# THE LOUISIANA LENDER LETTER

Recent Legal Developments Important to Lending in Louisiana

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## Do not lose the original note

*This case, holding that debt evidenced by a promissory note cannot be enforced without the original note, will raise concern among lenders. Both this decision and the earlier one cited by the court (and rendered by the same judge) appear to be aberrant under Louisiana law and may be distinguishable on the facts from other disputes (in both cases the facts suggest that the promissory note never existed). Nonetheless, this case is a reminder that lenders should have procedures to ensure that original promissory notes are safely retained.*

Singleton v. American Security Bank of Ville Platte, Inc., 2003 WL 1983741 (La. App. 3 Cir. 4/30/03).

The Louisiana Third Circuit Court of Appeal held that enforcement of a promissory note without the original note was "impossible." The only authority cited in the opinion is an earlier decision by the same judge in Richey v. Richey, 733 So.2d 618 (La. App. 3 Cir. 1999), writ denied, 749 So.2d 639 (La. 1999). In both cases there was doubt whether the purported promissory note actually existed. In Singleton, the lender only produced a photocopy of an earlier note, which had been altered or marked by hand to reflect a later loan but had not been re-signed by the borrower, and in Richey it appeared that an ex-wife, who had been ordered by the court to sign a promissory note in a certain amount, never did so and may not have understood that she was obligated to do so.

The Court did not mention La. R.S. 10:3-309(a) (enacted as part of Louisiana's adoption of the Uniform Commercial Code), which permits a person not in possession of an instrument but otherwise entitled to enforce it to do so if the instrument is destroyed, lost, or in the wrongful possession of a third person who is unknown or cannot be found or served. The Court likewise did not cite La. C.C. Art. 1832 which permits proof by testimony of a destroyed, lost, or stolen contract otherwise required to be in writing. This statute has often been used to enforce lost promissory notes, certified checks, and other instruments. See, e.g., Hatch v. Acadiana Bank & Trust Co., 488 So.2d 437 (La. App. 3 Cir. 1986); Wallace v. Recile, 453 So.2d 606 (La. App. 4 Cir. 1984).

## Beware of forged draw requests on credit lines requiring joint authorization

*This recent case may make you think twice before extending a single credit line to multiple borrowers or any other credit line that requires multiple authorizations for draw requests. Many lenders may not be in a position to make sure that draw requests are properly signed by all borrowers and multiple authorizations may increase the risk of forgeries. In such cases, lenders may want to include a provision in their loan documents providing that all of the borrowers will be liable for all draws made by any one or more borrowers. In addition, a lender may want to include a provision that each borrower is liable for all draws, even unauthorized draws, where funds are disbursed to any one of the borrowers. Finally, lenders should consider inserting a provision that requires the borrower to provide written notice of any unauthorized draws to the lender within a certain number of days of the lender's statement reflecting such draws.*

Parish National Bank v. Ott, 841 So.2d 749 (La. 2/25/03).

A husband and wife (who presumably opted out of Louisiana's community property regime) obtained a line of credit which required both of their signatures on draw requests. The wife forged her

husband's signatures on several draw requests. The husband learned of the forgeries, but he did not advise the bank. Several months later, the wife obtained two additional draws by again forging her husband's signature. At that time, the husband instructed the bank not to authorize any more draws without his verbal authorization but still did not advise the bank of the forgeries. The husband then made an interest payment on the line of credit before the line of credit went into default. The bank sued the husband and wife for the full amounts due and claimed that the husband ratified his wife's draw requests by failing to report the forgeries and by paying interest on the loan.

The Louisiana Supreme Court noted that written draw requests are not "instruments" as defined under Louisiana's version of the U.C.C., La. R.S. 10:3-104(b), and thus are not governed by the negotiable instrument provisions of UCC Chapter 3. The underlying promissory note was a negotiable instrument governed by La. R.S. 10:1-203 imposing an obligation of good faith in its performance or enforcement.

The Louisiana Supreme Court affirmed the lower courts' holdings that the husband was not liable for the unauthorized draws made prior to his discovery of the forgeries. The trial court's findings that the husband did not ratify the draws and that the bank did not exercise commercially reasonable banking standards were upheld.

However, the Supreme Court reversed the lower courts' holdings that the husband was not liable for the unauthorized draws made several months after he learned of the forgeries. The court found the husband's actions in waiting a few months after discovering the forgeries before even taking minimal action to be egregious and thus violated the obligations of good faith and fair dealing imposed on obligations arising out of a promissory note or other negotiable instruments by La. R.S. 10:1-203.

**Single executory process proceeding on separate mortgages**

*This case permitted a bank to use one executory process action to foreclose on two separate collateral mortgages, encumbering two separate pieces of property owned by two distinct groups of owners, but securing the same third-party debt. Lenders may understandably prefer to use a single foreclosure action in similar situations to reduce the cost of litigation, but they should be cautious about a potential problem that was not discussed in this decision. A single executory process action may result in a single appraisal and a single sheriff's sale of both properties together, which would probably not be in the lender's best interest. Lenders considering a single foreclosure on multiple mortgages should be careful to include in the petition a prayer for separate appraisals and separate sales.*

Liberty Bank & Trust Co. v. Dapremont, 844 So.2d 877 (La. App. 4 Cir. 2/11/03).

The Louisiana Fourth Circuit Court of Appeal found no deficiencies in bank's executory process foreclosure proceeding on two bearer collateral mortgage notes secured by collateral mortgages on two separate pieces of immovable property that were pledged as security by individual makers for a single corporate debt. The court also held that the existence of a written pledge agreement and acknowledgment of pledge were not necessary because the creditor had actual possession of the pledged collateral mortgage note. The court also indicated that the affidavits attached to the lender's petition and the wording in the collateral mortgage (indicating that the collateral mortgage note was being pledged to secure indebtedness to the lender) also established the existence of the pledge.

*[NOTE: Lenders who use collateral mortgages should be cautious in relying on the court's holding concerning the proof of the pledge, at least if subsequent lending transactions secured by the pledge of the same collateral mortgage note occur with*

*the borrower. Earlier courts have held that if a later transaction is intended to be secured by the same pledge, the lender must prove that intent by producing a contemporaneous acknowledgment of the pledge. Subsequent legislation (including the adoption of the Louisiana version of Article 9 of the U.C.C.) was intended to avoid this requirement, but given the earlier cases, many lenders have continued to be conservative and to require a written acknowledgment of pledge. In the Liberty Bank decision it appears that only a single loan was at issue, and therefore the court was only addressing the original existence of the pledge and not the intention that later indebtedness would also be secured by it. For this reason, lenders may still want to rely on a written acknowledgement of pledge executed when later loans are extended.]*

**"Pre-approved" credit cards**

Kennedy v. Chase Manhattan Bank, 2003 WL 21181427 (E.D. La. 5/19/03).

The United States District Court in the Eastern District of Louisiana held that an offer for a pre-approved credit card did not violate the Fair Credit Reporting Act, 15 U.S.C. § 1681, because "firm offer" in the Fair Credit Reporting Act means "firm offer if you meet certain criteria." The court also held that the Fair Credit Reporting Act preempted any violation of state law under the Louisiana Unfair Trade and Consumer Protection Act.

**National Banks not subject to state law usury claims**

Beneficial National Bank v. Anderson, 123 S.Ct. 2058 (6/2/03).

The Supreme Court of the United States held that Section 30 of the National Bank Act, 12 U.S.C. §§ 85 and 86, provides the exclusive cause of action against national banks for usury claims. Thus, an action filed in state court to recover damages from a national bank for allegedly charging excessive interest in violation of the common law usury doctrine and a state usury statute may be removed to federal court under §1441 because the claim could only arise under federal law. The sections of the National Banking Act setting forth substantive limits on rates of interest that banks may charge and prescribing remedies available to borrowers charged higher rates provide the exclusive cause of action for usury claims against national banks and completely preempt state law usury claims against national banks.

**Looking beyond a settlement agreement to object to discharge of settled debt**

Archer v. Warner, 123 S.Ct. 1462 (3/31/03).

The Supreme Court of the United States held that debt for money promised in a settlement agreement, which settled and released a prior state law claim for fraud, may still be nondischargeable under 11 U.S.C. § 523(a)(2)(A).

**Failure to Setoff Extinguishes Obligation of Surety?**

Stumpf v. Hibernia National Bank, 845 So.2d 1133 (La.App. 5 Cir. 2003).

At the request of a Chapter 7 trustee, a bank released funds in deposit accounts to the trustee which secured the bank's loan to the Chapter 7 debtor. After the Bankruptcy Judge ruled that the bank lost its security interest in the accounts upon their release to the trustee, the bank sought to satisfy the debt by applying a guarantor's pledged account and stock. The Louisiana Fifth Circuit Court of Appeal held that the bank's release of the deposit accounts to the Trustee without exercising its right of setoff "was an impairment of that security and operated to extinguish the obligations of the surety…." The Court failed to address whether the bank's loan documents included the standard language that a release of collateral does not impair rights against guarantors.

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