RECENT DEVELOPMENTS IN LOUISIANA LAW

RELATING TO

SECURITY DEVICES AND OTHER MATTERS OF INTEREST TO BANKS

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A. Mortgages.

1. Improper release.

Urban Property Company of Louisiana v. Pioneer Credit Company, 04-246 (La. App. 5th Cir. 8/31/04); ___ So. 2d ___; 2004 WL 1960013 (not yet released for publication in the permanent law reports). The holder of a mortgage note assigned it to Urban, delivering physical possession of the original note to Urban at that time. Thereafter, the assignor sold its remaining portfolio of other notes to Pioneer. Despite the prior assignment to Urban, Pioneer executed a "lost note" affidavit which was used to cancel the mortgage securing the note that had been assigned to Urban. After the mortgagors defaulted on the note, Urban, finding that its mortgage had been canceled on the basis of Pioneer's affidavit, brought suit against Pioneer for the balance of the note. After the trial court decided that it would simply award Urban half of its demand, rather than resolving the complex legal issues presented by the case, the court of appeal, in an opinion reported at 845 So. 2d 1227, found on its own notice that Urban had failed to state a cause of action because it had not yet suffered any actual damages. After remand, Urban amended its petition to state that the mortgagors did not have income subject to garnishment nor sufficient assets with which to satisfy any deficiency judgment, and that suit upon the note would thus amount to a vain and useless effort. Pioneer urged an exception of no cause of action, which was granted. The court of appeal affirmed on the ground that Urban's allegations about the insolvency of the makers of the notes still did not establish that Urban sustained any damages it could recover from Pioneer. Under the law, where an interested party has not given its consent, the erasure of the inscription of a mortgage cannot be effective. Urban has not been deprived of its mortgage because the law allows the reinstatement of a mortgage that has been erroneously cancelled. There was no allegation that Urban had taken any steps to reinstate and enforce the mortgage. Thus, the court found that it still had not alleged any actual damage that it could recover from Pioneer.

2. **Assignments**.

<u>**Ginger Mae Financial Services, L.L.C. v. Ameribank, FSB**</u>**, 2002-2492 (La. App. 1st Cir. 09/26/03); 857 So. 2d 546.** Under a correspondent loan purchase agreement, GMFS purchased a loan originated by Ameribank. The correspondent loan purchase agreement contained a warranty that all documents submitted to GMFS were genuine and that all representations made with respect to the loans were true and correct. The agreement also required Ameribank to repurchase any mortgage loan in the event that a representation or warranty relating to that loan should prove to have been inaccurate as of the date made. An addendum to the agreement contained a further warranty that all "Documents" (defined to be all loan closing documents) would be accurate, correct, complete, valid, binding and enforceable." A default occurred under the loan, and GMFS discovered that the tax returns submitted with the loan package had never been filed with the Internal Revenue Service. GMFS brought suit seeking to compel Ameribank to repurchase the loan. Summary judgment was granted and affirmed despite Ameribank's contention that the addendum applied only to loan closing documents prepared by the closing bank. The court agreed with the construction placed upon the contract by GMFS; the addendum merely reinforced Ameribank's obligations in the agreement and clarified the main contract provisions. Under the clear terms of the contract, Ameribank warranted that all information it submitted to GMFS was genuine.

B. **Bond for deed.**

1. <u>**Seals v. Sumrall**</u>**, 2003-0873 (La. App. 1st Cir. 9/17/04); 2004 WL 2071520 (not yet released for publication in the permanent law reports).** In 1993, the parties entered into a bond for deed contract whereby the vendee agreed to pay the vendor the sum of $40,000 at the rate of $446.35 per month until a total of $36,000 had been paid in full. In 1995, the same parties entered into a second bond for deed contract relative to the same immovable property, whereby the vendee agreed to pay to the vendor the sum of $33,897.78, at the rate of $446.35 per month until the full sum of $33,897.78 had been paid in full. Neither contract specified the number of installments nor mentioned interest. Nor did the second contract state that it superseded the prior contract. After realizing that she had paid the full $33,897.78 specified in the second bond for deed, the vendee brought suit for specific performance of the vendor's obligation to deliver title and for recovery of a small

overpayment she had allegedly made. The vendor reconvened, claiming that the true intent of the parties was that the deferred purchase price be payable with interest at the rate of 8.5%. Moreover, since the vendee had stopped making payments prior to the time that the full purchase price with interest had been paid, the vendor sought dissolution of the bond for deed contract. The trial court found the bonds for deed to be unambiguous and granted judgment in favor of the vendee ordering the transfer of title to the immovable property. The court of appeal reversed, essentially restoring the parties to the *status quo ante*. According to the court, since the 1995 contract contained no language evidencing an intent to set aside the 1993 contract, the terms of the earlier contract were relevant. That contract reflected a purchase price of $40,000, but seemingly provided only for the payment of $36,000. This constituted an ambiguity as to the price agreed upon by the parties. Further ambiguity resulted from the absence of a rate of interest and/or a term for the payment of monthly installments. Considering the introduction of parol evidence, the court found that the testimony overwhelmingly demonstrated that the parties originally intended a down payment of $4,000 with the balance to be deferred in monthly installments over a period of 10 years at 8.5% interest. Accordingly, the trial erred in ordering specific performance.

With regard to the vendor's reconventional demand, the court observed that the seller in a bond for deed contract is not entitled to retain all monies paid by the buyer as liquidated damages, despite contract provisions to that effect. A contract term expressly providing for the forfeited payments to be considered as rental will be enforced when the evidence reflects such payments are not in excess of the fair rental value of the property. Here, however, the contract did not provide for the retention of these amounts as rental, nor did the record reflect the fair rental value of the property. With regard to the prayer for judicial dissolution, the court pointed out that the decision of whether to allow the dissolution or not, or whether to grant further time, is left to the discretion of the court. Considering the ambiguity found in the price of the bond for deed contracts, and the fact that the vendee had made payments through the time she filed suit for specific performance, the court declined to allow dissolution of the contracts and instead afforded the vendee additional time to perform. This result was appropriate for the additional reason that there was no evidence that the vendor had given the notice required by La. R.S. 9:2945, which requires the seller in a bond for deed contract to have the escrow agent serve notice upon the buyer to perform within 45 days before the seller seeks dissolution.

2. **<u>Berthelot v. The Le Investment, L.L.C.</u>, 2002-2054 (La. App. 4th Cir. 1/21/04); 866 So. 2d 877.** In a transaction involving a hotel, the parties executed a document entitled "Lease Purchase Agreement" requiring a non-refundable payment of $500,000 plus a monthly payment of $30,000 for a term of 25 years. The document also contained a section entitled "Purchase Agreement" requiring a non-refundable down payment of $500,000 with the $3,750,000 balance of the purchase price to be paid at 8.5% per annum interest in monthly installments. The document further provided that if the sale were consummated at the end of the 25 year term, a final act of sale would be passed conveying title to the property to the lessees. The lessees paid both the down payment and all monthly installments as they fell due through the time of suit but allegedly failed to comply with a provision of the agreement requiring that the property be maintained in the condition required to meet the requirements of a Quality Inn franchise. Accordingly, the lessor filed a rule for eviction, and the trial court granted judgment cancelling and termination the lease and ordering its erasure from the public records. The court of appeal vacated the judgment.

Observing that Louisiana courts have routinely treated agreements similar to the one at issue as a bond for deed contract, regardless of the characterization given them by the parties and regardless of whether the contract omits protections designed for the benefit of a party who does not protest their absence, the court found that the agreement had the legal effect of a bond for deed despite the lease and rental language contained in it. The only basis for default mentioned in the bond for deed statute is the failure to make required payments. Resorting to equity to resolve the case, the court found there to be nothing offensive or against public policy about having maintenance requirements in contracts affecting real property. However, the trial court erred by allowing the plaintiff to proceed by means of the summary eviction proceeding when the basis for default was only failure to comply with a maintenance requirement, rather than nonpayment of the monthly installments. The plaintiff should have been required to file an ordinary suit allowing the defendant a full trial on all defenses and offsets. Moreover, in a failed bond for deed transaction, the jurisprudence establishes that the purchaser is entitled to the return of all monies paid on the purchase price subject to a deduction for the fair rental value of the property during the period of purchaser's occupancy. In this case, to allow the plaintiff to retain all monies paid on the purchase price would be inequitable and unreasonable. Since the court of appeal was unable to determine the fair market rental value of the property, the judgment was vacated and the matter remanded for trial on the merits.

C. Notice of lis pendens.

1. **Mortgage Electronic Registration Systems, Inc. v. Bynum, 2003-1671 (La. App. 1st Cir. 5/14/04); 879 So. 2d 807.** After obtaining the conviction of a criminal defendant for money laundering and Medicaid fraud, the State instituted forfeiture proceedings against the defendant's home under the Medical Assistance Programs Integrity Law, La. R.S. 46:437.1. Two weeks after being served with the forfeiture petition, the criminal defendant executed a quitclaim deed, by which he transferred to a third person whatever right, title and interest he had in his home for the stated consideration of $1. This quitclaim deed was immediately recorded in the conveyance records. Another two weeks later, the transferee borrowed $151,000 from a mortgage company, granting the mortgage company a mortgage upon the property as security for the debt. Despite the earlier quitclaim deed, the criminal defendant and the transferee executed a cash sale deed by which the property was conveyed to the transferee for the stated consideration of $178,000. The transferee participated in this process in order to "help out" the criminal defendant and was paid $5,000, with the understanding that the house would be repurchased within a year. There was a delay of over a month before the second cash sale deed and the mortgage were properly recorded. In the meantime, the State had filed in the mortgage records a notice of lis pendens, which gave a full legal description of the property and the title and docket number of the State's forfeiture petition but did not list the record owner of the property. The following year, when the mortgage company instituted foreclosure proceedings upon its mortgage, the State intervened, seeking a determination that the sale from the defendant was a simulation and that the State's rights to forfeiture outranked the mortgage.

   Under the Medical Assistance Programs Integrity Law, the State is granted a privilege on all property owned by a person from whom recovery is due, and the privilege is effective as to third parties upon filing a notice of lis pendens in accordance with law. The statute further provides that, if property is transferred to a third party to avoid paying a recovery, the privilege ranks ahead of any other privilege, mortgage or security interest on the transferred property. The trial court ruled in favor of the State, holding that the Medical Assistance Programs Integrity Law supersedes the public records doctrine.

The court of appeal affirmed, but on different grounds. According to the court, the form prescribed by law for a notice of lis pendens is found in La. C.C.P. art. 3752, which requires that a notice of lis pendens be filed in the mortgage records of the parish where the property is located. Thus, the ranking of the State's privilege is clearly subject to the public records doctrine. However, La. C.C.P. art. 3752 contains no requirement that the notice of lis pendens name the record owner of the property. Instead, only a description of the property affected must be included. Since the State's notice of lis pendens complied with all of the requirements set forth in La. C.C.P. art. 3752 and since the State's notice of lis pendens was effective as to third parties prior to the date of recordation of the competing mortgage, the State's privilege had priority. The court distinguished Cardinal Federal Savings Bank v. Corporate Towers Partners, Ltd., 629 So. 2d 462 (La. App. 3d Cir. 1993), a Third Circuit case which had dealt with the issue of whether a notice of lis pendens is invalid for failure to name the record owner of the property, on the ground that it was unclear whether the Cardinal court had concluded that the notice of lis pendens in that case was invalid because it failed to name the true owner of the property or because it had been filed only in the suit records.

2. **Williams v. Williams, 2003-2089 (La. App. 1st Cir. 6/25/04); ____ So. 2d ____ 2004 WL 1418401 (not yet released for publication in the permanent law reports).** In 1996, the plaintiff filed suit to have an alleged donation between the parties set aside on the ground of ingratitude. The plaintiff filed a notice of lis pendens in the conveyance records of Iberville Parish, the parish where the property was located. A year later, the defendant sold the property at issue to a third party. Afterward, the defendant filed an exception of failure to join an indispensable party (*i.e.*, the transferee), which was denied by the trial court. After trial on the merits, the trial court rendered judgment revoking the donation. On a prior appeal, the appellate court concluded that the transferee was an indispensable party and reversed the judgment, remanding for further proceedings. After remand, the transferee filed an exception of no cause of action, contending that the notice of lis pendens was ineffective because it had not been recorded

in the mortgage records. The trial court sustained the exception, and the court of appeal affirmed. The purpose of a notice of lis pendens is to give effective notice to third persons of the pendency of an action affecting title to immovable property. Proper recordation of the notice of lis pendens makes the outcome of the suit of which notice is given binding upon third parties. La. C.C.P. art. 3752 requires that the notice of lis pendens be recorded in the mortgage office of the parish where the property to be affected is situated. The court rejected the plaintiff's contention that "mortgage office" means "the office of the clerk and recorder of mortgages" of the parish involved. Under the plain wording of the statute, as well as prior Supreme Court precedent, the words "mortgage office" mean registry in the mortgage records. Accordingly, effective notice is achieved only upon registry in the mortgage records. The fact that La. R.S. 9:2721, providing that no acts concerning immovable property shall have effect against third parties until deposited in the office of the parish recorder or the register of conveyances, does not change the result and does not prevail over the more specific provisions of the Code of Civil Procedure.

D. Private Works Act.

1. **<u>Voelkel Construction v. Recorder Of Mortgages of East Baton Rouge Parish</u>, 2002-1153 (La. App. 1st Cir. 06/27/03); 859 So. 2d 9.** The owner's notice of contract described the property as located at "SWC Airline Road and Highland Highway, Baton Rouge, Louisiana." The documents attached to the notice of contract referred to unrecorded site work drawings. More than six months after the work had been completed and the owner was open for business, a concrete supplier filed a lien under the Private Works Act, describing the property as simply "Albertson's Number 2747, Airline at Highland, East Baton Rouge Parish, Louisiana." The court held that the claim of privilege was insufficient because it contained even less than a municipal address, which under La. R.S. 9: 4831C is itself insufficient to perfect a privilege. Nor did the incorporation by reference of the site work drawings into the notice of contract supply the necessary description. Moreover, since the original notice of contract did not contain the proper legal description, the concrete supplier had sixty days from substantial termination, rather than sixty days from filing of a notice of termination (no notice of termination was ever filed), within which to file its claim. Thus, the concrete supplier's lien was also untimely.

2. **<u>Paul Hyde, Inc. v. Richard</u>, 2003-1413 (La. App. 4th Cir. 9/10/03); 854 So. 2d 1000.** In a suit to enforce the arbitration clause of a residential construction contract, the homeowner moved to dissolve the contractor's statement of privilege on the ground that it was filed before substantial completion of the work and therefore was not filed "within 60 days after the filing of the notice of termination or substantial completion of the work" as required by the Private Works Act. The trial court ordered the cancellation of the lien, and the court of appeal reversed. Even though the Private Works Act is in derogation of general contract law and must be strictly construed, it should not be construed in such a manner to defeat the purpose of the statute. The purpose of the Private Works Act would be thwarted by requiring those who are no longer performing work on a project to exercise considerable diligence to ascertain when substantial completion occurs in order to be able to file their lien claims within a narrow 60-day window. Conversely, holding that a lien may be filed when the claimant's participation in the project ends, although before substantial completion, promotes the object of the Private Works Act and does not lead to any negative consequences for the owner.

3. **<u>Nu-Lite Electrical Wholesalers, LLC v. Alfred Palma Inc.</u>, 2003-1167 (La. App. 1st Cir. 4/2/04); 878 So. 2d 660.** The plaintiff supplied materials to an electrical subcontractor which, after experiencing difficulties on the job, was replaced with another electrical subcontractor. After a while, the original electrical subcontractor stopped coming to the job site. A few months later, the plaintiff filed a statement of privilege under the Private Works Act for materials furnished to the original electrical subcontractor. Granting summary judgment in favor of the owner, the trial court concluded that the lien claim was untimely because it had not been filed within 60 days after the last work performed by the original electrical subcontractor. The court of appeal reversed. Though the Private Works Act does not speak to the abandonment of work by a subcontractor, it does define a "work" as a single, continuous project for the improvement or construction of an immovable or its component parts. Thus, a work constitutes the entire continuous project, and not one portion of the project. Accordingly, "abandonment of the work" for purposes of commencement of the 60-day lien filing period refers to the abandonment of the entire single, continuous project. Since the plaintiffs' lien claim was filed within 60 days after the second electrical subcontractor finished the work, it was timely.

II. Security interests in movable property.

A. Creation/perfection.

1. **<u>B. G. Wire Rope & Slings, Inc. v. Dyson</u>, 2003-2390 (La. App. 1st Cir. 9/17/04); ___ So. 2d ___; 2004 WL 2072051 (not yet released for publication in the permanent law reports).** In 1992, a judgment creditor assigned to Community Bank, as security for two specified promissory notes, all of its rights under a previously existing judgment. The assignment authorized the judgment debtors to make direct payment to the bank. A few years later, the judgment creditor apparently assigned the same judgment outright to the plaintiff, which thereafter filed a timely suit to revive the judgment. The judgment debtors resisted the revival suit with an exception of no right of action, claiming that Community Bank had assigned the judgment in 1997 to them and that the original judgment creditor executed at that time a satisfaction of judgment. After the trial court sustained the exception, the plaintiff sought a new trial on the basis of an affidavit from the attorney who had prepared the 1992 assignment of judgment to Community Bank. The reason that the affidavit was not produced earlier was that the plaintiff's counsel thought that the words "as additional security" in the assignment were clear enough, and he did not realize the intent of the document would be at issue. The motion for new trial was denied.

   The court of appeal affirmed. The words "additional security" cannot overcome the plain meaning of the document read *in toto*. Here, the bank was fully authorized to give receipt in its own name for all payments made under the judgment and had the immediate right to collect the judgment, rather than having to wait until a default by the assignor. Thus, ownership of the judgment was assigned to Community Bank at the time of transfer as a source of payment of the loan. Without a valid assignment, the plaintiff had no right of action to revive the judgment. Judge Downing dissented, finding that the unambiguous language of the document reflected it to be a security device. To interpret the assignment otherwise would give the assignee the right to double recovery of the assignor's indebtedness. Once the secured obligation was paid, the security interest in favor of the bank should have been released.

2. **<u>Gahagan v. Thornton</u>, 03-851 (La. App. 3d Cir. 12/10/03); 861 So. 2d 813.** Gahagan made a $5,000 loan to the defendant upon the

security of the pledge of the defendant's 1978 and 1979 Super Bowl rings. The rings were physically delivered by the defendant into Gahagan's possession. A few months later, a finance company controlled by Gahagan made an additional loan to the defendant upon the security of a pledge of the same Super Bowl rings. After the defendant had applied for bankruptcy relief, Gahagan and the finance company filed an *in rem* suit seeking the seizure and sale of the rings to satisfy both debts. The defendant responded with an exception of no right of action, contending that the loans were pledged only to the finance company, and not Gahagan. The trial court granted this exception on the ground that delivery of the pledged items and continued possession were essential to maintain a pledge. According to the trial court, the rings were delivered to the finance company at the time of the second loan and placed in a lock box at a bank. Even though the bank ultimately returned the rings, the finance company's subsequent delivery of the rings to Gahagan did not avail him, because that delivery was not made by the defendant. The court of appeal reversed. Since both transactions occurred after January 1, 1990, they were governed by Chapter 9 of the Louisiana Commercial Laws, which requires the parties to enter into a security agreement and file a financing statement. Under Section 9-609, one means by which a secured party may take possession of the collateral securing his interest is pursuant to judicial process. There was nothing in the record indicating that Gahagan did not follow the Louisiana Commercial Laws in securing his interest in the two Super Bowl rings.

3. **Byrnside Drilling Company, Inc. v. Armour, 38,073 (La. App. 2d Cir. 1/30/04); 865 So. 2d 310.** In 1989, Byrnside Drilling Company stacked a drilling rig on a tract of land that it thought belonged to the Jaycees or the Masons. In actuality, the land belonged to Cortez Burns Armour, who, after the rig had remained on her property for a year, filed suit seeking rental payments for the use of her land and enforcement of a purported lessor's lien. When attempts to serve Byrnside were unsuccessful, a curator ad hoc was appointed, judgment was rendered in Mrs. Armour's favor and the drilling rig was sold under a writ of fieri facias in July of 1990. A month later, Byrnside returned and, finding the rig gone and learning of the judgment and sheriff's sale, filed a petition for damages against Mrs. Armour and the vendee at the sheriff's sale. In 1992, the First National Bank of West Monroe intervened in the suit, claiming to hold a priming chattel mortgage that was executed prior to the effectiveness of Chapter 9 of the Louisiana Commercial Laws. The matter went to trial in 1998, and

Mrs. Armour died in 2000. When evidence had still not been concluded by June of 2002, the parties to the suit filed petitions for declaratory judgment seeking a determination of the validity of the sheriff's sale. The trial court held that Byrnside could not complain about lack of notice of the sale since it had taken no steps to make itself known by changing its registered address. With regard to the chattel mortgage, the court held that the mortgagee was entitled to notice reasonably calculated to apprise it of the sheriff's sale if its identity was reasonably identifiable. Since the chattel mortgage was filed only in Ouachita Parish, the trial court held that the mortgagee did not take steps to make itself reasonably ascertainable and should have taken steps to record the chattel mortgage in the parishes in which the rig was located.

The court of appeal affirmed, though on different grounds. The contrasting descriptions of the rig in the proces verbal from the sheriff's sale and in the recorded chattel mortgage were widely different, each containing some specific and other very vague entries, none of which matched. In order to enforce a lien against movable property, the identity of the property must be capable of ascertainment. If that identity is lost by uniting or commingling the movable with another movable, the lien is automatically destroyed. Thus, the chattel mortgage in the present case could not be enforced against the property sold. Even assuming that the drilling rig described in the chattel mortgage and the drilling rig sold at the sheriff's sale were one and the same, the court held that the location of the rig as specified in the chattel mortgage ("Smith Road in Ouachita Parish") was not only vague but also incorrect, since the rig was no longer located in Ouachita Parish. A defect in the specified location of a movable fails to put third parties on notice that the property described as being located in one parish is actually located in another. Moreover, an inaccurate specification of location in a mortgage document is not cured by recording the document in all 64 parishes. When the location is inaccurately stated, unsuspecting third parties are lulled into a sense of (false) security. Thus, the incorrect specification of a location on Smith Road in Ouachita Parish was fatal to the efficacy of the chattel mortgage against third parties.

B. Priority.

1. Tetra Applied Technologies v. H.O.E., Inc., 2003-1523 (La. App. 3d Cir. 5/26/04); 878 So. 2d 708, 53 UCC Rep. Serv. 2d 650. A contractor granted Hibernia a security interest in all of its present and future accounts receivable, perfected by a UCC-1 financing statement. Thereafter, the contractor entered into a contract to construct four wireline skid units. In furtherance of this project, the contractor purchased various supplies and equipment from certain trade creditors. Under the terms of the contract between the contractor and its customer, the customer had the right to withhold payment from the contractor in the event any subcontractors filed liens or claims against the customer or its property. Following the contractor's default and after discovering that many of the contractor's trade creditors had not been paid, the customer instituted a concursus proceeding with respect to the remaining contract balance. Reasoning that the customer stood in the shoes of the contractor and was a depositary and keeper of the funds remaining due to the trade creditors, the trial court found the claims of the trade creditors superior to that of Hibernia.

The court of appeal reversed, ordering summary judgment in favor of Hibernia. Under Chapter 9 of the Louisiana Commercial Laws, Hibernia had a perfected security interest in the accounts and their proceeds. To provide an additional warning of Hibernia's ownership interest in the collateral, the contractor stamped each invoice with a notice that the account had been assigned to Hibernia. These actions clearly put the trade creditors on notice of Hibernia's security interest in and ownership of the debtor's accounts receivable. The provision of the contract allowing the customer to divert payment to the trade creditors did not rob the amounts owing to the contractor of their status as accounts receivable. At the time a security agreement was signed, the contractor had already lost ownership of the collateral and therefore no provision in the contract could grant the trade creditors an interest in the accounts. The trade creditors might have had superpriority status had they obtained and perfected a purchase money security interest in the goods they provided. Since they did not do so, Hibernia, as the only claimant with a perfected security interest, had priority.

2. **<u>A & B Bolt and Supply Inc. v. Standard Offshore Services, Inc.</u>, 2002-1823 (La. App. 1st Cir. 06/27/03); 858 So. 2d 509.** A judgment creditor brought garnishment proceedings against Hibernia National Bank, which answered the garnishment interrogatories admitting that it held $8,000 in a bank account in the judgment creditor's name but claiming to hold "rights of pledge, compensation and offset against all funds on deposit" as security for a defaulted promissory note. The

judgment creditor then filed a rule for judgment pro confesso, at the hearing of which the bank introduced into evidence the note and a commercial security agreement by which the judgment debtor had granted the bank "a continuing security interest in any and all funds that Grantor may now and in the future have on deposit with Lender." The trial court found in favor of Hibernia, and the court of appeal affirmed.

The judgment creditor's first contention was that its seizure became effective upon service of the garnishment interrogatories and that, in order for the bank to avail itself of the right of setoff under La. R.S. 6:316, it must first cause its privilege to be "perfected" by placing the judgment debtor in default. In this case, however, Hibernia's promissory note contained a clause creating a default in the event that the borrower should default under any other loan in favor of any other creditor. Thus, the Hibernia loan was in default at the time of seizure. Under La. R.S. 6:316, all that is required to trigger the provisions of the statute is that the depositor be in default; the notice requirement in that statute does not nullify the depository bank's right to statutory setoff if the notice is not provided. Rather, the notice requirement is designed solely to absolve the depository bank of liability to its depositor for returned checks if notice is mailed within the prescribed time. Additionally, the court noted that La. C.C.P. art. 2415 provides that, unless the seizing creditor files a motion to traverse within fifteen days after service of the garnishee's answer, any property of the judgment debtor in the possession of the garnishee is released from seizure. The seizing creditor did not do so in this case and thus, even if it had a valid adverse claim to the funds in the bank account, that claim was waived by its failure to file a motion to traverse in a timely manner.

In reaching its decision in this case, the court did not cite a single provision of Chapter 9 of the Louisiana Commercial Laws. The court expressly declined to follow Chrysler Credit Corporation v. Whitney National Bank, 798 F. Supp. 1234 (E.D. La. 1992)(a pre-UCC case), which had held that, in order to avail itself of the statutory setoff remedy, the bank must comply with the notice requirement of La. R.S. 6:316. While Louisiana courts will look to federal cases for guidance, those decisions are not binding.

C. Claims for damage to collateral.

1. **North American Fire & Casualty Co. v. State Farm Mutual Auto Ins. Co., 2003-300 (La. App. 3d Cir. 10/01/03); 856 So. 2d 1243.** The

plaintiff had issued a vendor's single interest insurance policy to a secured party holding a security interest in a motor vehicle. The debtor, who did not carry liability insurance, was then involved in an automobile accident in which the vehicle was damaged due to negligence of a third party. After paying the secured party for the damage sustained by the vehicle, the plaintiff then sought to bring a subrogation claim against the third party's liability insurer, which invoked the "no pay, no play" statute at La. R.S. 32:866. Summary judgment was sustained in favor of the third party liability insurer. Although the secured party had been damaged by losing the value of the collateral that supported the loan, there was no evidence of any contract between the liability insurer, the secured party or the tortfeasor, giving the secured party any right to recover from a tortfeasor who damaged the vehicle, nor was there any evidence demonstrating how the tortfeasor had any liability under La. Civ. Code art. 2315 to protect the secured party from the possibility that the person to whom it would lend money would fail to maintain liability insurance and would therefore not be permitted to recover the first $10,000 in property damage. Even if the plaintiff was subrogated to the rights of the secured party, the secured party had no rights against the tortfeasor to which the plaintiff could be subrogated.

2. **<u>Merit Plan Insurance Company v. Desalvo</u>, 2003-1493 (La. App. 4th Cir. 3/24/04) 871 So. 2d 461.** When the debtor failed to maintain insurance on a vehicle as required by a security agreement, the secured party forced placed insurance that protected only the secured party. Thereafter, the automobile was damaged in a collision. The forced placed insurer then brought a declaratory judgment action against the driver of the other vehicle and its insurer, which responded with an affirmative defense under the "no pay, no play" provision of La. R.S. 32:866(a). Both parties moved for summary judgment. The forced placed insurer argued that damage had been sustained directly by the secured party in that capacity and that the secured party had no obligation to purchase or maintain liability insurance on the vehicle. In rejecting this contention, the court followed the Third Circuit's decision in <u>North American Fire & Casualty Co. v. State Farm Mutual Automobile Insurance Company</u>, 03-300 (La. App. 3d Cir. 10/1/03); 856 So. 2d 1233, holding that the secured party's insurer, like the secured party itself, does not have an independent cause of action against the tortfeasor.

III. Foreclosure/collection actions.

A. Executory process.

Banker's Trust Company of California NA v. Cooley, 2003-1942 (La. App. 1st Cir. 6/25/04); ____ So. 2d ____; 2004 WL 1418393 (not yet released for publication in the permanent law reports). Although unable to produce the original assignment by which it had acquired a mortgage note, the assignee of the note sought to enforce the mortgage by executory process, relying on La. C.C.P. art. 2635. That article, as recently amended, provides that it is "necessary only" for an executory process plaintiff to submit authentic evidence of certain specified items, not including assignments, and that the "requirement of authentic evidence is necessary only in those cases, and to the extent, provided by law." Although recognizing that this article does not specifically require authentic evidence of an assignment as a condition to the use of executory process, the court found this requirement to be well established in Louisiana law, citing the 1960 Official Comments to the article as well as caselaw that predated its legislative amendment.

The plaintiff also sought to rely on paragraph D of La. C.C.P. art. 2637 (added in 1987), which excuses the requirement of authentic evidence in the case of a name change, merger, purchase and assumption or similar disposition of a financial or lending institution. As presently written, this provision is the penultimate paragraph of the article, which was wholly re-written in 1989. Again, the court looked to the Official Comments, adopted in 1960, which had observed that the last two paragraphs of the article refer only to proving the identity of the defendant. (As originally written, the last two paragraphs of the article referred to heirs and succession representatives of a debtor.) Finally, the plaintiff sought to rely on La. R.S. 9:4422, which removes any requirement of authentic evidence of the assignment of a negotiable instrument *or* an instrument that would be negotiable but for a limitation of personal liability of the maker. Since that limitation was absent from the note in question, the court found that La. R.S. 9:4422 had no application. Thus, executory process was enjoined.

B. Assignments.

1. **Security National Partners, Limited Partnership v. Baxley, 37747 (La. App. 2d Cir. 10/29/03); 859 So. 2d 890.** Security National Partners filed ordinary foreclosure proceedings to enforce a collateral mortgage that ostensibly secured two hand notes, both executed in 1990, which it had acquired from Alaska Southern Partners. Alaska

had obtained these notes from the Resolution Trust Corporation following the failure of the original payee, Jonesboro Federal Saving and Loan Association; however, the notes contained no endorsement from the original payee. In 1996, the plaintiff and the mortgagors entered into a written modification and forbearance agreement with respect to the notes. In defense of the foreclosure suit, the mortgagors argued that the plaintiff had not proved that it was the holder of the hand notes or collateral note and that the notes had in any event prescribed. The trial court granted summary judgment in favor of the plaintiff and denied the exception of prescription. The court of appeal affirmed. Security National had presented sufficient evidence demonstrating that it was a "person entitled to enforce" the hand notes under La. R.S. 10:3-301. With respect to the mortgagors' contention that the plaintiff was not entitled to enforce the collateral mortgage note, the court observed that revised Chapter 9 of the Louisiana Commercial Laws applies to the sale of promissory notes, a transaction that gives rise to a security interest as defined in Chapter 9. Under La. R.S. 10:9-203(f), the creation of a security interest in a promissory also gives the assignee the right to any supporting obligation for the promissory note. Since the collateral mortgage note and its accompanying mortgage were clearly supporting obligations, they were transferred to the plaintiff along with the hand notes.

With regard to the exception of prescription, the court observed that both the collateral mortgage and the hand notes were payable upon demand and were therefore subject to liberative prescription of five years that commenced in 1990. However, the mortgagors admitted making a payment in 1993, as well as several payments pursuant to the 1996 modification agreement, the last of which occurred within five years before the date of filing of the suit. Thus, the hand notes had not prescribed. The court also observed that, under the "constant acknowledgment" rule, detention by the pledgee of a thing pledged serves as a constant acknowledgment of the debt and hence a constant renunciation of prescription. Since the collateral mortgage note was held in pledge continuously as security for the hand note indebtedness, the constant acknowledgment rule "serves to prevent the running of prescription on that note."

2. **<u>Credit Recoveries, Inc. v. Crow</u>, 37,913 (La. App. 2d Cir. 12/17/03); 862 So. 2d 1146.** In 1988, the defendant executed a promissory note payable to the order of The First National Bank of Shreveport or bearer. On an unspecified date, this note was assigned

to the plaintiff's order by Premier Bank, National Association (which, as even the defendant's filings in the suit indicated, appeared to be the successor by merger to The First National Bank of Shreveport). When the plaintiff filed suit on the note in 1999, the defendant was able to avoid summary judgment by urging that he had received a release from Premier Bank and that there was no longer any balance owing under the note. At trial, the plaintiff sought to introduce the original note, but the trial court sustained an objection to its admissibility, apparently reasoning that, since the lawsuit had been brought by someone other than the initial payee, the plaintiff had to prove its ownership of the note. Though the plaintiff's attorney later questioned the defendant about the debt, he did not ask the defendant whether the note that he had offered into evidence was the note the defendant had signed. At the close of the plaintiff's case, the defendant moved for involuntary dismissal, which the trial court granted. The court of appeal reversed. Under Article 902 of the Code of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to commercial paper to the extent provided by general commercial law. Under La. R.S. 10:1-201(20), a holder is the person in possession of an instrument if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if he is the identified person and is in possession. In this case, the note was originally bearer paper. If, at the time of the endorsement, Premier Bank was in fact the holder of the instrument, then the endorsement was effective to make the plaintiff the holder. If, on the other hand, Premier Bank was not the successor to the rights of The First National Bank of Shreveport, then its endorsement was merely an anomalous endorsement without effect. Either way, the plaintiff had the right to enforce the instrument, and the trial court abused its discretion by refusing to allow the note into evidence. The court should have allowed the note into evidence and then allowed the defendant to raise his defenses to the note.

3. **<u>Johnston v. Lloyds Insurance Co.</u>, 37,489 (La. App. 2d Cir. 08/20/03); 853 So. 2d 738.** The plaintiff, who was the son of the parties to a community property settlement, brought suit against a "claims made" liability insurer of the Franklin Parish Clerk of Court contending that the clerk had been negligent in failing to record his parent's community property settlement in the mortgage records. Apparently, the community property settlement included within its four corners a mortgage securing a note granted to the plaintiff's mother, who allegedly assigned the note to the plaintiff. The document was

recorded only in the conveyance records. According to the petition, a third party creditor, who outranked the plaintiff's mortgage because of the lack of recordation in the mortgage records, foreclosed on the property, thereby extinguishing the plaintiff's mortgage. The clerk himself was not sued, and it was discovered that the policy issued by the defendant did not afford coverage because the claim was not made until long after the expiration of its effective period. The plaintiff then amended his petition to add the Louisiana Association of Clerk of Courts risk management agency, which was the insurer at the time of the discovery of the omission. That insurer was dismissed on the ground that the direct action statute did not afford the plaintiff a direct cause of action. The plaintiff then sought to add as a party defendant the deputy clerk who had recorded the instrument. The deputy clerk claimed that the suit had prescribed on the basis of one year liberative prescription applicable to torts. To defeat the plea of prescription, the plaintiff urged that the clerk's nonfeasance occurred in the breach of his contractual obligation for recordation of the instrument in the mortgage records.

On its own motion, the court of appeal raised the peremptory exception of no right of action. Johnston was not a party to the mortgage, and any contract would have arisen between the clerk (rather than the deputy clerk) and his mother. The allegation that the note was assigned to him did not give him standing to sue on the asserted contract. Likewise, the clerk committed no tort to the plaintiff, who was not the holder of the note at the time the mortgage was recorded. Rather, he was a third party to the mortgage who would be charged with what the public records revealed or did not reveal about the mortgage at the time of the assignment of the note. Since the plaintiff had no right of action, it was unnecessary to consider the prescription issues.

C. Open accounts.

<u>Hurley State Bank v. Pickens</u>, 03-911 (La. App. 3d Cir. 12/10/03); 861 So. 2d 846. Responding to an advertisement offering computers through Value America, the defendant, a consumer, completed paperwork for the purchase of a computer. Thereafter, when a billing dispute arose concerning the increase in her payments from \$46 to \$57 per month, she called Value America to indicate that the arrangement was not working out and that she no longer wanted the computer. Defendant then ceased making payments, and Hurley State Bank, Value America's financing agent, brought a collection suit alleging the existence of an open account. In support of its claims, the bank produced business records as to the amount owing under the account, but was apparently unable to produce any open account agreement, relying instead on the defendant's testimony to the effect that she signed a contract at the time she purchased her computer. The trial court found that the bank had failed to meet its burden of proof, and the court of appeal affirmed.

Quoting a lengthy colloquy between the court and the bank's counsel concerning whether an open end account or a closed end account was contemplated, and citing the defendant's testimony that her unequivocal intent was to enter into only one transaction with Value America, the court found that the plaintiff had failed to prove the existence of an open account. Therefore, the relaxed burden of proof otherwise applicable to open accounts did not apply. Since the bank could not produce any contract and could not produce any credit cards that would support its claim that a revolving line of credit was established, the trial court was not manifestly erroneous in dismissing the bank's suit.

D. Default judgments.

1. **Discover Bank v. Peters, 38,366 (La. App. 2d Cir. 4/14/04); 870 So. 2d 602.** In a suit to collect a $16,000 balance owing on a credit card, the plaintiff attached to its petition an affidavit of sums owing on the account and a set of requests for admissions. A few weeks later, the defendant filed a pro se document entitled "Pleading of Special Matter Pursuant to Civil Rule 9," which neither admitted nor denied the allegations of the petition and did not state any facts upon which any defenses may have been based. The pleading also contained section captioned "Notice of Potential Civil Rights Violation" and "Notice of Potential Violation of Federal Criminal Law." The following month, the plaintiff took a preliminary default judgment and sent certified mail notice to the defendant that the plaintiff planned to confirm the default in accordance with law. Three weeks later, the plaintiff presented the court with a statement of account, an affidavit of correctness of account and non-military service, and a proposed judgment by default. The documents presented also included an unsigned certificate by the clerk that no answer, exception or opposition had been filed by any party. The trial court rendered a default judgment, and the court of appeal affirmed.

   Jurisdictional arguments advanced by the defendant were meritless, since the district court is a court of general jurisdiction and service of process was accomplished in accordance with law. The defendant's pleading did not amount to an answer and did not contain any order with regard to his request for additional time to answer. The trial court was in any event not required to allow the defendant additional time within which to answer. The defendant was also not entitled to a hearing prior to the rendition of judgment, since La. C.C.P. art. 1702C explicitly allows a default matter to proceed without a hearing. With regard to the fact that the clerk's certificate was unsigned, the court observed that it could determine from the record itself that what the defendant filed was not an answer. Moreover, the plaintiff avoided any misunderstanding by sending a letter explaining that a preliminary default had been entered and that a confirmation of default would follow. The plaintiff awaited an appropriate and discreet time before proceeding with the confirmation of the default.

2. **Advanta Bank Corporation v. First Mount Zion Baptist Church, 03-732 (La. App. 5th Cir. 12/30/03); 865 So. 2d 165.** Advanta obtained a default judgment against the defendant church for the balance owing under the lease of certain musical equipment. Rather than taking an appeal, the church filed a petition for nullity, alleging that its directors had not received notice of the lawsuit and that its directors had not authorized its pastor to enter into the lease agreement. The trial court denied the church's petition for nullity, and the court of appeal affirmed.

Under La. C.C.P. art. 2002, a judgment is absolutely null where there is a failure to serve the defendant with citation and a certified copy of the petition. In this case, the church was served through personal service on its former pastor, who at the time was its registered agent. Service was thus valid despite the church's argument that it was the responsibility of its current pastor to change the registered agent. The church's claim that enforcement of the judgment would be unconscionable and unequitable was also to no avail, because the church did not point to any fraud or ill practice on the part of Advanta depriving the church of the opportunity to present a defense. Finally, the previous pastor's lack of authority to enter into the lease was a defense which should have been presented in opposition to Advanta's claims. An action for nullity based upon fraud or ill practice is not intended as a substitute for an appeal or as a second chance to prove a claim which was previously denied for failure of proof.

E. Defenses to enforcement.

1. Res judicata/lis pendens.

a. Jackson v. Adcock, **2004 WL 1900484 (E.D. La. 2004).** GE Capital instituted executory process to foreclose a mortgage upon residential property in New Orleans. The mortgagors filed a state court petition for injunction, asserting a myriad of discrepancies, theories and defenses to the foreclosure and the mortgage. The civil district court denied the petition for injunction, and the defendants failed to take an appeal. Thereafter, the mortgagors filed the present suit seeking damages arising out of the mortgagee's allegedly wrongful foreclosure petition. Citing Burguieres v. Pollingue, 2002-1385 (La. 2/25/03); 843 So. 2d 1049, the court held that the five requirements for res judicata existed: (i) a valid judgment; (ii) a final judgment; (iii) identity of parties; (iv) the existence of the cause of action asserted in the second suit at the time of final judgment in the first litigation; and (v) a demonstration that the cause of action asserted in the second suit arose out of the same transaction that was the subject matter of the first suit. Here, there existed a valid, final judgment involving the same parties, the same transaction, and a cause of action that was available to the mortgagor at the time of her petition for injunction. The validity of the foreclosure was addressed by the state district court and, since the mortgagors' claims for damages were predicated upon the same factual allegations, they were barred by the doctrine of res judicata.

The court also addressed the timeliness of a Fair Debt Collection Practices Act claim which the mortgagor asserted against the mortgagee's attorney in an amended petition filed more than one year after the attorney had filed the foreclosure petition. Since the amended petition, under Louisiana law, related back to the filing of the original petition, which was filed within one year of the foreclosure suit, the court held that the Fair Debt Collection Practices Act claim against the attorney was not barred by the statute of limitations.

b. **Tower Partners, L.L.C. v. Rao, 03-0665 (La. App. 4th Cir. 1/21/04); 869 So. 2d 126.** After the holder of a collateral mortgage filed executory proceedings to enforce the mortgage, the defendants filed a wrongful seizure and injunction suit claiming, among other things, that the foreclosure suit contained inaccurate payment information. During the pendency of the injunction suit, the mortgagee amended its foreclosure petition to correct the deficiencies, and the property was thereafter sold with appraisal at a sheriff's sale. The mortgagee then brought a separate suit for deficiency judgment, which the defendant defended on the basis of res judicata, alleging that the mortgagee should have sought the deficiency in the injunction suit as a compulsory reconventional demand. The court of appeal rejected the plea of res judicata on the ground that the cause of action for a deficiency did not arise until the sheriff's sale, when it was known that a deficiency actually existed. In this case, the sheriff's sale occurred after the mortgagee had already answered the injunction suit but prior to trial of that suit. Though the mortgagee could have amended its pleadings in the injunction suit to seek a deficiency judgment, it was not required to do so. In his dissent, Judge Cannizzaro claimed that the court's ruling encourages forum shopping, because the mortgagee might have discerned some hostility by the judge hearing the injunction suit and purposely chosen to defer asserting its deficiency claims in the hope of drawing a more favorable judge.

In large measure, the decision of the majority was based upon La. C.C.P art. 1066, which provides that an action which either matured or was acquired by the defendant in the principal action after answer *may* be presented, with the permission of the court, as a reconventional demand. The dissent argued that the permissive nature of that article is intended to give the trial court the ability to refuse to allow a reconventional plaintiff to assert a wholly unrelated reconventional demand and thereby retard the progress of the suit. He also observed that in Burguieres v. Pollingue, 2002-1385 (La. 2/25/03); 843 So. 2d 1049, the Louisiana Supreme Court set forth five criteria that must be met for a matter to be considered res judicata, one of them being that the cause of action asserted in the second suit existed at the time of final judgment in the first litigation. In his view, that criterion, as well as the other four, were all satisfied.

c. **Wells v. Standard Mortgage Corporation, 2002-1934 (La. App. 4th Cir. 07/09/03); 865 So. 2d. 112.** After fire damaged mortgaged immovable property, the mortgagee held the insurance proceeds pending their disbursement to the contractor hired to repair the damage. The first payment of insurance proceeds was issued jointly to the mortgagor and the contractor at the time of completion of the first phase of repairs. The mortgagee then issued subsequent checks directly to the contractor without verifying that the work had been completed. Although the checks were jointly payable, the contractor allegedly forged the name of the mortgagor. When the contractor failed to finish the work, the property was then condemned by the city, and the mortgagor fell into default of her mortgage. The mortgagor filed an executory process suit, which the mortgagor attempted to defend by making a reconventional demand for negligence and breach of fiduciary duty by the mortgagee in paying the contractor without verifying that the work had been completed. A few days after the trial court granted the mortgagee's exception of no cause of action, on the ground that an ordinary proceeding may not be incorporated into an executory proceeding, the mortgagor brought a second suit against the mortgagee making the same claims. The dismissal of the reconventional demand was, however, appealed by the mortgagor, and the mortgagee therefore filed an exception of lis pendens with respect to the second suit. In opposing this exception, the mortgagor conceded that the mortgagee was "most likely correct" and voluntarily agreed to stay the later case pending the court's ruling on the granting of the mortgagee's exceptions in the first case. The holding in the first case was ultimately affirmed, but before that occurred the trial court in the second proceeding granted the mortgagee's exception of lis pendens and exception of no cause of action, dismissing the later suit. The court of appeal reversed.

Although the exception of lis pendens was properly granted at the time because the earlier case was still pending at the appellate level, the earlier case was no longer pending, thus removing the basis for the lis pendens. Because lis pendens does not address the merits of the dispute between the parties, a reviewing court considers lis pendens in the procedural and factual climate that exists at the time of review, rather than at the time of the trial court judgment. With respect to the mortgagee's exception of no cause of action, the trial court apparently granted that exception because the contract for repair of the property was between the mortgagor and the contractor, and did not involve the mortgagee. However, the court of appeal found that the mortgage contract between the mortgagor and the mortgagee was also relevant and, in addition, the mortgagor contended that the mortgagee was liable as a depositary under governing Civil Code articles. Since these claims stated a cause of action on the face of the petition, the court of appeal reversed the trial court's sustaining of the exception of no cause of action. With regard to the res judicata effect of the earlier judgment, that effect was limited to the propriety of the mortgagee's use of executory process to foreclose on the property and was not res judicata as to the negligence claim.

2. Transaction or compromise/releases.

a. **<u>Ocwen Federal Bank v. Hawkins</u>, 2003-1622 (La. App. 1st Cir. 5/14/04); 879 So. 2d 759.** While executory proceedings were pending, the mortgagors contacted the mortgagee inquiring what it would take to reinstate the loan. In response to this inquiry, the mortgagee issued a "loan reinstatement schedule" indicating that the total amount due on the loan as of the date of the response was $7,595. A few days later, the mortgagor sold the property for $3,600 plus an assumption of the mortgage. Several months afterward, the mortgagee voluntarily dismissed its foreclosure proceedings without prejudice. A year after the dismissal, the purchaser filed a motion to enforce the settlement in the executory proceeding, contending that while the foreclosure was pending the mortgagee's counsel had represented to the purchaser in writing that the outstanding amount necessary to bring the mortgaged debt current was $7,395 and that, based on this representation, the purchaser had paid that amount to bring the mortgage current. The plaintiff further contended that the mortgagee was estopped from contending that it was owed another $28,350 in interest, in addition to the $40,000 principal balance. The trial court denied an exception of no right of action filed by the mortgagee. In addition, the trial court found that the purchaser had detrimentally and justifiably relied on the pleadings, and that, since the $28,350 in accrued interest had not been pleaded in the original petition for executory process, it was no longer secured by the mortgage. The court of appeal reversed.

According to the court of appeal, the central question was whether the loan reinstatement schedule constituted a transaction or compromise. Under La. Civ. Code art. 3071, a transaction or compromise must either be reduced into writing or recited in open court. The requirement that it be reduced to writing necessarily implies that the agreement be evidenced by documentation signed by both parties. The mortgagee's agreement to allow the debtors to bring their past due arrearage current in order to halt the foreclosure proceeding was not a transaction or compromise, nor was the loan reinstatement schedule.

b. **First South Farm Credit ACA v. Gailliard Farms, Inc., 38,731 (La. App. 2d Cir. 8/18/04); 880 So. 2d 223.** In 1994, Mr. Brown and the corporation of which he was president executed as co-makers a promissory note held by the lender. Since the lender's loan officer was Mr. Brown's son-in-law, all of the loan documents were signed on the lender's behalf by the loan officer's supervisor. Each year, the parties restructured the debt; however, the lender failed to reinscribe its security and lost its position to other creditors. In connection with the restructuring of the loan in 2000, Brown and the corporation again signed as co-makers the promissory note which served as the basis for the present suit, and also granted the lender additional collateral in the form of an assignment of government subsidies. When sued upon the promissory note, Brown offered into evidence a copy of a handwritten document executed in December of 1999, signed by Brown and his son-in-law, stating "assignment of FSA payments and new mortgage on equipment in return for release of personal liability." The loan officer's supervisor denied any knowledge of the document, and the loan records of the lender contained no copy of it. According to the court, regardless of the validity of the 1999 agreement, the 2000 package of loan documents contained four separate documents which Brown executed two times each: once in his capacity as president and once individually. An employee of the lender also testified that Brown was told at the time he executed the 2000 mortgage package that he would be personally liable on the debt. Brown was bound by the four corners of the promissory note. Even if a previous agreement to release personal liability existed, the 2000 mortgage superseded it.

3. Relative nullity.

Hibernia National Bank v. Kuebel, 03-1131 (La. App. 5th Cir. 3/9/04); 868 So. 2d 969. In 1984, the defendant delivered a $468,000 promissory note in payment of shares to which he had subscribed in St. Tammany Corporation, which was created as a commercial vehicle for the acquisition of First National Corporation, the bank holding company of First National Bank of St. Tammany Parish. He also executed an agreement pledging the shares to the corporation as security for the note. Under the reorganization and merger agreement between the two corporations, the defendant's note was assigned to the former shareholders of First National Corporation, and the defendant received stock in First National Corporation. Following the merger, the defendant benefitted from a stock split and also sold some of his First National Corporation stock, applying the proceeds to reduce his indebtedness. When he later defaulted, Hibernia, as trustee of the trust which held the note, filed suit. The defendant claimed that the issuance of the note was void because it was executed in exchange for St. Tammany Corporation stock in violation of La. R.S. 12:52(c), which provides that corporate shares may not be issued until a promissory note given as payment of the shares has been paid in full. Following Hibernia National Bank, as trustee of the Blossman Group Trust v. Johnny Smith, 96-1106 (La. App. 1st Cir. 6/20/97); 697 So. 2d 1051, both the trial court and the court of appeal held that, even though the issuance of the initial shares was a relative nullity, that nullity could not be relied upon by the defendant. The court also rejected the defendant's contention that his failure to receive actual corporeal possession of the stock vitiated valid consideration sufficient to make the note enforceable against him as an *in personam* obligation. Even though he might not have received the stock, he admitted having signed the promissory note, executing a stock pledge agreement, selling shares of stock at a profit and applying the proceeds to the principal balance of the note.

4. Redemption of litigious rights.

Regions Bank v. Norris Rader of Lafayette, Inc., 2003-1665 (La. App. 3d Cir. 7/14/04); 879 So. 2d 904. Two months after Regions

Bank obtained summary judgment against the guarantors of a \$6,000,000 loan, and while an appeal was pending, counsel for Mega Properties informed the guarantors that it had acquired the judgment by assignment from Regions. The trial court granted a motion to substitute Mega as party plaintiff. The guarantors then asked the appellate court to remand the case to the trial court, asserting that the assignment constituted the sale of a litigious right and that, under La. Civ. Code art. 2652, they should be permitted to extinguish their obligation by paying the price that Mega paid for the assignment. The amount Mega paid was apparently \$1,400,000; however, the guarantors argued that that figure should be reduced by \$400,000 in proceeds from the sale of pledged stock which Mega had disposed of after the assignment.

Mega opposed the remand first on the ground that the guarantors had not actually tendered the price paid for the assignment. Following Clement v. Sneed Brothers, 116 So. 2d 269 (La. 1959), the court held that a tender was unnecessary because, when the litigious right is transferred after judgment, the party seeking to exercise litigious redemption has no way of being legally certain of the real price paid for the transfer until evidence is adduced. Mega also defended on the basis that its assignment was not the sale of a litigious right; however, since the assignment occurred after the trial court had rendered judgment, none of the argument or evidence concerning the sale of a litigious right was before the trial court, and the appellate court could not consider extraneous evidence. Accordingly, the matter was remanded to the trial court for the limited purpose of deciding whether the assignment constituted the sale of a litigious right and, if so, the amount necessary for the guarantors to redeem. In order to prevent a loss of the parties' docket preference and to prevent unnecessary delay, the court held that the appeal would remain on its docket and would be considered following the return of the record after remand.

5. **Unauthorized practice of law**.

Wells Fargo Bank, Minnesota, NA v. New Orleanian Limited Partnership, 2002 -2228 (La. App. 4th Cir. 08/27/03); 855 So. 2d 388. After the borrower defaulted on an \$8.4 million promissory note secured by the St. Charles Regency, the loan servicer advised the borrower that it would be servicing the loan and instructed the borrower to remit all future payments to it. The servicer later wrote a second letter proposing terms under which the debt might be restructured and stating that the servicer was empowered to act on behalf of the lender in the capacity of attorney-in-fact. Another letter was written the next day, advising the borrower of the default and again reiterating that the servicer was empowered to act on behalf of the lender in connection with the loan. That letter indicated that if payment were not forthcoming within ten days, the lender would take all actions it deemed appropriate, including foreclosure. A few weeks later, a Baton Rouge law firm wrote to the borrower, advising that the loan had been referred to it for collection and that the law firm would institute foreclosure proceedings if payment were not made within fifteen days. When the borrower failed to honor the demand, the law firm filed a petition for executory process on behalf of the lender. The borrower responded with a petition for injunction, raising technical deficiencies in the foreclosure petition (which were apparently cured by an amended petition) and a contention that the order of seizure and sale had been obtained as a result of the unauthorized practice of law. Summary judgment was granted by the trial court and upheld on appeal.

According to the court, by describing itself as the "attorney-in-fact," the servicer indicated that it was not authorized to perform legal services. Nor was the borrower able to produce any contract under which the servicer was to provide legal services; indeed, the contract that was produced simply authorized the servicer to act as "special servicer" and contained a provision requiring the servicer to perform its duties in accordance with applicable laws. Because it is illegal for corporations to practice law in Louisiana, this provision necessarily meant that the servicer was not authorized to represent the lender in legal matters. With respect to the borrower's contention that the letters threatening foreclosure constituted the unauthorized practice of law prohibited by <u>Andrus v. Guillot</u>, 160 So. 2d 804 (La. App. 3d Cir. 1964)(which the court in a footnote observed may have been legislatively overruled by 1997 amendments to the Collection Agency Regulation Act), the court noted that the actions taken by the servicer were clearly the kind of collection attempts that a non-attorney may perform under Andrus. The letter that the servicer wrote alluding to legal proceedings indicated that "the lender," not the servicer, would take legal action if the borrower did not cure the default. The letter sent by the law firm indicated that the lender had referred the loan to the law firm through the servicer; thus, there was no evidence that the servicer had hired the law firm.

6. **Co-debtor stays.**

a. **<u>In re Smart Card Automotive, Inc.</u>, 2003 WL 21715012 (E.D. La. 2003).** In its Chapter 11 proceedings, a corporate debtor instituted an adversary proceeding against its lender, alleging breach of contract and breach of fiduciary duty. The lender filed a state court action against the president and controlling shareholder of the corporate debtor, seeking to recover upon his guaranty. The bankruptcy court refused to stay the state court proceeding until the adversary proceedings had been concluded, and the district court affirmed. Though a bankruptcy court has the power to temporarily enjoin actions against a non-debtor under "unusual circumstances," those unusual circumstances exist only if the non-debtor and the debtor enjoy such an identity of interests that the suit against the non-debtor is essentially a suit against the debtor or where the third party action will have an adverse impact on the debtor's ability to reorganize. The bankruptcy court's finding of the lack of unusual circumstances was not clearly erroneous.

b. **<u>In the Matter of Mendy</u>, 2003 WL 21488654 (E.D. La. 2003).** After the bank filed executory proceedings against mortgaged real estate owned by a limited liability company, its principal, who was a guarantor of the loan, filed for Chapter 13 relief, triggering the automatic stay provisions of 11 U.S.C. § 362. The bankruptcy court granted the bank's motion to lift the automatic co-debtor stay, and the district court affirmed. In this case, the proceeds of the loan had been received by the limited liability company, not the Chapter 13 debtor. Although the Chapter 13 petition listed the limited liability company as a co-debtor on the obligations due to the bank, there is no question that the loans were made by the bank directly to the limited liability company, which alone received the consideration for the obligations. Under Louisiana law, a limited liability company is a legal entity separate from its members, who own no interest in the company's property. Since the Chapter 13 debtor was merely a guarantor, the bank was entitled to relief from the automatic stay, notwithstanding contentions by the debtor that her Chapter 13 plan proposed repayment of the debt.

F. Commissions.

Small Business Loans Source Inc. v. F/V Miss Kaitlin, 2004 WL 2009278 (E.D. La. 2004). In connection with a vessel seizure and sale conducted by the United States Marshals Service, the seizing creditor entered a credit bid of $75,000. The marshal contended that it was entitled to a commission based upon the appraised value of the vessel, rather than the credit bid. The court agreed. Under 28 U.S.C. § 1921(c)(1) and 28 C.F.R. § 0.114(h), which apply to all judicially-ordered private mortgage foreclosure sales, in cases where a nominal sum is bid, the commission is based upon the lesser of the amount of the judgment lien or the appraised value of the property under levy. Despite the plaintiff's efforts to characterize the foreclosure transaction as a sale, the transaction "walks and talks like a setoff" in satisfaction of a private mortgage. As is typical in mortgage foreclosures, the plaintiff received ownership of the vessel in exchange for its credit bid and in turn extinguished the mortgagor's debt. Even though $75,000 in some contexts is not nominal, the court found that it was nominal when compared to the value of the vessel ($510,000), and the amount of the mortgage debt ($515,000). The amount of the bid was chosen by the plaintiff in this case solely to manipulate the marshal's commission, and therefore the bid should not be used as the basis for calculating the commission.

G. Revocatory actions.

De La Vergne v. De La Vergne, 2004-0412 (La. App. 4th Cir. 10/13/04); ___ So. 2d ___; 2004 WL 2365093 (not yet released for publication in the permanent law reports). During the pendency of the defendant's bankruptcy proceedings, Whitney National Bank arranged for the bankruptcy court to abandon a pledged share of stock that the defendant owned in a closely-held corporation. The bank then released the pledge of the stock and returned it to the defendant in exchange for a payment of $8,000, which was apparently paid by a trust to which the defendant immediately transferred ownership of the stock. The plaintiff, who was the defendant's brother, then filed a revocatory action, claiming to be the holder of a judgment against the defendant and alleging that the transfer caused or increased the defendant's insolvency. The plaintiff moved for summary judgment, which was granted by the trial court but reversed on appeal.

To prevail on his motion for summary judgment, the plaintiff had to show that the defendant was his obligor, that the defendant was insolvent, and that the insolvency had either been caused or increased by the transfer of the stock to the trust. According to the court, the plaintiff failed to support his motion for summary judgment with facts sufficient to establish the elements of a revocatory action. Though the court could take judicial notice of the existence of the judgment, which the plaintiff failed to introduce into evidence, there was nonetheless an issue of fact as to whether the defendant remained indebted to the plaintiff, in view of the defendant's affidavits that nothing remained owing under the judgment. More importantly, the plaintiff failed to submit evidence to show that the transfer of stock caused or increased the defendant's insolvency. The transfer did not in and of itself establish his insolvency at the time of the transfer, nor did the defendant's own list of sparse assets prove his insolvency, considering his sworn affidavit denying that he was insolvent. Following the ruling of the Third Circuit in Reading & Bates v. Baker Entergy Resources, 96-1276 (La. App. 3d Cir. 5/21/97); 698 So. 2d 413, the court rejected the argument that a creditor alleging insolvency need only show the amount of the defendant's debts, at which point the burden of proof switches to the defendant to show that he has assets of an equal or greater value. Moreover, in this case, the defendant contended that the trust paid $8,000 for the stock, and there was absolutely no evidence as to the value of that stock. For these reasons, genuine issues of material fact remained precluding summary judgment.

IV. Mennonite/tax sales.

A. Henderson v. Kingpin Development Company, 2001-2115 (La. App. 1st Cir. 08/06/03); 859 So. 2d 122. The holder of a collateral mortgage brought an executory proceeding to enforce it, but did not name as a party defendant, or otherwise give notice of the foreclosure to, a third possessor who had purchased the property from the mortgagor. The holder of the collateral mortgage purchased the property at sheriff's sale and then sold it to a third party. Two years later, the third possessor filed suit to set aside the sheriff's sale on a number of grounds, including a lack of notice in violation of his constitutional rights. The trial court granted summary judgment in favor of the third party possessor. The court of appeal reversed.

Though Louisiana law contains no statutory requirement that the current owner of mortgaged property receive notice of the seizure, Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), creates a federal constitutional requirement that a seizing creditor who avails himself of Louisiana's foreclosure proceedings provide notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action. Despite the defendant's contention, this requirement is not limited to cases involving tax sales. Citing Davis Oil Company v. Mills, 873 F. 2d 774 (5th Cir. 1989), the court recognized that it might be reasonable to draw some line limiting a seizing creditor's obligation to search conveyance records, but in this case the burden of searching the conveyance records to determine whether the mortgagor had transferred the property to a third possessor would not seem to be unreasonable. However, the plaintiff did not file a copy of his deed into the suit record, and it was therefore impossible for the court to make a determination as to whether the exercise of reasonable diligence would have uncovered the identity of the plaintiff, as well as his name and address, before the sheriff's sale so as to entitle him to mailed notice of the seizure. Thus, summary judgment was improper.

In reaching this holding, the court reinforced the line of cases to the effect that the "request-notice" provisions of La. R.S. 13:3886 act as a supplement to notice by publication, allowing otherwise unascertainable parties to make themselves known, and do not relieve the responsible state actor from exercising reasonable diligence to ascertain the identity of persons subject to the deprivation of their property. Thus, a party with an interest in the property does not waive his due process rights by failing to request notice under the statute. The court also considered the effect of La. R.S. 13:3886.1, which purports to reduce the claim of a person deprived of notice to a monetary claim which must be asserted within one year of the sheriff's sale. The court held that Mennonite sets forth a federal constitutional requirement whose standards for notice cannot be altered by a state statute like La. R.S. 13:3886.1.

B. **<u>Marshak v. Raz</u>, 2003-0893 (La. App. 1st Cir. 2/23/04); 871 So. 2d 363.** Three years after his purchase of immovable property at tax sale, the tax buyer obtained a monition judgment. A month later, the tax debtor filed a suit to annul the tax sale, based upon the allegation that she did not receive prior notice of the tax sale. The holder of a mortgage upon the property intervened into the suit. Meanwhile, in the monition proceedings, the tax debtor and mortgagee filed a petition to nullify the monition judgment, but their petition was dismissed by the trial court on the ground of res judicata. A motion for new trial was then filed in the monition proceedings, but never heard. In the annulment proceedings, the trial court granted summary judgment in favor of the tax debtor and mortgagee, nullifying the underlying tax sale due to the sheriff's failure to notify the mortgagee of the tax delinquency. The court of appeal affirmed. Even though La. R.S. 13:4950 seems to imply that monition is available after only three years, the court held, following <u>Gunter v. Moore</u>, 2002-1126 (La. App. 3d Cir. 2/5/03); 838 So. 2d 118, that the legislature intended the delay for bringing a monition proceeding, as an alternative to a suit to quiet tax title, to coincide with the five-year prescriptive period, as opposed to the three-year redemptive period. Thus, the trial court did not err in declaring null the judgment of monition. Moreover, a monition judgment cannot cure an absolute nullity. Even though La. R.S. 47:2180.1 provides that a tax sale shall not be annulled or set aside due to the lack of notice to the mortgagee, the holding of the United States Supreme Court in Mennonite requires that, where a mortgagee is identified in mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address or by personal service. Here, there was no attempt to notify the mortgagee, and the underlying tax sale is therefore an absolute nullity.

C. **Lacoste Builders, L.C. v. Strain, 2003 WL 22466233 (E.D. La. 2003).** By deed that was duly recorded in June of 1996, Lacoste Builders, L.L.C. purchased property in St. Tammany Parish. A year later, when the sheriff conducted a tax sale of the property, it gave advance notice of the tax sale only to the prior owner and not to Lacoste. A few years later, Lacoste granted a mortgage on the property in favor of First American Bank & Trust. Lacoste then sought bankruptcy protection and, following the lifting of the bankruptcy stay, First American purchased the property at sheriff's sale. The bankruptcy trustee and First American then moved to annul the tax sale. The court granted summary judgment in their favor.

Though there was an issue concerning whether the trustee still had the procedural capacity to bring suit, the court held that issue to be immaterial because the mortgagee clearly had standing. Following Murchison v. Marzullo, (La. App. 3d Cir. 12/10/97); 705 So. 2d 1129, the court held that when First American purchased the lot at sheriff's sale, the right to attack the sale was conveyed to First American along with any and all other rights in the property. On the issue of prescription, the court noted that more recent state jurisprudence has held that a failure to give notice required by Mennonite renders a tax sale an absolute nullity that cannot be cured by the expiration of the peremptive period. The court also found that the uncontradicted evidence showed that Lacoste had properly recorded its deed, was the record owner of the property at the time of the tax sale, and that the sheriff made no effort to give Lacoste the notice to which it was entitled under Mennonite. Thus, the tax sale was an absolute nullity as a matter of law.

Finally, concerning the tax debtor's claim that she should have been given a Mennonite notice of the foreclosure sale, the court held that since the tax sale was an absolute nullity, the tax debtor had no legally protected property interest in the lot at the time of the foreclosure sale and thus was not entitled to notice.

D. Keller v. Allison, 2003-1644 (La. App. 4th Cir. 6/23/04); 879 So. 2d 344. In 1994, mortgaged property was adjudicated to the City of New Orleans for nonpayment of 1991 ad valorem taxes. In 2003, the assignee of the mortgage note instituted executory process. In that same month, the City of New Orleans sold the adjudicated property to a third party, directing the attorney for that third party to give the notice which La. R.S. 33:4720.17(A) requires to be given to the owner and mortgagee at least 60 days prior to the sale of adjudicated property by the city. The third party then intervened into the executory proceedings, seeking injunctive relief. After a lengthy recitation of the manifest error rule which applies to factual findings of trial courts, and a review of provisions of the Code of Civil Procedure bearing on injunctions, the court of appeal found to be reasonable "the fact finder's conclusions" that the mandated notice be made by the City of New Orleans and that the city had no right to designate anyone else to give the required notice. Accordingly, the statutory 60-day waiting period prior to the sale of the property did not pass, and, as a result, the sale to the intervener was invalid. Moreover, the fact finder's conclusion that the intervener was not a party of interest and had no right to enjoin the executory process action was also a reasonable one. Judge Cannizzaro dissented, pointing out that the issue to be reviewed by the court of appeal was not a factual finding but a legal determination which, in his view, was wrong, since La. R.S. 33:4720.17(A) simply provides that the political subdivision "shall cause notice to be given."

V. Lender liability.

A. Credit Agreement Statute/breach of commitments to lend.

1. **King v. Parish National Bank, 2004-C-0337 (La. 10/19/04); ___So. 2d ___; 2004 WL 2340253.** As a condition to additional financing for the borrower's anticipated business expansion, the bank required that he consolidate and cross-collateralize his existing individual loans under a consolidated note that was payable on demand or, in the absence of demand, in certain specified installments. The bank officer allegedly assured the borrower that the loan consolidation and restructuring would not impair or jeopardize his "financial or personal welfare" as long as he remained current on all of his obligations to the bank. Just before the approach of the maturity of the consolidated note three years later, the bank for the first time required appraisals on the collateral, two of which were performed by an appraisal firm through an uncertified appraiser who was the son of the bank's president. When these appraisals indicated insufficient collateral value, the bank refused to renew the loan. After a few months of negotiation, the

parties entered into a workout agreement by which specified properties were conveyed to the bank. Thereafter the borrower filed suit against the bank, several of its employees and the appraiser, asserting that the bank had acted in bad faith in requiring appraisals that had not been required before, in failing to afford him the opportunity to select the appraiser and in using an employee of an appraisal firm who allegedly had an direct or indirect interest in the earnings of the bank. On the basis of the Louisiana Credit Agreement Statute, the district court granted summary judgment in favor of the bank. The court of appeal affirmed the summary judgment with respect to the borrower's allegations of fraud, error and duress in connection with the workout, but held that the borrower's allegations that the bank had acted in bad faith in requiring the appraisals were outside the scope of the statute and that the evidence concerning the requirement of an appraisal, the requirement of a particular appraiser and the use of an uncertified appraiser all provided enough support to allow a fact finder to find the defendant liable. The Supreme Court reinstated the grant of summary judgment against the bank and its employees on all counts.

Citing its decision in Jesco Construction Corp. v. Nationsbank Corp., (La. 10/25/02); 830 So. 2d 989, the court observed that the Louisiana Credit Agreement Statute precludes all actions for damages arising from oral credit agreements, regardless of the legal theory of recovery. Allowing debtors to bring actions predicated upon oral agreements to lend money, but on theories other than breach of contract, would thwart the legislative intent and render the statute meaningless. In this case, the plaintiff's contentions were essentially that, at the time of the loan consolidation, a bank employee assured him that his financial and personal welfare would not be jeopardized by the consolidation as long as he remained current and that upon maturity of the consolidated loan, the bank used appraisals performed by an appraiser chosen by the bank as a pretext for denying him further credit, contrary to the bank's earlier promises and previous course of dealing. With respect to the first of these contentions, the plaintiff argued that the statute did not apply because the claims were based on the bad faith conduct of the defendant during the loan renegotiation, rather than the execution of the consolidated promissory note. However, the Louisiana Credit Agreement Statute includes an agreement to make any financial accommodation. In effect, the bank officer's alleged undertaking that the consolidation loan would not impair the borrower's welfare was an agreement by the bank to make financial accommodations if the borrower remained current. Since the borrower produced no writing evidencing such an agreement, his claim of bad faith against the bank was precluded by the Credit Agreement Statute. With respect to the borrower's claim of bad faith in requiring appraisals, the court observed that the Credit Agreement Statute in effect treats certain actions or representations of creditors as if they were credit agreements and requires that they be put in writing to be enforceable. Essentially, the borrower was asserting an implied agreement by the bank not to require appraisals. Since such an alleged agreement is based only on the parties' previous commercial relationship and not upon a written agreement, it is expressly precluded by the Credit Agreement Statute. Thus, the bank was entitled to summary judgment on all of the borrower's claims of bad faith arising out of the loan workout.

The court then turned to the issue of whether the bank's employees were entitled to the protection of the Credit Agreement Statute. Since it was clear from the plaintiff's petition that all of the alleged actions of the bank employees were taken in the course and scope of their employment by the bank, those provisions of the Credit Agreement Statute which preclude the borrower's claims against the bank also preclude his claims against the bank's employees. To allow otherwise would provide a means to circumvent the Credit Agreement Statute by merely asserting a claim of bad faith against bank employees rather than against the institution itself.

Finally, with regard to the bad faith claims against the appraiser, the court held that the Credit Agreement Statute did not apply, since those claims arose from the actions of the appraisers "in relation to their performance of the commercial property appraisals plaintiff hired these defendants to render."

Echoing his dissenting opinion in Jesco, Justice Calogero continued to believe that the language of the Credit Agreement Statute does not preclude causes of action based upon fraud, misrepresentation, promissory estoppel or other equitable theories.

2. **Fortenberry v. Hibernia National Bank, 37,266 (La. App. 2d Cir. 08/20/03); 852 So. 2d 1221.** The plaintiff, a farmer who had contracted a crop loan from Hibernia in 2001, began discussing a crop loan for 2002 with a bank officer, who allegedly advised him orally that the 2002 crop loan had been approved. When the farmer contacted the officer later seeking the initial advance under the 2002

crop loan, the officer individually made a personal loan to him of $38,000 for the purpose of paying his land rent. According to the farmer's allegations, she then froze his bank account and arbitrarily reduced the projected production from the farmer's wheat crop below the parish average, thereby insuring that his 2002 crop loan would not be approved. The farmer then filed suit claiming that the bank's misrepresentations prevented him from farming in 2002 and effectively prevented him from procuring financing from other lending institutions. Central to the farmer's claim was that the bank had breached its promise to fund the 2002 crop loan. It was also alleged that the bank officer had stated that she deliberately intended to cause him harm and that she took actions for the express purpose of precluding him from obtaining financing from other lenders.

Against these claims, Hibernia pleaded the exception of no cause of action based upon the Louisiana Credit Agreement Statute. In response, the farmer twice amended his petition to allege a pattern of gross negligence or "intentional negligence" in handling loan applications to the detriment of area farmers, fraudulent conduct in making gross misrepresentations to the farmer, and acts of fraud through concealment, suppression of the truth and misrepresentations. These allegations appear to center around the bank's alleged failure to inform the farmer that the officer had no authority to approve the loan. A contention was also added that the farmer had suffered a stroke as a result of the stressful situation created by the bank and its officer. Thus, the farmer also sought damages for severe emotional and physical injuries.

Against the bank's contention that the credit agreement precluded the claims asserted in his petitions, the farmer produced evidence of a "repayment agreement," dated March 1, 2002, by which he agreed to pay the bank officer personally $38,000 when he closed his 2002 crop production loan. The court rejected the argument that this document would qualify as a credit agreement with the bank or the officer, because nothing in the document obligated either of them to extend further credit. Citing case law that culminated in the Supreme Court's decision in Jesco Construction Corporation v. Nations Bank Corporation, 2002-0057 (La. 10/25/02); 830 So. 2d 989, the court observed that the Supreme Court had held that the Credit Agreement Statute precludes all actions for damages arising from oral credit agreements, regardless of the legal theory of recovery asserted. According to the Second Circuit, this prohibition applies even to claims alleging fraud and also applies to personal injuries suffered as a result of an alleged failure to lend. Moreover, a bank officer enjoys the protection of the statute when sued personally for an alleged failure to honor a promise to lend.

Though the court found that the plaintiff's central allegations were the failure to grant a loan, it noted that there were vague allegations pertaining to possible tortious interference with contract, violation of government contracts and wrongful seizure of funds. No ruling was made as to whether the plaintiff might be able to state a cause of action on such claims, and the court remanded for the purpose of allowing the farmer thirty days to state a viable cause of action.

3. **<u>Hibernia National Bank v. Antonini</u>, 37,836 (La. App. 2d Cir. 12/10/03); 862 So. 2d 331.** To facilitate his purchase of an apartment complex, the defendant executed a promissory note payable to Hibernia, secured by a collateral mortgage upon the property. The loan was guaranteed by the seller from whom the defendant had purchased the apartment complex. When sued upon the note, the defendant argued that the note should be extinguished because Hibernia had fraudulently induced him to sign the note and to purchase the property when the seller began having problems paying his own mortgage loan to Hibernia. This claim was supported by allegations that Hibernia's loan officer had provided him with an operating statement that incorrectly portrayed the apartment complex as profitable, along with an appraisal showing an inflated potential future profitability. Defendant also claimed that he would not have purchased the property but for Hibernia's alleged unfulfilled promise to provide permanent financing for the project and that he had relied to his detriment on Hibernia's alleged inappropriate marketing activities and promises for permanent financing. After trial, the trial court granted judgment in favor of the bank, and the court of appeal affirmed.

The record of the case contained sufficient evidence for the trial court to reasonably conclude that Hibernia did not engage in any fraudulent activities. Its officer testified that the bank would not assist the owner of a property in the marketing or the sale of property, and that any commitment to provide financing would be in writing. The documents relied upon by the defendant were his own letters that he authored to the bank regarding his desire for permanent financing. With regard to the appraisal, the appraiser testified that the valuation was based upon "typical management" which, in contrast to the actions taken by the defendant, would have immediately brought the vacant units in the complex to a rentable state of repair. Finally, the court noted that detrimental reliance is not favored and that the trial court reasonably concluded that Hibernia did not fraudulently misrepresent the value of the property nor did it make a commitment to provide permanent or long term financing (The Louisiana Credit Agreement Statute was not cited in the opinion).

The defendant also claimed that the debt was extinguished when an alleged alter ego of the holder of the note purchased the property at tax sale. Not only was the trial court correct in finding that the tax purchaser was a separate and distinct entity from the holder of the note, confusion would not operate because the tax purchaser purchased only the property and not the note, which was unaffected by the tax purchaser's acquisition of the property.

Hibernia had accepted a sum of money from the seller in exchange for a release of his liability for the debt. The court of appeal modified the judgment to allow the defendant a dollar-for-dollar credit for the amount so paid by the seller for a release.

4. **<u>Delta Rault Energy 110 Veterans, L.L.C. v. GMAC Commercial Mortgage Corporation</u>, 04-139, 2004 WL 1752859 (E.D. La. 2004).** In connection with short term financing, plaintiffs executed an $8,200,000 promissory note which provided that a 1% "exit fee" would be due upon the earlier to occur of prepayment, maturity or acceleration. The note provided that the exit fee was deemed earned in full on the date of the note and that the lender would not otherwise be willing to make the loan without it. However, the note also provided that the exit fee would be waived if the lender provided permanent financing for the mortgaged property. In order to close a loan with another lender for permanent financing, the plaintiffs were forced to pay the exit fee and then filed suit for a refund of the exit fee. The defendant moved for summary judgment, which the court granted.

Rejecting the plaintiffs' contention that the exit fee was more like a prepayment penalty or an invalid stipulated damage clause that did not reasonably approximate the holder's damages, the court found that the exit fee was either an additional fee connected to the loan or deferred interest. With regard to the plaintiffs' attempt to introduce extrinsic evidence on the purported ground that the language providing for a waiver of the fee was ambiguous, the court found that the language was clear and explicit and did not lead to absurd consequences. Therefore, there was no need to look beyond the four corners of the note. Though the defendant had in fact extended an offer for permanent financing, which it had no obligation to do, the plaintiffs chose not to accept the offer because they had obtained a more favorable rate from another source. Accordingly, under the clear and unambiguous terms of the contract, the waiver provision of the exit fee was not triggered. The court also disagreed with the plaintiffs contention that the defendant had failed to make an offer at a "market rate." According to the note, the defendant had no obligation to offer permanent financing at all, much less at a "market rate." Because the transaction had involved sophisticated parties represented by counsel, the parties could have easily written such a requirement into the note as part of the contract but failed to do so.

B. Breach of fiduciary duty.

Bizcapital Business & Industrial Development Corp. v. Union Planters Corp., 2003-2208 (La. App. 4th Cir. 9/8/04); ___ So. 2d ___; 2004 WL 2112140 (not yet released for publication in the permanent law reports). After making a $6,000,000 loan to the borrower, Bizcapital brought suit against Union Planters Bank and Business Bank, asserting claims of negligent misrepresentation and detrimental reliance. The defendants filed exceptions of no cause of action, which the district court sustained on the basis of La. R.S. 6:1124, providing that no financial institution has a fiduciary obligation to its customers or any third party unless there is a written agreement so stating. The court of appeal reversed.

The allegations of the petition appear only in Judge Cannizzaro's concurrence, which was written to point out the "flagrant breach of the acceptable standards of business conduct by Union Planters Bank and the Business Bank of Baton Rouge." According to the allegations, an illegal check-kiting scheme perpetrated by Union Planters' customer resulted in a $4,000,000 overdraft in its Union Planters deposit account. Union Planters and the customer then entered into a workout agreement with respect to this overdraft, while the customer attempted to refinance the overdraft loan with Bizcapital. Upon contacting Union Planters, Bizcapital was told that the reason Union Planters wanted to move the loan was that Union Planters no longer handled a certain type of business. Bizcapital and Hibernia then made a $6,000,000 loan, the proceeds of which were used to repay the overdraft loan at Union Planters. As a condition of that loan, the customer was required to collect a $2,900,000 account receivable. Immediately prior to making the loan, an officer at the Business Bank confirmed to Hibernia and Bizcapital by telephone that he had in hand a check in the amount of $2,900,000. In the suit, Business Bank contended that it had no record of ever receiving the $2,900,000 check.

According to the majority opinion, a review of the minutes of the House Commerce Committee reflects that the legislature did not intend to totally immunize banks from all legal duties in their relationships with customers and third parties. The trial court's interpretation of La. R.S. 6:1124 conflicts with the letter and spirit of the law and produces an unintended and unreasonable result. The defendants are not immune from the claims of negligent misrepresentation and detrimental reliance. Moreover, the trial court should have allowed the plaintiff leave to amend to assert a cause of action for fraud.

C. Wrongful seizure.

1. **Donnaud's Inc. v. Gulf Coast Bank and Trust Company, 03-427 (La. App. 5th Cir. 9/16/03); 858 So. 2d 4.** After the lower court rendered a $472,000 judgment in favor of the bank on three promissory notes, the judgment debtor took a devolutive, rather than suspensive, appeal. During the pendency of the appeal, certain property of the judgment debtor was seized and sold for $190,000. In a decision previously reported at 759 So. 2d 268, the court of appeal reversed summary judgment as to $18,000 in principal and remanded the case for a resolution of the factual conflict concerning that amount of principal. Otherwise, the summary judgment was affirmed, and the judgment became subject to no further appeal when the judgment debtors failed to seek a rehearing or apply to the Supreme Court for writs. Thereafter, the judgment debtors filed suit to recover the $190,000, alleging that a wrongful seizure had occurred because the seizure was based upon a judgment which was not then final. The bank responded with an exception of no cause of action, which was granted by the trial court and affirmed on appeal. According to the court, the fallacy in the judgment debtor's argument was that the prior court of appeal judgment was indeed final and collectible as to $454,000 in principal, as well as with respect to its determination that the bank had the right to collect that amount.

2. **Turner v. Associates Commercial Corporation, 03-0224 (La. App. 5th Cir. 10/28/03); 860 So. 2d 244.** After instituting executory proceedings to enforce a security interest in a vehicle, the secured party

filed a rule to compel the defendant to produce the vehicle. Shortly before the scheduled hearing on the rule, the defendant retained an attorney to obtain a continuance. At the time, the trial court informed the parties that the defendant should settle the matter, pay the account or turn over the truck. At the hearing of the rule, the trial court found that the writ of seizure was valid and ordered the vehicle to be turned over. The defendant then filed a malpractice action against his attorney, who succeeded in obtaining a summary judgment which the court of appeal affirmed.

The client's first claim was that the attorney was negligent for failing to object to the creditor's failure to serve the petition for executory process and the rule for seizure and sale upon him. The court found that the attorney had no ground to assert failure of service, since citation is not necessary in executory proceedings and notice of seizure and sale was unnecessary since the writ had not yet been executed; the client was properly served with the rule to produce chattel. The attorney was also not negligent in failing to argue that the writ of seizure and sale had expired prior to the hearing date. Unlike writs of fieri facias, writs of seizure and sale do not lapse after one year. With regard to the client's contention that the attorney was negligent in failing to present evidence of payment at the hearing, the court observed that the client had still not been able to provide proof of payment of two monthly installments, non-payment of which justified the creditor in accelerating the debt.

Finally, with regard to the client's contention that the lawyer committed malpractice in failing to assert claims for wrongful seizure that occurred when the sheriff inadvertently seized the vehicle before the continued hearing date, the court noted that the plaintiff had one year from the seizure to assert this claim. Since the attorney's representation of the client had ended long before the expiration of that one-year period, the claim for damages was not lost as a result of the attorney's conduct.

D. Consumer protection cases.

1. Truth-in-Lending/Motor Vehicle Sales Finance Act.

<u>Vickers v. Interstate Dodge</u>, 2004-109 (La. App. 3d Cir. 9/29/04); ___ So. 2d ___; 2004 WL 2181017. At the time of their purchase of a motor vehicle, the plaintiffs executed a combination Promissory Note and Truth-In-Lending Disclosure Statement. The note appeared on a Bank One form and, immediately following its execution, was assigned to Bank One. Though the original of the note held by the bank contained the purported initials of one of the plaintiffs, reflecting an election to purchase credit life insurance, his initials were not on the copy of the note delivered to the plaintiffs nor on the copy of the note retained in the dealership's files. However, at the time of the sale, plaintiffs completed a separate application for credit life insurance. After the vehicle was damaged, the plaintiffs filed suit against the dealership and the bank, alleging that the initials appearing beside the election of credit life insurance on the promissory note were forged and that both the dealership and Bank One violated the Louisiana Motor Vehicle Sales Finance Act, which incorporates the Truth-In-Lending Act, and the Louisiana Unfair Trade Practices and Consumer Protection Act. After trial, the court ruled that the initials on the bank's original counterpart of the note were a forgery and that the transaction violated the Louisiana Motor Vehicle Sales Finance Act, the Truth-In-Lending Act, Regulation Z and the Louisiana Unfair Trade Practices Act. The trial court refunded the aggregate finance charges of $8,000 paid by the plaintiff and awarded a civil penalty of three times that amount, plus attorney's fees and nominal damages of $300 to each plaintiff under the Unfair Trade Practices Act. The trial court cast both the dealership and the bank in solido for these amounts, but awarded the bank judgment against the dealership for the entire amount it was cast in judgment and ordered the dealership to repurchase the note as required by the dealer agreement between them. Both the dealership and the bank appealed. Though the court of appeal affirmed the judgment against the dealership (except for the $300 nominal damage award), it reversed the judgment against the bank.

The Truth-In-Lending Act requires that payments for insurance be included in the finance charge unless the lender discloses that the insurance is not required to qualify and the borrower gives affirmative written indication of his desire to purchase the insurance after being informed that the insurance is not required and the cost of insurance has been disclosed to him in writing. This requirement is incorporated into the Louisiana Motor Vehicle Sales Finance Act. The court rejected the defendants' contention that the disclosures contained in the note, together with the plaintiffs' completion of the separate application for credit life insurance, satisfied these requirements. Since there was no cross-reference in the insurance section of the note to the separate application and, under the plain terms of the note, credit life insurance would not be provided unless the plaintiffs initialed the line provided in the insurance section, the court held that the plaintiffs' signatures on the application could not be used to satisfy the requirements of the Truth-In-Lending Act. Accordingly, the credit life insurance premium was a finance charge that caused the financial disclosures in the note to be incorrect.

Nonetheless, without proof that the bank committed the act of forgery or knew of it, the trial court's judgment holding it liable under the Motor Vehicle Sales Finance Act on the basis that it was by definition "an extender of credit" was error. Under 15 U.S.C. § 1641(a), the liability of an assignee is limited to those situations in which a Truth-In-Lending violation is apparent on the face of a disclosure document. The Truth-In-Lending Act preempts conflicting state law. Following Alexiou v. Brad Benson Mitsubishi, 127 F. Supp. 2d 557 (D.C. N. J. 2000), which had held preempted a New Jersey statute providing that the subsequent holder of a consumer note is subject to all claims and defenses of the retail buyer against the retail seller, the court held that the Truth-In-Lending Act preempts the definition of the term "extender of credit" in the Louisiana Motor Vehicle Sales Finance Act with regard to an assignee's liability. Since there was no evidence that the forgery of the plaintiffs' initials was apparent on the face of the note, the trial court's finding of liability on the part of Bank One was in error. The court also observed that the trial court's conclusion that the FTC holder language in the note rendered Bank One liable for the forgery was likewise error.

With regard to the liability of the dealership, the court of appeal held that the evidence supported a finding that the dealership had forged the plaintiffs' initials and held that the trial court correctly assessed a refund of all loan finance charges and three times the amount of the charges plus attorney's fees under the Louisiana Motor Vehicle Sales Finance Act, which allows such a penalty if the extender of credit has intentionally or in bad faith violated the provisions of Part II of the Act. La. R.S. 6:969.18(E), which is contained within Part II of the Act, provides that an extender of credit may receive payment of additional fees and charges provided that they are not considered to be additional finance charges under the Truth-In-Lending Act. Since the insurance premium was an additional finance charge that was not properly disclosed, collection of the premium was a violation of this provision thereby triggering the right to recovery of the penalty. However, the award of $300 in nominal damages under the Unfair

Trade Practices Act was reversed, because a review of the record revealed that the plaintiffs did not present any evidence of damages which resulted from the defendants' conduct.

Finally, the court affirmed the judgment in favor of the bank requiring the dealership to buy back the note and reimburse all of the bank's defense costs. Under the terms of the governing dealer agreement, the dealership warranted that all the documents were genuine and were not subject to any defenses or claims by the customer against the dealer or the bank. The court also rejected the dealership's contention that the bank could not both require a buy-back of the note and seek indemnification and defense costs. Both remedies were available to the bank under the wording of the dealer agreement.

2. Fair Credit Reporting Act.

a. **Bank One, N.A. v. Colley, 294 F. Supp. 2d 864 (M.D. La. 2003).** In an attempt to repair their credit report, the claimants paid their debt with First USA Bank and allegedly obtained an agreement from that creditor to completely delete the trade line from their credit report. When they later attempted to refinance their mortgage, they found that the trade line still existed and visited a local branch of Bank One, a First USA affiliate, in order to remedy the problem. The local Bank One officer contacted a local credit reporting agency, which promised to remove the inaccurate information. Though the claimants subsequently received an updated credit report from the local credit reporting agency reflecting removal of the trade line, the claimants later discovered the trade line was not deleted from credit reports issued by national reporting agencies. The claimants sued First USA alleging negligence, defamation and violations of both the Louisiana Unfair Trade Practices Act and the Fair Credit Reporting Act. The court granted summary judgment in favor of the bank. With regard to the Louisiana Unfair Trade Practices Act, all claimants conceded that First USA Bank, as a bank chartered under the authority of the United States, was exempt from its provisions.

With respect to negligence and defamation claims arising under state law, the court considered the tension between two preemption provisions of the Fair Crediting Reporting Act. Section 1681t(b)(1)(F) provides that no requirement or prohibition may be imposed under the laws of any state with respect to a subject matter regulated under § 1681s-2, relating to the responsibilities of persons who furnish information to consumer reporting agencies. On the other hand, § 1681h(e) provides that no consumer may bring an action or proceeding in the nature of defamation, invasion of privacy or negligence with respect to the reporting of information against any person who furnishes information to a consumer reporting agency unless there is malice or willful intent to injure. After reviewing three varying approaches adopted by courts across the country, the court concluded that the temporal analysis approach was the correct one. Preemption of state law claims arising *before* the furnisher of information receives notice of the dispute is governed by § 1681h(e), while preemption of state law claims arising *after* that time is governed by § 1681t(b)(1)(F). Using the temporal analysis in this case, the latter preemption provision was applicable, and the claimant's state law claims were therefore preempted.

In determining whether the claimants had stated a cause of action under the Fair Credit Reporting Act, the court noted that § 1681s-2(a), which creates an affirmative obligation to refrain from reporting inaccurate information, does not create a private right of action. Section 1681s-2(b), which imposes duties upon a furnisher of information once it receives notice from a consumer reporting agency that a consumer is disputing credit information, does create a private right of action; however, in this case, the claimants admitted that there was no evidence that the bank ever received notice of the dispute from a credit reporting agency. Accordingly, summary judgment was properly granted on these claims as well.

b. **Kennedy v. Chase Manhattan Bank USA, NA, 369 F. 3d 833 (5th Cir. 2004).** Responding to "pre-qualified" offers for credit card accounts from the defendant bank, the plaintiffs returned the application to the bank, which then obtained consumer credit reports from the defendant credit reporting agencies. Based upon the information in these reports, the bank notified the plaintiffs that it would not open credit card accounts for them. The plaintiffs then brought suit against the bank and credit reporting agencies for violation of the Fair Credit

Reporting Act. The district court granted the defendants' motion to dismiss, and the court of appeal affirmed.

As amended by the 1997 amendments to the Fair Credit Reporting Act, 15 U.S.C. § 1681(a)(l) provides that a creditor must honor a firm offer of credit only if, based upon information in the credit report or other information bearing upon creditworthiness, the consumer meets the criteria initially used to select that consumer for the offer. The creditor must establish the criteria for the firm offer of credit prior to extending the offer and must maintain a record of the criteria. Consumer reporting agencies are permitted to furnish only limited information for a credit transaction not initiated by the consumer, and therefore they comply a list of customers meeting specific criteria provided by the creditor, who then uses the list to solicit customers with pre-approved offers of credit. To access more detailed information, a creditor must obtain a consumer's authorization. As the district court correctly determined, a "firm offer of credit" under the Act "really means a firm offer if you meet certain criteria." In this case, the plaintiffs authorized the bank to obtain a consumer report for the purposes of issuing a credit card account. Moreover, the bank notified the plaintiffs in the pre-approved certificate that the plaintiffs had the right to prohibit the use of their credit information in connection with any transaction they did not initiate. The bank also fully apprised the plaintiffs that the bank would review their credit history prior to determining whether the bank would extend the offered credit. The plaintiffs signed the pre-approved certificates, agreed to the terms and conditions of the offers, and authorized the bank to access their credit information. Thus, the complaint did not state a cause of action against the bank, nor did the complaint state a cause of action against the credit reporting agencies for failing to maintain reasonable procedures and certifications needed to comply with the Act as required by § 1681(e). The allegations of the complaint against the credit reporting agencies were nothing more than unsupported legal conclusions.

E. RICO claims.

<u>Brown v. Protective Life Insurance Co.</u>, 353 F. 3d 405 (5th Cir. 2003). On behalf of herself and other proposed class members, the plaintiff brought a RICO action against Protective Life Insurance Company and Crescent Bank and Trust, alleging a RICO claim in connection with the defendants' sale of credit life insurance. The district court granted a motion to dismiss, and the court of appeal affirmed. Under Supreme Court precedent, a RICO plaintiff has standing only if he has been injured in his business or property by conduct constituting a RICO violation. In class actions, named plaintiffs who represent a class must allege and show that they personally have been injured, not that the injury has been suffered by other, unidentified members of the class. Thus, the plaintiff in this case must allege that she was injured by predicate acts which, in this case, would be the interstate transportation of goods in excess of $5,000 taken by fraud. Only one civil case has permitted aggregation of alleged violations to meet the statutory predicate act requirement, and that case was unpersuasive because it improperly relied upon two criminal cases that permitted aggregation. Since the plaintiff's insurance premium was only $1,800, she failed to meet the RICO standing requirements, and the district court therefore correctly dismissed her claim. With regard to the plaintiff's argument that the $5,000 threshold was reached since the amount of insurance proceeds exceeded that sum, the court noted that the proceeds could not be used to state a RICO cause of action because they were in fact given to her and did not harm her business or property.

VI. Deposit account liability.

A. **<u>Quality Gas Products, Inc. v. Bank One Corporation</u>, 2003-1859 (La. App. 1st Cir. 6/25/04); ___ So. 2d ___; 2004 WL 1418056 (not yet released for publication in the permanent law reports).** After learning that its bookkeeper had taken checks made payable to its order and deposited them into her personal account, the plaintiff brought suit against Bank One, which was apparently the bank where the personal account was maintained. Bank One filed an exception of prescription, based upon La. R.S. 10:3-420, contending that all claims on those checks that had been paid more than one year prior to the filing of suit had prescribed. The trial court sustained the exception, and the court of appeal affirmed. Contending that the bookkeeper's endorsement of the checks with the words "for deposit" followed by an account number did not constitute a forged endorsement, the plaintiff argued that its suit was an action based on a negotiable instrument and was thus subject to five-year liberative prescription. According to the court, even though this case did not involve a forged endorsement, it clearly involved conversion of an instrument as provided under La. R.S. 10:3-240. Thus, the one-year prescriptive period applied. The statute does not authorize a separate action on the instruments themselves.

B. <u>Wisner Elevator Company, Inc. v. Richland State Bank</u>, **37,764 (La. App. 2d Cir. 12/12/03); 862 So. 2d 1112; 52 UCC Rep. Serv. 2d 349.** The Farm Service Agency issued a check payable to Chad E. Gill, with language on the back of the check indicating that it was payable to the order of Richland State Bank for issuance of a cashier's check payable to one of Mr. Gill's agricultural suppliers with the balance payable to Mr. Gill. Endorsing the back of the check beneath this language, Mr. Gill deposited the entire amount of the check into his checking account, and no cashier's check was ever issued to the supplier. The supplier then brought suit against the bank for conversion of the instrument, contending that the bank had negotiated the instrument in a manner inconsistent with the endorsement. Both parties moved for summary judgment, and the trial court granted summary judgment in favor of the bank. The court of appeal affirmed.

Although the writing on the back of the check was referred to in the pleadings as an endorsement, it did not truly conform to the definition found in La. R.S. 10:3-204, since it was placed on the back of the check by the drawer. Although some cases in other jurisdictions have expressed concern that allowing a waiver of a restrictive endorsement could be used as a means of concealing embezzlement or misappropriation, the court observed that the comments to the uniform revision of Article 3 of the UCC state that the article does not displace the law of waiver as it may apply to restrictive endorsements. Moreover, La. R.S. 10:1-103 provides that, unless displaced by particular provisions of Title 10, the other laws of Louisiana apply. The court then turned to pre-UCC cases in which the Louisiana Supreme Court had held that the holder of a check may erase or strike out any restrictive endorsement that is not necessary to his title. Thus, when Mr. Gill affixed his signature under the writing on the back of the check, he made it his own endorsement. As his own endorsement, Mr. Gill had the power to waive it and direct that the check, upon which he was designated as the sole payee, be deposited into his account in its entirety.

VII. Miscellaneous.

A. Confidentiality of customer records.

<u>**Union Planters Bank, National Association v. Salih**</u>**, 369 F. 3d 457 (5th Cir. 2004).** In a state court class action suit claiming that Union Planters Bank violated Louisiana law by "forced placing" flood insurance through surplus lines insurance broker, rather than obtaining insurance through the pool of insurers approved by the Federal Emergency Management Agency, the plaintiffs obtained the issuance of a subpoena directing the defendant insurer

and its agent to produce the names and addresses of all of the bank's Louisiana borrowers whose flood insurance had been obtained through the insurer. In moving to quash the subpoena in state court, the agent and the insurer contended that production would violate La. R.S. 6:333 and the Gramm-Leach-Bliley Act. The insurer also contended that the Louisiana court had no power to issue a subpoena beyond state lines. The bank filed no formal pleading to concur in the motion, but at oral argument voiced support for it based upon the Gramm-Leach-Bliley Act. The state trial court denied the motion to quash, and, on an emergency writ application, the state court of appeal quashed the subpoena directed to the insurer but denied relief to the agent. No writ application was made to the Louisiana Supreme Court. Relying on the Gramm-Leach-Bliley Act, the bank then brought a federal proceeding seeking to restrain the agent from disclosing the information he was ordered to produce pursuant to the state court subpoena. The federal district court granted both a temporary restraining order and a preliminary injunction, which were vacated by the court of appeals. Under what has become known as the Rooker-Feldman doctrine, federal district courts lack appellate jurisdiction to review, modify or nullify final orders of state courts. If a state trial court errs, the judgment is to be reviewed and corrected by the appropriate state appellate court. Thereafter, recourse at the federal level is limited solely to an application for a writ of certiorari to the United States Supreme Court. Under governing Louisiana law, a ruling denying a motion to quash a subpoena brought by a non-party to the action determines in whole the merits of the single issue between the parties and is therefore a final appealable judgment. Thus, in this case, the state court order was a final judgment for Rooker-Feldman purposes. It is immaterial that the agent and insurer chose not to pursue an appeal as provided by state law but instead sought only supervisory writs. Moreover, the bank's contention that it was technically not a party to the Louisiana state court order and therefore was not subject to its preclusive effect was without merit. The bank was a named defendant in the state court proceedings and certainly had standing to challenge the production of information requested in the subpoena duces tecum. The bank was clearly in a position to seek review of the state court ruling that it was now challenging in federal court. The fact that the bank unilaterally chose not to join the motion or to seek appellate remedies beyond the Louisiana court of appeal was of no consequence.

Part Two: 2004 Legislation

Bankruptcy

Act 476: Amends La. R.S. 9:5166 to allow a debtor by affidavit to obtain release of a pre-bankruptcy judicial mortgage to the extent of property acquired after the bankruptcy filing.

Clerks of Court

Act 679: Amends La. R.S. 44:137, to provide that clerks of court no longer have the duty to retain originals filed on or after January 1, 2005, so long as the clerk retains a copy, including a digital copy. The original may be returned to the person tendering it for filing.

Exemptions

Act 60: Amends La. R.S. 13:3881 to provide that Roth IRAs are exempt from seizure.

Act 468: Amends La. R.S. 13:3881 to provide that the federal earned income tax credit is exempt from seizure, except for seizure by the Department of Revenue or for arrears in child support payments.

Act 481: Amends Title 20 of the Revised Statutes to provide that the homestead exemption on separate property used as the homestead may be waived in a mortgage by the spouse that owns the homestead, without the requirement of joinder by the other spouse.

Farm Products

Act 63: Amends the provisions of Title 3 of the Revised Statutes with respect to the formal requirements of effective financing statements covering farm products. Among other changes, there is no longer a need for the debtor's signature on the effective financing statement, thus conforming to the deletion of the signature requirement in the 2001 revision of Chapter 9 of the Louisiana Commercial Laws.

Foreclosure Procedure

Act 877: Amends La. C.C.P. art. 2293 to provide that notice of seizure must be given to any occupants or tenants of the seized property. Notice must be made by personal or domiciliary service; however, if service cannot be made in that manner, it can be given by posting.

Fraudulent Transfers

Act 447: Wholly repeals the 2003 enactment of the Uniform Fraudulent Transfer Act and reverses changes that had been made in 2003 to the Civil Code articles governing revocatory actions.

Garnishments

Act 18: Amends La. C.C.P. art. 2411 to provide that the effect of a garnishment ceases if the seizing creditor fails to obtain a garnishment judgment within 180 days of the filing of the answers to interrogatories. Also explicitly requires service of a notice of seizure upon the garnishee.

Act 741: Amends La. C.C.P. art. 2412 to require that the judgment creditor send notice to the judgment debtor of the filing of a garnishment petition by mail or other electronic means; however, failure to give notice does not affect the validity of the seizure.

Lease

Act 821: Wholesale revision of the Civil Code articles on lease sponsored by the Louisiana State Law Institute. Among other changes, the lessor's privilege has been modified in certain respects. The exemptions from seizure that had been contained in the lease articles have been suppressed. The privilege over movables belonging to third parties has been expanded to apply to anything located in or upon the leased property as long as the lessor does not have knowledge that it belongs to a third person. With respect to the rights of sublessees, the privilege continues to attach to property of the sublessee only to the extent that the sublessee is indebted to his sublessor at the time the lessor exercises his right. The 15-day right of pursuit following removal remains unchanged, but the right of pursuit will exist even if the landlord has consented to the removal.

As with existing law, a tenant has the right to sublease, assign or encumber the lease unless the contrary is stated. However, a provision that prohibits one of these rights is deemed to prohibit all others unless a contrary intent is expressed. A provision prohibiting subleasing, assignment or encumbrance is strictly construed against the lessor.

Mortgage Cancellation

Act 294: Legislation adopted in 2003 added La. R.S. 9:5167.2, requiring a mortgagee to cancel a mortgage within 60 days after the date of receipt of full payment of the balance owed. Act 294 of 2004 makes this provision applicable only to residential mortgages on one-to-four family residential property, and specifically provides that the requirement does not apply to collateral mortgages or future advance mortgages.

Act 480: Enacts La. R.S. 9:5169.1, which allows cancellation of a mortgage based upon an authentic act of cancellation from the mortgagee or assignee of record who is the last holder of any note secured by the mortgage. It is no longer necessary to produce the note in order to obtain a cancellation, regardless of whether the note was paraphed for identification with the mortgage. The act of cancellation must include the agreement by the mortgagee to indemnify the party responsible for cancelling the instrument against any loss arising therefrom.

Motor Vehicle Repossession

Acts 191 and 814: Allow self-help repossession by certain licensed lenders of titled motor vehicles on or after the effective date of the statute, January 1, 2005. Self-help is available only after the debtor has missed two consecutive payments (or has made no payment for 60 days) and a notice has been sent to the debtor to the effect that Louisiana law permits repossession of motor vehicles without judicial process. (This same language is required to be included in security agreements beginning on or after January 1, 2005.) Following repossession, the lender is required to file a notice of repossession in the mortgage records of the parish where the collateral was located at the time of seizure, and (except in the parish of Orleans) pay a fee of $250 to the appropriate "law enforcement agency." Resort to self-help repossession will not deprive the creditor of his right to a deficiency judgment.

Act 203: Amends La. R.S. 32:1720.1 to remove the requirement of ten days' certified mail notice to a vehicle owner prior to surrender of the vehicle by a storage facility or body shop to a secured party.

Notaries

Act 62: Provides that clerks of court may refuse a document tendered for recordation if it fails to contain the notarial identification number or the attorney bar roll number and the typed or printed name of the notary and witnesses.

Act 77: Amends La. R.S. 35:200, enacting a one-year prescriptive period and three-year preemptive period for actions against non-lawyer notaries, whether the claim is based upon tort, breach of contract or otherwise.

Act 455: Requires the notary to use the parties' first full names, not their initials alone.

Act 565: Dispenses with the requirement that notarial acts contain the full social security number of the parties, requiring instead only the last four digits of the social security number.

Security Interests

Act 303: Makes technical corrections to Chapter 9 of the Louisiana Commercial Laws and related statutes.

(1) Amends R.S. 9:1149.5 to delete the thirty-day relation back of purchase money security interests in manufactured home; priority is governed solely by Chapter 9.

(2) Requirement of "written consent" of beneficiary of life insurance policy to security interests has been suppressed in favor of the more generic, and already existing, requirement of an "authenticated record."

(3) Where references were made in a number of places to statutes, regulations and rules of law that might govern an issue, the term "rule of law" has been suppressed.

(4) Clarifies that the normal UCC filing officer is "the recorder of mortgages of Orleans Parish or the clerk of court of any other parish."

(5) Clarifies that a filing covering if titled motor vehicle is effective upon filing with the Office of Motor Vehicles "provided the receipt" (not "and such receipt") is subsequently validated by the department.

(6) Provides that an oil, gas or water well lien is subject to previously perfected security interests or security interests that are later perfected under a previously filed financing statement, so long as there is no period without filing or perfection.

Tax Sales

Act 430: Requires the tax sale purchaser to notify mortgagees after a tax sale.