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## Reporting Recent Legal Developments Important To Lending In Louisiana

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By the Bankruptcy and Commercial Lending Groups of Lemle & Kelleher, L.L.P.

### **Another Warning To Claims Traders**

*In our December 2003 issue, we reported on the case of Luk-Shop, L.L.C. v. Pinewood LaPlace Associates, L.L.C., 802 So. 2d 1291 (La. 2002), which made clear that a promissory note becomes a “litigious right” where a lender files suit thereon and the borrower answers and denies liability. Under Louisiana Civil Code Article 2652, a defendant may extinguish a “litigious right” that has been sold to another by paying the purchase price plus interest. Another Louisiana case reveals the unintended consequences of Louisiana’s sale of litigious rights law to buyers of disputed debt.*

In *Regions Bank v. Norris Rader of Lafayette, Inc.*, 879 So.2d 904 (La. App. 3 Cir. 7/14/04), a bank obtained a summary judgment on a note in excess of three million dollars against a borrower. After the borrower appealed the summary judgment, the bank sold its judgment to a third party, and the third party substituted in the case as plaintiff.

The borrower then requested that the appellate court remand the case to the trial court asserting that the assignment constituted the sale of a litigious right and Louisiana Civil Code Article 2652 allowed it to extinguish the obligation by paying the third party the price it paid for the judgment, plus interest. The appellate court remanded the case to the trial court for the limited purpose of deciding whether the assignment constituted a sale of a litigious right and, if so, the amount necessary for the defendant to redeem that right.

### **Does Louisiana’s Credit Agreement Statute Protect Parties Working For Lender?**

*Louisiana’s credit agreement statute, La. R.S. 6:1121 et seq., bars actions against lenders based on alleged oral credit agreements or financial accommodations. However, does the credit agreement statute protect parties retained by the bank (such as consultants, attorneys, and appraisers) in connection with a credit agreement or other financial accommodation? The Louisiana Supreme Court recently limited the scope of whom may be protected by the statute but stopped short of a per se rule limiting the scope of the statute to the lender and its employees.*

In *King v. Parish National Bank*, 885 So.2d 540 (La. 10/19/04), a borrower sued a bank, its employees, and appraisers in tort, breach of contract, fraud, error and duress. Borrower alleged that the defendant bank and its employees advised that the restructuring of the plaintiff’s obligations to the bank would not in any way impair or jeopardize his financial and personal welfare as long as the plaintiff remained current on his obligations. The borrower also alleged the bank improperly required that plaintiff obtain current appraisals on the collateral when such appraisals were not required



previously of the plaintiff in order to procure financing. Finally, the borrower alleged that the appraiser, who was the son of the president of the bank and not certified, improperly appraised his property. The trial court granted summary judgment and dismissed all of the claims against all of the defendants pursuant to La. R.S. 6:1121, *et seq.* The appellate court affirmed except on the issue of bad faith conduct in relation to the loan renegotiation.

However, following its holding in *Jesco Construction Corp. v. Nationsbank Corp.*, 830 So. 2d 989 (La. 2002), the Louisiana Supreme Court again held that La. R.S. 6:1121, *et seq.* precluded all of plaintiff's causes of action which were all based on alleged oral assurances to make a financial accommodation. Further, the Louisiana Supreme Court held that the provisions of the statute protect not only the bank but also its employees when the employees are acting within the course and scope of employment.

However, the Louisiana Supreme Court found that the claims against the appraisers and appraisal company should not have been dismissed. The Court noted that La. R.S. 6:1121, *et seq.* bars claims against lenders on oral credit agreements and the claims against the appraiser and appraisal company did not implicate an alleged oral credit agreement. The Supreme Court's holding did not rule out the possibility that independent contractors working for a bank on restructuring a loan would be protected by La. R.S. 6:1121, *et seq.*

## **Mortgagor Not Entitled To Notice Of Date Of Rescheduled Foreclosure Sale**

*Once is enough when it comes to providing notice of a foreclosure sale to a mortgagor who cancels an earlier sale by filing bankruptcy.*

In *Chase Manhattan Mortgage Corporation v. Lassiter*, 889 So.2d 1155 (La. App. 5 Cir. 11/30/04), after a mortgagor defaulted on a promissory note, she was served with notice of a seizure of her property in an executory foreclosure proceeding. The notice provided that the property would be sold on the scheduled date or a "day thereafter as scheduled by the Sheriff." The mortgagor then filed a petition for bankruptcy, and the judicial sale was cancelled. However, after the mortgagor's bankruptcy was dismissed, the judicial sale was rescheduled. The mortgagor did not receive notice advising of the second sale date, and the property was sold at auction on the sale date.

The mortgagor filed a motion to annul the sale, alleging that the sale of the property was invalid because she was not served with notice of the sale. The court found that La. R.S. 13:3852 only requires notice of the first scheduled sale date. The court found no authority under Louisiana law that would require notice of a rescheduled sale. Further, the court found that Louisiana's law comports with the constitutional standards for actual notice set forth in *Menonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).





## **Statutes Governing Prescription On Demand Note Not Mutually Exclusive**

*The holder of a demand note may interrupt prescription by any of the bases provided under Louisiana Civil Code Article 3498 or La. R.S. 10:3-118(b).*

In *Certified Capital Corporation v. Reis*, 2004 WL 2415125 (La. App. 1 Cir. 10/29/04), a holder of a demand note brought an action to collect on the note. The maker of the note filed a peremptory exception of prescription, which the trial court sustained under Louisiana Civil Code Article 3498.

The appellate court found that two statutes governed the action. Article 3498 provides that actions on all promissory notes are subject to a liberative prescriptive period of five years. Likewise, La. R.S. 10:3-118(b) provides that an action to enforce a demand note is barred if neither principal nor interest on the note is paid for a continuous period of five years. However, unlike Article 3498, a demand for payment interrupts prescription under La. R.S. 10:3-118(b). Since the appellate court found that both provisions apply to demand notes, the court held that the holder of a demand note was not limited to the defenses to prescription available under Article 3498 but may also avoid prescription by making a demand for payment under La. R.S. 10:3-118(b).

## **Misleading Settlement Offer in Letter Triggers Fair Debt Collection Claim**

*Debt collectors should take care not to make any misleading statements in their collections letters. Fifth Circuit finds that setting a false deadline to accept a settlement offer provides a basis for a claim under the Fair Debt Collection Practices Act.*

In *Goswami v. American Collections Enterprise*, 377 F.3d 488 (5<sup>th</sup> Cir. 2004), debtor brought an action against a debt collector under the Fair Debt Collection Practices Act, 16 U.S.C. 1692, *et seq.* (“FDCPA”) alleging that the debt collector’s letter falsely stated that “only during the next thirty days, will our client agree to settle your outstanding balance with a thirty (30%) percent discount off your above balance owed”. In fact, the creditor had authorized the debt collector to give debtors a 30% discount at any time, not just for a thirty-day period.

The Fifth Circuit found that the debt collector’s statements regarding the deadline to accept the discount was false or misleading and provided a basis for a claim under FDCPA. The court held that while a debt collector may offer a settlement to a debtor, it may not be deceitful in the presentation of the settlement offer.





**Editors: David F. Waguespack and Andrew H. Goodman**

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*This publication and the information herein is not legal advice and is not intended to serve as a substitute for consultation with an attorney. Specific legal issues and concerns require the advice of an attorney.*

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*Our Bankruptcy and Creditor's Rights Group ...*

*New Orleans*

*Pan American Life Center  
601 Poydras St.  
New Orleans, LA 70130  
(504) 586-1241*

*Alan H. Goodman • James R. Conway, III • Patrick Johnson, Jr.  
James C. Butler • Thomas M. Benjamin • David F. Waguespack  
Brent C. Wyatt • Andrew H. Goodman*

*Shreveport*

*Louisiana Tower, 10<sup>th</sup> Floor  
401 Edwards Street  
Shreveport, LA 71101-3289  
(318) 227-1131*

*Malcolm S. Murchison • Stephen E. Ramey • Leland G. Horton*

