient pre-tax sale notice. This argument was based upon R.S. 47:2157, which provides that notice sent after the expiration of the redemptive period shall constitute a notice of sale, and the sending of this notice constitutes service of the notice of sale under Article VII, Section 25 of the Louisiana constitution. According to the court, this argument ignores the long-established jurisprudential rule that a state must provide notice *prior* to any action that will adversely affect the property interests of a party. Mennonite does not require that a property owner's interest be completely terminated before he is entitled to notice; rather, notice is due before any action or proceeding which will adversely affect the property. Louisiana courts have consistently recognized that a tax sale adversely affects property interests and have never dispensed with the requirement of notice before a sale. Although R.S. 47:2157 purports to establish that post-tax sale notice to the property owner is constitutionally sufficient, its provisions are "inapplicable" because an application of the statute would conflict with longstanding federal and state precedent. Statutes exist within the bounds of the Constitution, not vice versa. Thus, the court rejected the tax sale buyer's contention that post-tax sale notice could cure a constitutionally defective pre-tax sale notice.

The court then turned to the issue of whether the tax collector's actions prior to the tax sale created a genuine issue of material fact as to whether the tax debtor had received constitutionally sufficient notice. On this issue, the court rejected the affidavit from the subcontractor as to efforts that it generally undertook to locate interested parties, because the affidavit did not specifically state that any of the searches were conducted with respect to the tax debtor in this case. There were reasonable additional steps that the tax collector could have taken, such as giving notice to the mortgagee and sending notice to the tax debtor at the address reflected on his act of sale. Thus, the tax sale buyer failed to demonstrate that the tax collector provided notice reasonably calculated under all circumstances to apprise interested parties of the tax sale, as Mennonite requires.

2. **Custer v. Gala Investments, L.L.C., 14-409 (La. App. 5th Cir. 12/16/14); 167 So. 3d 8.** A notice of delinquency of 2006 taxes sent to a limited liability company that owned an immovable was signed as received by the daughter-in-law of the company's sole member. Afterward, the limited liability company transferred the immovable to the sole member. This member, who was the record owner at the time of the tax sale in 2007, was

not given any notice prior to the sale. Four years after the tax sale, the member filed suit against the tax sale buyer to annul the sale since notice of the tax sale had not been sent to the member personally. He also alleged that he had executed a mortgage at the time he acquired the property and notice of the tax sale had not been sent to the mortgagee. The tax sale buyer reconvened for judgment confirming its tax title. The trial court granted the tax sale buyer's motion for summary judgment, but the court of appeal reversed.

Although the limited liability company had received notice of the tax sale, R.S. 47:2180 (as it existed at the time of this tax sale) required the tax collector to give notice to a person who was the record owner on the day of the tax sale but who was not the tax debtor at the time the sale proceedings were initiated. This duty did not arise until after the tax sale took place. In this case, the member offered his affidavit that he had never received notice addressed to him of the tax sale either before or after the property was sold. The tax sale buyer's response that the certified mail receipt showed that the limited liability company had been sent notice of the tax sale prior to the sale did not satisfy the tax sale buyer's burden to offer evidence showing that the sheriff attempted to give notice to the new owner after the tax sale, as required by R.S. 47:2180. In a footnote, the court rejected the tax sale buyer's argument that notice to the limited liability company passed constitutional muster as notice to its sole member. C.C. art. 24 is clear that the personality of a juridical person is distinct from that of its members. Moreover, it had not been shown that the limited liability company had actual notice of the tax sale, as the return receipt was signed by a person who was not a member of the limited liability company. Thus, a genuine material issue of fact remained outstanding, precluding summary judgment.

Addressing another assignment of error, the court held that the mortgagee in this case was not entitled to pre-tax sale notification because its mortgage was granted by the subsequent purchaser rather than by the tax debtor. Moreover, the mortgagee had allowed a default judgment to be rendered against it without appealing that judgment, and the issue of notice to the mortgagee was therefore not properly before the court on appeal.

3. **<u>Breaux v. Cozy Cottages, LLC</u>, 2014-486 (La. App. 3d Cir. 11/12/14); 151 So. 3d 183.** Under the will of a testator who died in 1952, his widow was given a usufruct over a tract of separate property, the naked ownership of which was to go to his siblings. Those siblings did not participate in his succession proceedings, and a judgment of possession was signed in 1952 decreeing that his widow was sent into possession "as owner, of the use and usufruct," of the tract. The next paragraph of the judgment of possession then provided that the widow was "sent into possession, as owner, of the above estate." The judgment of possession apparently did not recognize the naked ownership interest of the decedent's siblings. The widow died in 1983, and the parish tax assessor sent a notice of tax sale to her estate. The

property was apparently then sold at tax sale to her son, whose interest later became vested through subsequent transfers in the plaintiff in the current declaratory judgment litigation. The defendant in the suit claimed under a different chain of title, which appears to have emanated from the siblings of the owner who had died in 1952. The defendant filed a third-party demand against its title insurer.

Both the defendant and the title insurer moved for summary judgment, arguing that the tax sale in the plaintiff's chain of title was a nullity for lack of proper notice. The title insurer also moved for summary judgment on the third-party demand on the ground that the defendant had failed to cooperate when it hired new counsel and that the insurer had no duty to defend its insured against the plaintiff's claims because the policy provides the insurer with the option to defend, tender policy limits, or settle with parties other than the insured. After the trial court denied both motions for summary judgment, both the defendant and the title insurer sought writs requesting a review of the denial. The court of appeal denied writs and in a full opinion explained its reasons for doing so.

There was no dispute that the siblings of the original owner were not given notice of the tax sale; however, the Supreme Court held in Quantum Resource Management LLC v. Pirate Lake Oil Corp., 112 So. 3d 209 (La. 2013), that Mennonite does not retroactively undo prescription that has already accrued. The testator died in 1952, and the prescriptive period of thirty years for acceptance or renunciation of his succession began to run with his death. Under both the prior law and current law, if his siblings accepted the succession, either expressly or tacitly, they were naked owners entitled to notice of the tax sale and, in the absence of notice, the tax sale would be an absolute nullity. However, if they failed to accept or renounce the succession within the thirty-year prescriptive period, they were not naked owners and were therefore not entitled to notice of the pending tax sale. Since the record did not indicate whether or not the siblings accepted or renounced the succession, summary judgment was inappropriate.

With respect to the title insurer's defenses, the court observed that the title insurer had failed to demonstrate how its insured's election to assume and manage its own defense in light of a substantial conflict of interest with the insurer was a failure to cooperate, thereby negating coverage. With respect to the insurer's contention that it had no duty to defend its insured, because the policy gave it the option of paying or settling or of tendering policy limits rather than defending, the court found that the insurer had not fulfilled its obligations under the policy because it had neither cured the title nor tendered policy limits. According to the terms of the policy, the duty to defend does not terminate until claims have been settled or parties other than the insured have been paid. Since neither had happened, the trial court did not err in denying the title insurer's motion for summary judgment on these issues.

B. Treatment of nullity suits as petitory/possessory actions.

1. **<u>Davis v. Lenci, LLC</u>, 2013-1276 (La. App. 3d Cir. 7/09/14); 143 So. 3d 1234.** The wife of a tax debtor brought suit to set aside a 2002 tax sale on the ground that they had not been given notice of delinquency of taxes. The property had been conveyed to them in July 2001, and the sheriff apparently sent notice to a prior owner. Several years after the tax sale, the tax sale buyer sold the property to a third party, who performed substantial repairs. Finding that notice had not been given to the tax debtors, the trial court ruled in their favor, but also held that the third-party buyer was entitled to remain in possession until reimbursed the amount spent on improvements. The court of appeal reversed.

   Though it found no manifest error in the trial court's findings that the plaintiff and her husband had never received notice of the tax sale, the court construed the action as a petitory action under C.C.P. art. 3651. Since the third-party buyer had been in uninterrupted corporeal possession of the property for more than one year, the burden of proof imposed upon the plaintiff in this petitory action was that of proving title good against the world. The plaintiff had proved only that the tax sale was invalid; she had not satisfied her burden of showing title good against the world. Judge Peters concurred, observing that, while the claim for relief bore some similarity to a petitory action, he did not feel that it was a petitory action, nor had either litigant couched the suit as a petitory action. Nevertheless, he concurred in the court's holding because of his belief that the plaintiff was not entitled to notice of the tax sale since her deed was recorded after the parish assessor had ceased updating the tax rolls in 2011. Moreover, the evidence suggested that she and her husband had been given notice after the tax sale, as R.S. 47:2153(C) required at the time in cases where a sale occurred between preparation of the tax rolls and the ensuing tax sale.

2. **<u>Cropprue Rental Properties, LLC v. Michael</u>, 49,631 (La. App. 2d Cir. 3/4/15), 162 So. 3d 645.** A notice of delinquent taxes that the sheriff's office had mailed to the owner was returned as undeliverable. Without taking any further steps to attempt to give notice to the owner, other than publishing notice of the tax delinquency, the property was adjudicated to the parish at tax sale. A year earlier, a bond for deed purchaser had begun operating a daycare facility upon this lot and the adjacent lot, but the bond for deed included only the legal description of the adjacent lot. In 2006, after the bond for deed purchaser had satisfied all of its obligations to the bond for deed seller, a cash sale was executed in its favor, again limited only to the adjacent lot. In early 2013, the plaintiff in these proceedings sent a notice pursuant to R.S. 47:2206 to the tax debtor (the prior owner) indicating an interest in purchasing the property from the parish. This notice was also returned as undeliverable. Following notice by publication, the parish then sold the property to the plaintiff for $2,400. When the daycare facility

refused to surrender the property, the plaintiff filed a petition to quiet tax title against the tax debtor and the daycare center. Shortly before this suit was filed, the bond for deed sale was amended to convey both lots to the daycare center. In defense of the suit, the defendants asserted that the adjudication and the subsequent sale of the property to the plaintiff were both invalid due to insufficient notice. The trial court granted summary judgment in favor of the plaintiff. The court of appeal affirmed in part and reversed in part.

In order to comply with R.S. 47:2180 (as it existed at the time of the tax adjudication), the sheriff's office was required to provide the record owner with notice by certified mail and, if that certified mail was returned undeliverable, the sheriff's office could satisfy the notice requirements by advertisement. Without much further explanation, the court held that the sheriff's compliance with the statute was sufficient to comply with Mennonite, apparently rejecting the defendants' arguments that the sheriff was required to take additional steps, such as a record search or an Internet search, to locate the tax debtor. As to the daycare center, it had no record ownership of the property at the time of the tax sale adjudication and therefore was not a proper party to raise notice issues relating to the original tax adjudication, though the court observed in a footnote that the bond for deed sale had been amended prior to suit. With respect to the sale of the adjudicated property to the plaintiff, the court again found that certified mail notice, though returned, followed by publication was sufficient to terminate the tax debtor's rights in the property. Although the plaintiff "did nothing extra to locate (the tax debtor) their conduct appears minimally to satisfy La. R.S. 47:2206." The court again held that, since the daycare center had no record ownership of the property at the time of the sale to the plaintiff, it was not a proper party to raise the lack of proper notice.

However, because the daycare center had been in possession of the property since at least 1998, it had acquired the real right of possession under C.C. art. 3422 and was considered provisionally as owner under C.C. art 3423. Accordingly, the daycare center had sufficiently asserted its ownership rights as a defense to the plaintiff's petition, and the determination of ownership would ultimately be a question of fact. Thus, the matter was not ripe for summary judgment.

C. Reimbursement to tax sale buyer upon annulment.

Mooring Tax Asset Group, L.L.C. v. James, 2014-0109 (La. 12/9/14); 156 So. 3d 1143. Unaware of a tax sale that had occurred two years earlier, the owners of residential property sold it to the defendant. Two years later, the tax sale buyer filed a petition to quiet title. The defendant filed exceptions and an answer, as well as a reconventional demand against the taxing authority, asserting that the tax sale was null for several reasons, including insufficient pre-sale notice. The trial court granted summary judgment in the defendant's favor, finding that the tax deed was an absolute nullity due to lack of sufficient pre-sale notice. After this ruling, the tax sale buyer contended that the declaration of nullity should be preliminary, rather than a final judgment, until it was paid all costs allowed pursuant to R.S. 47:2291. The trial court ultimately ruled in favor of the defendant, finding that since the tax sale was an absolute nullity, the tax sale buyer was not entitled to be reimbursed for taxes, costs, interest or penalties. A divided panel of the court of appeal affirmed in a decision published at 129 So. 3d 653, primarily on the basis of its holding that R.S. 47:2291, which was part of the legislative overhaul of tax statutes effective January 1, 2009, was substantive in nature and therefore prospective only. The court of appeal also held that Article VII, Section 25 of the constitution did not require the current owner, as a third-party purchaser, to reimburse the tax debtor before the annulment of the tax sale could be given effect.

The Supreme Court reversed, finding that the lower courts erred in ordering immediate cancellation of the tax deed without reimbursement to the tax sale buyer of its costs. The Supreme Court also held that the defendant, as the current owner seeking to annul the tax sale, is the party responsible for payment. Article VII, Section 25 of the Constitution specifically dictates that a judgment of nullity of a tax sale cannot be effective until the tax sale buyer is reimbursed taxes, costs and interest. The court's prior holding in Smitko v. Gulf South Shrimp, Inc., 94 So. 3d 750 (La. 2012), holding that if a tax sale is absolutely null because of a due process violation there are no time limitations that can be applied to prevent a party from asserting an action for nullity, cannot be generalized so far as to hold that no constitutional mandate can be applied relative to an absolute nullity. Requiring the current owner to reimburse the tax sale buyer is consistent with the Civil Code articles relative to absolute nullities, which provide that the parties must be restored to the situation that existed before the contract was made.

The court noted that Article VII, Section 25 of the Constitution is silent on the issue of who is responsible for making reimbursement to the tax sale buyer. Citing the warranty obligations in the acts of sale in favor of the defendant in this case, the court found that "it was clear" that all rights and obligations the tax debtor had regarding the property were transferred with the sale of the property, including the right to redeem. Even though the sale to the current owner occurred after the three-year redemptive period had passed, the current owner would have been the party entitled and obligated to redeem the property in order to clear the tax title if he had purchased while the redemptive period was in effect. Although the time to redeem had expired, it remained the obligation of the property owner to clear title. As the current owner of the property who was subrogated to all rights and actions of the former owners and tax debtors, it was equally incumbent upon the current owner to reimburse the tax sale buyer's costs. The court also held that, since immovable property taxes are exclusively a charge upon the property assessed and collectible only from the tax sale of that property, "it is clear" that any obligation relative to those taxes did not follow the tax debtor once he sold the property. Thus, the obligation to clear the tax sale deed, which cannot be accomplished without paying the tax sale buyer's costs, necessarily belongs to the current owner of the property. Finally, the court observed that persons are held to have constructive notice of the existence and contents of recorded instruments affecting immovable property.

Because the tax deed was properly recorded in the public records, the current owner was effectively put on notice that there was an issue involving unresolved property taxes on the property.

D. Tax adjudications.

1. **Quantum Resources Management, L.L.C. v. Pirate Lake Oil Corp., 14-687 (La. App. 5th Cir. 4/15/15); 170 So. 3d 259.** In this mineral concursus proceeding involving royalties allocable to submerged land in Jefferson Parish, one claimant asserted ownership based upon a 1925 tax sale, and the opposing claimant asserted ownership based upon a 1936 redemption of a 1920 tax adjudication to the state. Following a prior decision of the Supreme Court in this litigation published at 112 So. 3d 209, to the effect that Mennonite did not apply retroactively to void the 1925 tax sale on the ground of lack of notice to the record owner of the lot, the trial court granted summary judgment in favor of the claimant asserting rights under the 1936 redemption, and the court of appeal affirmed. The basis for this holding was that the 1925 tax sale was null because the property had already been adjudicated to the state at the time of that tax sale and, under governing jurisprudence, property adjudicated to the state cannot be sold at a subsequent tax sale.

   The claimant asserting title on the basis of the 1925 tax sale argued that under the Louisiana Constitution, there are only two exceptions to the constitutional five-year peremption on attacks upon tax sales: lack of an assessment and payment of taxes before the sale, neither of which applied here. This claimant further argued that any attempt to invalidate the tax sale because the property had been previously adjudicated to the state must fail because the Constitution implicitly allows prescription or peremption to run against the state under these circumstances. Rejecting this argument, the court observed that the Supreme Court has held that the constitutional provision prohibiting the running of prescription against the state in any civil matter applies to both prescription and peremption. Thus, when property has been previously adjudicated to the state for unpaid taxes, the peremptive period normally applicable to tax sales does not run against the state while the property remains in the state's ownership.

2. **Sapphire Land Company, L.L.C. v. Chesapeake Louisiana, L.P., 49,712 (La. App. 2d Cir. 5/20/15); 172 So. 3d 122.** Prior to a tax sale held in 1987 for delinquent 1986 parish taxes, the tax collector served notice of the delinquency upon the tax debtor that was the record owner of the property in January of 1986. Following the tax sale, the tax collector sent notice of the tax sale to a purchaser who had purchased the property from the tax debtor before the tax sale, informing the purchaser of his right to redeem the property within three years. This notice was sent to the purchaser at the address shown on his deed; however, an unidentified person had changed the street address on the notice from 70th Street to 71st Street. When 1987

parish taxes went unpaid, the tax collector again sent notice to this purchaser at the address shown on his deed, but when this notice was returned as undeliverable, someone wrote the name of the prior year's tax sale buyer on the notice and then sent the notice to the tax sale buyer. That year, the property was adjudicated to the parish. Twenty years later, after the Haynesville Shale began to be developed, the parish leased the property to the defendant in this suit. The plaintiff in this suit, after acquiring by quitclaim the interest of both the purchaser and the 1987 tax sale buyer, then paid the 1987 taxes, and the tax collector issued a certificate of redemption for the tax adjudication. When the parish's mineral lessee would not release its lease, the plaintiff filed suit alleging that the mineral lease was void because the tax sales were absolute nullities in light of the tax collector's failure to send notices to the purchaser and to the 1987 tax sale buyer. The parish had never been placed judicially in possession of the property prior to granting the lease, and the parish had failed to allocate any of the bonus revenue or royalty payments it had received to the past due taxes. After a trial on the merits, the trial court ruled in favor of the mineral lessee, and the court of appeal affirmed.

The period for redeeming the tax adjudication expired three years after the tax adjudication deed was recorded. The tax debtor's failure to redeem the property within this three-year period limited the plaintiff to an action to annul the tax sale. The sheriff's proces verbal indicated that he sent notice of delinquency of the 1987 taxes to the purchaser at the address listed on his deed. When that notice was returned undeliverable, the notice of delinquency was mailed to the tax sale buyer. Thereafter, the tax collector executed a proces verbal certifying that notices had been given. The properly executed proces verbal creates a presumption that valid notice of a tax sale was given. As evidenced by the tax sale adjudication, after the initial mailing to the purchaser was returned, further notice of the impending sale was published. The plaintiff had therefore failed to rebut the presumption that the tax sale was valid.

With regard to the claim that the parish had never had itself placed judicially into possession as permitted by R.S. 47:2231-33, the court held that the filing of a lawsuit to be placed in possession is discretionary, and the failure to do so does not prevent the taxing authority from leasing the minerals under the more specific provisions of the Mineral Code. Moreover, the parish did not lease the property itself; it merely leased the mineral rights, which are neither assessable nor taxable. Therefore, the parish's failure to institute an action to take possession did not affect the adjudication of the property to the parish nor did it affect the parish's right to enter into the mineral lease. Finally, the court held that the trial court properly concluded that any interest the plaintiff might own in the property is subject to the mineral lease. R.S. 9:2721 provides that anyone who acquires immovable property encumbered by a recorded lease takes the property subject to all provisions of the lease if the lease was recorded prior to the deed. The quitclaim deeds from the purchaser and the 1987 tax sale buyer specifically provided that the vendors sold their interest in the property subject to all restrictions, right-of-way grants and servitudes of record. Thus, the trial court did not err in determining that the plaintiff acquired the property subject to the mineral lease. On application for rehearing, Judge Caraway observed that the court's opinion overlooked the fact that the three-year rule for redemption of tax sales does not prevent redemption of an adjudication after three years. Longstanding jurisprudence in Louisiana has referred to the public body's relationship to the adjudicated tax property before redemption as a mere "inchoate" title. The parish had not argued that the redemption it effected many years later was ineffective. According to Judge Caraway, the court's opinion leaves unaddressed what effect the redemption certificate has on the mineral lease and whether the plaintiff, as the current owner, is entitled to future lease royalties.

IX. Lender liability.

A. Credit agreement statute.

1. **First American Bank and Trust v. Jackson, 2014-0739 (La. App. 1st Cir. 3/6/15); 2015 WL 997210.** In a suit for deficiency judgment on a mortgage note that the mortgagor had co-signed with her brother, the mortgagor reconvened claiming damages for detrimental reliance and unjust enrichment and alleging that she had executed the note and mortgage solely on account of the bank's oral assurances that the note and mortgage were a form of interim financing that would be cancelled and released within 30 days. The trial court sustained the bank's exception of no cause of action, and the court of appeal affirmed. R.S. 6:1122 precludes any action against a creditor based on an oral credit agreement, by expressly providing that a debtor shall not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, and is signed by the creditor and debtor. The Supreme Court has made it clear that this prohibition applies to any action for damages arising from oral credit agreements, regardless of the legal theory of recovery asserted.

    On appeal, the mortgagor argued that the Credit Agreement Statute was inapplicable because she was not a debtor who received a benefit of a loan or promise of a loan from the bank. The court disagreed. Contrary to her contentions, she was clearly a "debtor" within the contemplation of R.S. 6:1121(3), which defines a debtor to include a person who owes money to a creditor. The note executed by the mortgagor as a co-maker with her brother unequivocally established that she owed money to the bank. The oral assurances allegedly made by the bank officer were part of the process resulting directly in the execution of the note and mortgage. Thus, those alleged oral assurances met the definition of a credit agreement, and recovery on the basis of them was therefore precluded by the Credit Agreement Statute.

2. <u>Palmisano v. Nauman-Anderson</u>, **14-652 (La. App. 5th Cir. 1/28/15); 167 So. 3d 891.** Over the course of a ten-month romantic relationship, a man bought plane tickets and clothing for a woman and made certain cash advances to her for purposes of paying credit card bills and legal expenses. After their relationship ended, the man sent the woman a promissory note to memorialize the terms of their alleged loan agreement. The woman refused to sign the note, contending that the money and items she had received were gifts. The man then filed suit against the woman to collect the amounts he had advanced to her during the course of their relationship. The woman moved for summary judgment, contending that, in order to constitute an actionable loan, the subject loan agreement must be written and signed by both parties, as required by the Credit Agreement Statute. The trial court granted summary judgment in her favor, but the court of appeal reversed.

The Credit Agreement Statute prohibits a debtor's claim against a creditor unless the agreement is in writing, expresses consideration, and is signed by both the creditor and debtor. The defendant and the trial court misread the Supreme Court's ruling in <u>Jesco Construction Corp. v. Nations Bank Corp.</u>, 830 So. 2d 989 (La. 2002), which stands for the proposition that a debtor may not maintain an action against a creditor based upon an oral credit agreement, regardless of the theory of recovery asserted. The plain language of the Credit Agreement Statute prevents its application to the man's claims. With regard to the woman's defense that she was entitled to summary judgment because the promissory note was unsigned, the court observed that personal, unsecured loans based on oral agreements are legally valid and enforceable and need not be memorialized in the form of a promissory note. Consequently, the fact that the man produced an unsigned promissory note during discovery is irrelevant to the question of whether his alleged loan agreement is valid and enforceable. Because the motion for summary judgment was based on two faulty legal premises, first that the Credit Agreement Statute applied to this lawsuit and secondly that her alleged loan agreement with the plaintiff required a signed promissory note, the defendant failed to meet her burden of proof in order to obtain summary judgment.

3. **See <u>Coleman v. Barclays Capital, PLC</u>, 2015 WL 5823385 (E. D. La. 2015) and <u>Whitney Bank v. Nafel</u>, 2015 WL 1457528 (M. D. La. 2015), each discussed <u>supra</u>.**

B. Unfair Trade Practices.

1. <u>Patrick v. Dupont</u>, **2014-0812 (La. App. 1st Cir. 3/11/15); 2015 WL 1129092.** Several years after a group of shareholders in a closely-held corporation sold their shares to other shareholders, they brought suit against the purchasing shareholders and a bank alleging a scheme to fraudulently induce them to divest their ownership of the corporation at an artificially low

price. This scheme allegedly involved diverting income that was properly payable to the corporation into certain unauthorized bank accounts at the defendant bank. The suit alleged that, in order to hide this unauthorized diversion of funds, the defendants created "warranty files" which falsely indicated that certain work was performed at no charge as warranty work, when in fact payment was actually received for the work and deposited into these bank accounts. The suit alleged causes of action for fraud, conspiracy, negligent misrepresentation, violation of the Louisiana Unfair Trade Practices Act and unjust enrichment. The bank filed an exception of prescription, arguing that all of the tort claims had prescribed and that none of the claims sufficiently alleged a cause of action against the bank. The trial court granted both exceptions.

Insofar as one of the plaintiffs was concerned, the court of appeal sustained the granting of the exception of prescription. Even though the plaintiffs had made inconsistent assertions in multiple verified pleadings as to when they actually became aware of the warranty scheme, there was evidence that the scheme had been "confessed" to this plaintiff more than one year before suit was filed. This was buttressed by an email that the plaintiffs' former attorney had written to their current attorney indicating that one of the plaintiffs had first heard of "this" shortly before a specified date, "so the clock is ticking." As to another plaintiff, however, the evidence showed that he had no relationship with the buyer who had confessed the warranty scheme and he never directly discussed the warranty scheme with him. Thus, the earliest possible date that the trial court could have found that that plaintiff had become aware of the scheme was within one year of the date suit was filed, and the trial court erred in finding that his claims had prescribed.

The court then found it necessary to determine whether this plaintiff had properly stated a cause of action. Assuming all factual allegations of the petition as true, the court concluded that this plaintiff had stated a cause of action against the defendant bank for fraud and conspiracy to defraud by alleging that the bank had actively participated in the warranty scheme and that the bank had agreed to open unauthorized bank accounts to allow the other defendants the use of funds that properly belonged to the corporation. However, the trial court correctly determined that this plaintiff had not stated a cause of action against the bank for negligent misrepresentation or detrimental reliance. Nevertheless, the trial court should have allowed amendment of the petition to correct these deficiencies.

Finally, the court of appeal held that the remedy of unjust enrichment is subsidiary in nature and is not available if the law provides another remedy. Because the plaintiffs had alleged several other causes of action against the bank, they were precluded from asserting a claim for unjust enrichment. Moreover, it is irrelevant whether the plaintiffs' other claims had prescribed; the fact that a plaintiff does not successfully pursue another available remedy does not give him the right to recover under the theory of unjust enrichment.

2. **Adcock v. Wooten, 50,116 (La. App. 2d Cir. 9/30/15); ___ So. 3d ___, 2015 WL 5718601 (not yet released for publication in the permanent law reports).** A real estate agent contacted the plaintiff to solicit the listing of the plaintiff's home that was subject to pending foreclosure proceedings. Several months later, the plaintiff accepted an offer of purchase submitted by the spouse of an employee of the real estate agency. While this offer was being considered by the mortgagee, the plaintiff received another offer for a higher amount of money and relayed the existence of this offer to the real estate agent, who replied by email that "unfortunately we can only accept one offer at a time." The following day, the mortgagee accepted the original offer, and shortly afterward the plaintiff sold the property to the original offeror. Immediately upon purchasing the property pursuant to the original offer, this purchaser sold the property to the second offeror for the higher price he had offered. More than a year after the email from the real estate agent, but less than a year after the actual closing, the plaintiff filed suit against the real estate agency under the Unfair Trade Practices Act.

The trial court granted the defendants' exception of peremption, but the court of appeal reversed. The trial court was wrong in determining that the cause of action perempted one year from the date of the email. Any alleged ascertainable loss of money to the plaintiff, and any alleged unfair or deceptive acts or practices, occurred on the date of the two closings, when the money was disbursed. If the second sale had not occurred, there would not have been any cause of action. Thus, suit filed within one year of the sale was timely.

3. **MSF Trust I v. Stewart, 2013-1975 (La. App. 1st Cir. 5/11/15); 2015 WL 2185000.** Five months after an executory process sale, the mortgagor, acting in proper person, filed a "petition to rebut defendant's claim for foreclosure relief" in the executory proceedings, alleging that the seizing creditor was not entitled to enforce the note and mortgage and had "presented a fraud upon the court" because the mortgagee was not the holder of the original note. Over the ensuing eleven months, the mortgagor filed a host of other claims and ultimately filed an amended petition in which he alleged that the mortgagee's actions constituted unfair trade practices. The mortgagee filed peremptory exceptions of prescription of the wrongful seizure claims and peremption of the unfair trade practice claims. The trial court sustained the exception of peremption and dismissed the matter in its entirety.

The court of appeal affirmed the ruling sustaining the exception of peremption as to the unfair trade practice claims. Claims of unfair trade practices are subject to a peremptive period of one year, and in this case had to be filed at the very latest within one year after the sheriff's sale. Because the claim for unfair trade practices was not filed until long after the one year had passed, any claim for unfair trade practices was perempted on its face. In a footnote, the court pointed out that an amendment to a pleading cannot relate back to the filing of the original pleading where a cause of action is extinguished by peremption. Thus, the trial court correctly sustained the exception of peremption as to the unfair trade practice claims, but incorrectly dismissed the mortgagor's claims for wrongful foreclosure and ill practices.

4. **See Truong v. Bank of America, N.A., 717 F. 3d 377 (5th Cir. 2013), discussed supra.**

C. **Fraud.**

1. **Gilbert v. Gottsegen, 14-593 (La. App. 5th Cir. 5/21/15); 171 So. 3d 289.** In 1999, one co-maker of a mortgage note made a $450,000 payment that the holder of the note accepted in full settlement of a deficiency judgment the mortgagee had obtained against the two co-makers of the note. Nearly a year later, the mortgagee executed an assignment of its deficiency rights to a company that was owned by the co-maker who had made the payment. After this first co-maker sought to collected the virile share of the other co-maker, the two co-makers ultimately reached an agreement by which the second co-maker paid to the first co-maker the sum of $80,000 in satisfaction of his liability. Eight years later, this second co-maker filed suit against the first co-maker, alleging that the first co-maker had engaged in fraudulent conduct. The thrust of the fraud allegations was that all of the actions undertaken by the first co-maker to collect the second co-maker's virile share of the deficiency judgment were fraudulent, since the deficiency judgment had previously been extinguished by the first co-maker's full compromise of that judgment with the creditor. The trial court granted summary judgment in favor of the first co-maker, and the court of appeal affirmed.

The second co-maker failed to recognize the distinction between conventional subrogation and legal subrogation, which arises by operation of law, or the existence of legal subrogation at all. Under C.C. art. 1804, a solidary obligor who has rendered the whole performance, though subrogated to the right of the obligee, may claim from the other obligors no more than the virile portion of each. Under C.C. art. 1829, subrogation takes place by operation of law in favor of an obligor who pays a debt he owes with others and who has recourse against those others as a result of the payment. With legal subrogation, there is no additional requirement that the obligee take action to transfer his rights to the settling co-obligor. In this case, the subsequently prepared documents containing subrogation rights were an after-the-fact attempt to establish conventional subrogation. But the first co-maker nonetheless maintained a valid and enforceable legal subrogation to collect from the second co-maker the latter's virile share of the settlement of the deficiency judgment. While the deficiency judgment itself may have been satisfied, thus rendering it unassignable, that would have no effect upon the first co-maker's legal subrogation rights to collect the virile share of the judgment from the second co-maker. The first co-maker's collection of a valid and enforceable debt in no way constituted fraud, especially since the first co-maker generously agreed to accept $80,000 on a minimum virile share of $225,000.

2. **See <u>First American Bank and Trust v. Geaux Development Group, LLC</u>, 2014-0565 (La. App. 1st Cir. 1/7/15); 2015 WL 94827, discussed <u>supra</u>.**

D. Discovery sanctions.

1. **<u>BancorpSouth Bank v. Kleinpeter Trace, L.L.C.</u>, 2013-1396 (La. App. 1st Cir. 10/1/14); 155 So. 3d 614, <u>writ denied</u>, 159 So. 3d 1067 (La. 2/27/2015).** In response to a bank's ordinary process foreclosure, the mortgagor and guarantor reconvened, claiming that the bank's president had fraudulently allowed some of the loan proceeds to be used for the purpose of repaying unrelated indebtedness owed by one of the members of the mortgagor. During the course of discovery, the defendants filed a motion to compel and motion for sanctions, complaining of the bank's alleged failure to produce a number of requested documents, including the bank's president's "desk file," and the bank's destruction of a file maintained by the loan officer's assistant. On the same day this motion was filed, the bank filed a motion for a protective order to prohibit the defendants from discovering documents reflecting the bank's internal evaluation or analysis of the loan, claiming that this information was not discoverable pursuant to R.S. 6:333(I). In a judgment rendered in October 2012, the trial court denied the bank's motion and at the same time granted the defendants' motion to compel, ordering the bank to produce a number of documents and files, including all documents that had previously been withheld on the basis of R.S. 6:333(I). The October judgment "reserved" the defendants' motion for sanctions for a ruling after the bank had complied with the judgment.

   A few weeks later, the defendants filed another motion to compel and for sanctions "based on new and troubling facts" that the bank had revealed two days after the rendition of the October judgment that it had known for several months of thousands of discoverable emails and electronic documents that it had failed to produce. As a sanction, the defendants moved to strike all of the bank's affirmative defenses to the reconventional demand and for dismissal of the main demand. The bank defended on the basis that the additional information referred to by the defendants had been identified in an expanded data search of the bank's electronic files and that the results of that search were stored on a disk that had been delivered to bank's counsel several months before the first discovery hearing was held. Counsel for the bank represented that the information on the disk was under review in compliance with the October judgment and that the information on the disk that had already been reviewed had been produced to the defendants. At the conclusion of the hearing on the latest motion to compel, the trial court ordered the bank to deliver a complete unredacted copy of the disk to the court and to produce to the defendants all responsive non-privileged electronic documents stored on the disk. The trial court warned the bank that non-compliance with this order could lead to dismissal of the bank's main demand and the striking of its affirmative defenses to the reconventional demand. The court also ruled that it would impose an adverse presumption on account of the bank's destruction of the file maintained by the loan officer's assistant. These rulings were embodied in a judgment signed in January 2013.

In May 2013, the court held another hearing to determine whether the bank had complied with the January judgment. At this hearing, the bank's attorney testified that he had realized in May 2012 that there had been a "disconnect" in document production causing him to arrange for the bank's internet technology department to conduct an additional search and to produce the disk in question. Upon reviewing this disk, the bank's attorney erroneously concluded that there were "maybe two dozen total emails" that "were all irrelevant" and some stand-alone documents that were subject to the privilege the bank had claimed. During the hearing that had led to the October judgment, the bank's attorney discovered his error, and he immediately began the review process so that the emails on the disk could be produced. However, he admitted that he did not advise opposing counsel of his error. At the May 2013 hearing, the bank also produced extensive testimony of the efforts it had undertaken since that time to analyze and produce the documents on the disk and otherwise to produce discoverable electronic documents.

At the conclusion of this hearing, the trial court dismissed the bank's main demand and struck its defenses to the reconventional demand. Though the trial court indicated that it did not doubt the veracity of the bank attorney's testimony concerning the disk and did not feel that the bank's attorneys had intentionally misled the court and though the court acknowledged that each discovery incident standing alone would not be sufficient for the imposition of severe sanctions, when viewed collectively the bank's actions rise "to a level of an extreme pattern of abuse" warranting these sanctions. As support for this finding, the court observed that documents that should have been produced three years earlier were just now being produced and some had yet to be produced. The trial court also awarded $225,000 in attorney's fees to the defendants, without identifying the grounds on which it was doing so.

The court of appeal affirmed the trial court's ruling that there was no privilege under R.S. 6:333(I). Though paragraph (I) provides that all financial records prepared by a bank in connection with its evaluation or analysis of the loan "shall be confidential and shall not be discoverable or admissible in evidence in any civil action pertaining to . . . any such loan," this provision must be construed with the remainder of the statute, which creates a duty of confidentiality in favor of a bank's customers and implicitly withdraws protection for banks when the prescribed procedures are not followed. The statute does not limit or otherwise prevent a customer from obtaining financial records that pertain to his own loan. To the contrary, paragraph (F) expressly provides that nothing in the statute prohibits or restricts any such disclosure. The bank's interpretation of paragraph (I) cannot be reconciled with the statute's broad definition of "financial records" to which a customer is entitled.

However, the court reversed the trial court's discovery sanctions. Louisiana law distinguishes between sanctions available for failure to comply with discovery requests and sanctions available for disobedience of court-ordered discovery. It is only in the latter case that C.C.P. Art. 1471 allows the court to impose the most severe sanctions, such as orders striking pleadings, dismissing the action or rendering a judgment by default. Dismissal for a discovery violation is a draconian penalty that should be applied only in extreme circumstances and after considering whether the violation was willful, whether less drastic sanctions would be effective, whether the violations prejudiced the opposing party's trial preparation, and whether the client participated in the violation. Dismissal is justified only for violations of court-ordered discovery and then only if the record contains sufficient evidence of willful disobedience, bad faith or fault by a party, as opposed to its counsel.

The October judgment directed the bank to produce all documents that had been withheld on the basis of R.S. 6:333(I). The bank had actually delivered the entire disk to its counsel five months before the entry of that order without in any manner instructing or directing its counsel not to disclose the entire disk. The trial court accepted as credible the bank attorney's testimony that his failure to disclose the disk was due to his own mistaken belief that it contained very little new information. Thus, any failure with respect to the disclosure of the disk was the fault of the bank's attorney, rather than that of the bank, and did not support the sanction of dismissal.

The destruction of the file maintained by the loan officer's assistant could not support discovery sanctions under C.C.P. Art. 1471, because the destruction occurred before the order was entered. Nonetheless, an adverse presumption could be imposed under a theory of spoliation of evidence. When a litigant fails to produce evidence within his reach, a presumption that the evidence would have been detrimental to his case is applied. The bank had offered an explanation that this file had been inadvertently picked up by an outside vendor and shredded. The record supported the trial court's factual determination that the explanation offered by the bank as to the destruction of the file was pretextual and did not constitute a reasonable explanation. Thus, the trial court's imposition of an adverse presumption on account of the destruction of the file was not an abuse of discretion.

Because the evidence did not support a finding that the bank willfully failed to obey any discovery order, C.C.P. Art. 1471 did not authorize an award of attorneys' fees and, to the extent that the trial court's award of attorneys' fees was imposed as a sanction under that article, the trial court abused its discretion. C.C.P. Art. 1469(4) authorizes a court in ruling on a motion to compel to award the reasonable expenses incurred in obtaining the order including attorneys' fees, but the awardable expenses authorized by this article are not as broad as those that may be imposed under C.C.P. Art. 1471. Thus, the trial court erred in ordering the bank to pay more than the reasonable cost of obtaining the discovery order, and the matter was remanded for a determination of the amount of the reasonable expenses the defendants had incurred in obtaining the January judgment.

2. **JPMorgan Chase Bank, N.A. v. Boohaker, 2004-0594 (La. App. 1st Cir. 11/20/14); 168 So. 3d 424.** In response to an ordinary process foreclosure proceeding upon a mortgage note that had been transferred numerous times, the mortgagors propounded written discovery requesting any and all documents supporting the contention that the note was owned by the present plaintiff. After several months without any satisfactory discovery response from the bank, the mortgagors' counsel scheduled a Rule 10.1 conference, at which time both parties agreed to a production date. When that date passed without the production of any documents, the mortgagors filed a motion to compel, which the trial court granted, ordering the bank to produce the requested documents by a specific date and warning that if the bank failed to do so the court would consider additional sanctions.

When this deadline passed without the production of any documentation, other than additional copies of the same documents that had been attached to the petition, the mortgagors filed a motion for sanctions seeking dismissal. The trial court granted the motion for sanctions and prohibited the bank from using any documents that were not produced to the mortgagors to support its claims against the mortgagors. In the meantime, the mortgagors filed an exception of no right of action, arguing that the bank had not established that it was a person entitled to enforce the note under R.S. 10:3-301 because of certain missing links in its "chain of title" to the note. The mortgagors also filed an exception of prescription arguing that, because the bank was not the proper party to enforce the note, the present suit did not interrupt the five-year prescriptive period running against the note. In opposition, the bank asserted that its possession of the original note was sufficient to establish its right to enforce the note and that its suit timely interrupted the five-year prescriptive period. The trial court granted both exceptions and dismissed the case.

On appeal, the court of appeal reversed the granting of the exception of no right of action. The party raising the exception of no right of action bears the burden of proof. Though evidence supporting or controverting an exception of no right of action is admissible, in the absence of evidence to the contrary the allegations of fact in the pleadings will be taken as true. In a suit on a promissory note, the payee who produces the note sued upon makes out a prima facie case of its claim to enforce the note. However, if the face of the instrument indicates title is in any person other than the possessor of the note, the burden is on the possessor to prove his ownership. Under R.S. 10:3-301, a person entitled to enforce an instrument includes a non-holder in possession of the instrument who has the rights of a holder. According to the Official Comments, a non-holder with the rights of a holder includes any person who under applicable law is a successor to the holder or otherwise acquires the holder's rights. As explained by the Comments to R.S. 10:3-203, because the transferee under these circumstances is not a holder, there is no presumption under Section 3-308 that the transferee, by producing the instrument is entitled to payment. Proof of a transfer to the transferee by a holder is proof that the transferee has acquired the rights of a holder, and at that point the transferee is entitled to the presumption under Section 3-308.

The mortgagors had the burden of proving evidence that controverted the allegations of the petition to the effect that the plaintiff had the right to recover under their note. In attempting to meet their burden of proof, the mortgagors relied primarily upon the absence of certain documentation. However, these assertions failed to realize that the bank was not required to prove the allegations of its petition at this time. Those allegations are accepted as true for purposes of the exception, unless the mortgagors present evidence controverting those allegations. The absence of supporting documentation does not disprove that the transfers occurred as alleged, nor is such documentation essential to prove the alleged transfers. The jurisprudence holds that a note payable to order may be transferred without endorsement, and the transfer can be proved by parol evidence. Based upon the allegations of the petition, the bank had a right of action to enforce the note, and the trial court erred in granting the exception of no right of action. Having found no merit to the argument that the bank had no right of action, the court found that there was likewise no merit to the argument that the bank's petition did not interrupt prescription.

Nevertheless, the court of appeal affirmed the trial court's discovery sanction. The discovery requests were outstanding and unanswered for almost one year when the trial court issued an order directing the plaintiff to produce the requested documents within fifteen days. When the bank failed to comply with that order, the trial court entered the sanctions order prohibiting the bank from using any documents or other evidence that was not produced. The bank's contention on appeal that the trial court abused its discretion in prohibiting the use of "other evidence" because that phrase could extend to testimony, was without merit. The sanctions order prohibited only documents and other evidence that were responsive to the discovery requests. The order did not purport to prohibit any testimony or other tangible evidence that was not responsive to the discovery requests. The bank's non-compliance with the discovery order was due to its repeated failure to produce the documents to its counsel. Under these circumstances, the trial court did not abuse its discretion in prohibiting the use of unproduced evidence that was responsive to the discovery request.

E. Other lender liability cases.

1. <u>Denham Homes, L.L.C. v. Teche Federal Bank</u>**, 2014-1576 (La. App. 1st Cir. 9/18/15); ___ So. 3d ___, 2015 WL 5474473 (not yet released for publication in the permanent law reports).** A real estate developer's confirmed bankruptcy plan provided that proceeds from the sale of lots would be split equally between the defendant bank, which held a mortgage on the property, and certain Private Works Act claimants. Once those claimants were satisfied, the bank would be paid 70% of all lot sales proceeds until its secured claim was paid in full, at which time two unsecured creditors would receive the net proceeds from future lot sales. One of these unsecured creditors paid off all the Private Works Act claims and had the statements of those claims cancelled from the public records. That creditor then asserted subrogation to the rights of the Private Works Act claimants under the bankruptcy plan's payment schedule. Once the bank learned of the cancellation of the Private Works Act privileges, it notified the debtor of its objection to receiving only 50% of the net proceeds, maintaining that it was entitled to 70% of all proceeds. In 2011, when the debtor attempted to close the sale of 21 lots before one of the benchmark deadlines set forth in the plan, the bank refused to release its mortgage, thereby preventing that sale from closing. The bank similarly refused to release its mortgage in connection with other proposed sales in 2011, likewise causing those sales to fail. After the debtor failed to meet the first anniversary benchmark for sales required under the plan, the bank issued a notice of default signaling its intent to foreclose on the property. The following day, the debtor filed a motion to reopen its bankruptcy proceedings. The bankruptcy court found that the debtor had not followed the terms of the bankruptcy plan with regard to the percentage of distributions and that the bank had properly refused to release its mortgage.

   While an appeal of this bankruptcy court order was pending, the bank seized and sold the remaining property at sheriff's sale. The bank then filed a motion to dismiss the appeal as moot, because the debtor no longer had any assets to organize. The federal district court ultimately dismissed the appeal as moot, but vacated the bankruptcy court's entire order to protect the debtor against the potential preclusive effect of that order. The debtor and the two unsecured creditors then brought a state court action for damages and declaratory relief against the bank, alleging that the bank's refusal to release its mortgage in connection with the lots sales prevented the collection and distribution of sales proceeds to the creditors as required by the plan. The bank excepted to all tort claims on the basis of prescription, since more than one year had elapsed since the bank's actions in 2011. The bank also filed an exception of no cause of action, on the ground that none of the plaintiffs had any contractual claims that could be asserted against the bank under the bankruptcy plan.

The trial court granted the exceptions of prescription and no cause of action directed to the claims asserted by the unsecured creditors. The unsecured creditors appealed.

The court of appeal affirmed the trial court's action in sustaining the exception of prescription. In opposition to this exception, the plaintiffs had argued that the debtor's filing of a motion to reopen in the bankruptcy court interrupted prescription as to their tort claims. The court disagreed. A motion to reopen a bankruptcy does not constitute a new action but is little more than a ministerial function designed to reactivate a case so that the court can receive and act upon some other request. Because the plaintiffs failed to introduce the motion to reopen into the record, the court could not find that the motion encompassed the plaintiffs' tort claims. The court also did not find that the bankruptcy proceedings imported a stay that precluded the filing of a claim against the bank. The fact that the plaintiffs filed their state court petition during the pendency of the appeal in federal court undermined any argument that the bankruptcy proceeding was an impediment to filing a state court proceeding.

Nevertheless, the court of appeal reversed the trial court's actions in sustaining the exception of no cause of action. Rejecting the bank's contention that a confirmed bankruptcy plan is a judgment that establishes only obligations owed by a debtor to its creditors, the court held that a confirmed bankruptcy plan functions as a contract under Louisiana law, creating enforceable rights and obligations between the parties. Given this finding, the court then considered whether the plaintiff had asserted the essential elements for a breach of contract: (1) the obligor's undertaking an obligation to perform; (2) the obligor's failure to perform the obligation; and (3) the failure to perform resulted in damages. While the petition did not expressly assert breach of contract claims, it nonetheless alleged the basic elements of a breach of contract claim. The petition alleged that all of the parties voted to accept the terms of the plan and that the bank was required under the terms of the plan to accept 50% of the lot sales proceeds until the Private Works Act claims were paid off and had an obligation to release its mortgage on the lots to allow sales to go forward. The petition also alleged that the bank breached this obligation, resulting in damage in the form of missed collections of net proceeds from the sale of lots. Thus, accepting the allegations of the petition as true, sufficient operative facts had been urged to state a cause of action for breach of contract.

2. <u>**Kovach v. Hancock Bank of Louisiana**</u>**, 2014-0981 (La. App. 4th Cir. 5/6/15); 164 So. 3d 436.** As security for a commercial loan, the borrower's shareholder executed a collateral assignment of a $1,000,000 policy on his life. When the borrower failed to pay the loan, the bank sent a default letter

to the insurer seeking the policy's $52,000 cash surrender value. Based upon the terms of the collateral assignment, the insurer paid the cash surrender value to the bank and cancelled the policy. Because the owner of the policy had been diagnosed with cancer, he was unable to procure substitute life insurance and thereafter filed a petition for damages and breach of contract against both the insurer and the bank alleging that they had failed to follow proper procedures for surrendering the policy. The trial court granted summary judgment in favor of the insurer but denied the bank's motion for summary judgment. The court of appeal reversed the grant of summary judgment in favor of the insurer.

The owner of the policy contended that the assignment was not legally enforceable because of an unfulfilled suspensive condition, specifically, a provision of the assignment that the bank would not exercise its right to surrender the policy until there was a default in payment of the loan or in payment of the premium when due, nor until twenty days after the bank had mailed notice of intention to exercise such right. While the bank may not have had the legal right to request surrender of the policy without proper notice, the matter before the court pertained to the obligations of the insurer. Since the assignment specifically provided that the sole signature of the bank would be sufficient for the insurer to surrender the policy, there was no uncertain event that had to occur before the insurer could act on the bank's instructions once it received the letter from the bank. Similarly, the court rejected the policy owner's contention that the insurer had a duty to discover whether the bank had sent a twenty-day notice before requesting the surrender of the policy, for the assignment specifically provided that the insurer was authorized to recognize the bank's claims without investigating the reason for any action taken by the bank or confirming the giving of any notice under the assignment or otherwise. Thus, the insurer owed no duty to investigate the bank's reasons for requesting the surrender of the policy.

Nevertheless, the court of appeal agreed with the policy owner that a reasonable fact finder could conclude that, as the policy owner's insurer, the insurer had a duty to inform him that the policy was about to be cancelled. There is a strong public policy requiring prior notice to an insured of cancellation of an insurance policy in order to afford the insured sufficient time to obtain other insurance. Also, C.C. art. 2054 provides that, when the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract but also to whatever the law, equity or usage regards as implied in a contract of that nature or necessary for the contract to achieve its purpose. Life insurance companies enter into contracts to provide life insurance to their insureds. Cancelling a policy upon its surrender without notifying the insured would be inconsistent with the intention of the policy. Thus, a genuine issue of material fact existed as to whether the insurer breached a separate contractual duty owed to the policy owner.

3. **Burgers v. Bickford, 2015 WL 1726161 (E. D. La. 2015).** The plaintiff entered into a formal agreement to provide construction financing to three related limited liability companies. By agreement of the parties, the loan was divided among the three limited liability companies, with the agreement that those companies were to transfer title to the land to be developed to a corporation that had been established as a "corporate vehicle" facilitating development of the property. The financing agreement allowed this corporation to make draw requests on behalf of each of the limited liability companies.

The plaintiff brought suit against the limited liability companies for breach of contract contending that they had moved the project to other land, thus undermining the plaintiff's security. Claiming a security interest in all general intangibles of the project, the plaintiff also asserted that certain option agreements that the limited liability companies had held to purchase adjacent land were improperly terminated to his prejudice. By amended complaint, the plaintiff added the other parties to the option agreements, alleging causes of action for unjust enrichment and violations of the Unfair Trade Practices Act and seeking to have the options declared to be binding. The plaintiff also brought a revocatory action seeking rescission of the cancellation of the options and filed a notice of lis pendens in the mortgage records. The defendants responded with counterclaims that the plaintiff had failed to make loan advances when required and that the filing of the notice of lis pendens was improper. The court granted summary judgment in favor of the plaintiff on its claims for judgment under the notes, rejecting the limited liability companies' argument that the plaintiff was not entitled to judgment since it could not show that the loan funds were actually received by the three limited liability companies. Under the explicit terms of the contract, the plaintiff was entitled to rely on the corporation to make and request advances on behalf of the three limited liability companies. A possible failure of the corporation to distribute those advances to the limited liability companies did not prejudice the plaintiff's rights under the promissory notes.

In response to the counterclaims, the plaintiff argued that the notes contained language to the effect that the maker "agrees that any and all obligations under this note shall not be subject to any claims of compensation or set-off whatsoever." According to the court, the words of the contract were not clear in intended scope to the degree that the plaintiff attempted to stretch them. The evidence was ambiguous as to how this provision was intended to extend to the claims for damages based on breach of contract that exceed what would otherwise be subject to compensation. Thus, summary judgment was not appropriate, except to the extent of the defendants' attempt to bring a counterclaim to extinguish any obligation owed to the plaintiff on amounts that the plaintiff had already advanced to the limited liability companies.

The court also rejected, at least for purposes of summary judgment, the plaintiff's argument that its obligation was only to provide financing up to specified amount, rather than providing financing in that amount. According to the court, the language of the agreement provided that the amount contributed to each limited liability company would be based upon its properly made advance requests, unless the agreement had been terminated, such as by default.

Finally, with respect to the propriety of the notice of lis pendens, the court held that there was no dispute that the plaintiff's suit included a request to have the original options to purchase recognized as legal and binding and subject to the plaintiff's alleged mortgage and security agreement. Litigation concerning options on immovable property affects the title to that immovable property, since the recordation of an option makes it effective against third persons as to the immovable property at issue. The factual inquiry of whether litigation affects title as to certain property requires only comparing the allegations in the lawsuit and the corresponding property descriptions with the property description in the notice of lis pendens. The plaintiff's claims therefore affected title to the property described in the notice of lis pendens, making the filing of the notice of lis pendens proper.

X. Deposit account and trustee liability.

A. Timeliness of claims.

1. Forged endorsements.

Johnson v. Allen, 2014-0490 (La. App. 4th Cir. 1/7/15); 158 So. 3d 852, 85 UCC Rep. Serv. 2d 521. The plaintiff filed suit against the defendant bank in 2012, alleging that it was liable for having cashed insurance proceeds checks on which the plaintiff's endorsement had been forged by his "friend." Though these checks were apparently issued shortly after Hurricane Katrina, the plaintiff claimed that he did not learn of them until late 2011, when his deposition was taken in a lawsuit he had filed against his homeowner's insurer. In opposition to the bank's exception of prescription, the plaintiff argued that the doctrine of *contra non valentem* suspended the running of the prescription of his claim until he discovered the forgery. The trial court at first overruled the bank's exception but, after the Supreme Court's holding in Specialized Loan Servicing, LLC v. January, 119 So. 3d 582 (La. 2013), sustained the exception. On appeal, the plaintiff sought to distinguish Specialized Loan Servicing on the ground that the bank had prevented him from availing himself of his cause of action. However, the pleadings failed to demonstrate any specific allegation that the bank fraudulently concealed the forgery or committed any act to prevent the plaintiff from obtaining knowledge of the conversion. Fraud must be pleaded with particularity. The only allegation the plaintiff made against the bank was that it was negligent in cashing the checks. Finding the Supreme Court's holding in Specialized

Loan Servicing to be controlling, the court of appeal affirmed the trial court's ruling sustaining the exception of prescription.

2. Unauthorized withdrawals.

a. **Grubaugh v. Central Progressive Bank, 2014 WL 794141 (E. D. La. 2014), 82 UCC Rep. Serv. 2d 829.** Over a period of several years, the plaintiff allowed his mother and sister, who were employees of the defendant bank, to manage his finances. Following his mother's death, the plaintiff discovered that his account had been nearly depleted because of wrongful acts of his mother and sister. When the plaintiff brought suit against the bank, the court granted the bank's motion for summary judgment. With respect to the claim for those items drawn on the account without an authorized signature of the plaintiff, R.S. 10:4-406(f) requires a customer to report his unauthorized signature within one year after a statement has been made available to him, regardless of the care or lack of care of either the customer or the bank. In this case, the bank sent monthly statements but the plaintiff ignored them because he "wasn't really fooling with the money." Section 4-406(f) does not require the customer to have actually received the statements; rather it requires only that the bank send or make the statements available. Moreover, the plaintiff's assertions of good faith are irrelevant outside the one-year window.

With respect to claims under R.S. 10:3-420 for items paid by the bank on the plaintiff's forged endorsement, R.S. 10:3-420 contains a one-year prescriptive period. As the Louisiana Supreme Court recognized in Specialized Loan Servicing, LLC v. January, 119 So.3d 582 (La. 2013), the doctrine of *contra non valentem* does not apply to claims under Section 3-420 except where there is fraud on the part of the defendant. Though the plaintiff submitted some evidence that his mother or sister misrepresented a material fact with an intent to deceive, there was insufficient evidence to prove that the plaintiff's reliance on their representations was justifiable. Even assuming the plaintiff asked his mother about the statement shortly after he opened his account, it is difficult to conclude that asking that one question gave the plaintiff license to never question the absence of statements over the ensuing two and a half years. Finally, the court held that the plaintiff did not have a cause of action for breach of fiduciary duty because he provided no evidence that he entered into any written agency or trust agreement under which the bank agreed to act as a fiduciary, as required by R.S. 6:1124.

b. **Pace v. Gulf Coast Bank and Trust Company, 2014-0342 (La. App. 4th Cir. 9/17/14); 2014 WL 4657482.** A man whom the plaintiff had befriended at a casino made a number of withdrawals from her bank accounts. In late February 2008, the local branch manager called the plaintiff to notify her that money was missing for her accounts, and the plaintiff immediately executed an affidavit disputing 211 ATM withdrawal transactions between October 6, 2007 and February 22, 2008. When the bank refused to credit her account, she brought suit for reimbursement of the unauthorized transfers occurring between December 17, 2007 and February 18, 2008, indicating that the withdrawals that pre-dated December 17, 2007 had been previously marked as unauthorized out of an abundance of caution. According to her testimony, the plaintiff had been instructed by the branch manager to put down all of the transactions that were suspicious "just in case, 'til all of the police detectives and all the work was in." The trial court awarded the plaintiff judgment for all of the disputed items, and the court of appeal affirmed.

The bank's defense was that the unauthorized transactions had not been reported within 60 days. The Electronic Funds Transfer Act limits a consumer's liability to $50, but provides that reimbursement need not be made to the consumer for losses a financial institution establishes would not have occurred but for the failure of the consumer to report an unauthorized electronic funds transfer within sixty days after transmittal of a statement showing the transfer. The burden of proof is on the bank to prove that the debits were unauthorized and that a loss would not have occurred but for the plaintiff's failure to report the unauthorized transfers within sixty days of transmittal of the periodic statement. At trial, the plaintiff testified that she never gave the man she met at the casino her ATM card or PIN number. Even though she had asserted in her affidavit that the transactions pre-dating December 17, 2007 were unauthorized, she did so only because the bank manager told her to list all transactions that were questionable. The trial court was confronted with two permissible views of the evidence as to whether the unauthorized transactions began in October or December 2007, and there was no manifest error in believing the plaintiff's testimony that the unauthorized transactions had begun in December 2007.

3. Claims against trustees.

<u>Serigne v. JPMorgan Chase Bank, N.A.</u>, 2014-0432 (La. App. 4th Cir. 3/18/15); 162 So. 3d 1198. Plaintiffs, the beneficiaries of a trust funded with proceeds from a wrongful death suit that was settled when they were minors, brought suit against the trustee for inappropriately releasing money from the trust to their mother after they attained the age of majority. The trustee moved for summary judgment, claiming that it had mailed a final account to the beneficiaries in 2005, thus triggering the running of the peremptive periods set forth in R.S. 9:2234. In response, the beneficiaries argued that the trustee knew or should have known that the address to which the final account was sent was incorrect. The trial court granted the trustee's motion for summary judgment, and the court of appeal affirmed.

Although the beneficiaries claimed that the trustee had information that one of the beneficiaries had a different address from that to which the final account was sent, there was no evidence that the beneficiaries had ever provided the trustee with a written instrument authorizing a different or additional mailing address to be used for either of them. Because R.S. 9:2234 provides that all actions shall in all events be filed within three years of the date the trustee renders an accounting, the beneficiaries' claims were perempted by 2008.

B. Detrimental reliance/negligent misrepresentation.

<u>Simmons, Morris & Carroll, LLC v. Capital One, N.A.</u>, 49,005 (La. App. 2d Cir. 6/27/14); 144 So.3d 1207, <u>writ denied</u>, 152 So.3d 886 (La. 11/14/14). The plaintiff law firm received a "spam" email from a sender in Japan purportedly seeking to retain the firm for debt collection purposes. In response, the law firm asked for information about the debt and proposed either a $275 hourly rate or a 25% contingency fee. Rather than answering the law firm's inquiry for information about the debtor, the purported client responded that the debtor had agreed to issue a check to the law firm for $350,000 and gave instructions for the firm to deduct its retainer fee once the check was received. Though the law firm never received any information about the debtor or the debt it was purportedly retained to collect, it did receive what appeared to be a cashier's check issued by the Bank of Nova Scotia in the amount of $350,000 payable to the law firm. At the time the law firm deposited the check into its trust account, both the law firm and the depository bank failed to recognize the check as a foreign check, and as a result the law firm's account was provisionally credited for $350,000. This provisional credit was reversed that night by the bank's proof department. The bank generated a letter to the law firm to that effect, but that letter was not received until six days later. A day before receipt of the letter, an associate in the law firm contacted an employee at the local bank branch and was told that the check "had cleared" and that the funds were in the account. The associate asked another attorney in the firm to authorize the wire, but this other attorney was hesitant to do so because she had heard of scams targeting attorneys. After being again assured on the telephone by the bank employee that the funds were in the account, the law firm authorized a wire for $349,175, deducting $825 for its charges for its services. However, the law firm never accessed its account records online to verify that the funds were in its account and never informed the bank employee that the check was a foreign check. The next day, the law firm received the bank's notification letter, and a day later the bank's branch manager informed the firm that the Bank of Nova Scotia had verified that the check was counterfeit. Two of the attorneys from the law firm then went to the bank to speak to the employee, who admitted telling the attorneys previously that the check had cleared. The law firm then brought suit against the bank for negligent misrepresentation.

At the close of the trial, the judge ruled from the bench in favor of the law firm finding the case to be a "straightforward negligent misrepresentation and detrimental reliance case." The trial judge not only granted judgment for the amount of the wire but also attorneys' fees of $90,000 on the basis of a finding that the requests for admissions propounded by the law firm were not properly supplemented when appropriate. The court of appeal reversed the entire award.

To prevail on a negligent misrepresentation claim, there must be a legal duty on the part of the defendant to supply correct information, and the plaintiff's damages must result from his justifiable reliance on the defendant's misrepresentation. Similarly, a claim of detrimental reliance requires proof of justifiable reliance on the representation as well as a change in position to one's detriment because of the reliance. In this case, there was no written agreement establishing a fiduciary relationship, as contemplated by R.S. 6:1124. However, the legislature, in enacting R.S. 6:1124 did not intend to totally immunize banks from all legal duties in their relationships with customers and third parties. The case of <u>In re Succession of McKnight</u>, 768 So.2d 794 (La. App. 2d Cir. 2000) held a bank liable under a theory of negligent misrepresentation where it had failed to provide correct information when advising its customer on how to open a joint account in order to allow for the disbursement of the account funds to the plaintiff upon the customer's death.

In this case, however, the information sought from the bank employee was equally available to the law firm by accessing its trust account online. Rejecting the law firm's arguments that the bank's deposit account rules established a legal duty on the part of the bank to exercise ordinary care, the court found that both parties erred in failing to recognize the check as a foreign check. Regardless of the error on the part of the bank's teller, the bank discovered the error and reversed it that very same day. The bank's notification letter was not mailed until four days later, but according to the deposit account rules all notices to the customer are deemed effective when mailed. Moreover, the deposit correction would have appeared on the law firm's online account well before receipt of the notification letter. By logging onto its online banking account, the law firm could have seen the very same thing anyone at the bank would have seen in checking the law firm's account, namely, that the deposit error had been corrected and the funds were not available in the account. Thus, the law firm failed to prove the element of justifiable reliance required to recover for either negligent misrepresentation or detrimental reliance. There was no duty on the part of the bank to inform the law firm as to whether the foreign check had cleared nor did the bank breach any duty with regard to the handling of the check. The court then pointed out that there were "numerous red flags" in the purported representation that should have put the law firm on notice that a scam was afoot. The law firm was in the best position to protect itself from the loss it suffered at the hands of the scam artist.

C. Breach of contract.

1. **<u>PAF, Inc. v. Regions Bank</u>, 14-195 (La. App. 5th Cir. 9/24/14); 150 So.3d 477.** A 1991 real estate purchase agreement between the plaintiff and a

predecessor to the defendant bank provided that the plaintiff would be permanently relieved of all service charges on all of its bank accounts as a condition of the sale. Five years later, the predecessor bank was acquired by the defendant, and eleven years after the acquisition, the defendant bank began charging the plaintiff service charges. When this was brought to the bank's attention, the bank contended that it was entitled to charge for "miscellaneous charges" which were different from "service charges." The plaintiff then closed its accounts and brought suit against the bank for breach of contract. At trial, the bank's treasury management officer testified that, in the banking industry, service charges include fees for monthly account maintenance, checks, debits, credits, deposits and the like, and miscellaneous charges include fees for overdrafts, returned checks and stop payments. Holding that the bank had breached its contractual obligations, the trial court ordered the bank to reimburse $13,000 in charges. The court of appeal reversed.

Under the circumstances of the case, since the two contracting parties were business entities one of which was a bank, the court found that the parties intended the technical meaning of "service charges" as used in the banking industry. The trial court had apparently based the amount of its award on testimony from the plaintiff's expert witness, who did not distinguish between service charges and miscellaneous charges. Thus, the trial court's award of damages must be reversed. The court of appeal also found specific performance to be impracticable because it would require the re-establishment of a contractual relationship between the parties. Since the plaintiff voluntarily terminated the purchase agreement when it voluntarily closed its bank accounts, the bank no longer had an enforceable obligation and specific performance was unavailable. However, the court opined at the end of its opinion that, while it could not compel specific performance, "we offer the remedy of specific performance in the event the plaintiff chooses to re-establish its relationship with the bank, in which event the bank accounts previously subject to the agreement would again be subject to the agreement as interpreted." Judge Liljeberg concurred, objecting that the last two sentences of the court's opinion "offering" the remedy of specific performance was an inappropriate advisory opinion. Moreover, if the plaintiff were to re-establish a relationship with the bank, more information would be required before the court could determine whether the accounts would be subject to the 1991 agreement.

2. **Ceasar v. Chase Bank, 2014-899 (La. App. 3d Cir. 2/11/15); 2015 WL 567306.** After sending prior notice to a depositor of its intent to do so, the defendant bank closed the depositor's checking account. The depositor then brought suit against the bank for breach of contract that allegedly occurred when the account was closed without notice. The trial court granted summary judgment in favor of the bank, and the court of appeal affirmed. At the hearing on the motion for summary judgment, the depositor attempted to introduce into evidence a document he claimed was a statement generated by

the bank "that showed that they messed up his checking account." The trial court properly excluded this document on the basis that it was not authenticated as a genuine bank record for the bank account. Moreover, the trial court correctly held that the depositor had failed to make a prima facie case for breach of contract. Though the depositor alleged that his account was closed without notice, the record established that written notice, as required by the account agreement, had been mailed to the depositor's mailing address twelve days before the account was closed and had been delivered to the statement mailing address six days before the account was closed. Thus, there was no issue of fact regarding the bank's compliance with the notice requirements of the governing account agreement.

XI. Professional responsibility.

A. Title insurance claims.

In the matter of West Feliciana Acquisition, L.L.C., 744 F. 3d 352 (5th Cir. 2014). A mortgagee that had obtained a mortgage from a troubled paper mill sent the mortgage to a title company for purposes of recordation but failed to attach legal description. The title company then recorded the mortgage without a description of the mortgaged property and issued a policy of mortgagee title insurance. When the absence of the legal description was discovered, the title company apparently resolved the problem about six weeks later. The paper mill continued to suffer financial problems and, acting on advice of its counsel that it owed a fiduciary duty to its unsecured creditors to file for bankruptcy within 90 days after the corrected recording, the mortgagor applied for Chapter 11 relief. Though the validity of its mortgage was never adjudicated, the mortgagee brought suit against the title company and title underwriter based on both the title insurance policy and a general negligence claim. The district court granted summary judgment in favor of the defendants, and the court of appeals affirmed.

Under the title policy, the underwriter contracted to indemnify the mortgagee for loss but only in the event the loss resulted from a failure of title. The mortgagee's title to the paper mill never failed and, on the contrary, its title was preserved through the title company's correction efforts. Thus, it is impossible for any loss to be attributed to a failure of title and thus be covered by the policy. The court also rejected the mortgagee's arguments, based on Citicorp Savings of Illinois v. Stewart Title Guaranty Co., 840 F. 2d 526 (7th Cir. 1988), that the title policy was breached at the time the loan was made because that is when the title of the mortgage became voidable. The court observed that Citicorp's holding that a title policy actually guarantees to the lender that its mortgage is valid has been rejected by many other courts. Finally, the court of appeals held that the district court had correctly dismissed the negligence claims for lack of proof of causation. Not only had the mortgagee failed to demonstrate that the title defect was a cause in fact of the ultimate financial failure of the paper mill, legal causation is ultimately a question of policy as to whether a particular risk falls within the scope of the duty. In this case, the defendant's duty to the mortgagee was defined by the title policy, which simply provided for indemnity against actual loss and not a guarantee of the effectiveness of the mortgage or the property's fair market value.

B. Prescription.

Loan Partners, LLC v. PTC Family Investments, LLC, 2014-0582 (La. App. 4th Cir. 11/26/14); 157 So. 3d 771. In connection with purchase money financing to be provided by a savings and loan association, the buyer was required to use the services of a specific title company, which was engaged to perform the title search. Five years after the sale, the holder of a recorded mortgage that had not been discovered during the course of the title search filed suit to enforce the mortgage against the buyer, which then filed third-party demands against the title company and its employee, the attorney who had performed the title search. The trial court granted the attorney's exception of peremption on the ground that more than five years had elapsed since the alleged malpractice, and the cause of action was therefore perempted pursuant to the attorney malpractice statute, R.S. 9:5605. The trial court, however, denied the exception of no cause of action filed by the title company, on the ground that the attorney malpractice statute applied only to the attorney and not to his employer, which was an entity not engaged in the practice of law. The title company then filed an exception of no cause of action, arguing that the buyer ceased to have a cause of action against it because the allegations made by the buyer arose from the alleged malpractice of the attorney and, since those claims were perempted, the cause of action against the title company was likewise extinguished. The trial court sustained the exception of no cause of action, and the court of appeal affirmed.

A solidary obligor may raise against the obligee defenses that arise from the nature of the obligation or that are common to all the solidary obligors, but he may not raise a defense that is personal to another solidary obligor. The protection provided to an attorney under R.S. 9:5605 is not personal to the attorney. Since the claims against the title company were based upon the attorney's alleged legal malpractice, the attorney malpractice statute therefore creates a defense of no cause of action that is available to the attorney's employer.

C. Course and scope of employment.

Webb v. Webb, 14-422 (La. App. 5th Cir. 11/25/14); 165 So. 3d 157. To secure a line of credit to his law firm, an attorney allegedly forged the signature of his wife on a mortgage of a community immovable and then, without the wife being present, presented the document for notarization to another attorney in his firm. When the first attorney's wife discovered the mortgage upon the community property, she filed suit seeking damages against the law firm for the actions of its employee, the second attorney who had notarized the mortgage. The law firm moved for summary judgment contending that, while the second attorney may have notarized this document in the course of his employment as a notary, it was not notarized in the scope of his employment with the law firm. The trial court granted the law firm's motion for summary judgment, but the court of appeal reversed.

Under Louisiana law, an employer is answerable for the damage occasioned by its servant in the exercise of the functions in which the servant is employed. An employee is acting within the course and scope of his employment when the employee's action is "of the kind that he is employed to perform, occurs substantially within the authorized limits of time and space, and is activated at least in part by a purpose to serve the employer." In this case, the court was not persuaded by the notary's self-serving affidavit that he did not notarize the mortgage in the scope of his employment with the law firm. The notary admitted that he notarized the document at his office during business hours without witnessing the signing of the document. There is, at least, a genuine issue of material fact as to whether his actions were of the kind he was authorized to perform, substantially within the authorized limits of time and space, and activated at least in part by a purpose to serve his employer.

D. Disciplinary actions.

In re Bercier, 2014-2352 (La. 3/27/15); 164 So. 3d 170. The Supreme Court ordered a two-year suspension for violations of the Rules of Professional Conduct arising in the course of two different matters. In one of these matters, the decedent bequeathed an immovable to the attorney and, following the death of the decedent, the attorney wrote to the holder of a collateral mortgage indicating that it should cease any collection efforts because the balance would be paid upon completion of the succession. The attorney later arranged for this property to be sold to a third person, without disclosing the existence of the collateral mortgage and without using the proceeds from the sale to satisfy the obligation secured by the collateral mortgage. After first representing to the buyer that he was acting as the attorney for the decedent's heirs, he never advised the buyer that he was the sole legatee or was acting other than as an attorney. The Supreme Court accepted the hearing committee's finding that the respondent engaged in dishonest behavior when he knowingly deceived the buyer by failing to disclose the collateral mortgage despite having full knowledge of its existence. The respondent also deceived the holder of the collateral mortgage for his own personal benefit, by failing to disclose his interest as the sole legatee and delaying foreclosure upon the mortgage by representing that the debt would be paid upon completion of the succession proceedings.