RECENT DEVELOPMENTS IN LOUISIANA CASELAW

RELATING TO

SECURITY DEVICES AND COMMERCIAL LENDING

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Louisiana Bankers Association
2025 Bank Counsel Conference
The Westin New Orleans Hotel
New Orleans, Louisiana
December 11, 2025

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Table of Contents

I. Mortgages and Other Security Rights in Immovables 1
- A. Public Records Doctrine 1
- B. Nature of a Mortgage 6
- C. Multiple Indebtedness Mortgages 6
- D. Judicial Mortgages 7
- E. Authentic Acts; Reformation 10
- F. Lender-Placed Insurance 11
- G. Private Works Act Privileges 14
  - 1. Sufficiency of Description of Claim 14
  - 2. Unlicensed Contractors 14
  - 3. Requirement of Notice of Lis Pendens 15
  - 4. Contractor's Claims Against Mortgagees 16
- H. Other Privileges Upon Immovables 17
- I. Tax Sales 18

II. Chapter 9 Security Interests and Other Security Rights in Movables 20
- A. Definition of Security Interest 20
- B. Priority 21
- C. Enforcement 22
- D. Claims Against Third Persons Obligated on Collateral 24
- E. Duty to Give a Statement of Account 28

III. Interpretation of Loan Documents 30
- A. Promissory Notes 30
- B. Borrowing Base Certificates 31

IV. Suretyship 32
- A. Ambiguous Signatures 32
- B. Continuing Guaranties; Revocation 33
- C. Subrogation/Subordination 35

V. Executory Process 37
- A. Injunctive Relief 37
- B. Post-Sale Attack 39

VI. Ordinary Process Foreclosure/Collection Actions 41
A. Venue; Personal Jurisdiction 41
B. Default Judgment....................43
C. Summary Judgment 47
D. Finality of Judgment....................52
E. Defenses 53
1. Vices of Consent....................53
2. Lack of Original Promissory Note 56
3. Litigious Redemption 58
F. Pro Se Litigation by Legal Entities 58
G. Garnishment 59
VII. Revocatory Actions 62
A. Prescription....................62
B. Creditor Derivative Actions 66
VIII. Lender Liability 67
A. Credit Agreement Statute 67
B. Other Breach of Contract Claims 68
C. Wrongful Seizure; Wrongful Foreclosure 70
D. Other Fair Credit Reporting Act/TILA/RESPA Cases....................72
E. Illegal Securitization....................74
IX. Deposit Account Liability 76
A. Conversion....................76
B. Forged Maker's Signature/ Improper Withdrawals 76
C. Negligent Misrepresentation 79

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I. Mortgages and Other Security Rights in Immovables

A. Public Records Doctrine

1. **Stormfield Capital Funding I, LLC v. 1911 Mandeville, LLC, 414 So. 3d 1240 (La. App. 4th Cir. 6/6/2025).** Several years after the death of their parents, a judgment of possession was rendered in the father's succession, placing seven children into possession of an immovable that the parents had acquired as community property. The mother also died leaving the same heirs, and, although succession proceedings were opened for her, apparently no judgment of possession was rendered in her succession. Eight years after the judgment of possession rendered in the father's succession, one of the seven children filed a motion to re-open both successions and to have himself appointed as succession representative. Without seeking to vacate the judgment of possession, he obtained, and was granted, a court order in both successions authorizing the sale of the property. A month after he executed and recorded an act of sale on behalf of the successions, he filed a "Motion to Implement Prior Court Order Re-opening Succession" seeking to vacate the judgment of possession. This motion was denied.

   Afterward, the buyer who had acquired the property from the succession representative sold it to a third party buyer, which obtained a mortgage loan to finance the acquisition. The title attorneys handling the closing discovered that the judgment of possession had been recorded but failed to inform the mortgagee or include the judgment of possession in their title report. A neighbor, who became concerned about the state of disrepair of the property, obtained a title search and learned of the judgments of possession. This neighbor then arranged for his limited liability company to obtain quitclaim deeds from the person who had been appointed as succession representative, both individually and as succession representative, and from certain others of the heirs. The third party buyer who had purchased and mortgaged the property likewise quitclaimed his interest in the property to this limited liability company.

   The mortgagee then filed the present suit for declaratory judgment that its mortgage encumbered the entirety of the property or alternatively, the one-half interest in the property that was not traced in the judgment of possession in the father's succession. After a trial, the trial court denied the petition for declaratory judgment without reasons, except to state that it was unable to declare that the mortgage was valid. The court of appeal **affirmed**.

   The mortgagee's first argument was that the trial court erroneously ignored Civil Code article 2035, which provides that nullity of a contract does not impair the rights acquired through the contract by a third party in good faith and that if the contract involves immovable property, the principles of recordation apply to a third person acquiring an interest in the property. According to the mortgagee's argument, Civil Code article 2035 protects its rights under the mortgage because it obtained the mortgage based on a recorded order rendered in the successions. The mortgagee further asserted that it was in good faith because it was provided with a "clean" title insurance commitment that contained no reference to the judgment of possession. The court found that it was "unable to find any support in the law" for the mortgagee's contention. A claim of good faith reliance on recorded orders authorizing sale of the property does not accurately reflect the public records doctrine. As Civil Code article 3341 provides, the recordation of an instrument does not create a presumption that the instrument is valid or genuine. Thus, the court rejected the mortgagee's assertion that its reliance on certain, but not all, recorded instruments "imbued" the mortgagee with a valid mortgage encumbering the entire property.

The mortgagee also argued that the trial court had erroneously failed to rule that the limited liability company's claim contesting the mortgage's validity was time barred. According to the mortgagee, the limited liability company's attack on the mortgage was prescribed because more than two years have elapsed since the administrator of the father's succession effected the sale of the property. This argument was based upon R.S. 9:5632(A), which provides that where the legal procedure is defective in the alienation of property by a legal representative of a succession, minor or interdict, any action shall be prescribed against by those claiming the defect after the lapse of two years. The court found that the statute did not apply, as its plain language contemplates a claim against the legal representative of a succession, minor or interdict. The LLC had brought no claim in this litigation, and the mortgagee had not filed any exception of prescription. The court could not locate any authority that invoked this prescription statute to validate the sale of the property or to enforce the mortgage under the facts of the case.

The mortgagee's final argument was that the judgment of possession had affected only the father's half interest in the property and not the mother's half interest, such that its mortgage should encumber the mother's half interest. According to the court, this argument overlooked the principle that a conventional mortgage may be established only by a person having the power to alienate the mortgaged property. Contrary to the mortgagee's suggestion, the trial court rendered no judgment to "invalidate" the mortgage in its entirety. The trial court could have reasonably concluded that the act of sale did not convey ownership of the property to the third party mortgagor, so as to imbue that mortgagor with the right to encumber the property with a collateral mortgage. Thus, the court could not say that the lower court abused its discretion in "determining under these particular facts that it could not declare a valid mortgage encumbering the Property." In a footnote, the court pointed out that ownership of the disputed property was not adjudicated in the court below, and the court of appeal declined to adjudicate it for the first time on appeal.

In its conclusion, the court noted "important public policy concerns related to succession integrity and the public records doctrine." The negative nature of the public records doctrine "protects the integrity of the land title system by ensuring that recorded documents cannot create false assurances of ownership or validity." Allowing mortgages to stand on title chains that disregard recorded judgments of possession would invite circumvention of succession proceedings and erode the reliability of Louisiana's property system. Thus, affirming the trial court's judgment is consistent "not only with the Civil Code but also with the broader goals of legal certainty and protection of rightful ownership."

2. **Natalie v. Fhubal, 404 So. 3d 1098 (La. App. 3d Cir. 2/26/2025).** Following the death of his parents, the person who "stood to inherit" an immovable entered into a verbal agreement by which he agreed to sell the property to the plaintiff in exchange for payments to be made over time. During this period, the plaintiff placed some movables in a storage shed located on the property and made incremental payments as needed by the seller, a homeless person, for support. After the plaintiff had paid approximately half of the purchase price, the seller entered into an agreement with another buyer to purchase the property for cash. This other buyer was aware of the arrangement with the plaintiff and admitted at trial that he "possibly" told the seller to tell the plaintiff that the payments that he had been made were just rental payments. An act of sale with the second buyer was executed and recorded, and the second buyer then demanded that the plaintiff to remove his movables from the property. The plaintiff then brought suit against the seller and the second buyer to enforce the verbal agreement to sell. The seller filed a *pro se* answer admitting the plaintiff's allegations and later signed a affidavit acknowledging the verbal agreement to sell and that the property had been delivered to the plaintiff. The second buyer defended on the basis of the public records doctrine, as nothing had been recorded to evidence the sale to the plaintiff. After a bench trial, the trial court held the sale to be effective against the second buyer since his knowledge of the verbal agreement and payments that had been made "affects his ability to claim the benefits of a good faith buyer." The court of appeal **affirmed**.

The second buyer through his testimony confirmed that he was aware of the verbal sale and did not deny that he told the seller to refer to the payments made by the plaintiff as rent payments. As the trial court noted, this clearly evidenced that the second buyer "was aware of the overall situation or status of the property as well as [the seller's] intent to defraud [the plaintiff]." The jurisprudence is consistent that third-party purchasers cannot rely on the protections of the public records doctrine if they have engaged in fraudulent behavior involving the property in question. The record supported the trial court's factual findings that the second buyer actively participated in the fraud against the plaintiff.

3. **Citi Mortgage, Inc. v. Bass, 419 So. 3d 370 (La. App. 1st. Cir. 8/4/2025).** A year after the first mortgagee filed an executory process action in 2020 to enforce its mortgage, the second mortgagee filed a separate foreclosure action. A few weeks afterward, upon learning that an attorney had cancelled its mortgage in 2008, the first mortgagee filed a petition to reinstate the inscription of its mortgage with the same rank and priority as the original inscription, naming the mortgagors as the only defendants and claiming that the mortgage had been cancelled through "inadvertent error or perhaps even fraud." The same day, the first mortgagee recorded a notice of lis pendens in the mortgage records giving notice of the filing of the suit.

Several months later, the property was sold in the second mortgagee's foreclosure proceedings to a foreclosure sale buyer, who later sold the property to third party buyer a few months afterward. Those buyers granted a mortgage upon the property in favor of their own mortgage lender. Afterward, the first mortgagee amended its petition to claim that the sheriff had ignored the notice of lis pendens and wrongly distributed the funds from the sale to the second mortgagee. The first mortgagee also alleged that all subsequent interest holders, including the purchaser at the foreclosure, his buyers and their mortgage lender, took their interests subject to the first mortgage.

The third party buyers and their mortgage lender moved for summary judgment on the basis of the public records doctrine. While their motions for summary judgment were pending, the first mortgagee obtained a default judgment against the original mortgagors, ordering the clerk to reinstate the first mortgage on the property with the same rank and priority as the original inscription. The buyers and their mortgage lender filed a motion for new trial from this default judgment, urging that they had not been provided notice prior to the hearing. The first mortgagee then filed a cross-motion for a summary judgment directing the clerk to reinstate its mortgage with the same rank and priority as the original inscription. The trial court denied the motion for new trial, granted the first mortgagee's motion of summary judgment, and denied the motions filed by the third party buyers and their mortgage lender. The court of appeal **reversed** the grant of summary judgment in favor of the first mortgagee but **affirmed** the denial of the summary judgment motion filed by the other parties. The court of appeal also found that the trial court had erred in not granting the motion for new trial.

The public records doctrine is a negative doctrine that does not create rights but rather denies the effect of certain rights unless they are recorded. Third parties are not allowed to rely on what *is* contained in the public records but can rely on the *absence* from the public records of those interests that are required to be recorded. An exception to the public records doctrine exists where a mortgage is cancelled from the public records through fraud, error or mistake and without the consent or knowledge of the mortgage holder. Such a cancellation does not deprive the mortgage holder of his security, even as against third persons dealing with the property in good faith in reliance on the public records.

Here, it was the first mortgagee's burden at trial to show that the mortgage was cancelled by error and without its consent. While the affidavit presented by the first mortgagee in support of its summary judgment motion tended to show that the mortgage may have been cancelled by error or mistake, the evidence presented did not show that this occurred without the first mortgagee's consent or knowledge. Rather, if the attorney who effected the cancellation was employed by or an agent of the first mortgagee or if the mortgage was cancelled due to the first mortgagee's own error or mistake, the first mortgagee may not be able to benefit using this exception to the public records doctrine. While the first mortgagee urged the court to infer that it did not consent, this was only speculation that fell short of its burden on its motion for summary judgment.

In support of their own summary judgment motion, the third party buyers and their mortgage lender asserted that the first mortgagee had taken no steps to address their purported mistake in cancellation of its mortgage by seeking to enjoin the sheriff's sale, rank liens prior to the sheriff's sale, or "unravel" the sheriff's sale once held. They argued that, if the first mortgagee had done so, it could have contained the dispute to one between only the first and second mortgagees, rather than allowing the sheriff's sale to take place and taking no action to avoid the inevitable third parties becoming involved. The court recognized the existence of certain jurisprudence that, notwithstanding the permissive nature of Code of Civil Procedure article 1092 allowing a third party claiming a mortgage on property seized to assert his claim by intervention, some cases appear to carve out exceptions, holding that if a mortgage holder has remedies to protect itself prior to a judicial sale, then the fraudulent or erroneous cancellation exception might not apply. Here, however, there was no evidence submitted in support of the motion for summary judgment to show if and when the first mortgagee became aware of the second mortgagee's foreclosure proceedings and whether it became aware of those foreclosure proceedings at a time when it could have taken steps to protect its security interest in the property. The court observed that very little evidence had been provided by the parties in connection with the motions for summary judgment and, given the scant evidence, the court could not determine whether the first mortgagee was required to take additional steps to protect its interests.

Finally, the court addressed the correctness of the default judgment that had been entered against the original mortgagors, under Code of Civil Procedure article 1702.1 and without a hearing in open court, ordering retroactive reinstatement of the first mortgagee's mortgage. The default judgment had been obtained. The first mortgagee contended that this was a "suit on a promissory note" under which a default judgment could be rendered under Article 1702.1. The court held that it could not agree that the trial court had authority, without notice and an opportunity to be heard, to order the mortgage reinstated on the property. The default judgment did not specifically order the mortgagors to pay any sums purportedly due but rather only declared the mortgage enforceable over other inferior encumbrances with the same rank and priority as the original inscription. Moreover, the mortgagors did not even own the property when the default judgment was rendered, and none of the other parties had been provided notice and an opportunity to be heard. Thus, the trial court erred in denying the motion for new trial and failing to vacate the default judgment.

B. Nature of a Mortgage

Wright v. J & J Properties of West Monroe LLC, 2025 WL 899964 (W.D. La. 3/24/2025). The *pro se* plaintiff in this case, claiming to be the "direct heir" of the original patentee of land under an 1845 patent, brought suit against the party who appeared to be the current record owner and its mortgagee, claiming unauthorized use and possession of patented land, possible engagement of timber and oil and gas operations, and a petitory action under Civil Code article 3651. The mortgagee moved for summary judgment on the ground that it was neither the owner nor possessor of the property. In response, the plaintiff indicated that "after taking a deeper dive at the case law concerning security interests versus ownership," he was willing to enter into discussions concerning removing the mortgagee as a defendant in a possible amended complaint and asked for an order permitting those discussions to take place. Finding that an amended complaint was not needed, the court **granted summary judgment** in the mortgagee's favor. The mortgagee held merely a non-possessory right over property to secure the performance of an obligation. A mortgage neither gives title nor possession to the mortgaged property, and there was thus no genuine issue of material fact as to whether the mortgagee deprived the plaintiff of any possession because the mortgagee never claimed nor had possession of the property.

C. Multiple Indebtedness Mortgages

In re First Emanuel Baptist Church, 2025 WL 2730501 (Bankr. E.D. La. 9/24/2025). A multiple indebtedness mortgage secured any and all present and future loans made by First NBC Bank to the mortgagor. Subsequently, First NBC Bank and the mortgagor entered into a recorded mortgage modification that referenced three different promissory notes and again recited that the secured "Indebtedness" included any and all future notes executed between First NBC Bank and the mortgagor. After First NBC Bank was placed into receivership, the FDIC, as its receiver, executed in favor of the bank involved in this adversary proceeding an assignment, which was recorded on January 9, 2018, assigning "certain loans," including one of the notes referenced in the mortgage modification. The assignment also assigned all of First NBC Bank's right, title and interest under the "Loan Documents," which were defined as all documents with respect to that note in which the seller had any interest, including mortgages and all written modifications.

On October 9, 2018, an "Assignment of Mortgage" from the FDIC to another assignee was recorded, assigning the remaining promissory notes. Allegedly, the actual transfer to this other assignee had taken place by allonges to those notes executed in October 2017, before the assignee bank had recorded its assignment. The debtor's motion to sell the mortgaged property was converted by the court into an adversary proceeding to determine the validity, priority and extent of the liens on the property. In this adversary proceeding, the assignee bank moved for summary judgment, claiming that it had purchased all rights in the mortgage modification and those rights could therefore not be assigned to the other assignees. The other assignee, which filed its own motion for summary judgment, claimed that it was entitled to a pro rata share of any proceeds from the sale of the property. The court denied both motions for summary judgment.

The recordation of the assignment to the assignee bank did not guarantee the validity of the assignment or the purchase agreement under which the bank acquired the mortgage. As for the bank's argument that it was entitled to priority because it recorded its assignment first, the court observed that recordation merely permits a party to introduce an instrument into evidence to assert its validity "against third parties"; it does not guarantee the validity of the instrument's substance.

The parties also disputed facts surrounding the execution of the assignment in favor of the other assignee, which argued that "there was no document in the applicable public records reflecting that the [Mortgage Modification] . . . had been . . . transferred, at the time the [the assignment in favor of the other assignee] was executed." Because the court could not weigh evidence at the summary judgment stage and genuine issues of material fact exist, **summary judgment was inappropriate**.

D. Judicial Mortgages

1. **<u>Williams v. Perret</u>, 411 So. 3d 663 (La. App. 3d Cir. 5/29/2024)**. Between the time a mortgage was erroneously cancelled and the recordation of a judgment reinstating it with "the same rank in priority as the original," the mortgagor transferred the property to a living trust. Later, the original mortgagor took bankruptcy, and the bankruptcy court lifted the automatic stay as to the property. The mortgagee then obtained a money judgment in ordinary process foreclosure proceedings, recognizing the mortgage but with the proviso that the judgment was *in rem* only as to the original mortgagor. Shortly afterward, the bankruptcy court entered an order

directing the parish clerk of court to cancel certain judgments and mortgages as they pertained to the bankrupt debtor, including the judgment recognizing the mortgage. The mortgagor then filed a *pro se* petition for mandamus to direct the clerk to cancel the judgment. The district court denied the mandamus, and the court of appeal **affirmed**.

The argument that the judgment recognizing the mortgage was improper because the property had been transferred to the trust during the time that the mortgage was erroneously cancelled of record was an impermissible collateral attack on the judgment recognizing the mortgage, and the court therefore refused to consider that argument. Moreover, the judgment that the mortgagor was seeking to have cancelled was *in rem* only against her and limited to the collateral. While the bankruptcy court issued a judgment directing the clerk to cancel the judgments insofar as they pertained to the debtor, the judgment in question was *in rem* only and limited to property that was excluded from the bankruptcy estate and not subject to the bankruptcy proceedings.

2. **Sunset Harbour v. Zughayer, 389 So. 3d 930 (La. App. 5th Cir. 5/22/2024).** A judgment creditor recorded its judgment against the owner of a subdivision lot in 2013. A few months afterward, the sheriff, as tax collector, filed in the mortgage records a tax lien and privilege affecting both the movable and immovable property of the owner of the lot. Later that year, the sheriff obtained a judgment for the amount of taxes due, which was also recorded as a judicial mortgage. Several years afterward, a 1% interest in the property was sold at tax sale. The tax buyer then filed a petition to confirm and quiet title to the immovable property and for partition. The original judgment creditor was the only party to oppose the suit, and the judgment creditor and tax buyer applied for a consent judgment, which declared the tax buyer to be the owner of 1% of the property free of any interest held by the judgment creditor, directed the partial cancellation of the judgment insofar as it encumbered the property described above, and ordered the sale of 100% of the property at public auction, with the proceeds first to pay the tax buyer the amount it had paid for the taxes plus interest, with the remaining proceeds of the sale to be paid 1% to the tax buyer and the balance to the judgment creditor.

Before the partition sale occurred, the tax buyer obtained against the tax debtor, the sheriff and other creditors a default judgment similar in substance to the consent judgment. The default judgment also ordered cancellation of the sheriff's money judgment and tax lien.

A few months afterward, at the sheriff's request, a writ of fieri facias was issued for the seizure of the property under the judgment that the sheriff has obtained, and the sheriff filed a notice of seizure describing the property as a 99% undivided interest in the lot. The partition sale took place two days later and the sheriff, after depositing the proceeds from the sale into the registry of the court, filed a claim for all of the net proceeds on the basis of his seizing creditor's privilege. The district court entered judgment in favor of the original judgment creditor and against the sheriff. The court of appeal **reversed**.

The sheriff's position was that his seizing creditor's privilege was "independent and distinct from the partial cancellation" of his judicial mortgage and tax lien. The court agreed that the sheriff held, by virtue of R.S. 47:337.65, a lien and privilege on all of the judgment debtor's movable and immovable property. By operation of Code of Civil Procedure Article 2292, which provides for the seizing creditor's privilege, the tax lien attached to and must be satisfied from the proceeds of the sale - a movable. In contrast, the original judgment creditor had no rights in the property because its judicial mortgage had been cancelled with its consent two months before the partition sale occurred. The "sad irony" that the judgment creditor's consent to the cancellation of its judicial mortgage before the sale caused the judgment creditor's mortgage to lose its priority was not lost on the court, but the court could not give retroactive effect to a right that no longer existed by the date of the sale. Once the judicial mortgage was cancelled, the property was no longer burdened by the extinguished mortgage and the judgment creditor was no longer a secured creditor with respect to the property. Accordingly, the nonexistent judicial mortgage could not attach to the proceeds of the judicial sale under Civil Code Article 815.

3. **<u>Renaudin v. Bosworth</u>, 398 So. 3d 139 (La. App. 5th Cir. 8/14/2024).** In a suit on a promissory note, the court of appeal in a prior decision reported at 367 So. 3d 116 reversed the trial court's denial of summary judgment and granted summary judgment in the lender's favor for $100,000.00 "plus reasonable attorney's fees to be determined by the trial court on remand." The lender then recorded this judgment in the mortgage records and, several months later, the judgment debtor filed an *ex parte* motion with the district court arguing that the judgment of the court of appeal was not a final judgment and therefore unsuitable for recordation. The trial court then signed an *ex parte* order cancelling the judicial mortgage "as improperly filed, as it is premature as there is no final judgment at this time."

On a suspensive appeal, the court of appeal **reversed** the trial court's action and ordered reinstatement of the judgment because, in cancelling the judgment based on an *ex parte* motion, the trial court denied the judgment creditor the right to notice and an opportunity to be heard. Instead, the trial court should have set the matter for a contradictory hearing. Apart from this procedural error, the trial court also erred in finding that recordation was "premature" because it had been recorded while an application for review was pending before the Louisiana Supreme Court. Code of Civil Procedure Article 2252 does not prohibit, and in fact specifically allows for, the recordation of a judgment prior to the lapse of the delay for a suspensive appeal. A judicial mortgage is created by filing a judgment in the mortgage records, and the date that a judgment is recorded affects the judgment creditor's ability to execute against the judgment debtor vis-à-vis other potential creditors. Here, the judgment creditor's act of recording the judgment established his priority over subsequent judgment creditors. Thus, the trial court's *ex parte* order was both procedurally defective and substantively erroneous.

E. Authentic Acts; Reformation

1. **Bajewski v. Bajewski, 398 So. 3d 737 (La. App. 5th Cir. 10/9/2024).** In order to take advantage of his wife's credit rating in connection with a home renovation loan, the plaintiff transferred his undivided interest in his separate property to himself and his wife jointly by a quitclaim deed in the form of an authentic act. The couple divorced several years later, and the plaintiff then filed suit to revoke the transfer on the ground that the donation was not evidenced by a valid authentic act.

   At trial, the former wife and the notary before whom the instrument was executed both testified that it was signed in the presence of the two witnesses and the notary at the couple's home. The notary did not have a clear recollection of the event and could not identify the plaintiff, but did recall being told to "sit down and shut up" by the seller. The two witnesses both testified that the plaintiff had brought the document to them to be signed when no other persons were present. The court ruled in favor of the defendant, sustaining the validity of the transfer, and the court of appeal **affirmed**.

   An authentic act is presumed to be valid, and a party asserting otherwise must present "strong and convincing proof" of such a magnitude as to overcome this presumption. Whether or not the quitclaim deed was properly executed is a question of fact to which the manifest error-clearly wrong standard applies in reviewing the district court's findings of fact. There was no manifest error in the trial court's decision to credit the testimony of the former wife and the notary over that of the plaintiff and the two witnesses. The plaintiff had not provided any objective evidence to support his claims or to contradict the testimony of the other witnesses. While the testimony of the defendant and notary conflicted with that of the plaintiff and the witnesses regarding where, when and in what order the document was signed, their testimonies were not so "internally inconsistent or implausible" that a reasonable fact finder would not credit their stories.

2. **Smith-Johnson v. Bushnell, 405 So. 3d 1156 (La. App. 3d Cir. 2/12/2025).** An act of sale conveyed the entirety of a subdivision lot, indicating the municipal address of the house located on the lot. There was actually a second structure with a different municipal address also located on the same subdivision lot. That structure was occupied by a tenant at the

time of the sale and for three years afterward. During this period, the tenant paid rent to the seller, and the seller performed yard maintenance on the yard surrounding the other structure and maintained insurance on it. After the tenant vacated the structure, the buyer of the subdivision lot posted "No Trespassing" signs in front of it, prompting the seller to file a petition for reformation on grounds of mutual error.

After a trial, the trial court reformed the cash sale to exclude the portion of the property within the fenced boundaries of the yard surrounding the structure that had been rented. The court of appeal **affirmed**, rejecting the buyer's arguments that any error was unilateral. The defendant admitted that the tenant had not paid him rent for several years after the sale. Also, while he maintained property insurance on the house located at the municipal address listed in the act of sale, he did not do so on the other municipal address. He also admitted that his appraisal included only the house at the municipal address listed in his cash sale and that he paid $90,000 for that house that was appraised at $92,000. Though he claimed that he had allowed the tenant to remain because the tenant had nowhere else to go, he admitted that he had no conversations with the tenant and did not provide any landlord services to her.

According to the court, every document pertaining to the sale specifically referenced the defendant's purchase as the municipal address listed in the cash sale, as did the mortgage granted by the defendant. While it is true that the lot had never been properly partitioned "due to intrafamily donations," the facts established overwhelmingly that the properties were separate municipal addresses and the plaintiff retained ownership of the rented structure as the plaintiff continued to rent, insure and maintain it. Thus, there was no error in the trial court's finding that both parties intended the sale of only the residence located at the municipal address listed in the act of sale.

F. Lender-Placed Insurance

1. **Williams v. Integon National Insurance Company, 132 F. 4th 801 (5th Cir. 3/25/2025).** In a suit by the mortgagor to recover losses to property that was insured under a lender-placed insurance policy, the district court granted the insurer's motion to dismiss under Rule 12(b)(6) on the ground that the plaintiff was neither a named insured, additional insured or third party beneficiary. The Fifth Circuit **reversed** and remanded with instructions to permit the mortgagor leave to amend her complaint, finding that the mortgagor might be able to plead plausible facts supporting third party beneficiary status.

   The Louisiana Supreme Court has articulated three criteria that must be met for a contract to benefit a third party: (1) the stipulation for the third party must be manifestly clear, (2) there must be certainty as to the benefit provided to the third party, and (3) the benefit must not be a mere incident of the contract between the promisor and the promisee. This policy contained a provision that if the amount of the loss exceeded the lender's insurable interest, the insurer would pay the mortgagor any residual amount due for the loss, up to the limit of liability. The court agreed with the mortgagor that this loss payment provision made manifestly clear that the policy stipulated a benefit for her.

On the issue of whether there was certainty as to the benefit provided to the plaintiff, the Fifth Circuit followed a line of cases, which was acknowledged but apparently not followed by the district court, that this prong is met when the plaintiff pleads damages that exceed the mortgagee's insurable interest. Finally, on the issue of whether this benefit was a mere incident of the contract, the Fifth Circuit rejected the "blanket approach" that all lender-placed policies share the same purpose of protecting the lender's own security interest and not to provide any benefit for the mortgagor. Each contract must be evaluated on its own terms and conditions. Thus, if the plaintiff can show with certainty as to the benefit owed to her under the policy, by alleging that the amount of the loss exceeded the mortgagee's insurable interest, she has standing to pursue her claims as a third party beneficiary.

2. **Talbot v. American Security Insurance Co., 2025 WL 1094920 (W.D. La. 4/11/2025).** In a suit by a residential mortgagor to recover for property damage under a lender-placed insurance policy, the court **granted summary judgment** in favor of the insurer, rejecting claims by the mortgagor that it was a third party beneficiary of the policy. The mortgagor's primary contention was language in an endorsement defining "you" to refer to both the financial institution that was a named insured and to the borrower. Moreover, the insurer had issued at least one check jointly payable to both the mortgagor and mortgagee. The insurer successfully argued that these facts, as well as the fact that the policy imposed duties and obligations on the mortgagor, did not convert the mortgagor into a named insured, additional insured or a third party beneficiary. As the policy provided that losses were to be paid to the "named insured," without making any reference to "you," the plaintiff's reliance on the definition of "you" to manifest an intent to make the mortgagor a third party beneficiary was misplaced.

3. **Okpalobi v. PHH Mortgage Corporation, 2025 WL 3122828 (E.D. La. 11/7/2025).** Following hurricane damage to a residence encumbered by a home equity conversion mortgage, the person who had been appointed executrix of the estate of the deceased mortgagor filed suit in her individual capacity against the insurer and mortgage holder, claiming that the mortgage holder had breached its contractual and fiduciary duty to pursue additional insurance proceeds from the insurer under a lender-placed policy of insurance. Asserting that the plaintiff in her individual capacity did not

have an interest in the property and that the mortgage holder did not in any event owe her any duty to pursue additional insurance proceeds, the mortgage holder successfully had the plaintiff's suit dismissed with prejudice on a Rule 12(b)(6) motion. Subsequently, she filed another suit against the mortgage holder and its servicer for damage arising out of the same storm, this time in both her individual and representative capacities, claiming that the mortgage provided that if the mortgagor died she would be a beneficiary of the loan. She also alleged that the property was insured by an "unknown" insurer and that the defendants had "pocketed" the insurance proceeds rather than making them available to repair the property. Her claims were for breach of contract, negligence, intentional infliction of emotional distress, fraud, unjust enrichment, bad faith and racial discrimination.

After removing this suit to federal court, the defendants moved to dismiss on the ground of the plaintiff's lack of standing to sue in her individual capacity as well as the doctrine of *res judicata* based upon the first suit. The court **dismissed** the plaintiff's individual claims without prejudice for lack of standing and dismissed with prejudice her claims in her capacity as executrix of the estate on grounds of *res judicata*.

On the issue of standing, the plaintiff argued that she had individual standing because she resided at the property and had spent substantial effort in repairing and restoring it to a habitable condition. As the resident, she claimed to be the "legal usufructuary," even though the judgment of possession rendered in the mortgagor's succession proceedings was silent as to her possession of the property. The court indicated it would follow the judgment of possession to find that the plaintiff did not have standing to sue in her individual capacity, but she did have standing to sue as the executrix of the estate.

The court observed that a successful plea of *res judicata* requires four elements: (1) parties are identical or in privity, (2) the prior judgment was rendered by a court of competent jurisdiction, (3) the prior action was concluded by a final judgment on the merits, and (4) the two actions involved the same claim or cause of action. The first element, identity of the parties, was satisfied because the mortgagor holder, which was a defendant in the first suit, had adequately represented the mortgage servicer's interest in that suit. Regarding the same-claim-or-cause of action element, the Fifth Circuit follows a transactional test focusing on whether the two cases are based on the same nucleus of operative facts. In both suits, the plaintiff alleged that she had rights in the property, the property sustained hurricane damage, the property was insured under a lender-placed insurance policy, and the insurer disbursed insurance proceeds to the lender. Although she pursued different claims and asserted different theories of recovery in the two suits, both suits involved the same nucleus of operative facts, and the claims that the plaintiff brought as executrix were therefore barred by the doctrine of *res judicata*.

G. Private Works Act Privileges

1. Sufficiency of Description of Claim

<u>Crawford Electric Supply Company Inc. v. LOGA Holding LLC</u>, 406 So. 3d 634 (La. App. 1st Cir. 2/21/2025). An electrical supplier filed a statement of claim or privilege asserting its entitlement to $60,000 for the cost of "electrical supplies", without itemizing the materials that it had actually supplied and without attaching invoices. When the supplier brought suit on the claim against the contractor and its surety, they moved for summary judgment on the ground that the plaintiff had failed to preserve its claim by filing a statement of claim or privilege reasonably identifying the materials supplied. The trial court granted the defendants' motion for summary judgment, but the court of appeal **reversed**. R.S. 9:4822(H)(4) requires only that the claimant set forth the amount and nature of the claim and reasonably identify the elements comprising it. As the official revision comments note, technical defects in a statement of claim should not defeat the claim or privilege as long as the notice is adequate to serve the purposes intended. Considering this stated purpose, the court found that the plaintiff's statement of claim did contain a reasonable identification of the elements comprising the nature of the obligation, and the description of "electrical supplies" achieves the purpose of the statement of claim, which is to give notice to the owner, contractor and third parties that a privilege is being claimed. Thus, the trial court erred in granting summary judgment in favor of the defendants.

2. Unlicensed Contractors

<u>Long v. Robichaux</u>, 405 So. 3d 654 (La. App. 1st Cir. 9/20/2024). A property owner filed a writ of mandamus to cancel a statement of claim or privilege filed under the Private Works Act by an unlicensed contractor. The trial court granted the mandamus and ordered cancellation of the statement of claim or privilege, but deferring consideration of the plaintiff's claim for damages. After an appeal was taken, the court of appeal noted that the judgment appeared to be a non-appealable partial judgment and remanded for a determination by the trial court as to whether to designate the judgment as a final judgment. The trial court decreed that the judgment was not designated as a final judgment, and, as a result, the court of appeal, *sua sponte*, **dismissed the appeal** for lack of subject matter jurisdiction.

3. Requirement of Notice of Lis Pendens

225 Baronne Complex, LLC v. Roy Anderson Corp., 408 So. 3d 291 (La. App. 4th Cir. 1/31/2025). On a major construction project, the contractor filed a statement of claim or privilege on December 22, 2015. In a summary proceeding, the owner obtained an order directing cancellation of this statement of claim or privilege on the ground that its filing violated the underlying contract and also did not comply with the requirements of the Private Works Act. In accordance with the judgment directing cancellation, the recorder of mortgages cancelled the statement of claim or privilege on April 21, 2016. Upon a devolutive appeal, the court of appeal reversed, and the contractor then filed a mandamus action, with an accompanying notice of lis pendens, on May 26, 2017, seeking an order compelling the recorder of mortgages to reinstate the statement of claim or privilege. On September 1, 2017, the recorder did so, reinstating the original recordation information of the statement of claim or privilege.

In 2019, the Legislature amended Section 9:4833(E) of the Private Works Act maintaining a pre-existing requirement that a claimant file a notice of lis pendens within one year of the filing of his statement of claim or privilege but also adding a provision allowing cancellation of the statement of claim or privilege upon the recorder's receipt of a written, signed application when a timely notice of lis pendens is not filed. Two years later, the owner filed a petition for cancellation of the statement of claim or privilege on the basis that the contractor had not filed its notice of lis pendens until May 26, 2017, which was more than one year after the original filing of the statement of claim or privilege. In response to this suit, the contractor filed an exception of res judicata, which the trial court overruled. On the merits, the trial court directed the recorder cancel the statement of claim or privilege, and the court of appeal **affirmed**.

The court first addressed the issue of whether the contractor was required to file a notice of lis pendens within one year after the filing of its original statement of claim or privilege in 2015. The contractor argued that it could not have done so because there was nothing in the Orleans Parish records after the trial court directed cancellation of the statement of claim or privilege in April 2016, and therefore the contractor could not have complied with the requirement of Section 9:4833(E) that a notice of lis pendens contain a reference to the recorded statement of claim or privilege. Rejecting this argument, the court found Section 9:4833(E) to be clear and unambiguous that a notice of lis pendens must be filed within one year of filing the statement of claim or privilege and includes no caveats or conditions to the effect that this deadline may change. The contractor pointed to nothing that somehow legally prevented it from filing a notice of lis pendens during any part of the one-year period. The Legislature's intent in requiring a lienholder to file a notice of lis pendens within one year is to provide the public with timely notice of a dispute regarding the property and ultimately to bind third parties to the outcome of the suit. The interpretation urged by the contractor would undermine the purpose of the notification aspect of the lis pendens to provide the public with notice during the pendency of the action, not after it is concluded. Thus, the contractor was required to file a notice of lis pendens within one year of recording its statement of claim or privilege and, because it did not do so, this formed a legal basis for cancellation of the statement of claim or privilege.

The court then turned to the res judicata argument, which was based upon the contractor's contention that the owner should have raised the contractor's failure to file the notice of lis pendens in its first suit. Rejecting this argument, the court agreed with the owner that this cause of action did not exist at the time of the final judgment in the first suit. The ability to obtain cancellation of a statement of claim or privilege where a timely notice of lis pendens has been filed was not added to the statute until 2019 and, as the owner contended, this created a new cause of action to cancel a lien based on an untimely filed notice of lis pendens. The court rejected the contractor's argument that the right to cancel the statement of claim or privilege already existed by virtue of Civil Code article 3367, which allows cancellation of a mortgage or privilege that has ceased for lack of reinscription. As the court explained, reinscription is not the same as a notice of lis pendens, and Civil Code article 3367 allows for cancellation of a lien for lack of reinscription, not on the basis of an untimely notice of lis pendens. If the court were to agree with the contractor that the amendment to Section 9:4833(A) did not create a new cause of action because one already existed under Civil Code article 3367, this would render the new part of Section 9:4833(E) superfluous and meaningless. Under rules of statutory interpretation, the court was to presume that the Legislature already knew about Civil Code article 3367 but nonetheless chose to amend Section 9:4833(E), thereby indicating its intent to establish a new cause of action because no such cause of action already existed in the statutory and codal law.

There was also clear evidence that the Legislature intended this change in the law to be applied retroactively, as the transition rules in the Act specifically provided that the amendments to R.S. 9:4833 apply retroactively to all works, including those begun prior to the general effective date of the statute. Because there was clear evidence of the Legislature's intent that this substantive change to Section 4833(E) was to apply retroactively, res judicata did not preclude the second suit.

4. Contractor's Claims Against Mortgagees

J. Calvarera & Co., Inc. v. Stigler, 406 So. 3d 1200 (La. App. 5th Cir. 2/26/2025). After a contractor repaired hurricane damage to a residence, the insurance company paid the insurance proceeds to the homeowner and her mortgagee rather than complying with the contractor's request to have the insurance proceeds paid directly to it for its work. The contractor then demanded payment from the mortgagee, which refused on the basis that it had already released the insurance proceeds to the owner. After filing a statement of claim or privilege under the Private Works Act, the contractor brought suit against both the owner and the mortgagee for the money allegedly owed for the home repairs. The contractor's allegation against the mortgagee was that "by promising to make sure [the contractor] would be paid, [it had] lulled [the contractor] into not taking action to enforce its rights." The contractor also argued that the mortgagee had facilitated the owner's misuse of the money and that all defendants had violated R.S. 14:202. The trial court granted the mortgagee's motion for summary judgment, and the court of appeal **affirmed**.

Although the contractor's petition alleged that the mortgagee had "promised" that the contractor would be paid, the contractor conceded that it had no privity of contract with the mortgagee. Thus, the sole issue turned on the interpretation of the criminal statute and whether its provisions impose civil liability. Here, the mortgagee released all of the insurance proceeds to the owner. The mortgagee had the right to be listed as a payee on any insurance checks and the right to ensure that the property was repaired before releasing the insurance proceeds. Once the property was repaired, the mortgagee could not continue holding the money, as R.S. 6:337 requires mortgage servicers to disburse insurance proceeds to borrowers to pay for repair work. The court agreed with the mortgagee that R.S. 14:202 does not create a duty on behalf of a mortgagee to ensure that its borrower's contractors are paid. The mortgagee in this case did not receive the insurance proceeds "on account of a contract for the construction" of the residence. The contract was between the contractor and the homeowner, not between the contractor and the lender. R.S. 14:202 does not establish a civil duty on behalf of mortgagees to third parties. Moreover, the contractor's interests are protected by the lien that it had filed against the property. The contractor's remedy was against the borrower, rather than the mortgagee.

H. Other Privileges Upon Immovables

<u>Hancock Whitney Bank v. MOF-Willows, LLC</u>, 2025 WL 2337129 (E.D. La. 8/13/2025). After entry of final judgment in favor of a bond trustee in a federal court action filed to enforce its mortgage upon the defendant's apartment complex, the Sewerage and Water Board of New Orleans filed a motion for leave to intervene, ostensibly to assert a claim against the defendant for unpaid water and sewerage services but also to obtain a judgment against the bond trustee, rather than the defendant, for nearly half a million dollars. In opposition, the bond trustee argued that there was no intervention of right because the application was untimely and that the intervenor's interest in collecting its outstanding debt had no relation to the pending federal foreclosure action but instead could be litigated in state court.

Further, while the intervenor "conclusorily asserts" that it would suffer economic harm, it has no privilege on the property, and any judgment that it might obtain would rank inferior to the plaintiff's mortgage. The magistrate judge **denied** the motion for intervention.

One of the requirements for an intervention of right under Rule 24(a) is that the movant must have an interest related to the property or transaction that is the subject of the case. Here, the intervenor did not allege that it had obtained a money judgment for the unpaid utility bills constituting a judicial mortgage on the defendant's property, nor did it allege that it had any type of lien or existing property interest in the defendant's property. Instead, it simply has a claim for monetary damages arising from breach of contract or unjust enrichment.

The intervenor argued that it might in the future have a security interest under recently enacted R.S. 33:4887, which gives municipalities a privilege against multi-family residential property for the amount of unpaid service charges. The privilege arises when the municipal governing authority files a sworn statement of privilege in the mortgage records, and the privilege is effective against third persons when recorded and outranks mortgages and other rights that become effective against third parties after the recordation of the statement of privilege. Rejecting the intervenor's arguments, the court observed that the intervenor did not demonstrate that it qualified as a municipal governing authority and, even if it did, it had not taken the necessary steps to obtain a privilege. Moreover, it is not clear that R.S. 33:4887 would apply retroactively to create a privilege for unpaid services that became due before the statute's August 1, 2025 effective date. The intervenor's concern that the bond trustee's potential foreclosure on the apartment complex might impact its ability to collect its claim from the defendant did not give rise to an interest that would support an intervention of right, nor did this concern mean that the potential foreclosure somehow restricts the state court's ability to issue a monetary award in its favor against the defendant.

The court also found that there was no basis for a permissive intervention, as there was no common question of law or fact between the bond trustee's claim against the defendant and the intervenor's claim. While both parties have collection matters against the defendant, the Sewerage and Water Board's unjust enrichment claim is not related to the plaintiff's loan and foreclosure action, and there is not any common question of law between them nor any common question of fact. The mere fact that both parties are seeking to recover debts owed by the same defendant does not mean that there is an "overlap" in any factual disputes that may arise from their claims.

I. Tax Sales

1. **<u>TBM Investment Properties, LLC v. Kasney</u>, 408 So.3d 996 (La. App. 4th Cir 11/27/2024)**. The City of New Orleans issued a tax sale certificate to the plaintiff's predecessor based upon the property owner's failure to pay delinquent 2015 taxes. A few days after the tax sale certificate was

recorded, the City's Code Enforcement Bureau filed a proceeding against the assessed owner for code violations and, when these violations were not corrected, filed a notice of fines in the conveyance and mortgage records. A week later, the City sought to have the property sold under a writ of *fieri facias*, naming the assessed owner and the tax sale buyer as defendants, and in 2016, the property was sold at a sheriff's sale in the enforcement of the writ to a purchaser, who demolished a building that was located upon the property, built a new house on the property and then sold it to the predecessor of the defendant in the present suit. That defendant, the current owner, mortgaged the property to a bank in 2021. In late 2022, the plaintiff filed its petition to quiet title, naming the current owner and its mortgagee as defendants. The defendants moved for summary judgment on the basis of R.S. 13:2575(C), which grants municipalities a lien or privilege against property that is in violation, provides that the recordation of the lien creates a judicial mortgage, and provides that unredeemed purchasers under unredeemed tax sales have a right of redemption until only one year after the right of redemption from the tax sale elapses. Moreover, the defendants cited R.S. 13:2576(A), which provides that all actions to invalidate sales made under the statute are prescribed by the lapse of one year from the date of registry of the sale in the conveyance office (The same statute provides that all actions to subject the property to any mortgage that existed prior to the sale are also prescribed by the lapse of one year). The plaintiff argued that these statutes apply only to blighted properties and the property in this case had not been declared to be blighted. The trial court found that the plaintiff's right had prescribed, and the court of appeal **affirmed**.

The basis for the court's ruling was the provision of R.S. 13:2576(A) providing that all actions to subject the property to any mortgage existing before the sale conducted under the statute are prescribed by the lapse of one year from the date of registry in the conveyance office of the deed to the sheriff's sale purchaser. Following an indication from the Louisiana Supreme Court in *Central Props. v. Fairway Gardenhomes, LLC*, 225 So. 3d 441 (La. 2017) that the "set of rights acquired by the tax sale purchaser amounts to a lien on the property," the court held that the plaintiff's tax sale certificate amounted to a legal mortgage, and that the statute therefore applied to impose a one-year prescriptive period from the date of recordation of the sheriff's sale to the purchaser. In reaching this result, the court observed that the uncontested facts were that the tax sale purchaser had received notice of the city code violations, the writ of *fieri facias* and the recordation of the sheriff's deed in the conveyance records. The filing of these documents created a judicial mortgage on the property upon their recordation, and pursuant to R.S. 13:2576(A) the tax sale purchaser's right to quiet title had prescribed by the time it filed its suit. Though the court declined to address the tax sale purchaser's argument concerning the non-applicability of these statutes where there has not been a declaration of blight, the court observed in a footnote that prior jurisprudence implies that sustained, unabated violations are sufficient to reach a finding that a property is blighted without an express declaration from an administrative judgment designating the property as blighted.

2. **<u>Aegean Property Group, LLC v. Sumler</u>, 409 So. 3d 245 (La. App. 4th Cir. 2/3/2025).** The plaintiff, which had purchased a 99% interest in an immovable at a tax sale in 2018, filed a petition to quiet title against the assessed owner and its mortgagee. Both defendants were served and failed to answer. However, the assessed owner's son intervened, claiming that the assessed owner was in fact deceased at the time of the tax sale and the filing of the suit. After the trial court granted summary judgment against the intervenor and a default judgment against the mortgagee, the intervenor appealed (without participation by the mortgagee) challenging both judgments. The court of appeal dismissed the intervenor's appeal of the summary judgment against him, because he had not obtained a signed order of appeal, but the court held that the intervenor, as the independent administrator of his father's estate, had a justiciable interest in the action to quiet title and therefore had standing to appeal the default judgment against the mortgagee. Nevertheless, the court **affirmed** the default judgment. At the hearing for the default judgment, the plaintiff had offered into evidence the tax sale certificate, which under R.S. 47:2155 is *prima facie* evidence of the regularity of all matters regarding the tax sale and the validity of the tax sale. The burden shifted to the defendants to prove any defects in the tax adjudication proceeding, and neither defendant did so. Thus, there was no manifest error in the granting of the default judgment against the mortgagee.

II. Chapter 9 Security Interests and Other Security Rights in Movables

A. Definition of Security Interest

<u>Deutsche Bank National Trust Company v. Reyes</u>, 418 So. 3d 923 (La. App. 5th Cir. 4/9/2025). After their mortgage note was assigned during the pendency of a contested foreclosure action, the mortgagors claimed litigious redemption under Article 2652 of the Civil Code. The holder of the mortgage note opposed litigious redemption before the trial court on the ground that "Louisiana's commercial code and laws supersede the law of litigious rights," apparently without specifically citing UCC Section 9-411(c), a non-uniform provision of Louisiana UCC Chapter 9 that provides that Civil Code article 2652 does not apply to "the creation of a security interest in a litigious right." Following the trial court's denial of the mortgagors' motion for summary judgment on the issue, they sought supervisory writs, and in opposition to the writ application, the holder of the mortgage note for the first time argued the applicability of UCC Section 9-411(c). The court of appeal agreed with the holder, **denying** the mortgagor's writ application and rejecting the mortgagors' argument that UCC Section 9-411(c) applies only to security interests that secure the performance of an obligation and not to complete transfers of ownership.

Citing the discussion of this issue in *Louisiana Secured Transactions*, the court not only found UCC Section 9-411(c) to be clear and unambiguous but also recognized that a "security interest," as that term is defined in UCC Section 1-201(35), includes the rights of a buyer of accounts, chattel paper, payment intangibles or promissory notes in a transaction subject to Louisiana UCC Chapter 9. The court acknowledged a number of other recent appellate holdings that had applied the right of litigious redemption to a promissory note, but pointed out that the applicability of UCC Section 9-411(c) had not been raised in any of those cases. *See Regions Bank v. St. James Hotel, L.L.C.*, 144 So. 3d 50 (La. App. 4th Cir. 2014) (which relied on *Luk-Shop, L.L.C. v. Riverwood LaPlace Associates, L.L.C.*, 802 So. 2d 1291 (La. 2002), a case that involved the assignment of a promissory note in 1999, long before the July 1, 2001 effective date of the enactment of UCC Section 9-411(c)) and *Nationstar Mortgage, LLC v. Unopened Succession of Michael Frederick Kehoe*, 2021-192 La. App. 1 Cir. 11/1/21, 2021 WL 5356078 (La. App. 1st Cir. 2021).

B. Priority

<u>In re Kologik, LLC</u>, 2025 WL 951008 (Bankr. M.D. La. 3/28/2025). The plaintiff obtained a state court order directing the issuance of a writ of sequestration to Kologik's secured lender but did not serve garnishment interrogatories or otherwise seek to garnish the funds held by the lender in a cash collateral account. The day after the writ was served on the lender, the state court dissolved the writ, but a few weeks later the plaintiff sent the lender's officer a state court judgment allegedly maintaining the writ. After the debtor entered Chapter 11 bankruptcy, the lender turned over the remaining funds in the cash collateral account. The plaintiff then filed an adversary proceeding against the lender, seeking to recover damages arising from the lender's failure to honor the writ. The court **granted** the lender's motion for **summary judgment** on the basis that under no circumstances could the plaintiff prove that he was entitled to be paid anything on account of the writ.

Though the court noted the high likelihood that the lender had contractual rights of set-off, it did not base its decision on that ground because the loan documents were not in the record. Instead, the court recognized that the lender had a right of compensation and set-off pursuant to R.S. 6:316. The lender also had, at a minimum, a perfected security interest that had been perfected by control under "La. C.C.P. article 104(a)(1)" and that statutory security interest had priority over any interest acquired by the plaintiff not only because it was perfected earlier under UCC Section 9-317 but also because a security interest held by a bank with which a deposit account is maintained has priority over a conflicting security interest under UCC Section 9-327. It was also clear under UCC Section 9-341 that the writ did not alter the lender's rights, as a bank's rights and duties with respect to a deposit account it maintains are not terminated, suspended or modified by the creation of a security interest in favor of another party or the bank's knowledge of that security interest.

To award the plaintiff a judgment for damages would require him to prove that he would have ultimately prevailed in state court in recovering some funds from the lender. His arguments that the lender's representative had admitted that the loans were not in default at the time of the issuance of the writ of sequestration were misplaced, as the crucial question was whether a formal garnishment would have triggered a default sufficient to invoke the lender's rights of set-off. The answer to that is a resounding yes. It was undisputed that on the day the writ was served and on also on the day when it was maintained, the lender was owed considerably more by the debtor than the balances in the cash collateral account. Had the plaintiff filed garnishment proceedings, he would have discovered that there were no funds to which the writ could attach and therefore no funds for the lender to sequester.

C. Enforcement

1. **<u>Donelon v. Americas Insurance Company</u>, 404 So. 3d 930 (La. App. 1st Cir. 12/20/2024).** After placing an insurer in receivership, the Commissioner of Insurance amended his petition to name the insurer's holding company as a defendant and to place it in rehabilitation along with the insurer. The rehabilitation order placed the Commissioner into possession of all assets of both companies, including bank accounts, and enjoined all individuals from bringing suit against either of them. The holding company's secured lender filed a motion to intervene, alleging that it had extended an $8 million secured loan to the parent company under the Main Street Lending Program and seeking injunctive relief to prevent the receiver from using the bank's collateral for any purposes other than satisfying the repayment of the secured loan. Under a consent order issued in the injunction action, the receiver was ordered to maintain over $6,000,000 in the companies' cash accounts at the lender until all issues arising with respect to the bank's security interest had been resolved.

   After the trial court entered an order of liquidation, the liquidator and receiver answered the lender's petition for intervention raising affirmative defenses and asserting a reconventional demand alleging fraudulent transfer, aiding and abetting, breach of fiduciary duty and unjust enrichment. The crux of the reconventional demand was that the insurer's officers "with considerable assistance and encouragement from the bank" misled, manipulated and deceived the insurer's regulators by concealing the fact that the holding company had pledged all of its assets to secure the loan made by the lender. According to the reconventional demand, had the accurate terms and impact of the bank's loan been truthfully disclosed to regulators, the insurer and its holding company would have been placed into receivership well before the insurer faced claims under Hurricane Ida. The reconvention sought compensatory damages in the form of the total amount of claims that the insurer was unable to pay.

   In response to the receiver's reconventional demand, the bank asserted its own incidental demand against the companies and their officers and directors for declaratory judgment on its status as secured creditor, breach of contract, indemnification, negligent misrepresentation, detrimental reliance and unjust enrichment. The receiver filed exceptions of no cause of action, no right of action and lis pendens to the bank's incidental demands, claiming that they were unsecured general creditor claims against the general assets of the companies which must be resolved through the proof of claim process set forth in applicable insurance liquidation law. In opposition to these exceptions, the bank responded that it was required by the Code of Civil Procedure and the doctrine of res judicata to assert its claims in this proceeding. The trial court granted the receiver's exception of no cause of action, and the court of appeal **affirmed**.

The two rehabilitation orders decreed that both the insurer and its holding company were insurers as defined by Louisiana law, specifically R.S. 22:2002(4) which deems all related entities to be an insurer for purposes of the liquidation law. Based on the plain language of the statute, which prohibits actions at law or in equity against insurers, the liquidation law does not afford the bank a remedy on the facts alleged in its incidental demand. Instead, it is clear that through the enactment of the liquidation law, the Legislature intended that creditors of insolvent insurance companies must assert their claims exclusively through the proof of claim process. This, however, does not deny the bank due process. The bank's remedy is to assert its incidental demands by filing an amended proof of claim. To allow the bank to pursue the incidental demands outside the proof of claim process would create a preference over similarly-situated creditors whose claims are also pending in the receivership. Under R.S. 22:2025, policyholders' claims are paid before unsecured general creditor claims. A reversal of the trial court's decision sustaining the exception of no cause of action could potentially result in the bank being paid the balance of its loan before policyholders, resulting "in a subversion of the purpose" of the law protecting the interests of policy holders, creditors and the public. The court also held that the bank had no right against the directors and officers, because that right of action belonged exclusively to the liquidator rather than individual creditors. To allow individual claims by creditors would violate the exclusivity of the liquidation law and usurp the commissioner's role.

2. **<u>MMAA, LLC v. Archon Information Systems, LLC</u>, (La. App. 5th Cir. 9/8/2025) 2025 WL 2589174.** The plaintiff, which held a security interest in membership certificates that had been encumbered by the members of a Delaware limited liability company, brought a summary proceeding under UCC Section 9-607(f) seeking delivery and possession of the pledged membership certificates. After holding a two-day evidentiary hearing, the trial court denied the requested relief, and the court of appeal **denied the plaintiff's writ application** from the trial court's ruling. UCC Section 9-607(f) provides a procedural vehicle for seeking either delivery or endorsement of any instrument, contract, receipt or other document. It does

not require a trial court to do both, and it does not determine the substantive effect of delivery or endorsement. The trial court denied the requested relief because the plaintiff had failed to introduce the LLC operating agreement and therefore the trial court did not have sufficient evidence to determine whether the endorsement would conflict with Louisiana substantive law or the legal findings articulated by the court of appeal in *AOK Property Investments, LLC v. Boudreaux*, 308 So. 3d 1214 (La. App. 5th Cir. 12/9/20). In that case, the court distinguished between financial and management rights in limited liability company membership interests, explaining that a security interest encumbers only a members' financial rights, while the original member retains management rights under R.S. 12:1332, which provides that, unless otherwise provided in the articles of organization or operating agreement, an assignee does not become a member or participate in the management of the LLC. As the court held in that case, judgment creditors of an LLC member may not cause the debtor member's LLC interest to be seized and sold in the ordinary way that most assets of a judgment debtor can be seized. Instead, judgment creditors are entitled only to obtain a "charge" against a member's interest, and this charge entitles the charging creditor only to be treated as an assignee. Although the plaintiff claims that it seeks only possession of the certificate, it had stated on numerous occasions that it was seeking delivery and endorsement of the membership certificates, arguing that endorsement was essential to effectively exercise the plaintiff's rights.

The plaintiff also argued that the trial court erred in not applying Del. Code Tit. 6, § 18-704(a)(3), which provides that "an assignee of a limited liability company interest becomes a member . . . (3) *Unless otherwise provided in the limited liability company agreement by a specific reference to this subsection or otherwise provided in connection with the assignment*, upon the voluntary assignment by the sole member of the limited liability company of all of the limited liability company interests in the limited liability company to a single assignee." Because the italicized language was not included in the plaintiff's quotation of the statute, the court of appeal found that this quotation could be a material misrepresentation and sanctionable. According to the court of appeal, without the operating agreement, the trial court could not properly evaluate what relief was necessary or appropriate for the plaintiffs to "effectively exercise" their rights.

D. Claims Against Third Persons Obligated on Collateral

1. **<u>Sterling Commercial Credit, LLC v. Compliance Envirosystems, LLC</u>, 773 F. Supp. 3d 248 (M.D. La. 3/27/2025).** After acquiring the accounts receivable of a subcontractor pursuant to a factoring agreement, the assignee sent notifications to the contractor that the accounts it owed to the subcontractor had been assigned to the assignee. Despite two notifications, the contractor nonetheless paid the subcontractor instead of the assignee.

The assignee then brought suit against the contractor in federal court in Michigan, but the Michigan federal court dismissed the case on the basis of a lack of personal jurisdiction over the contractor. The assignee then brought suit in federal court in the Middle District of Louisiana, but the contractor moved to dismiss on grounds of forum *non conveniens*, arguing that the assignee was bound by a forum selection clause in the subcontract providing that venue was exclusive to the Nineteenth Judicial District Court for the Parish of East Baton Rouge. Agreeing with the contractor, the court **dismissed the suit without prejudice**.

Mandatory forum selection clauses are presumed enforceable. Here, the assignee argued that the clause was unenforceable because the assignee was not subject to the terms of the subcontract between the contractor and the subcontractor. The assignee's argument was that the subcontractor had merely assigned its accounts receivable and not its rights under the underlying subcontract. Thus, the assignee argued that it was not "subrogated in" as a party to the subcontract and the subcontract's forum selection clause was therefore unenforceable against it. The court found this argument to be at odds with the plain language of both Civil Code article 2642, which subrogates the assignee to the rights of the assignor against the debtor, and also UCC Section 9-404(a)(1), which provides that the rights of an assignee are subject to all of the terms of the agreement between the account debtor and assignor. As such, the assignee's right to payment under the subcontract is subject to the subcontract's forum selection clause.

Even if the assignee were not subject to the subcontract's forum selection clause through assignment and subrogation, it would nonetheless be bound by it through the doctrine of "direct-benefits estoppel," which binds a non-signatory to a contract if the non-signatory knowingly seeks and receives direct benefits from the contract or if the non-signatory seeks to enforce the contract or causes of action that must be determined by reference to that contract. The Louisiana Supreme Court has recognized this doctrine as an equitable remedy available in the absence of legislation and custom. The court found that the assignee satisfied the second prong of the direct-benefits estoppel analysis, because its suit sought to obtain payment from the contractor for the subcontractor's services under the subcontract. The assignee could not move forward with its suit for non-payment without reference to that subcontract. As such, the assignee was bound by the subcontract's forum selection clause.

Having found the mandatory forum selection clause enforceable, the court did not need to give weight to the assignee's choice of forum but instead was required to consider only arguments regarding public interest factors when conducting its forum *non conveniens* analysis. The public interest factors cited by the assignee were "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; and the interest in having the trial of a diversity case in a forum that is at home with the law." Rejecting this argument, the court found these factors to be no different between the federal court and the 19th JDC. Further, "[t]he public interest factors are meant to be used in situations where the suit was filed in an out of state federal court, or in rare circumstances, a different federal court in the state[,] [n]ot where the case was filed in the Defendant's home city and home court, as is the case here." This was not one of the rare cases in which the public interest factors favor keeping a case despite the existence of a mandatory and enforceable forum selection clause.

2. **AmeriFactors Financial Group, LLC v. Dunham Price Group, LLC, 389 So. 3d 71 (La. App. 3d Cir. 11/15/2023),** ***writ denied*****, 395 So. 3d 871 (La. 11/6/2024) (Justices Crichton, Crain and McCallum would grant the writ)**. A sub-subcontractor on a construction project assigned to an accounts receivable factor its accounts receivable, including amounts owed by the subcontractor by which the sub-subcontractor had been engaged. This subcontractor had provided a bond to the general contractor and had agreed with the general contractor to see that all lower-tier subcontractors were paid. Shortly after taking the assignment, the factor sent an email to the subcontractor's staff accountant requesting verification of the invoice. Attached to the email was a verification form that contained a waiver of the subcontractor's right to assert any defense to payment. The form further stated that it "shall constitute an agreement not to assert defenses or claims against payment pursuant to the Uniform Commercial Code." The subcontractor signed and returned the form and later returned an additional 12 verifications. Shortly after sending the first verification request, the factor sent the subcontractor a notice stating that it now served as the assignor's "accounts receivable management team" and that all of the assignor's accounts had been irrevocably assigned to the factor.

   Although the subcontractor paid the first six invoices, it refused to pay the last seven invoices because it had become aware that the assignor's lower-tier subcontractors were not being paid. As a result, the factor filed suit against the subcontractor for breaching the verification agreements. The defendant reconvened with claims of bad faith breach of contract, unjust enrichment and detrimental reliance, alleging that the factor had made misrepresentations about the nature of its relationship with the assignor, that the factor knew or should have known that the assignor was in no position to fulfill its financial obligations, and that the defendant had been "victimized by the bad acts" of the assignor and factor in failing to pay the assignor's lower-tier subcontractors.

   The factor moved for summary judgment, citing Section 9-403 of the UCC, which governs agreements between an account debtor and an assignor not to assert defenses against an assignee. In response, the defendant argued that Section 9-403 "plainly requires that in order for an agreement not to assert defenses against an assignee to be valid, that agreement must be made between the account debtor and the assignor." The defendant also claimed that it would not have signed the verification forms if it had known of the true relationship between the assignor and the factor or of the assignor's financial condition. The defendant further argued that the purported agreement to waive claims and defenses was invalid for failure of cause and consideration.

After summary judgment was denied, the case was tried before a jury, which found that neither party had proved a breach of contract or other right to recovery. The trial court denied the factor's motion for a judgment notwithstanding the verdict. The factor appealed, and the defendant answered the appeal. The court of appeal **affirmed.**

The defendant argued that the trial court had erred in not submitting a requested jury instruction that, in order to obtain a valid waiver of defenses, the plaintiff had to prove that it complied with Section 9-403(b). Specifically, the defendant had requested an instruction that if there is no waiver in the contract between the account debtor and the assignor, there can be no waiver in the assignment that the assignee took from the assignor against the defendant. The court of appeal found that the trial court properly refused to give this instruction. The waiver of defenses was pursuant to an agreement between the factor and the defendant, and the defendant could have refused to sign, notwithstanding the testimony of its officer that "there was no time" and "we had our arms behind our backs." As the trial judge stated, "I just refuse to believe that there are statutes either in Louisiana law, in the UCC, that preclude prudent business people from making their own decisions." While the waiver could not be forced upon it, the defendant could make its own decision to sign the waiver, and in this case did so. Section 9-403(b) applies only to agreements between an account debtor and an assignor and does not apply to agreements that are made directly between the account debtor and the assignee. The enforceability of those agreements is instead governed by law outside Chapter 9, as Section 9-403(f) provides.

Nevertheless, the court of appeal found that, even assuming that the factor had proved that the verification agreements were valid contracts, there was a reasonable basis in the record for the jury to conclude that the defendant did not breach them considering the fact that it would be an absurd result if the verification forms meant that the money the defendant paid to the factor would not go toward paying the subcontractors. The jury was instructed that, if the words of the contract do not lead to absurd results which the parties could not have intended, it did not need to do anything further to find their common intent. The jury heard testimony that the defendant had no choice but to halt its payments to the factor in order to pay the lower-tier subcontractors directly. Accordingly, the trial court did not err in entering judgment based on the jury's verdict or in refusing to grant the motion for JNOV.

The defendant's claim that the jury erred in not finding the factor liable for breach of contract was based on an argument that, by taking an assignment of the contract between the defendant and the assignor, the factor "stepped into the shoes" of the assignor. Rejecting this claim, the court of appeal observed that it was abundantly clear from the evidence that the factor had bought only the invoices, and not the contract, from the assignor. As for the claims of unjust enrichment and detrimental reliance, the jury did not manifestly err in rejecting these claims, in light of admissions from the defendant's officers that the factor did not provide any false or misleading information and the evidence showing that it was the factor that was impoverished by both the assignor and the defendant.

E. Duty to Give a Statement of Account

1. **Miller v. Stuart, 2025 WL 487190 (E.D. La. 2/13/2025).** The debtor of a vehicle loan brought suit against her secured lender for breach of its duty of good faith and fair dealing, its violation of UCC Section 9-210 and negligence per se, claiming that she had requested an accounting of the status of her secured obligation in August of 2024 but was ignored. Her suit contended that the defendant's failure to address her request caused her to suffer financial harm, emotional distress and the inability to resolve or challenge inaccuracies related to the loan.

   Granting the defendant's motion to dismiss under Rule 12(b)(6), the court observed that UCC Section 9-210(b) requires secured parties "other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor" to comply with a debtor's request with 14 days after receipt. Since UCC Section 9-210(b) does not apply to secured parties who are buyers of accounts, chattel paper, payment intangibles, promissory notes or a consignor, and since chattel paper is defined as a record that evidences both a monetary obligation and a security interest, the plaintiff had failed to state a claim against the defendant under UCC Section 9-210, as retail installment contracts, including the one that the plaintiff had signed, are chattel paper. In any event, while UCC Section 9-210 does present duties for certain secured parties, the letter that the plaintiff sent specifically stated that she was *not* requesting a statement of an account but was disputing the debt and requiring written information such as the original note with a wet signature, all tax filings and all security interests associated with this account. Her request was thus a mislabeled attempt to dispute the debt. As for her claim for breach of contract, her complaint failed to provide a basis for her breach of contract claim, as she had not alleged any facts to show that the defendant had breached any specific term of the contract. Although the plaintiff's complaint in its current form failed to provide sufficient factual allegations to plead a violation of UCC Section 9-210, negligence per se or breach of contract, the court nonetheless permitted her time to amend her complaint to allege specific facts supporting her claims.

2. **<u>Truehill v. Manufacturers and Traders Trust Company</u>, 2025 WL 1371827 (M.D. La 2/18/2025).** A *pro se* plaintiff brought suit against his residential mortgage lender seeking to enjoin an upcoming state court foreclosure and also claiming that the mortgagee had violated UCC Section 9-210 of the Uniform Commercial Code because it had failed to provide a statement of accounting within 14 days as allegedly allowed by law. The magistrate judge recommended **dismissal of the plaintiff's claims**. In support of the claim for an injunction, the plaintiff had not submitted any evidence to support a finding that his alleged $8,600 in mortgage payments would have satisfied his nearly half million dollar debt, and he therefore failed to establish that a preliminary injunction of the sheriff's sale was merited or otherwise within the authority of the court. Though the magistrate judge discussed the Anti-Injunction Act, the judge found that he need not reach that issue because the plaintiff had not established the required elements for preliminary injunctive relief.

   As for the claim for violation of UCC Section 9-210, the court stated that it was plainly inapplicable. That statute governs requests for an accounting under the Uniform Commercial Code and requires an accounting of obligations secured by collateral. The real property securing the mortgage in this case is not "collateral" for purposes of UCC Section 9-210. Moreover, Chapter 9 does not apply to the creation or transfer of an interest in or lien on real property. Thus, the defendants had no legal obligation under UCC Section 9-210 to respond to a request for accounting.

   The plaintiff's final claim was one of "debt bondage," which apparently was predicated upon the assertion that the defendant had "a pattern to make consumers such as plaintiff pay in the form of federal reserve notes obtained from physical labor which creates a taxable event with the Internal Revenue Services [sic]." Similar claims for peonage based on 42 U.S.C. § 1994 (which prohibits the holding of a person to service or labor under the system known as peonage) or involuntary servitude under the Thirteenth Amendment have been summarily dismissed because the plaintiff merely owes a debt and has not been forced into slavery with respect to repayment of that debt.

3. **<u>Calhoun v. Carmax Business Services, LLC</u>, 2025 WL 2267992 (M.D. La. 7/15/2025).** A year after purchasing a vehicle from the defendant's affiliate and then defaulting on the retail installment contract by which she had encumbered the vehicle as security for the loan, the plaintiff filed suit claiming that the defendant had breached its contract by attempting to collect the loan even though there allegedly had been a valid accord and satisfaction. The plaintiff also contended that the defendant's violation of UCC Section 9-210 had caused it to forfeit its security interest in the

vehicle. The claim of accord and satisfaction was based upon the argument that the plaintiff had sent correspondence entitled "Bona Fide Dispute Notice" by which she claims to have disputed the amount owed to the defendant but actually focused on alleged violations of the Truth-in-Lending Act. After sending this notice, she sent two money orders to the defendant for small amounts of money with language purporting to fully resolve her debt.

The magistrate judge **recommended denial of the plaintiff's motion for summary judgment**. On her claim of accord and satisfaction, not only had she failed to provide sufficient evidence to establish that a bona fide dispute existed, she provided no evidence of the defendant's consent to enter into an accord and satisfaction, as at no point did the defendant agree to accept any amount less than payment in full of the contract. As for the claim of a violation of UCC Section 9-210, the plaintiff had not shown that the requests she sent were sufficient, proper requests to trigger any relief that that UCC Section 9-210 might afford. Nowhere had the plaintiff cited any evidence or case law indicating that the relief being sought by the plaintiff was in fact available to her, much less that she was entitled to it. As the court observed, "[w]hile much liberality is allowed in construing *pro se* complaints, a *pro se* litigant cannot simply dump a stack of exhibits on the court and expect the court to sift through them to determine if some nugget is buried somewhere in that mountain of papers, waiting to be unearthed and refined into a cognizable claim."

III. Interpretation of Loan Documents

A. Promissory Notes

<u>In re Kologik, LLC</u>, 2025 WL 1014790 (Bankr. M.D. La. 4/3/2025). To fund plan exit financing that it had agreed to provide to a debtor in another bankruptcy proceeding, the debtor in this case borrowed $235,000 from the plaintiff. Under the terms of the plan exit financing, the debtor in this case was entitled to a pro-rata portion of any recovery made from claims against directors and officers in the other bankruptcy proceeding. The promissory note executed in favor of the plaintiff by the debtor in this case provided that the debtor would pay to the plaintiff its pro rata portion of all funds received by the debtor from the claims against the directors and officers in the other debtor's bankruptcy. The promissory note also provided that it evidenced a non-recourse obligation and that the plaintiff would look solely to the funds received by the debtor from those claims. The promissory note stated that it did not bear interest before default but provided for 18% default interest. The debtor later received proceeds from the director's and officer's claims but failed to pay the plaintiff the full amount lent under the note.

Before the debtor's bankruptcy filing, the plaintiff filed a state court action against the debtor and another lender, obtaining a writ of sequestration to obtain funds held by that other lender. After the bankruptcy was filed, the plaintiff filed a proof of claim for $837,000 and, in an adversary proceeding against the debtor and the other lender, moved for summary judgment. The court **denied the plaintiff's summary judgment motion**.

The plaintiff contended that it was entitled to recover not just the amount it had lent but also its pro rata portion of the director's and officer's proceeds. This argument was apparently based on the first paragraph of the note that obligated the debtor to pay to the plaintiff "the principal sum . . . together with other sums as provided herein." Rejecting this argument, the court agreed with the debtor that a plain reading of the note limited the plaintiff's recovery to his share of the amount obtained from the director's and officer's claims.

The plaintiff also contended that, even though the note provided that it would bear no interest until default, the note was modified to provide for 15% interest before default based upon a settlement evidenced by emails between the debtor's controller and the plaintiff, which the plaintiff contended were sufficient to conduct a binding settlement. The court rejected this argument because the controller's email provided that the debt schedule attached "will serve as the source of truth, pending any audit adjustment/reconciliation." This qualifying language showed that the debt schedule was not finalized, and the plaintiff submitted no evidence that it was ever finalized or what the terms of payment would be. Further, the court rejected the argument that monthly $6,000 payments made afterward evidenced a meeting of the minds regarding interest. Those payments, without more, were more reflective of the reality that money was owed than evidence of a settlement.

The debtor filed its own motion for summary judgment seeking a declaration that the amount due on the note was not an "open account" under R.S. 9:2781 and thus the plaintiff could not obtain attorney's fees. Citing state court precedent, the court agreed that an "open account" does not include the failure to pay a promissory note. Nevertheless, as the note did contain a provision for attorneys' fees, the court held that it would not penalize the plaintiff for pleading a claim for attorneys' fees under an inapplicable statute when the contract unequivocally allowed attorneys' fees.

Finally, the court rejected the debtor's request for summary judgment on its counterclaim to dissolve the state court writ of sequestration. According to the court, while it might be tempting to weigh in on the non-recourse language of the note, a ruling had already been made in the state court proceeding, and the *Rooker-Feldman* doctrine prevented the federal court from serving as an appellant court in deciding whether the state court writ should be dissolved as a wrongful seizure or whether the debtor should be entitled to damages for wrongful seizure.

B. Borrowing Base Certificates

<u>In re Goodman</u>, 2025 WL 1026275 (Bankr. W.D. La. 3/31/2025). The loan agreement between the lender and the operator of a lumber yard established a borrowing base for accounts and inventory. The loan was guaranteed by the debtor in the present bankruptcy proceedings. The lender filed an adversary proceeding seeking a judgment of non-dischargeability of the entire amount of the debt based upon several false borrowing base certificates. The court previously granted partial summary judgment in favor of the lender finding two of 17 borrower base certificates submitted in February 2017 to be false, leaving open the possibility that others might be proven at trial to be false. At the summary judgment stage, the court rejected the lender's argument that each advancement of funds under a borrowing base certificate acted as a renewal of the entire loan balance thereby justifying non-dischargeability of the entire amount owed. In its summary judgment ruling, the court left open the possibility that at trial the plaintiff might "bridge the gap" from showing that it merely used the borrowing base certificates to allow for new advances to showing that it was also agreeing to renew the entire outstanding loan balance at the time of each advance.

After trial, the court stood by its previous ruling that the plaintiff was relying on the borrowing base certificates for the purpose of determining whether to make future advances under the loan agreement not whether the existing loan should be renewed. The court found, however, that all of the borrowing base certificates submitted in February 2017 were false, as new timber was being sold first instead of old timber, and the old timber was accordingly losing weight due to shrinkage and also losing significant value. Though the lender was routinely performing a visual inspection of the timber yard, an ordinary visual inspection would not have uncovered any abnormalities. The court thus held that the lender's reliance upon the borrowing base certificates was reasonable, as there had been no prior problems concerning inaccurate reporting, there were no major red flags concerning misrepresentation, and a minimal investigation would not have uncovered the truth.

IV. Suretyship

A. Ambiguous Signatures

<u>Building Specialties Company of Louisiana v. Roadwrxx LLC</u>, 409 So. 3d 817 (La. App. 5th Cir. 12/4/2024). A credit application by which the defendant limited liability company established an open account with the plaintiff contained a clause stating that "[s]hould it become necessary to place this account for collection, I shall personally obligate myself and my corporation, if any, to pay the entire balance due . . . 33 1/3% attorney's fees and all costs of collection." The credit application was signed by the managing member of the limited liability company, with an indication of his title as managing member and the name of the company. When the account went unpaid, the plaintiff filed suit against both the limited liability company and its managing member for judgment *in solido* for the amount due together with interest and attorney's fees. The trial court granted the plaintiff's motion for summary judgment against both defendants and denied the individual defendant's motion for partial summary judgment to the effect that he was not liable. The court of appeal **affirmed**.

Contracts of suretyship are subject to the same general rules of interpretation as contracts in general. When the words of a contract are clear, unambiguous, and lead to no absurd consequence, no further interpretation may be made in search of the parties' intent. Considering the entirety of the contract, the court found the language contained in the credit application clearly and unambiguously created a suretyship agreement in which the individual defendant personally guaranteed the amounts due under the open account. The notation of "managing member" next to the individual defendant's name was "merely a title identification" and did not obviate the clear and unambiguous language of the suretyship created in the contract. In so holding, the court followed its earlier decision, involving a lease, in *Veteran's Commercial Properties, LLC v. Barry's Flooring, Inc.*, 67 So. 3d 628 (La. App. 5th Cir. 2011), and in a footnote distinguished its prior opinion in *Pelican Plumbing Supply, Inc. v. J.O.H. Const. Co., Inc.*, 653 So. 2d 699 (La. App. 5th Cir. 3/28/1995), which involved a credit application containing nearly identical language to that in the present credit application. In the *Pelican Plumbing* case, however, the trial court had considered parol evidence to ascertain the true intent of the parties. Here, though the individual defendant argued at the hearing on the motion for summary judgment that he would attest in an affidavit that he had no intention to personally bind himself, no affidavit was provided in support of his motion for partial summary judgment and parol evidence was not considered by the trial court.

B. Continuing Guaranties; Revocation

1. **<u>Origin Bank v. JPS Aero, L.L.C.</u>, 383 So. 3d 1148 (La. App. 2d Cir. 4/10/2024), *writ denied.* 394 So. 3d 817 (La. 10/15/2024).** In a suit on promissory notes, an unlimited continuing guaranty and an aircraft security agreement, the guarantor opposed summary judgment, arguing that the bank officer's supporting affidavit stated legal conclusions, such as a statement that the guaranty was "unlimited and the obligations continuing" and that the guaranty covered the obligation sued upon in the petition. The guarantor also contended that he had previously sold all of his interest in the borrower and had sent a letter to the bank several months afterward notifying the bank that he was terminating each and every guaranty agreement that he may have given to the bank with respect to the obligations of the borrower. He also argued that the guaranty was not self-proving because it was not in authentic form, and the bank officer's affidavit made no attestation as to the correctness, validity or applicability of the guaranty. The guarantor also contended, in his own countervailing affidavit, that the guaranty was applicable to a different loan, and, because there was no loan number on the first page but there was a loan number on subsequent pages, there was an issue of fact as to whether the guaranty was one document or was actually different documents pieced together. The trial court granted summary judgment in favor of the bank, and the court of appeal **affirmed**.

   With regard to the guarantor's argument that the guaranty was not self-proving, the court pointed out that under Civil Code Article 1838 a party against whom an act under private signature is asserted must acknowledge his signature or deny that it is his. A party who refuses to either acknowledge or deny his signature is held to have acknowledged it. The bank officer was qualified to identify the bank's business records because he was a representative of the bank and was familiar with the bank's method of compiling documents. The guarantor admitted in his answer that he signed certain guaranty agreements, but nowhere did he specifically deny signing the commercial guaranty at issue. This was insufficient as an explicit denial of his signature.

With regard to the contention that the guaranty covered a different loan than the one sued upon and was executed prior to when the subject loan was signed, as well as the guarantor's argument that it was unclear if the guaranty was one document or a pieced together document, the court pointed out that the guaranty stated in numerous places that it covered future indebtedness and was unlimited and that the guarantor's obligations were continuing. There was even a section of the guaranty stating in capital letters that it covered all now existing or hereafter acquired indebtedness on an open and continuing basis. The fact that a different loan number appeared on certain pages of the guaranty did not convince the court to conclude that the guaranty was a piecemeal document that required additional proof. Having a particular loan number on pages of the document is irrelevant, because the guaranty was continuing in nature.

With respect to the purported revocation, the court agreed with the bank that the mere act of sending correspondence to the bank was insufficient to extinguish the guarantor's obligations previously entered into. Even if the guaranty was properly revoked, it did not relieve the guarantor of any obligations he had already incurred. While the guarantor sought to have himself released from the guaranty when he sold his interest in the borrower, he did not secure a release from the bank but instead merely contracted for that release with the third party buyer. His obligations were not extinguished simply because he delivered a written revocation of his guaranty to the bank.

2. **<u>Origin Bank v. JPS Aero, L.L.C.</u>, 383 So. 3d 1125 (La. App. 2d Cir. 4/10/2024),** ***writ denied*****, 394 So. 3d 821 (La. 10/15/2024).** In a separate suit involving the same parties on different promissory notes and aircraft security agreement, the bank sought to obtain a deficiency judgment for the balance owing after the aircraft was sold at a sheriff's sale. The trial court (through a different judge than the one who granted summary judgment in the decision above) sustained the guarantor's objection to the bank officer's affidavit submitted for the purpose of authenticating the commercial guaranty. Because it had struck the affidavit, the trial court found that none of the documents attached to the petition could be authenticated, including the commercial guaranty, which the trial court accordingly found was inadmissible to support the bank's motion for summary judgment. Thus, summary judgment was denied.

From this ruling, the court of appeal previously granted supervisory writs, finding that the trial court erred in excluding the bank officer's affidavit, and remanded the suit to the trial court for reconsideration of the bank's motion for summary judgment. On remand, the guarantor argued that he had revoked his guaranty and also urged that since no loan number appeared on the guaranty it was not applicable to the notes sued upon. The trial court again denied the bank's motion for summary judgment, finding a genuine issue of material fact as to whether the guaranty covered the debts owed under the notes at issue, given that the guaranty had been executed after one of the notes had been signed but before the other. The court also found that the extent of any liability under the guaranty was at issue because the guarantor argued that he had unilaterally terminated it. Lastly, the trial court ruled that the fact that the parties disagreed was itself a genuine issue of material fact.

The court of appeal again granted writs, **reversed** the judgment of the trial court and **granted** the bank's motion for summary judgment. As the court held in the companion case, the guarantor was required to either definitively acknowledge or deny his signature, and he could not avoid the requirement simply by stating that he had no recollection of signing the guaranty. There was thus no genuine issue of material fact as to the validity and authenticity of the guaranty, and the trial court erred in finding otherwise. There was also no genuine issue of material fact as it pertained to the guarantor's liability for the notes at issue. Louisiana courts have routinely enforced continuing commercial guaranties that do not specifically detail within their four corners every principal debt that the guaranties cover. One of the notes was executed before the guaranty was signed, and the guaranty thus made him liable for that "now existing" debt. Furthermore, the other note was executed before his purported termination and, despite the termination, he remained liable for any principal debts existing at the time.

C. Subrogation/Subordination

<u>IberiaBank v. Nature's Way Energy Services, LLC</u>, 389 So. 3d 150 (La. App. 1st Cir. 4/17/2024), ***writ denied*** **392 So.3d 1145 (La. 9/24/2024).** In connection with the issuance of a standby letter of credit, the limited liability company for which the letter of credit was issued executed a demand promissory note payable to the issuer, and the five members of the limited liability company executed commercial guaranty agreements. After filing suit against the limited liability company and five guarantors, the bank entered into a "Contractual Subrogation Agreement" whereby it agreed that it would release one of the guarantors from his obligations under the letter of credit and subrogate him to the bank's rights against the other guarantors to recover the amount paid by the settling guarantor in excess of his 1/5 virile share. The settling defendant further agreed that his subrogation rights would at all times be subordinate to the bank's remaining claims against the other defendants.

Subsequently, the settling guarantor entered into a settlement agreement with the limited liability company and other parties, whereby it was agreed that a refund due from the beneficiary of the letter of credit would be placed in an escrow account from which the settling defendant would receive $175,000 of the escrow funds. Afterward, the bank filed a revocatory action and breach of contract action against the limited liability company and the settling defendant alleging that his subrogation rights were subordinate to the bank's claims. The bank sought judgment revoking all transfers of cash from the LLC to the settling defendant. The settling defendant's response was that he had never agreed to subordinate his rights against the limited liability company.

The trial court denied the settling defendant's motions for summary judgment and granted summary judgment in favor of the bank. The court of appeal **affirmed**. There was no dispute that the letter of credit and promissory note evidenced the limited liability company's indebtedness to the bank. The settlement agreement that the settling defendant and the bank had entered into provided that "[t]he subrogation rights granted to [the settling defendant] shall at all times be subordinate to Iberia's claims against [the other guarantors] and [the limited liability company] *on the same terms and conditions and to the same extent as provided in the Commercial Guarantees in favor of Iberia*." The Commercial Guaranty that the guarantors had executed all contained a subordination provision to the effect that "Any and all rights that Guarantor may have or acquire to collect from or be reimbursed by the Borrower . . . shall in all respects . . . be subordinate, inferior and junior to the rights of Lender to collect . . . Borrower's indebtedness that then remains." It was thus clear that the settling defendant had agreed that his right to repayment from the limited liability company was subordinate to the right of the bank. Although his obligation under the Commercial Guaranty was cancelled, the Contractual Subrogation Agreement "clearly indicates" that the subordination provisions of the guaranty still applied and subordinated his rights to the bank's claims against the limited liability company. The $175,000 payment he received fell within the subordination provision of the guaranty, as incorporated by the Contractual Subrogation Agreement, and his receipt of these funds constituted a breach of the subrogation agreement.

Finally, as for the settling guarantor's contention that additional discovery might have shown that less was owing on the debt than the bank alleged, the court observed that the defendant had not presented evidence creating a genuine issue of material fact to contradict the affidavit of correctness submitted by the bank's officer. The court also rejected the defendant's contention that the trial court erred in not permitting additional discovery before granting summary judgment, given that 3,000 pages of discovery had already been produced and information regarding the only four payments that had been made on the loan had already been produced as well.

V. Executory Process

A. Injunctive Relief

1. **<u>Sun Realty, L.L.C. v. DeRouselle</u>, 402 So. 3d 37 (La. App. 4th Cir. 11/18/24).** The plaintiff filed executory proceedings to enforce a "collateral mortgage note" secured by an act of mortgage upon an immovable. The defendant took a suspensive appeal from the trial court's order directing the sheriff to seize and sell the property and, at the same time, filed a petition for a permanent injunction. The court of appeal **affirmed** the trial court's order directing the issuance of executory process. In order to enforce a mortgage through executory process, the plaintiff must provide authentic evidence of the instrument evidencing the obligation secured by the mortgage and the act of mortgage importing a confession of judgment. The note evidencing the obligation secured by the mortgage is deemed authentic when it has been paraphed for identification with the mortgage. Here, the plaintiff had filed with its petition a certified copy of the mortgage and the original act of endorsement of the mortgage note to the plaintiff, along with a verification of the petition by its counsel. Before the trial court ordered the issuance of executory process, the plaintiff supplemented the record with the original note. Thus, the defendant's argument that the trial court should not have granted executory process on account of the plaintiff's failure to attach the note to its petition was moot.

   With regard to the claim that the verification by the plaintiff's attorney was insufficient and failed to authenticate the evidence submitted, the court noted that the law does not require that a petition for executory process be verified. The plaintiff produced the instrument evidencing the obligation, *i.e.* the collateral mortgage note, and the mortgage importing a confession of judgment. These documents are the bare minimum needed to establish a right to executory process. Additionally, as the plaintiff was not the original holder of the note, it produced an act of endorsement to establish itself as the rightful enforcer of the note. This assignment was an authentic act and was therefore authentic for purposes of executory process. The court then cited UCC Section 9-629 for the proposition that a verification may be based upon personal knowledge or upon information and belief derived from the records of the secured party, such as the data sheets referenced in this verification. This statute, along with R.S. 9:5555(B), provides that a verification need not specify the records upon which knowledge, information or belief is based.

   Note: Even though the opinion specifically states that the note in question was a "collateral mortgage note," the opinion later references this note having a remaining balance of $78,000 and nowhere discusses the existence of a hand note.

2. **<u>U.S. Bank Trust National Association, as Trustee v. Watson</u>, 2024 WL 4493398 (La. App. 1st Cir. 10/15/2024).** In dissenting from a writ denial in an executory process suit, Chief Judge Guidry points out that executory process is a harsh remedy and that in his view the plaintiff had failed to comply with the clear and unambiguous proof requirements of Code of Civil Procedure Article 2637(B) as the plaintiff's petition prayed for "all costs and expenses in enforcing the Note and Mortgage, and all advances for taxes, insurance premiums and all other charges and expenses permitted by the Note or Mortgage including prepayment penalty, if any, and late charges." Accordingly, he would grant the writ application and grant the preliminary injunction requested by the defendant.

3. **<u>U.S. Bank National Association v. Moses</u>, 2024 WL 3873408 (La. App. 5th Cir. 8/20/2024).** In response to an executory process foreclosure, the defendant filed "in proper person, not in his individual capacity but solely as trust protector of the Atakapa Indian Tribe of Four Symbols Moses Express Spendthrift Trust," a reconventional demand seeking an injunction to arrest the seizure and sale, claiming in essence that the plaintiff was not the true holder of the note and was engaged in criminal or fraudulent activity. He also alleged that he had transferred the property to the trust and had the authority as trustee to obtain an order decreeing that any notes contradicting the authority under the trust were null. The district court granted the defendant's request for a temporary restraining order and set a hearing on the application for preliminary injunction. The mortgagee responded with exceptions of improper cumulation and improper use of summary process as well as no cause of action. After a hearing, the district court dissolved the TRO, denied the defendant's request for preliminary and permanent injunctions and sustained all of the plaintiff's exceptions. At the defendant's motion for a new trial, the plaintiff attached a screen shot from the Louisiana State Bar Association membership directory showing that the defendant was actually a state bar member. Thus, the plaintiff argued that the defendant was not entitled to the vast deference usually afforded to *pro se* litigants. After the court denied the motion for new trial, the defendant filed an application for a supervisory writ.

   Although the denial of a motion for new trial is not susceptible of appeal, the Louisiana Supreme Court has ruled that the appeal of a denial of a motion for new trial should be treated as an appeal of the judgment on the merits. As to the judgment of the trial court denying the request for injunctive relief, an appeal may be taken as a matter of right. Therefore the judgment denying the request for preliminary and permanent injunctions was appealable, and the court of appeal thus had jurisdiction. However, because it was unclear whether the reconventional demand had been dismissed in its entirety, and the district court did not file a response to the court of appeal's invitation to give explicit reasons as to whether the judgment resulted in a complete dismissal of the reconventional demand, the court of appeal considered the judgment on the plaintiff's exceptions to be a partial final judgment that was not appealable.

On the merits of the appeal of the judgment denying the request for injunctive relief, the court observed that the principal demand for a permanent injunction is determined on its merits only after a full trial in an ordinary proceeding unless the parties agree to consolidate the trial on the merits of a permanent injunction with the hearing on the preliminary injunction. In this case, there was no indication that the parties had stipulated to such a consolidation. The court agreed with the defendant that the district court erred by deciding the permanent injunction when there was no such stipulation. As for the district court's denial of the defendant's request for a preliminary injunction, the district court was correct in refusing to grant a preliminary injunction. Even assuming that the property was transferred to the trust after the mortgage was executed, Louisiana Code of Civil Procedure Article 2701 provides that a transferee need not be made a party to the mortgage foreclosure. As for the defendant's contentions regarding the assignment of the note, under R.S. 10:3-109(c) the note became bearer paper when it was first endorsed without being made payable to any other person or entity. Finally, as to the defendant's claims of sovereign immunity, the court cited a ruling from the Middle District in a related case in which it found that the defendant was not only subject to state and federal laws in general, he is also subject to the rules and regulations governing practicing attorneys.

B. Post-Sale Attack

1. **Bayview Loan Servicing, LLC v. Holden, 391 So. 3d 751 (La. App. 1st Cir. 6/7/2024).** Following an executory process sale in which the mortgaged property was sold to the seizing creditor, the defendants, who did not object to or otherwise seek to arrest the sale, filed a reconventional demand claiming that the sale was absolutely null because the plaintiff was not entitled to enforce the note and had intentionally represented its status as the holder of the note in order to pursue executory proceedings. The plaintiff responded with an exception of res judicata, which the trial court denied. Thereafter, the plaintiff filed a motion to amend its original petition for executory process to attach a series of copies of assignments of the mortgage note. The plaintiff then moved for summary judgment, arguing that it was in possession of the note, which amounted to bearer paper on account of a prior endorsement in blank. The defendants opposed the plaintiff's motion for summary judgment on the ground that the assignments that had been submitted in the amended petition were filed after the original order of seizure and sale had been signed.

   Finding that the note was bearer paper, the trial court granted summary judgment in the plaintiff's favor. The court of appeal **affirmed**. R.S. 13:4112 prohibits the institution of an action to set aside a judicial sale by reason of any objection to form or procedure where the procès verbal or sheriff sale deed has already been filed. Here, neither of those events had occurred, so the reconvention was permitted, but summary judgment was nevertheless proper. The 1989 amendments to Code of Civil Procedure Article 2635 no longer require that every document submitted in support of a petition for executory process be in authentic form. Moreover, R.S. 9:4422, as amended in 2012, provides that the assignment of an obligation secured by a mortgage may be proved by any form of private writing. In the present case, the note has an attached allonge, which was endorsed in blank and is affixed to the note. The fact that the allonge was undated or did not reference the co-mortgagor's name did not create a gap in the title. Although the allonge was not authentic evidence of the assignment of the note, the endorsement in blank on the allonge rendered the note bearer paper, and authentic evidence of the transfer of the note was not required to enable the holder to foreclose by executory process.

2. **<u>Girod Titling Trust v. Hermes Health Alliance, L.L.C.</u>, 401 So. 3d 721 (La. App. 4th Cir. 7/1/2024).** After an executory process sale in which the mortgaged property was sold to a third party adjudicatee, the mortgagor filed an answer, reconventional demand, request to vacate sheriff's deed, request for declaratory judgment and request for mandamus. The ground for nullity alleged was apparently that the foreclosing creditor had failed to comply with R.S. 12:1354(A), which provides that a foreign limited liability company transacting business in Louisiana is not permitted to present any judicial demand unless it has first been authorized to transact business if required by and as provided by the LLC law. The foreclosing creditor filed a multitude of exceptions, all of which were denied by the trial court, which also, *sua sponte*, converted the executory process foreclosure action to ordinary process.

The court of appeal granted writs and **reversed**. First, the trial court had no authority to convert an executory proceeding to an ordinary proceeding on its own motion and without the consent of the foreclosing creditor. The trial court erred in denying the foreclosing creditor's exception of unauthorized use of summary process as well as the exception of improper cumulation, as requests for declaratory relief and to annul a sheriff's sale cannot be asserted in an executory process foreclosure proceeding and actions cannot be cumulated when they employ different forms of procedure.

The trial court also erred in denying the foreclosing creditor's exception of no cause of action since the mortgagor's own pleading admitted that the property had been sold to a third party. Under *Reed v. Meaux*, an action may be asserted to nullify a sheriff's sale provided that the foreclosing creditor was the adjudicatee and the defect asserted by the party seeking nullity was substantive and went to the fundamental nature of the obligation or its acquisition. Here, the mortgagor acknowledged in its pleading that the property was sold to a third party and, accordingly, the trial court erred in denying the exception of no cause of action. Finally, the trial court erred in denying the exception of no cause of action directed to R.S. 12:1354. The foreclosing creditor was not transacting business but was merely collecting on a debt and enforcing the rights to the immovable property securing the debt. As such, it was not required to comply with R.S. 12:1354 to institute the foreclosure proceedings.

***Note*:** In a separate opinion rendered the same day and appearing at 2024 WL 3249281, the court denied the mortgagor's writ application, rejecting the mortgagor's argument that Code of Civil Procedure Article 2592(3) permits a suit for declaratory judgment to be asserted in a summary proceeding. The Supreme Court has held that a suit for declaratory judgment is an ordinary action and not a summary proceeding. As such, it requires a trial on the merits where each party has an opportunity to present evidence in a form other than verified pleadings and affidavits. The reference in Code of Civil Procedure Article 2592(3) to a rule to show cause does not mean that declaratory judgment can be sought through a summary proceeding.

VI. Ordinary Process Foreclosure/Collection Actions

A. Venue; Personal Jurisdiction

1. **<u>Pirco, LLC v. RKRT Real Estate Investors, LLC</u>, (La. App. 5th Cir. 9/24/2025) 2025 WL 2721071.** A promissory note provided that the balance would be due when any one of three properties located in Orleans Parish were sold. After one of these properties was sold but the maker failed to pay the promissory note, the holder of the note filed suit in Jefferson Parish on the ground that the note had been executed there and that venue was therefore proper under Code of Civil Procedure article 74.4 and 76.1. The trial court denied the defendant's exception of no cause of action, and the court of appeal **denied the defendant's writ application** from that ruling. The defendant's argument was that venue was proper in Orleans Parish under Code of Civil Procedure article 80 (which provides that an action to assert an interest in immovable property may be brought in the parish where the immovable property is situated or in the parish where the defendant is domiciled) because the immovable property was located there and Code of Civil Procedure article 45 provides that article 80 governs venue exclusively if it conflicts with articles 71 through 77. Here, however, the sale of the Orleans Parish property merely served as a condition for when the loan was due, and the note did not contain any language that would grant the holder of the note an interest in any of the immovable property in Orleans Parish. Code of Civil Procedure article 80 therefore did not apply.

2. **<u>First Guaranty Bank v. Greenbrier Hotel Corporation</u>, 2025 WL 2797069 (M.D. La. 9/30/2025).** After the defendant defaulted in making the first principal payment due under a Main Street Loan, the bank

accelerated the maturity of the promissory note and filed suit in the Middle District of Louisiana to collect the entire balance of the note, with default interest at 21% per annum. The promissory note provided that it was governed by Louisiana law but did not include a choice-of-forum clause. The defendant, a West Virginia corporation with its principal place of business in that state, moved to dismiss for lack of personal jurisdiction. The bank conceded that the defendant was not subject to the general personal jurisdiction of the Louisiana court, but disputed the issue of specific personal jurisdiction.

According to the defendant's affidavit in support of its motion to dismiss, the bank contacted the defendant in West Virginia, and the parties negotiated and executed the loan documents in West Virginia. The loan was facilitated by a West Virginia resident who not only owned a West Virginia bank with which the defendant had previously conducted business but was the largest shareholder and chairman of the board of the plaintiff bank. The affidavit also asserted that the defendant was aware that the bank had offices in West Virginia and the defendant believed that any loan tendered by the bank would be serviced and administered from its branch in West Virginia. The affidavit further attested that at no time did anyone from the defendant travel to Louisiana to discuss or negotiate the loan or to execute loan documents. The defendant thus argued that the only link to Louisiana was that the bank opted to administer the loan from its offices in Louisiana rather than its offices in another state. In sum, the defendant argued that simply having a loan from a bank in Louisiana was insufficient, on its own, to establish that a defendant had purposely directed its activities toward the forum state for purposes of establishing specific personal jurisdiction.

In response, the bank's chairman of the board with whom the defendant had corresponded attested that, after receiving a single unsolicited telephone call, all of his conversations with the defendant concerning the loan occurred via telephone conference, during which the responsible bank officers were physically present in the bank's office in Hammond, Louisiana. The relationship manager averred that he executed all loan documents in Louisiana and did not travel to West Virginia to witness the borrower's signing of the loan package. It was not until after the loan became past due that bank officers travelled to West Virginia to meet with the defendant's representatives concerning the loan. The bank also pointed out that the loan documents repeatedly stated that the bank was located in Louisiana and all specified a Louisiana choice of law. Moreover, they specified a Louisiana address for written communications and payments.

The court held that it did not have personal jurisdiction over the defendant. The mere foreseeability that a party might perform many of its duties in the forum state does not create jurisdiction. The assertions and evidence presented by the bank merely established its own contacts with the forum state not those of the defendant. It was undisputed that the defendant had no offices, officers, employees or property in Louisiana, and there was no evidence that the defendant conducted business in Louisiana other than the bank's allegations regarding the loan documents, which the court found to be insufficient minimum contacts. The bank's actions of executing the loan documents in Louisiana was not the test, because the relationship between the defendant and the forum state must arise out of contacts that the defendant himself created with the forum state. All loan documents were executed by the defendant outside of Louisiana, and the alleged default giving rise to the bank's claim also occurred in West Virginia. The mere fact that the defendant contracted with a resident of Louisiana is insufficient to establish minimum contacts. An exchange of communications in the course of developing and carrying out a contract does not by itself constitute the required purposeful availment of the benefits and protections of the forum state; thus, the assertion that the documents and email correspondence repeatedly included the bank's Louisiana address bore little weight.

The court was not persuaded by the bank's argument that the defendant was a sophisticated investor who should have foreseen the potential for a Louisiana court's jurisdiction in light of the Louisiana choice of law provision. The fact that a note contains a choice of law provision is merely a factor to be considered and is not considered sufficient alone to confer jurisdiction. A choice of law provision does not *per se* contemplate a choice of forum. Parties may limit litigation to a particular venue through the use of a forum selection clause, but this note did not contain a forum selection clause.

After finding that it had no personal jurisdiction over the defendant, the court **transferred the suit** to a federal court in West Virginia, rather than dismissing it.

B. Default Judgment

1. **<u>Farm Credit Services of America, PCA v. Semien</u>, 408 So. 3d 634 (La. App. 3d Cir. 4/9/2025).** After the defendants defaulted under a retail installment contract, the original holder of the retail installment contract assigned its interest in the contract to the plaintiff which, after sending multiple default notices, filed suit and obtained a default judgment. One of the judgment debtors appealed, arguing that that the IP address for the Docu-signed endorsement of the loan documents had a location stamp in Ocean Springs, Mississippi, where she had never been. She also claimed that she was not "computer literate" and maintained that the plaintiff's evidence was not sufficient to support the default judgment. Rejecting that claim, the court found that the record was supported by sufficient evidence showing that the plaintiff had proved a *prima facie* case through an affidavit of its officer to which were attached the various loan documents. As for the

argument that the judgment debtor had not signed the contract by DocuSign, the court found that there was no evidence of these allegations in the record and, moreover, the judgment debtor was barred from asserting an affirmative defense for the first time on appeal from a default judgment.

2. **Butler v. Towd Point Master Funding Trust, 403 So. 3d 692 (La. App. 2d Cir. 1/15/2025).** An estranged husband executed a note and mortgage "on a manufactured home, which was situated on land . . . [that] was community property." However, the estranged wife did not sign or consent to the mortgage. After default, the lender filed suit for reformation of the mortgage, "declarative judgment", quiet title and other relief against both spouses. Though the wife was served, she did not file any responsive pleadings, and the lender obtained a default judgment from which the wife did not seek a new trial or appeal. A few months later, she filed a petition to annul the judgment alleging that it was invalid for numerous reasons, including the lender's failure to provide any evidence to support its petition for a default judgment. The lender filed a peremptory exception of no cause of action, which the trial court sustained. The court of appeal **affirmed**. It is well settled that Code of Civil Procedure article 2002, which allows certain judgments to be annulled, applies only to technical defects of procedure or form of judgment and that the failure to establish the *prima facie* case to obtain a default judgment under Code of Civil Procedure article 1702 is not a vice of form. A failure of proof must be raised in a motion for new trial or by appeal, not by an action for nullity.

3. **Discover Bank v. Hennigan, 402 So. 3d 89 (La. App. 3d Cir. 11/20/2024).** After properly serving a defendant, a credit card lender obtained a default judgment on the basis of an affidavit of correctness along with an account statement. The defendant then appealed, claiming that the court should "suspend the default judgment" so that the parties could come to an agreement over settling the account. She further claimed that she had failed to answer the suit because she had been told by an attorney for the lender that they could no longer speak because disputed purchases on the credit card were being researched by the credit card lender. According to the defendant, since the investigation was still ongoing, she believed that she was not required to file an answer. The court of appeal **affirmed** the default judgment, primarily on the basis of the affidavit of correctness that had been submitted into the record. The plaintiff had also filed a certificate in accordance with Code of Civil Procedure article 1702 that no notice of intent to pursue final judgment was required to be circulated to counsel because no appearance of record was made by the defendant and the plaintiff had not received any written contact from an attorney representing the defendant. Thus, the trial court did not err in finding that the creditor had submitted sufficient evidence to establish the elements of a *prima facia* case. If the defendant had wished to dispute any portion of the debt, she should have done so in an answer to the suit.

4. **<u>Wilmington Savings Fund Society, FSB v. Buckles</u>, ____ So. 3d ____ (La. App. 1st Cir. 9/24/2025) 2025 WL 2741184.** The mortgagee effected domiciliary service upon the mortgagor in an ordinary process foreclosure proceeding to enforce a residential mortgage. When the mortgagor failed to answer, the mortgagee filed a motion for confirmation of default judgment, attaching an affidavit from its loan servicer as to the amount due under the note and the fact that the note had been lost or destroyed and could not be located despite diligent efforts. The affidavit also attested to the publication of an advertisement in the newspaper regarding the missing note. The trial court rendered a default judgment providing that the judgment would be *in rem* only. After the default judgment was served upon the mortgagor by domiciliary service, the sheriff seized the property under a writ of *fieri facias* and scheduled a sheriff sale. A few weeks before the scheduled sheriff sale, the mortgagor filed a petition for preliminary injunction and a rule to show cause why the judgment should not be declared an absolute nullity, alleging that the mortgagor had not been served with the petition, as the mortgagor did not live at the address where domiciliary service was purportedly effected. In addition to arguing that the mortgagor had not carried his burden of proof of showing that service was not completed and could not prove irreparable injury, the mortgagee also argued that the motion to annul was an improper use of summary proceedings. After the trial court denied the motion, the mortgagor took a suspensive appeal.

The court first considered its jurisdiction to hear the appeal. An order or judgment relating to a preliminary injunction is appealable as a matter of right. Because the trial court's judgment lacked proper decretal language in that it did not dispose of all of the mortgagor's claims, the ruling on the motion to annul was not a final judgment and was therefore not appealable. Nevertheless, in the interest of judicial efficiency, the court of appeal exercised its discretion to treat the appeal for the ruling on the motion to annul as a supervisory writ application, which the court **denied**.

The court first observed that the sheriff's return was *prima facie* proof of service and that the mortgagor therefore bore the burden of overcoming this presumption. At the hearing, the mortgagor had stated that he had not lived at the address where service was purportedly effected since he was fifteen years old. But this statement was not made under oath, and the mortgagor did not offer any other evidence in the form of witnesses or documents. On the other hand, the mortgagee had introduced documentary evidence that showed the mortgagor as a "manager" of several businesses that had the address where service was effected. Thus, the trial court did not err in ruling that the mortgagor had failed to overcome the presumption of correctness of the sheriff's return.

The mortgagor also argued that he had not received notice of the mortgagee's intention to seek a default judgment. Under Code of Civil

Procedure article 1702(a), notice of intent to obtain a default judgment is required only if a party has made an appearance of record, if an attorney for a party has contacted the plaintiff or the plaintiff's attorney in writing after the action is filed, or if the suit is a delictual action. Here, none of those circumstances existed, and the mortgagee was therefore not required to provide the mortgagor with notice of its intent to seek a default judgment.

The court refused to consider the mortgagor's arguments that the trial court had erred in finding that the record supported the default judgment, as the mortgagor had not filed his notice of appeal until well beyond the time allowed for appealing the default judgment.

5. **<u>First Tower Loan, LLC v. Combs</u>, 411 So. 3d 1010 (La. App. 2d Cir. 5/21/2025).** The plaintiff brought a collection suit on a consumer loan seeking the unpaid balance of the loan with contractual interest of 29.65% for one year and 18% thereafter. On the basis of an affidavit of correctness submitted by the plaintiff, the trial court rendered judgment as prayed for but, a few months later, entered a minute entry in the record indicating that the court had "reviewed the record" and "amended judgment amount." The court whited out the principal amount of the judgment, reduced it, and changed the interest rate to "legal" interest. The plaintiff then appealed, and the court of appeal, agreeing that the trial court lacked authority to take the action that it did, affirmed the default judgment but **amended** it to include the amounts the plaintiff had prayed for. Under Code of Civil Procedure article 1702(C), the trial court had no alternative other than to sign the proposed default judgment or order a hearing. Ultimately, the default judgment cannot be different in kind from that which was demanded in the petition and the amount properly proven. The trial court lacked authority to deviate from these two alternatives, and it was error to render judgment for a different principal or interest rate. Upon close examination of the affidavit of correctness, the court of appeal found that it "faithfully represents" the content of the loan agreement the defendant had signed and there was not even a basis for the trial court to order a hearing.

The trial court also erred in reducing the principal amount from the amount prayed for and properly rebated in accordance with R.S. 9:3533 to the amount financed on the face of the promissory note. The loan contract in question was a pre-computed consumer credit transaction and the unpaid balance, after all rebates required by law, was the amount prayed for. There was no further requirement for an itemization of payments or how the total amount sued upon was calculated.

Finally, with respect to the trial court's reduction of the interest rate, R.S. 9:3519(a) provides for a maximum finance charge of 36% per year on that portion of the loan not exceeding $1,400.00 and 27% per year on the excess up to $4,000.00 in principal. The law allows the lender to apportion the principal and charge the allowed rate for each portion thereof and compile those rates to get an average finance charge. When the contractual interest is within legal limits, the court must enforce it and is without discretion to award interest at a rate other than that contracted for in the note.

For similar opinions rendered in consolidated cases, *see* 411 So. 3d 906; 411 So. 3d 983; 411 So. 3d 986; 411 So. 3d 990; 411 So. 3d 994; 411 So. 3d 997; 411 So. 3d 1001; 411 So. 3d 1004; 411 So. 3d 1007; 411 So. 3d 1016; 411 So. 3d 1019; 411 So. 3d 1022; 411 So. 3d 1030. In the opinion appearing at 411 So. 3d 994, the court of appeal noted in a footnote that some of the installments appeared to be prescribed on the face of the pleading but the trial court did not ask the plaintiff to submit *prima facie* proof that the action was not barred, as it was authorized to do so under Code of Civil Procedure article 1702(D). Nevertheless, the court of appeal was not permitted to supply the exception of prescription.

C. Summary Judgment

1. **<u>DCR Mortgage 7 Sub 1, LLC v. Legends Square, LLC</u>, 2024 WL 4833819 (La. App. 1st Cir. 11/20/2024).** Following the failure of a bank in whose favor the defendants had executed a promissory note, security agreement and guaranty, the attorney in fact of the FDIC, as receiver for the failed lender, executed an allonge to the promissory note assigning it to the plaintiff, along with an assignment of note and mortgage. The assignee later brought suit against the guarantors and moved for summary judgment on the basis of an affidavit from its officer to the effect that he was familiar with the loan account and authenticated the various loan documents attached to his affidavit. The guarantors opposed summary judgment on the ground that the loan documents were not attached to a deposition and were inadmissible, as the officer who executed the affidavit lacked the personal knowledge to identify the documents. The trial court granted summary judgment in favor of the plaintiff, and the court of appeal **affirmed**. The courts have deemed that an affiant is sufficiently qualified to identify business records without direct, independent, first-hand knowledge of their content. Here, the officer's affidavit sufficiently demonstrated his personal knowledge to testify and identify the plaintiff's records in respect to the defendant's obligations to the plaintiff, including the power of attorney authorizing the FDIC's officer to sign the allonge, the assignment, and the receivership order. Moreover, the genuineness of these documents was deemed admitted when the defendants failed to respond to requests for admission. The court was not persuaded by the guarantors' argument that they "could not have authenticated any of the documents because they were not parties to them." Admissions may be used to establish a controversial issue constituting the crux of the matter in litigation.

   Finally, in a footnote, the court rejected the defendant's argument that the plaintiff failed to prove transfer of the note because the allonge did not adequately reference the note and was undated. The plaintiff provided sufficient proof of the assignment of the note and was not required to prove that the requirements for a negotiation were satisfied. Endorsement and delivery are not the only ways to transfer a promissory note, although they may be the only ways to negotiate a promissory note.

2. **National Collegiate Student Loan Trust 2004-1 v. Brown, 401 So. 3d 985 (La. App. 2d Cir. 12/18/2024).** A student loan was made pursuant to a "Non-Negotiable Credit Agreement" that contained a promise to pay and the necessary features of a conventional obligation as well as a clause that provided that if the borrower chose to fax his signature page on this "Application/Promissory Note" then it would not be governed by articles 3 or 8 of the Uniform Commercial Code. The creditor's rights under this contract were later sold to a Delaware business trust and, after the loan fell into default, the business trust brought suit against the borrower. The borrower filed an exception of no right of action claiming that the plaintiff, as a Delaware business trust, lacked capacity to sue because only a trustee has the capacity to file suit on behalf of a trust and the trust itself has no right of action. The trial court overruled this exception and also granted summary judgment in favor of the plaintiff. The court of appeal **affirmed**. As for the exception of no right of action, the court followed jurisprudence from the Third Circuit to the effect that this plaintiff did not fit the definition of a Louisiana express trust because there had been no transfer of ownership of property to a trustee. Moreover, both the Louisiana Trust Code and the Louisiana Uniform Commercial Code include business trusts in the definition of a "person". Thus, the plaintiff, as a Delaware statutory trust, is a juridical person with the capacity to sue in its own name.

The borrower opposed summary judgment on the basis of an argument that the plaintiff had failed to produce the original note at issue and the business records that were purportedly authenticated by an affidavit of correctness of the current plaintiff were not its own business records but rather the business records of a prior servicer. The court rejected both arguments. The contract in question was not in the nature of a negotiable or bearer paper but was simply an ordinary written contract, which the plaintiff has the right to enforce because it acquired the original lender's rights pursuant to a subsequent assignment. Moreover, the language of the credit agreement confirmed that, once it was signed and returned by fax, the fax header would constitute an original of that agreement. Thus, the plaintiff was not required to produce the original note to enforce the debt.

As for the claim that the affidavit was not based on personal knowledge because it purported to authenticate records of a prior business, the business records exception to the hearsay rule does not preclude the introduction of business records originally generated by another business, if such records are properly authenticated and determined to be trustworthy by the trial court. The defendant's argument misses the mark because it "elides" the business records exception into the hearsay rule. The courts have deemed the requirement of personal knowledge sufficient to authenticate business records satisfied when the affiant is qualified to introduce the business records as such. Where the affiant is familiar with the account and business records, it is not necessary for the affiant to show that he personally prepared the business records or that he had direct, independent, first-hand knowledge of their contents.

3. **National Collegiate Student Loan Trust 2005-1 v. Brown, 401 So. 3d 998 (La. App. 2d Cir. 12/18/2024).** After a student loan was originated, it was transferred along with a number of other loans to the plaintiff. When the loan fell into default, the transferee filed a collections suit to enforce the credit agreement that the defendant had signed at the time the loan was made. The defendant filed an exception of lack of procedural capacity asserting that the plaintiff, which was a registered business trust under Delaware law, did not have the procedural capacity to sue. The trial court overruled the exception, following prior jurisprudence that a business trust that is recognized as a juridical person in another state has the same capacity to bring a civil suit in Louisiana courts. The plaintiff then moved for summary judgment, which was granted by the trial court and **affirmed** on appeal, as was the trial court's overruling of the exception of no right of action.

Both the Louisiana Trust Code and the Uniform Commercial Code include business trusts in the definition of a person, and as the Third Circuit has previously held, a registered business trust is granted juridical personality. This right is recognized in Louisiana. The only remaining issue therefore was whether the plaintiff had a real or actual interest vesting in it the ability to enforce the action. The plaintiff had alleged that it was the owner of all of the rights, title and interest assigned in the loan pool, and a copy of the deposit and sale agreement offered into evidence indicated that the loan originator had sold, transferred and assigned the loans to the plaintiff. This, coupled with the accompanying documents that were introduced into evidence, caused the court to find that the plaintiff did in fact have a real and actual interest by which to enforce the suit, and the trial court did not err in overruling the exception.

In opposition to the summary judgment, the defendant argued that the plaintiff was required to introduce extrinsic evidence such as the original promissory note to enforce the loan. The court disagreed, because the credit agreement was not a negotiable instrument and indeed the terms of the instrument specified that the credit agreement would not be governed by article 3 of the Uniform Commercial Code. Given that this was an ordinary proceeding rather than an executory proceeding, and the fact that the credit agreement was a non-negotiable instrument, the plaintiff was not required to produce the original note to enforce the debt. As for the argument that the affidavit introduced in support of the summary judgment was inadmissible because the affiant was not qualified to testify as to the records of the prior holder of the loan, the court observed that Code of Evidence article 803 does not preclude the introduction of incorporated business records originally generated by another business if properly authenticated and deemed to be trustworthy by the trial court. The witness laying the foundation for the admissibility of business records does not have to be the preparer of those records but only needs to be familiar with the record keeping system of the entity whose business records are sought to be introduced.

In this case, the affiant specifically stated that she was familiar with the process by which the loan servicer receives loan records from prior servicers and incorporates those records into its system of records. This satisfied the personal knowledge requirements of Code of Civil Procedure article 967, as the affidavit reflected the affiant's personal knowledge of the record systems of both the original loan servicer and the present plaintiff. The affiant also established that the documents were obtained by the current loan servicer from the prior servicer and incorporated into the loan records maintained on behalf of the plaintiff. Once the plaintiff established its *prima facie* case, the burden shifted to the defendant to refute or rebut the plaintiff's allegations through evidence that indicated the existence of a genuine issue of material fact. Here, the defendants introduced an affidavit in which they generally denied having any contact or involvement with the loan servicer or the affiant. While the defendants allege that the amount due that the plaintiff sought to enforce was inaccurate, no evidence was introduced to support this claim. Code of Civil Procedure article 966 requires a party to come forth with evidence demonstrating that he will be able to meet the burden at trial. Without further evidence from the defendant regarding the payment history on the student loan which would differ from the record submitted by the plaintiff, the trial court did not err in granting summary judgment.

Finally, the court of appeal held that the trial court did not err in denying the defendant's motion to consolidate six different cases that were filed against the borrower and guarantor and six cases filed against the borrower's husband and guarantor. While the defendant highlighted that the borrower and her spouse were spouses who obtained their respective loans with the same guarantor, the court found that there were considerable differences between the respective loans associated with the borrower and her spouse, and the plaintiffs were different trusts with their own unique juridical personality, despite the fact that each trust stemmed from the same parent company. Because of these differences, the trial court did not err in denying the motion to consolidate.

4. **First NBC Bank v. River Park Development, L.L.C., ___ So. 3d ___ (La. App. 1st Cir. 9/17/2025) 2025 WL 2671028.** In an executory proceeding filed to enforce a multiple indebtedness mortgage securing two promissory notes, an assignee that acquired the notes under a loan sale

agreement from the FDIC as receiver of the original mortgagee, was substituted as a party plaintiff and then converted the matter to an ordinary proceeding. After summary judgment was granted in favor of the assignee, the defendant filed a motion for new trial, and the trial court then signed both a judgment denying the motion for new trial and a judgment that granted the motion for new trial and vacated the summary judgment. In a prior appeal, the court of appeal vacated both judgments and remanded the matter for the rendition of a valid final judgment on the motion for new trial. The trial court then entered judgment denying the motion for new trial and issuing written reasons for the granting of summary judgment. The court of appeal **affirmed** the summary judgment as to one promissory note, but **reversed** summary judgment as to the other.

In affirming summary judgment on one of the promissory notes, the court rejected the defendant's contention that any document offered as proof of the current plaintiff's ownership of the promissory notes was inadmissible because the best evidence was the loan sale agreement from the FDIC. The court found no merit to this argument, as Code of Civil Procedure article 966(B)(2) allows for objections to exhibits that are actually filed in connection with a summary judgment motion, not for alleged evidence that is *not* filed in support or opposition of summary judgment. The defendant could not generally object to exhibits filed by the plaintiff based on an alleged document that was not filed. The court also rejected the defendant's contention that the affidavit submitted by the plaintiff's officer in support of summary judgment was not based upon personal knowledge because he did not have access to the original documents and therefore could not attest that any of the true and correct copies were in fact what they purported to be. Rejecting this argument, the court pointed out that, where business records are concerned, the courts have deemed Code of Civil Procedure article 967 to be satisfied when the affiant is qualified to identify the business records as such; it is not necessary for the affiant to show that he personally prepared the business records or that he had direct, independent, first-hand knowledge of their contents.

The court also rejected the defendant's contention that the plaintiff's use of copies of the underlying loan documents, rather than the originals, was insufficient to support summary judgment. Non-original documents can be used in support of a motion for summary judgment for enforcement of a promissory note, so long as the documents can be properly authenticated. There is no evidentiary requirement that the plaintiff furnish the original loan documents in an ordinary proceeding. The plaintiff thus presented a *prima facie* case that it was entitled to enforcement of one of the promissory notes, and the defendant did not present any countervailing evidence to create a genuine issue of material fact. Therefore, summary judgment on that note was affirmed.

However, the court reversed summary judgment on the other promissory note, whose principal amount had been increased pursuant to a Change in Terms Agreement that was purportedly signed by an electronic signature in the name of "Pete" over the signature line for the managing member of the River Park. That managing member provided an affidavit that he always signed legal documents with his full name and that he has never signed a legal document as "Pete." Although the plaintiff had complied with R.S. 13:3733.2, which addresses records with electronic signatures, by submitting the certificate required by that statute, the affidavit submitted by the defendant's managing member nonetheless created an issue of material fact precluding summary judgment.

Another argument rejected by the court of appeal was that the trial court had erred in stating, in its written reasons for judgment, that the mortgage was "first priority". Written reasons for judgment are merely an explication of the trial court's determination and do not alter, amend or affect the final judgment, which in this case did not purport to address the priority of the mortgage.

One judge dissented from the portion of the court's ruling affirming summary judgment in favor of the plaintiff on one of the notes, on the basis of his belief that the supporting affidavit was not competent summary judgment evidence, as it was submitted by an officer for the plaintiff's servicing company and appeared to be based on records of the plaintiff itself and the original mortgagee. Supporting affidavits are required to be on personal knowledge, which means something that a witness actually saw or heard as opposed to something a witness learned from an outside source. Moreover, the dissenting judge was not convinced that the original loan documents are not required, pointing out that, in the cases relied upon by the court for the proposition that copies are sufficient, there were no objections to the use of copies as opposed to the original documents.

D. Finality of Judgment

FC Marketplace, LLC v. Sitework Construction, LLC, 404 So. 3d 1023 (La. App. 1st Cir. 12/27/2024). The plaintiff obtained a default judgment that included an award of 10% late fees and 25% attorneys' fees. In opposition to a rule for judgment debtor examination, the defendant argued that the judgment lacked finality because it did not specify how the late fees were to be calculated or the amount to which the attorneys' fee award applied. The trial court refused to stay the judgment debtor examination, and, treating the defendant's motion for an appeal as a writ application, the court of appeal **denied the writ**, agreeing with the plaintiff that the amounts awarded for late fees and attorneys' fees were "determinable from simple mathematical calculation." The late fees were 10% of the principal sum that was due and the attorneys' fees were also 25% of the principal sum due.

E. Defenses

1. Vices of Consent

Bank of America, N.A. as Trustee v. Conerly, 401 So. 3d 133 (La. App. 4th Cir. 5/10/2024). In an executory process foreclosure on a residential mortgage, the trial court granted the mortgagors' request for injunctive relief on the ground that the mortgagee had failed to obtain the mortgagors' confession of judgment prior to filing suit. After the suit was converted to ordinary process, the mortgagors claimed that they had not signed the loan documents. After the trial court denied the mortgagee's motion for summary judgment, the suit proceeded to a trial on the merits, at which an officer of the mortgagee's servicer testified to the transaction history on the note and the assignments to the present mortgagee. The surviving mortgagor, who was 90, maintained that she did not recognize her signature or that of her late husband on the documents and had no memory of borrowing a loan or granting the mortgage. On cross-examination, she admitted that she had taken out a loan from the original mortgagee but the loan "wasn't no mortgage." She claimed that the check representing the loan proceeds was for furniture rather than for her home.

Citing the failure of the defendant to present any handwriting experts to demonstrate that the documents were indeed inaccurate or fraudulent, the trial court rendered judgment in favor of the mortgagee. On appeal, the mortgagor maintained that the mortgage holders, including the present holder of the mortgage, took advantage of the mortgagor's age and limited education and that she and her husband had been victims of mortgage fraud and elder abuse. In **affirming** the judgment, the court of appeal pointed out that the mortgagor had failed to satisfy the first element of a cause of action for fraud that a misrepresentation was made. She offered no specific, substantive evidence at the hearing to prove her allegations. As for the mortgagor's age and limited education, Louisiana law presumes that a person who signs a contract understands its terms. The mortgagor presented no expert or lay testimony to substantiate that she or her late husband lacked capacity at any time. Here, the testimony of the mortgage servicer's officer and the exhibits established the mortgagors' execution of the documents, the payments made on the note, and the outstanding balance. Finally, as for the allegation that the mortgagee had committed fraud upon the court and/or abuse of process, the court of appeal observed that its scrutiny of the record showed no deprivation of the defendant's legal rights and that the mortgagor had in fact received a fair and impartial trial. While the court acknowledged the mortgagor's sense of unfairness and heartbreak at losing her home at this late stage in life for reasons she did not understand, courts are obligated to follow the law.

Byline Bank v. Alexandria Hospitality Partners, L.L.C., 402 So. 3d 84 (La. App. 3d Cir. 11/20/2024). Before signing a mortgage to encumber a hotel, the mortgagor altered the property description to state that the mortgage encumbered only 4.37 acres rather than 5.49 acres. When the mortgage was filed, that alteration was removed, and a substitute page describing the 5.49 acre tract was substituted. Several years later, the lender filed an ordinary process foreclosure action against the mortgagor and guarantors and obtained summary judgment recognizing that the mortgage should have encumbered only 4.37 acres and reforming the document on the basis of mutual error. That judgment was reversed on appeal, because mutual error is an issue of fact, and the defendants had presented affidavits opposing the motion for summary judgment.

On remand, the defendants filed a reconventional demand on the basis of fraud, claiming that the exhibit had been fraudulently altered by the lender despite its knowledge that the mortgage was supposed to encumber only 4.37 acres and that the lender had concealed its fraud by not forwarding any of the recorded loan documents to the defendant. The defendants also claimed that they would not have signed the loan documents had they known that the lender would fraudulently alter the legal description. The lender filed an exception of vagueness asserting that the defendants had not alleged sufficient facts to demonstrate fraudulent behavior. The lender also filed an exception of no cause of action, asserting that there could be no fraud based upon the inclusion of the additional property in the mortgage because that property had been sold by the mortgagor on the day the mortgage was executed and therefore could not have been encumbered by the mortgage and, in any event, the lender was foreclosing only on the reduced acreage. The trial court sustained the exceptions and dismissed the reconventional demand, but the court of appeal **reversed**.

There are three basic elements to an action for fraud: (i) misrepresentation, suppression or omission of true information; (ii) the intent to obtain an unjust advantage; and (iii) the error induced by a fraudulent act must relate to a circumstance substantially influencing the victim's consent to (a cause of) the contract. Here, the defendant's petition in reconvention satisfied all three elements and therefore stated a cause of action.

Burgh Investments, Inc. v. Burk, 2025 WL 1555351 (E.D. La. 6/2/2025). A home equity line of credit was established in favor of the defendant and his wife. Nearly ten years later, when almost $1 million was owed under the line of credit, the lender assigned its rights to the plaintiff, a corporation whose president and sole officer was the defendant's son. The plaintiff then filed suit to recover the unpaid balance, alleging that payments had not been made as agreed and that it had consequently terminated the line of credit and accelerated the entire balance due. Admitting his signature on the agreement, the defendant asserted defenses of confusion, lack of holder in due course status, and fraud based on the plaintiff's allegedly fraudulent activity in acquiring the note. The defendant also filed a third party demand against his former wife seeking to hold her responsible for half of the balance due on the basis of a consent judgment rendered in their divorce by which each spouse agreed to pay one-half of the balance of the debt. The court **granted summary judgment** in favor of the plaintiff on the main demand and also granted summary judgment in the defendant's favor on his third party demand.

The basis for the assertion of fraud was that the defendant's son had allegedly made an oral agreement that he would make payments on the note but that, rather than repaying the note, the son formed the plaintiff corporation in order to acquire the promissory note and avoid his payment obligations. Rejecting this defense, the court pointed out that, while Louisiana law recognizes fraud as an affirmative defense to a breach of contract claim by vitiating a party's consent to the contract, the agreement in this case was executed with a prior lender, which the defendant did not allege to have acted fraudulently in any respect. All of the fraudulent activity concerned the plaintiff's acquisition of the note, which occurred more than nine years after the line of credit agreement was signed. Accordingly, those actions could not vitiate the defendant's consent to the line of credit agreement.

As for the defense of confusion, the court pointed out that confusion requires that the qualities of obligee and obligor be united in the same person. The defendant's son was not a party to the agreement, and his obligations came from an agreement separate and apart from the line of credit agreement. Even accepting the defendant's allegations that there was a basis to pierce the corporate veil and treat his son and the plaintiff as alter egos, the father and son would merely be both obligee and obligor of each other as to separate agreements, and there was accordingly no basis to extinguish the debt on the basis of confusion.

As for the holder in due course argument, the court observed that the defendant had failed to establish any defense, and it was therefore immaterial whether the plaintiff qualified as a holder in due course who takes free of from most defenses.

On the third party demand, the spouse's defense was that she had been prepared to pay her half of the debt as required by the consent judgment but had not done so because the defendant was not willing to pay his half at the time. Accordingly, she argued that she should not be required to indemnify the defendant for the increased costs arising from the defendant's failure to repay the loan at that time. Rejecting this argument, the court pointed out that the consent judgment did not contain a provision requiring simultaneous performance and accordingly the defendant's failure to pay his half of the promissory note simultaneously with his former spouse's offer to do so did not provide a basis for her to refuse to perform. Moreover, even if she were permitted to refuse to perform her obligations under the consent judgment, she would still be liable for the solidary obligations under the line of credit agreement and the defendant would retain his right to enforce her contribution to their solidary obligation under Civil Code article 1805.

2. Lack of Original Promissory Note

<u>HSBC Bank USA, National Association as Trustee v. Dunbar</u>, 400 So. 3d 1107 (La. App. 2d Cir. 10/2/2024). In an ordinary process suit filed to enforce a lost mortgage note, the mortgagor moved for summary judgment on the ground that the plaintiff had not advertised the loss of the note within a reasonable time, as required by R.S. 13:3741. The mortgagee filed an untimely opposition to the motion for summary judgment requesting that it be allowed to post a security bond. The trial court granted the mortgagor's motion for summary judgment but at the same time granted the mortgagee's request to post a security bond. From this ruling, the mortgagor filed a writ application that was denied by both the court of appeal and the Supreme Court.

After the mortgagee posted bond, the mortgagee then itself moved for summary judgment. In response, the mortgagor filed an exception of *res judicata* based on her own earlier summary judgment. The trial court overruled the exception of res judicata and granted the mortgagee's motion for summary judgment. The court of appeal **affirmed**.

Res judicata envisions a second action and does not apply in a case where there is no second action but merely judgments of the trial and appellate court within the same suit. In those instances, the law of the case doctrine is the proper procedural principle for describing the relationship between prior judgments within the same case. But the law of the case doctrine does not apply in the context of a trial court's ruling on interlocutory issues. Here, the trial court correctly considered its prior ruling on the mortgagor's summary judgment to be "law of the case" as to the issue adjudicated therein, specifically the issue of whether the mortgagee had advertised the loss of the promissory note within a reasonable time. The court also observed in a footnote that the first judgment granting the mortgagor's motion for summary judgment was not certified as a final judgment, no appeal was filed therefrom, and instead the mortgagor had correctly filed an application for supervisory writ. If the court of appeal's and Supreme Court's denial of writs in response to her writ application were to be taken as "law of the case", as the mortgagor seemed to be arguing, she would be precluded from making the very argument she was now urging in her appeal.

The court of appeal also rejected the mortgagor's contention that the trial court had erred in granting the mortgagee's untimely request to post a security bond thirteen years after it had notice of the loss of the note. The mortgagor argued that finding that advertising a lost note 67 months after the note was lost did not comply with R.S. 13:3741 but then allowing the posting of a security bond thirteen years after default would lead to "absurd" results. The court of appeal agreed with the mortgagee that the only time period for posting a bond under the statute is before judgment is rendered on the lost note. While R.S. 13:3741 has a "reasonableness requirement," it is clearly limited to the advertisement option. The legislature's requirement that an advertisement be posted within a reasonable time ensures that there is "no easy way out" of an obligation to pay for borrowers like the mortgagor in this case, who chose not to pay her mortgage loan for fourteen years.

U.S. Bank National Association etc. v. Barbe, (La. App. 5th Cir. 7/3/2025) 2025 WL 1835952. In an ordinary process foreclosure filed to enforce a residential mortgage, the mortgagee's servicer obtained summary judgment, which was reversed on appeal because the mortgage servicer had failed to either produce the note or satisfy the statutory requirements for enforcing a lost note. Thereafter, the servicer transferred the mortgage loan to the present plaintiff, not in its individual capacity but as trustee of a pass-through trust. The trial court granted a motion to substitute the trustee as the new party plaintiff, and the trustee then filed a motion for summary judgment, arguing that it had cured the defects previously noted by the court on appeal and had satisfied the requirements for enforcing a lost promissory note. The defendants not only opposed summary judgment but also filed a "Motion to Dismiss for Misrepresentation and Lack of Standing and Not a Party of Interest," claiming that the new plaintiff lacked standing because it failed to prove ownership of the note, its officer had admitted that it neither owns nor services the mortgage at issue, and the new plaintiff never established a valid chain of possession. The trial court denied the motion, and the court of appeal **denied the defendant's writ application** from that ruling.

Louisiana law permits mortgage servicers to act on behalf of a mortgagee and in this case the new plaintiff had never misrepresented that it owned the debt in its personal capacity but always as trustee of the pass-through trust. The present plaintiff had also satisfied the evidentiary problems the court had noted in the previous appeal. Thus, the present plaintiff had standing to enforce the note and mortgage, and the fact that another transfer of the mortgage had occurred did not entitle the defendants to dismissal of the action. The defendant's arguments were more appropriately considered in a motion for summary judgment, which the defendants had not filed, and a trial court has no authority to grant summary judgment in favor of a non-moving party. In any event, genuine issues of material fact remained which would have precluded the granting of a motion for summary judgment if the defendants had filed one.

National Collegiate Student Loan Trust 2006-1 v. Huggins, 399 So. 3d 847 (La. App. 2d Cir. 10/2/2024). After the defendant defaulted on student loans, the plaintiff, which had acquired the loans by assignment, filed suit to collect the balance owed. The trial court twice sustained exceptions of no right of action that were based on the plaintiff's failure to file the original promissory note. After each of the exceptions was sustained, the plaintiff filed an amended petition explaining that a loan made under a federally guaranteed non-negotiable credit agreement; the loan was funded; the defendant; the original lender requested reimbursement of the advanced funds from the plaintiff; and when the plaintiff honored the request for reimbursement, the original lender transferred ownership of the account to the plaintiff. Though the plaintiff filed the credit agreement and transfer of ownership documents into the record, it did not file a promissory note. The trial court sustained the defendant's exceptions of no cause of action and no right of action, holding that, because the plaintiff admitted that it did not have the note and there was no evidence that the original note was lost, destroyed or otherwise available, the plaintiff had no cause of action, and without a cause of action it also had no right of action.

The court of appeal **reversed**, observing that the trial court appeared to have incorrectly considered the case to be an executory proceeding. The trial court should have applied the rules applicable to breach of contract cases. In order to prevail on a breach of contract claim, a plaintiff must prove that the defendant owed an obligation, that the defendant failed to perform, and that the defendant's failure to perform resulted in damages to the plaintiff. Here, the plaintiff had sufficiently pleaded the existence of contracts with the defendant, that the defendant breached them through non-payment and that those breaches caused the plaintiff damages. The plaintiff has accordingly stated a cause of action. The trial court also erred in sustaining an exception of no right of action, because, as a party to the contract, the plaintiff had real and actual interests in its breach of contract claim.

3. Litigious Redemption

See **<u>Deutsche Bank National Trust Company v. Reyes</u>, 418 So. 3d 923 (La. App. 5th Cir. 4/9/2025)**, discussed *supra*.

F. Pro Se Litigation by Legal Entities

<u>ELA Group, Inc. v. Bradley, Murchison, Kelly and Shea, LLC</u>, ___ So. 3d ___ (La. 10/14/2025), 2025 WL 2926185. Acting through its president, a corporation filed a legal malpractice claim against the defendant. The corporate plaintiff then retained counsel, who contacted the defendant and enrolled as counsel of record a few days after the defendant had filed exceptions asserting the unauthorized practice of law and no right of action. The trial court sustained these exceptions, and the court of appeal, in a decision appearing at 409 So. 3d 1046, affirmed, finding that a petition filed by a non-attorney on behalf of a corporation has no legal effect and that the plaintiff could not simply cure the deficiencies in its pleading by having counsel enroll of record. The court of appeal reached this result even though the claim would be perempted if filed anew.

In a *per curiam* opinion, the Supreme Court **reversed** the holdings of the lower courts that the petition had no legal effect based on a concern about the unauthorized practice of law. Where a corporate officer or managing member of a limited liability company files an action on behalf of the entity solely to prevent the occurrence of a legal consequence of non-filing, such as prescription, peremption or default, that filing shall not be found to have no legal effect. Nevertheless, the court held that the plaintiff should enroll counsel before taking further action in the suit and that the trial court could impose a reasonable deadline for doing so.

In a footnote, the court seemed to suggest that a single member LLC, including one managed by a spouse held as community property, is treated as a disregarded entity under federal tax regulations and should be treated the same as a natural person for all purposes of R.S. 37:212(B), which allows a person to attend to or care for his own business, claims or demands. Justices Crain and McCallum concurred, believing that R.S. 37:212(C), which allows an entity to represent itself through an officer in a claim not exceeding $5,000, is ambiguous and the court should find that a corporation may appear as a *pro se* litigant through an authorized officer in all cases.

G. Garnishment

1. **<u>TD Auto Finance, LLC v. Higgs</u>, 417 So. 3d 790 (La. App. 5th Cir. 5/23/2025).** Garnishment pleadings against an employer were served by "domiciliary service" upon an employee of the employer at the employer's business address. This employee was not the employer's registered agent. Nevertheless, the employer answered the garnishment interrogatories, and the trial court entered a garnishment judgment. Nearly a year later, the creditor filed a motion for "garnishment accounting," requesting judgment against the employer in the amount of any seized but undelivered funds up to the amount originally prayed for. This motion was personally served on the employer's registered agent. In response, the employer moved to annul the judgment pursuant to R.S. 13:3923 and also filed declinatory exceptions of insufficiency of service of process. The trial court denied these exceptions and granted judgment in favor of the creditor "as prayed for." The court of appeal **vacated** the judgment.

   The creditor was required to serve the employer as required by law upon its duly appointed registered agent. A judgment rendered against a defendant who has not been served with process is an absolute nullity. Moreover, in the absence of evidence of proper citation and service of process in strict compliance with the law, all subsequent proceedings are absolutely null. Thus, the trial court's original garnishment judgment was an absolute nullity, and as were all subsequent proceedings, and the trial court erred in denying the employer's motion to re-open the garnishment proceedings and annul the garnishment judgment.

The court rejected the creditor's argument that the employer had waived insufficiency of service by answering the garnishment interrogatories. According to the court, it was well settled that an employer's actual knowledge of the garnishment petition does not obviate the need for service. Moreover, the objection of insufficiency of service of process is waived if it is not pled either prior to or contemporaneously with the filing of an answer or other pleading seeking relief. Here, the employer's first filings into the record expressly raised the objection of insufficiency of service of process.

2. **<u>First Pay, Inc. v. Dukes</u>, 405 So. 3d 1066 (La. App. 1st Cir. 11/20/2024), *reversed*, ___ So. 3d ____ (La. 10/24/2025), 2025 WL 2990290.** Personal service of a garnishment petition was made upon the defendant's purported employer. When the employer failed to answer the garnishment interrogatories, the plaintiff moved for a judgment *pro confesso* for the full amount of the judgment that had been rendered against the judgment debtor. Two weeks before the scheduled hearing on the motion for judgment *pro confesso*, the garnishee provided answers to the garnishment interrogatories to the seizing creditor, who was also an attorney, but did not file those answers into the record. The employer did not appear at the hearing on the motion for judgment *pro confesso,* which was accordingly granted.

Over two months later, the purported employer filed a motion to re-open the garnishment asserting that it had never employed the judgment debtor and that between the hearing on the motion for judgment *pro confesso,* it had provided the plaintiff with answers to the garnishment interrogatories so indicating. In support of its motion to re-open, the purported employer submitted an affidavit from its general counsel to the effect that he had notified the plaintiff that the purported employer never employed the judgment debtor and that answers had been provided to the plaintiff prior to the hearing. In opposition to the motion, the plaintiff argued that the court is permitted to reconsider only a garnishment judgment rendered pursuant to default as part of a continuing proceeding and not to re-open or reconsider a judgment *pro confesso*.

The trial court granted the motion to re-open the garnishment proceedings and vacated the judgment *pro confesso*, but the court of appeal reversed. Under the version of R.S. 13:3923 in effect prior to August 1, 2022, wage garnishment proceedings were subject to being re-opened even though the garnishee had failed to timely answer the garnishment interrogatories and a judgment by default had been rendered against the garnishee. However, R.S. 13:3923 was amended effective August 1, 2022 by an act that (without amending the language of the existing article allowing re-opening of garnishment proceedings where a judgment of default has been rendered against the garnishee) added a new Subsection B, whose "plain language" explicitly states that nothing in R.S. 13:3923 is not meant to affect judgments rendered pursuant to Code of Civil Procedure article 2413 (which deals with the rendition of a judgment *pro confesso* following a garnishee's failure to answer garnishment interrogatories). In a footnote, the court pointed out that the plaintiff had argued that the employer could have sought relief from the judgment *pro confesso* by filing a petition for nullity under article 2001, and the court itself noted that the petition for nullity "may have provided" the employer with a means of seeking relief.

One judge dissented, stating that he did not believe that the amendment to R.S. 13:3923 reversed long-standing jurisprudence allowing the re-opening of a default *pro confesso* judgment taken against a garnishee. A conclusion that Subsection B somehow prevents a garnishee from re-opening the garnishment following a judgment of default would lead to absurd results and would directly conflict with Subsection A. Also, the goal of a garnishment proceeding is to seize a debtor's property in the hands of a third party employer - not to force Louisiana employers to turn over property they do not possess nor to make employers the guarantors of their employee's debts.

The Supreme Court **reversed** the judgment of the court of appeal, noting that the plaintiff's argument was confined to a legal argument on the interpretation of R.S. 13:3923 and did not dispute the garnishee's representations that it had provided him with the information showing it was not a proper garnishee. The Supreme Court's opinion pointed out that, at the hearing on the motion for judgment *pro confesso*, an associate in the plaintiff's law firm stated to the trial judge that the garnishee had failed to file proper garnishment interrogatories, without informing the court that the plaintiff had actually received sworn answers to interrogatories indicating that the defendant had never been employed by the garnishee. The trial court had noted on the record that there was thus knowledge that the garnishee did not employ the defendant and that knowledge was not given to the court. Where a law is clear and unambiguous and its application will not lead to absurd consequences, the law must be applied as written. The Supreme Court agreed with the court of appeal that R.S. 13:3923 is clear and ambiguous. Nevertheless, its application in this case would lead to absurd results precluding re-opening the proceeding, where the trial court's judgment was based upon the omission of material information, would lead to a demonstrably absurd result. Under Louisiana law, when a statute is not clear, or when its application leads to absurd consequences, courts must result to secondary rules of statutory interpretation. In such cases, the statute must be interpreted as having the meaning that best conforms to the purpose of the law. Here, the purpose of garnishment law is to allow a creditor to seize a debtor's property in the hands of a third-party employer. That purpose is not advanced when information material to a decision is withheld from the court regarding a garnishee's responses. Upon re-opening of the proceedings, if the garnishee proves that it was never the employer of the defendant and was never indebted to him, it should not owe this judgment.

The Supreme Court noted that it was "significant to our decision" that the plaintiff was both the counsel of record and the underlying judgment creditor. According to the court, "under these unique facts," the garnishee should be given its day in court to prove that the defendant was not its employee.

Judge Hughes dissented, pointing out that the garnishee had not filed its answers into the record and had been given notice of the hearing date and did not appear. "There is nothing absurd about judgments being rendered against parties who fail to appear." The trial court was legally required to render judgment against the garnishee regardless of the "content of any irrelevant discussion held". Judge Hughes worried that the "certainty of collections law" will suffer if an equity disguised as an absurdity argument is introduced.

VII. Revocatory Actions

A. Prescription

1. **<u>Green v. Phipps-Green</u>, 416 So. 3d 1 (La. App. 4th Cir. 6/19/2025).** More than ten years after the recordation of a donation purportedly executed by the donor and her spouse, the spouse filed a "Petition to Annul Act of Donation on Grounds of Fraud and Ill Practice," alleging that he never signed the act of donation and that his purported signature on it must be a forgery. The suit was based on Code of Civil Procedure article 2004. The trial court granted the defendant's "Peremptory Exception of No Cause of Action Based on Prescription", apparently based on the defendant's argument that the suit was prescribed because it had not been filed within the prescriptive period for a revocatory action under Civil Code article 2041. Apparently, the trial court accepted the defendant's argument that, since the action was accordingly prescribed on its face, the plaintiff had no cause of action.

The court of appeal **reversed**, finding that neither of the code articles cited by either party were applicable and that the defendants and the trial court erred by conflating two separate and distinct legal concepts. First, Code of Civil Procedure article 2004 provides for the annulment of a judgment, and therefore has no application to the plaintiff's claim for annulment of a donation. Similarly, Civil Code article 204, which was the code article relied upon by the defendants and is applicable to revocatory actions, was also "inapt", as the parties in the case were not in the positions of creditor and debtor as contemplated by the revocatory action such that the prescriptive periods in Civil Code article 2041 would apply.

Turning to the peremptory exceptions, the court first pointed out that it was "quite clear from even a cursory reading" of Code of Civil Procedure article

927 that the exception of no cause of action and exception of prescription, while both peremptory, are nonetheless wholly distinct and are subject to different rules. Although the plaintiff improperly cited Code of Civil Procedure article 2004 as the basis for his claim, the Louisiana Code of Civil Procedure abolished the theory-of-the-case doctrine and instead established a system of fact pleading under which the parties may be granted any relief to which the facts alleged may entitle them. Because the plaintiff alleged that he did not sign the act of donation, it could not have been in authentic form, and the plaintiff's remedy was to have the donation declared an absolute nullity, as Civil Code article 1541 provides that a donation must be made by authentic act under penalty of absolute nullity. Thus, the plaintiff had stated a cause of action. As for the exception of prescription, a forgery is in derogation of public order and good morals, is not susceptible of ratification, is an absolute nullity, and can never be prescribed against, as both the jurisprudence and Civil Code article 2030 provide. Accordingly, the plaintiff's claims were imprescriptible.

2. **<u>In re Linder Oil Company</u>, 2025 WL 1024823 (Bankr. W.D. La. 3/31/2025).** The debtor in this bankruptcy case was a general partnership formed for the purpose of providing general administrative and property development services to related companies. One of those companies, referred to in the opinion as Consolidated, had obtained a number of loans from the bank, and these loans were personally guaranteed by an individual owner, who had also granted a mortgage on his residence as security for the loans. The debtor in the bankruptcy proceedings was not a guarantor of the loan, and the bank did not have a security interest in any of the debtor's assets or in any of the related oil and gas properties. Over a number of years before bankruptcy, the debtor made substantial monthly transfers of money to Consolidated, which in most cases used the monthly transfers to make payments on its loan owed to the bank. The bankruptcy trustee sought to recover these payments on three grounds: the Louisiana revocatory action, actual fraud under 11 U.S.C. § 548(a)(1)(A), and constructive fraud under 11 U.S.C. § 548(a)(1)(B).

Among the cross-motions for summary judgment filed by the trustee and the defendants were summary judgment motions directed to the revocatory action. After an extensive analysis of the law applicable to the Louisiana revocatory action and the governing prescriptive period, the court **denied the summary judgment motions** of both parties.

A trustee can bring an action under 11 U.S.C. § 544(b)(1) only if there exists at the time of commencement of the case at least one "triggering" unsecured creditor who could have brought an action to avoid the transfer under applicable non-bankruptcy law. Because a Louisiana revocatory action requires a showing that the same creditor had a claim to payment at the time of each transfer, the trustee must therefore show that the same creditor holds a claim at both the time of each transfer in question and at the time of the bankruptcy filing. Here, there was clearly at least one triggering creditor, and this requirement was therefore met.

A defense that the bank asserted in opposition to the revocatory action was that "this court must consider the solvency of all of the Linder Oil Group in its analysis of Debtor's solvency under the revocatory action." This argument was based upon the fact that the bank had considered the solvency of the primary borrowers as well as the various guarantors in making the loan, and therefore, according to the argument, the solvency of each member of this group should be considered for purposes of the revocatory action. As the court described this argument, because the bank itself had viewed the "amorphously defined" borrower group as an integrated or single business enterprise, the insolvency determination should be based on the collective solvency of the group rather than the solvency of only the Debtor. Rejecting the argument, the court held that how the bank viewed the various entities for purposes of determining insolvency was irrelevant, and the question was governed by the straightforward wording of Civil Code article 2036, which allows an obligee to revoke an act of its "obligor" that caused or increased the obligor's solvency. Since the debtor was the only obligor of the triggering creditor's debt, only the debtor's assets and liabilities should be considered in determining insolvency. The bank had failed to present any support for its "group insolvency" theory, and the court could find no case law that had even considered that theory. More importantly, the bank's argument found no support in Civil Code article 2036.

The court then turned to the issue of prescription, observing the period that between August 1, 2013 and August 1, 2021, the three-year peremptive period under Civil Code article 2041 did not apply "in cases of fraud." Because retroactive application of a prescriptive statute cannot operate to divest a party of vested rights, the fraud exception, though repealed in 2021, applied here.

The Trustee initially claimed that "fraud" as used in Civil Code article 2041 should have the meaning contained in Civil Code article 1953, which defines fraud as a misrepresentation or suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Later, the Trustee abandoned that position, instead arguing that "fraud" as defined in Civil Code article 2041 should be interpreted by referencing the now repealed source articles of Civil Code article 2036, which focused on prejudice rather than deliberate deceit. Finally, the Trustee took the position that the reference to fraud in Civil Code article 2041 must mean a "fraudulent conveyance" under the common law, because the Louisiana revocatory action, which is based on the Paulian action under the Roman civil law, is "strikingly similar" to the common law fraudulent conveyance action.

Making an *Erie* guess as to how the Louisiana Supreme Court would define the term "fraud," the court concluded that it would do so by following the definition in Civil Code article 1953. The Louisiana Supreme Court had shown no hesitancy in looking to Civil Code article 1953 to define fraud as used in the Louisiana Business Corporation Law. Moreover, the legislature had on two prior occasions inserted a fraud exception to peremptive periods applicable to malpractice claims, though in both of those cases it had specifically referenced Civil Code article 1953. Since the prescriptive and peremptive periods in the malpractice statutes are virtually identical to those found in the revocatory action, the court found that the legislature's reference to Civil Code article 1953 in the malpractice statutes likely means that the term "fraud" in the 2013 amendment to Civil Code article 2041 should similarly be defined by reference to Civil Code article 1953.

The court then considered the question of whether the fraud must relate to the actual acts that give rise to the revocatory action and whether there must be a nexus between the fraud and the triggering creditors. Based on the Louisiana Supreme Court's ruling in a legal malpractice case in *Lomont v. Bennett*, 172 So. 3d 620 (La. 2015), the court held that any action consisting of a misrepresentation or a suppression of the truth made with the intention to obtain an advantage or cause a loss or inconvenience will prohibit application of the peremptive period and that the fraud does not need to be tethered to the act itself. However, the fraud must be directed to the party making the claim, in this case, the triggering creditors. The court rejected the trustee's argument that the legislature "by sticking the word fraud in the prescriptive statute on revocatory actions, intended to import into Louisiana law the entire body of fraudulent conveyance law emanating from . . . Bankruptcy Code and the common law Uniform Fraudulent Conveyance Act."

Summary judgment was, however, denied on the issue of whether there was any evidence of fraud aimed at the triggering creditors because, even though a letter had been sent to one of the triggering creditors leading it to believe that the debtor had no excess cash to pay its invoices, it was not clear what period the debtor was referring to when it stated that it might not have excess cash available. Thus, the issue was inappropriate for determination by summary judgment.

The court then addressed the retroactivity of the 2013 amendment, adhering to its earlier ruling that the amendment could be applied retroactively but not, however, in a fashion that would operate to divest the defendants of vested rights. Thus, given the effective date of the amendment, August 1, 2013, the defendants had a vested right in asserting that any claim arising prior to August 1, 2010 had perempted under the pre-2013 version of article 2041.

The only summary judgment motion the court granted was a dismissal of a claim asserted by one of the trustee's assignees for a recovery on the basis of the Louisiana open account statute. As the defendants argued, "open account" under the law does not simply mean the creation of any debt but instead anticipates that the account is for services or goods rendered. The assignee's claim was more akin to a claim for an unpaid loan or breach of contract rather than a claim on open account.

B. Creditor Derivative Actions

Worth Capital Holdings 99, LLC v. McAvoy, 2024 WL 3908979 (M.D. La. 8/22/2024). After instituting executory proceedings to enforce a mineral mortgage, the mortgagee filed a "creditor derivative action" (as permitted by Delaware law) against the current and former directors and officers of the mortgagor, claiming that they had dissipated the mortgagor's assets for their own personal benefit through the possession of egregious royalty and overriding royalty interests, leaving the mortgagor with little or no income to pay creditors. These actions and others allegedly constituted a breach of fiduciary duty under the law of Delaware, where the mortgagor was organized. In addition, the mortgagee brought a claim for tortious interference with contractual relations. The court **granted the defendants' motion to dismiss**, but gave the mortgagee leave to file an amended complaint.

In its opinion, the court first addressed the issue of which state's law would apply. Unlike Delaware, Louisiana does not recognize a creditor derivative action. The court was bound to apply Louisiana choice of law rules and, under those rules, the court must apply the law of the state whose policies would be most seriously impaired if its law were not applied to the issue. The court rejected the defendants' argument that Louisiana's policies would be most impaired on the theory that the plaintiff's suit had alleged relevant actions only in Louisiana. While that may be true, the plaintiff's suit invoked defendants' fiduciary duties to the corporation, and the law of the place where the corporation is incorporated governs disputes regarding the relationship among the officers, directors and shareholders as well as fiduciary duties. Thus, Delaware's substantive law applied. Nevertheless, the court found that the plaintiff's allegations were insufficient, conclusory and lacking in the detail required to state a claim under Delaware law for either breach of fiduciary duty or breach of the duty of loyalty, given that the plaintiff had pleaded "almost no specific details whatsoever."

On the tortious interference claim, the court held that Louisiana law governed, rejecting the plaintiff's arguments that Delaware contacts predominated because the claim arose out of and was intricately related to the duties and responsibilities of a director of a Delaware corporation. The court found instead that Louisiana's policies would be more impaired if Delaware law were applied. The parties had entered into a contract in Louisiana dealing with Louisiana subject matter, and it would be reasonable for the parties to expect to be governed by Louisiana law with respect to torts that arise from a contractual relationship. Thus, Louisiana had a greater interest in ensuring that parties entering into Louisiana contracts are free to act in all the ways allowed under Louisiana's law to protect a company's interest. Applying Louisiana law, the court held that the plaintiff's claim for tortious interference failed because the plaintiffs had failed to plead that the defendants acted with malice, a required element under Louisiana law and had "utterly failed" to include any facts that would allow the court to infer that the defendants acted maliciously to interfere with the plaintiff's contract. Finally, with regard to the plaintiff's argument that the defendants had somehow tortiously interfered with the plaintiff's rights under the executory process order, the court noted simply that that order was not a contract that could be interfered with.

VIII. Lender Liability

A. Credit Agreement Statute

<u>Deutsch Bank National Trust Company as Trustee v. Price</u>, 401 So. 3d 95 (La. App. 4th Cir. 4/23/2024), *writ denied,* 393 So.3d 868 (La. 10/1/2024). After defaulting, the mortgagor executed several note modification agreements but was unable to comply with them. When the lender filed executory foreclosure proceedings, the mortgagor responded with a reconventional demand, which the trial court severed from the executory proceedings. The trial court then granted the mortgagee's exception of no cause of action, dismissing the reconventional demand. The court of appeal **affirmed,** dividing its analysis into three parts: state law claims, federal law claims and fraudulent judgment claims.

The state law claims were that the mortgage servicer had given the mortgagor advice not to take action on her loan while her fraud claim was being investigated. The lender's filing of an executory process suit allegedly amounted to negligence, tortious interference with contract, breach of contract, fraud and abuse of process. Citing the Louisiana Credit Agreement Statute, R.S. 6:1121, the court pointed out that the mortgagor had failed to provide a written agreement on which to base her claims that the servicer had advised her not to take action as the fraud investigation was ongoing. Thus, her claim did not meet the writing requirement of the Credit Agreement Statute. The mortgagor also failed to state a cause of action under Code of Civil Procedure Article 863, because she did not allege specific facts demonstrating how the lender did not comply with its responsibility to properly investigate the facts in its petition. As for her claim that the lender was liable under the Unfair Trade Practices Act, the court pointed out that the lender was exempt as a federally chartered bank.

The federal law claims were for violation of the Constitution, the Fair Housing Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, and RESPA. Rejecting these claims, the court reaffirmed its holding in a prior appeal in this same case that the lender had followed proper procedure in its executory proceedings and that a general allegation of the unconstitutionally of executory process is insufficient to state a cause of action under the Constitution. The mortgagor had stated no claim for conspiracy to interfere with civil rights under 42 U.S.C. § 1985 because she did not set forth facts to support a conspiracy nor allege that any defendant acted out of racial animus. She did not properly state a claim for a violation of the Fair Housing Act because she did not allege that the lender or servicer took any action based on her race or disability. The Fair Debt Collection Practices Act did not apply to the lender because it had filed suit to collect its own debt. No provision of RESPA provided a private right of action for erroneously filing a foreclosure action.

Finally, the mortgagor's fraudulent judgment claim failed because an action for nullity alleging fraud or ill practices must be asserted in a direct action filed in the court that rendered the judgment.

B. Other Breach of Contract Claims

1. *See* **<u>AmeriFactors Financial Group, LLC v. Dunham Price Group, LLC</u>, 389 So. 3d 71 (La. App. 3d Cir. 11/15/2023), *writ denied,* 395 So. 3d 871 (La. 11/6/2024),** discussed *supra*.

2. **<u>Nguyen v. JPMorgan Chase, N.A.</u>, 2024 WL 3877498 (E.D. La. 8/20/2024).** After obtaining a home loan from the bank in 2008, the plaintiff began making additional principal payments over a period of years. In December 2020, the plaintiff made additional principal payments totaling nearly $25,000.00 in that month alone, specifically indicating that the payment was to be applied to principal only and not to be applied to succeeding months' periodic payments. A bank representative responded through the bank's online electronic system that the plaintiff could not make advance principal payments because the account was due for March 2020 and was under a protection plan. An "escalations specialist" at the bank later acknowledged that that information was incorrect. The plaintiff allegedly learned afterward that all of the additional principal payments made between July 2020 and April 2021, including those made in December 2020, were "unapplied". After further exchanges over the electronic internal messaging system in which the plaintiff notified the bank that his loan "should be paid off by now," the plaintiff learned of what he viewed as questionable withdrawals from his escrow account.

   Ultimately, believing that the bank had "purloined, misappropriated, and intentionally misapplied credits and funds, while making false entries and records and making false statements," the plaintiff brought suit against the bank under a number of theories, including RESPA, the Truth-in-Lending Act, the Fair Debt Collection Practices Act, RICO, breach of contract, breach of fiduciary duty and unjust enrichment. Characterizing its interactions with the plaintiff as a simple payment dispute, the bank filed a **Rule 12(b)(6) motion, which the court granted** as to all but one of the counts. The RESPA claims were based upon the bank's alleged failure to respond to three qualified written requests. In response to that claim, the bank cited many district court cases recognizing that onerous and overly broad borrower requests, including those seeking an entire loan file, do not constitute a valid qualified written request. As to the first two requests, the court agreed with the bank that either the request was overly broad or the response was deficient. However, with regard to the third request, which sought the entire loan file, the bank had failed to invoke the provisions of the Federal Regulations to advise that the request was overly broad and burdensome but instead affirmatively agreed to produce the file and then failed to do so. While the court seemed to agree that the bank had correctly pointed out that the plaintiff had suffered no traceable damages, it nonetheless felt that this claim should not be adjudicated on the pleadings alone, and the motion to dismiss was therefore denied as to the RESPA claim related to the third qualified written request.

The Truth-in-Lending Act claim was based upon Section 1639(f), which prohibits a servicer from failing to credit a payment to the consumer's loan account as of the day of receipt. The statute of limitations for Truth-in-Lending Act claims is one year, and the bank correctly pointed out that the plaintiff had not identified a single payment had been made within one year before the date of suit, nor had the plaintiff established a ground for equitable tolling of the one-year limitation period. Therefore the motion to dismiss the Truth-in-Lending Act claims was granted. The court also dismissed the Fair Debt Collection Practices Act claim on the ground that neither Chase, which had become the loan servicer of a loan that it originated, nor Fannie Mae, the present holder of the loan, was a "debt collector" within the meaning of the statute. The RICO claims, which were based on allegations of mail fraud, wire fraud and bank fraud, was dismissed because the plaintiff had not established "continuing activity," which is one of the essential requirements of a RICO claim. Instead, the case involved a single alleged "scheme" with one discreet goal directed only at the plaintiff, and this scheme would conclude once the loan balance was paid off, as the plaintiff contended had already occurred. If the contractual relationship between the bank and Fannie Mae constituted a RICO enterprise, "which is a proposition bordering on the absurd," the enterprise did not pose a continuing threat of criminal activity.

The plaintiff's breach of contract claims were predicated upon Civil Code Article 1983. However, the court cited substantial jurisprudence to the effect that "good faith" is not an independent obligation that can support a breach of contract claim when the obligee can point to no other provision of the contract that has been breached. As for the state law fraud claims, the mistakes and errors that the bank allegedly committed, even gross ones, did not constitute fraud, because the plaintiff had not established fraudulent intent, which is a necessary and inherent element of fraud. The breach of fiduciary duty claims were dismissed on the basis of R.S. 6:1124, as there was no written agreement wherein the bank agreed to act as a fiduciary. The unjust enrichment claims were dismissed because the plaintiff had other remedies at law, which indeed he had asserted in his complaint. The fact that he might not be successful in pursuing those alternative remedies did not matter as to whether an unjust enrichment claim is viable, but the court pointed out that, if the bank's errors and mistakes resulted in the plaintiff paying money not owed, unjust enrichment could become available as a cause of action.

Finally, the claim for injunctive relief - which sought the production of the entire servicing file - was dismissed because injunctive relief is not an independent cause of action but rather is relief that must be tethered to a cause of action for which injunctive relief is appropriate. In a footnote, however, the court urged the bank to "simply produce the file."

3. **Adams v. Mid America Mortgage Inc., 2025 WL 912438 (M.D. La. 3/7/2025).** The mortgagors under a residential mortgage filed suit for rescission of their mortgage contract under the Truth-in-Lending Act and RESPA, unlawful foreclosure, breach of contract, and violation of the Uniform Commercial Code, claiming that in an effort to determine the rightful owner of their mortgage loan they had sent a letter to the defendant inquiring as to the proper beneficiary of the loan payments. In response, the mortgagee attached copies of the mortgage note transfer notice and company name change to support the validity of the debt and informed the mortgagors that the defendant would move forward with foreclosure. The magistrate judge **recommended dismissal** under Rule 12(b)(6) of all of the mortgagors' claims.

The claim for right of rescission under the Truth-in-Lending Act was ill-founded, because that act does not apply to residential mortgage transactions. The right to cancel under RESPA was ill-founded because the defendant did in fact respond to the mortgagor's inquiry and the mortgagors had made nothing more than conclusory allegations that they were unsatisfied with the response. The unlawful foreclosure claim was based upon the assertion that the defendant lacked standing to initiate foreclosure because it had "failed to adequately substantiate its legal entitlement to enforce" the mortgage. Not only had the plaintiff failed to allege facts to prove this claim but the loan documents attached to the plaintiff's own complaint indicated the opposite. The plaintiffs had not alleged the necessary facts to state a claim for breach of contract. Finally, the plaintiffs' allegations that the defendant had breached obligations under UCC articles 3 and 9 by engendering "discrepancies or deficiencies in the creation, perfection or enforcement of security interests in promissory notes" contained no specificity as to the alleged violations and were conclusory at best.

C. Wrongful Seizure; Wrongful Foreclosure

1. **LBC Fixed Income Fund I 2020, LLC v. Watkins Healthcare Group, LLC, 2024 WL 3275380 (E.D. La. 7/1/2024).** A mortgagee, which was the holder of two promissory notes, improperly filed an executory process

proceeding on a mortgage securing a third note which was actually never funded. Approximately one month later, the state court signed the order of executory process, and nearly a month after that, the clerk of court issued a writ of seizure and sale. When the mortgagee was notified that the note had never been funded, it moved to vacate the order and the writ, with the result that a sheriff's sale never occurred. After the foreclosure suit was dismissed for having been brought in an improper venue, the mortgagee then brought suit in federal court on the two mortgage notes that had been funded. More than a year after the initial state court action was filed, but less than a year after the clerk had issued the writ of seizure and sale in the state court proceedings, the mortgagor brought a counterclaim in the federal suit based on the Louisiana Unfair Trade Practices Act. The court granted the mortgagee's motion to **dismiss** on the basis of prescription.

The mortgagor's argument was that prescription under the Unfair Trade Practices Act begins to run only when a party suffers an ascertainable loss and that it had not suffered any ascertainable loss until the writ was signed, effecting a constructive seizure and leading to damages to its business and credit standing. Rejecting this argument, the court noted that the Unfair Trade Practices Act specifically provides that prescription runs "from the time of the transaction or act which gave rise to this right of action." Thus, the date of the alleged wrongful act begins the running of prescription. In this case, that act was the filing of suit, and the mortgagor's claims, being brought more than a year afterward, were thus untimely. The court also rejected the mortgagor's argument of a continuous tort, because the resulting harm that the mortgagor claims to have suffered was simply the byproduct of the original wrongful act and did not form the basis of a continuing tort.

2. **<u>Hawkins v. D. R. Horton, Inc.-Gulf Coast</u>, 2024 WL 5082336 (M.D. La. 11/12/2024).** While a state court foreclosure action brought by the assignee of the original mortgagee was pending, the plaintiff brought suit in federal court against the original mortgagee, asserting causes of action for wrongful foreclosure, breach of contract and quiet title. The magistrate judge **recommended granting summary judgment** for the defendant. While Louisiana recognizes a cause of action for wrongful seizure of property, the cause of action arises at the moment of the seizure. Here, the plaintiff had provided no evidence that the defendant initiated or was otherwise involved in the foreclosure proceedings against the plaintiff. The breach of contract claim was predicated on an assertion that the defendant had failed to satisfy its obligation to release the mortgage upon payment of the loan, but, despite the allegations of her complaint, the plaintiff had provided no evidence that the loan had been paid in full at any time. With regard to the quiet title action, the plaintiff had not demonstrated that she had a cloud on her title. To the contrary, the defendant asserted with undisputed support that it had no interest in the plaintiff's property as it had transferred the mortgage loan to its successor.

D. Other Fair Credit Reporting Act/TILA/RESPA Cases

1. **Collins v. Residential Acceptance Corporation, 2024 WL 4231370 (M.D. La. 7/17/2024).** A residential mortgagor filed suit against her lender, claiming a variety of causes of action based on the alleged absence of Truth-in-Lending disclosures or notice of right to cancel, the absence of any cash advance, and no holder in due course notice. In addition, she asserted claims under the Fair Credit Reporting Act, claiming that, because the note did not specify whether the "$" symbol meant pesos or U.S. dollars, the finance charge was inaccurate. The magistrate judge recommended **dismissal** of all of her claims under Rule 12(b)(6).

   Since the plaintiff had failed to point to any provision of the note or mortgage that the defendant allegedly breached, her breach of contract claim was inadequately pleaded. There is no private right of action under the Dodd-Frank Act, and therefore she had no cause of action for "anti-predatory lending violations" nor any claim for "good faith guideline violations." Her unjust enrichment claim was not viable, because there were two enforceable contracts that applied and the plaintiff had in fact brought a breach of contract claim. Her claim for a violation of Article 9 of the UCC, based on the absence of a "current valid active record of any non-UCC central filing" was baseless since her own exhibits confirmed that the mortgage was recorded in the conveyance records [sic] of East Feliciana Parish. Her Truth-in-Lending Act and Fair Debt Collection Practices Act claims were both time-barred as they were not brought within one year of the violation. Her fraud, negligent misrepresentation and conversion claims were likewise time-barred because they were asserted more than one year after the plaintiff should have been on notice of the alleged conversion.

2. **Roussell v. Santander Consumer USA, Inc., 2024 WL 3513885 (M.D. La. 7/5/2024).** The debtor under a vehicle retail installment contract filed suit against the lender, alleging violations of the Truth-in-Lending Act and anti-predatory lending violations. The magistrate judge **recommended dismissal** of the claims under TILA because TILA does not provide any rescission right for vehicle purchases and, more importantly, the TILA claim was outside the applicable one-year statute of limitations. With regard to the anti-predatory lending violations allegedly based on Title XIV of the Dodd-Frank Act, the plaintiff provided no argument for the existence of a private right of action and, in any event, his claims were outside the three-year statute of limitations, as they were filed more than three years after he entered into the contract. With regard to the alleged breach of contract and good faith claims, the plaintiff had not identified any portion of the contract that was breached. Instead, these claims were based upon an alleged nonexistent right to a notice of rescission. Finally, the claims of constructive fraud and negligent misrepresentation were not only time-barred because they were outside the one-year statute of limitations but also the plaintiff had failed to allege facts revealing that any false statements

were made by the defendant or that the defendant had the duty to explain the details of the contract or sale to the plaintiff. To prove fraud from silence or suppression of the truth, there must be a duty to speak or disclose information.

3. **Ho v. Jefferson Financial Federal Credit Union, 2024 WL 5186582 (E.D. La. 12/20/2024).** The lender made a loan secured by a duplex of which one unit, having approximately 57% of the value of the whole, was used as the borrower's residence, and the other unit was rented out as a commercial hair salon. The loan proceeds were used partially to pay taxes due to the Jefferson Parish Sheriff's office and to the United States Treasury. In addition, some of the loan proceeds were apparently used to repay a mortgage that had encumbered the property. Twelve days after the mortgage was executed, the borrower and his spouse started divorce proceedings. The borrower later died, and his sole heir, the party's minor child, was placed into possession of an undivided one-half interest in the property, with the estranged spouse being placed into possession of the other half. This spouse filed a complaint against the lender alleging violations of RESPA and the Truth-in-Lending Act, as well as assorted state law causes of action. The court **dismissed the federal claims** and declined to exercise supplemental jurisdiction over the state law claims.

A threshold question was whether RESPA and the Truth-in-Lending Act were inapplicable because the loan was a commercial loan. The plaintiff cited 12 C.F.R. § 723.2(3) for the proposition that loans secured by one-to-four-family residential property are excluded from the definition of commercial loans. However, this regulation was unrelated to either the Truth-in-Lending Act or RESPA. The court found that there were disputed issues of material fact that prevented summary judgment as to whether the loan was primarily for business or commercial purposes. Nevertheless, the court held that the plaintiff had not established a right to recovery under either RESPA or the Truth-in-Lending Act. Among other things, the plaintiff appeared to rely upon a servicer's duty to respond to a borrower's written inquiry, but she had presented no evidence that she had made such an inquiry. Her other RESPA claims were not even clearly asserted until her motion for summary judgment, thereby depriving the lender of a fair opportunity to defend the claims. The Truth-in-Lending violation was primarily that the lender had failed to determine the deceased husband's ability to repay as required by the Home Ownership and Equity Protection Act, 15 U.S.C. § 1602. Rejecting this claim, the court observed this statutory requirement did not apply to this loan because it was not a high cost mortgage. In any event, the lender did in fact meet its burden of determining the deceased husband's ability to repay.

Finally, with respect to the argument that the lender had violated the Truth-in-Lending Act by failing to offer her rescission, that right had lapsed three years after the date of consummation of the transaction and expired well before the borrower had died, thus rendering the plaintiff's equitable tolling arguments inapplicable.

4. **<u>Wilson v. Carrington Mortgage Services LLC</u>, 2025 WL 106428 (W.D. La. 1/15/2025)**. After executory proceedings to enforce a residential mortgage were filed in state court but later stayed, the mortgagor filed suit against the mortgagee, asserting a range of claims relating to the servicing of her mortgage loan, including claims under 42 U.S.C. § 1983, the Fair Debt Collection Practices Act and RESPA. After removing that suit to federal court, the defendant mortgagee filed a Rule 12(b)(6) **motion to dismiss, which was granted.** The plaintiff's claims for violation of 42 U.S.C. § 1983 failed because the plaintiff had not alleged any facts to support a finding that the defendant had a close nexus between itself and the state, that the defendant exercised powers that were traditionally the exclusive prerogative of the state, or that the state exercised coercive power over the mortgagee. The RESPA claims were based upon an argument that the mortgagee had failed to follow required loss mitigation procedures and had failed to respond to the plaintiff's qualified written requests. Even taking all of the plaintiff's factual allegations as true, the plaintiff alleged only in conclusory fashion that the defendant had violated RESPA and failed to provide any factual detail regarding how its responses were deficient or failed to comply with RESPA. Merely asserting that the defendant's actions violated the statute was conclusory and insufficient.

   The defendant opposed the claims under the Fair Debt Collection Practices Act on the ground that it was not a "debt collector." In response, the plaintiff argued that, because her mortgage was placed in forbearance before being assigned to the defendant, the defendant was indeed a debt collector within the meaning of the Fair Debt Collection Practices Act. The defendant's counterargument was that a mortgage assignment "is not coterminous with the assignment of the debt" and that "rights and ownership of the loan often are separate for the rights involved in a security device, such as a mortgage." According to the defendant's argument, the fact of the assignment of the mortgage after default was not evidence that the loan itself was assigned at that time as well. The court declined to conduct an inquiry into whether the defendant qualified as a debt collector, instead granting the motion to dismiss on the ground that the plaintiff's allegations were conclusory and lacked the necessary factual specificity to show that the defendant had engaged in conduct prohibited by the Fair Debt Collection Practices Act.

E. Illegal Securitization

1. **<u>Hawkins v. D.R. Horton, Inc. - Gulf Coast</u>, 2024 WL 4219301 (M.D. La. 8/29/2024).** Recommending the granting of a **12(b)(6) motion to dismiss**, the magistrate judge observed that a "multitude of courts" have held that the theory of improper securitization and/or pooling of a mortgage, thereby making any subsequent assignment invalid, or splitting the mortgage and

note, thereby making the note unenforceable, to be without merit. There is no legal authority that the sale or pooling of investments in an underlying note can relieve borrowers of their mortgage obligations or extinguish a secured party's rights to foreclose on secured property. Moreover, theories of securitization, impermissible separation of a note and mortgage, and lack of standing are not sufficient factual allegations to support a cause of action to remove a cloud on title. In an opinion appearing at 2024 WL 4217979, the district judge approved and adopted the magistrate judge's opinion.

2. **Jackson v. Mortgage Research Center LLC, 2025 WL 465900 (W.D. La. 1/28/2025).** A few weeks after origination of the plaintiff's mortgage loan, the original mortgagee sold it to a successor lender. Shortly afterward, the plaintiff then filed suit against both the original lender and the successor, asserting the "split-the-note" theory that had been advanced in many suits across the nation based on the premise that pooling of a mortgage note in a securitization improperly splits the mortgage from the note, resulting in an invalidation of the note and rendering the plaintiff the unencumbered owner of the property. The magistrate judge found that the plaintiff had no standing to assert these claims in light of Fifth Circuit law that a borrower who is not a party to a transfer of the borrower's note to another party does not have standing to bring suit to contest the validity of the assignment.

   Out of an abundance of caution, however, the magistrate judge nevertheless considered the substance of the plaintiff's claims and recommended dismissal for failure to state a claim. The claim for wrongful foreclosure was improper, because no foreclosure had ever been instituted and, to the extent the plaintiff sought to prevent the future institution of foreclosure proceedings, such a claim would be barred by the Anti-Injunction Act. The fraudulent concealment claim was not pleaded with particularity as required by Rule 9(b) and in any event, to the extent the plaintiff was alleging that he was not advised that the note might be sold, this claim fails based on the clear language in the note itself acknowledging the borrower's understanding that the lender may transfer the note. The plaintiff's Truth-in-Lending Act and RESPA claims were not supported by any factual allegations and, to the extent that the plaintiff was claiming that the originating lender had failed to advise him of pros and cons of an adjustable rate mortgage, that claim was rendered inapplicable by the fact that the plaintiff's note was a fixed rate note. Plaintiff's claims for slander of title, quiet title and the like had all been "roundly rejected" in Louisiana. Finally, there was no surviving allegation which, if proved, would present a basis for a claim for intentional infliction of emotional distress.

3. **Richardson v. United Wholesale Mortgage, LLC, 2024 WL 5264095 (M.D. La. 12/31/2024).** In another suit in which a residential mortgagor asserted a variety of causes of action against his mortgage lender, including

illegal securitization and peonage involuntary servitude, the court granted the lender's Rule 12(b)(6) motion to dismiss. Among other things, the court held that the FTC's holder-in-due-course rule under 12 CFR § 433.2 does not apply to mortgage loan agreements and that the submission of two money orders reciting "Payment In Full" did not extinguish the plaintiff's debt, because there was no indication that the amount of the claim was unliquidated or subject to a bona fide dispute. The theory behind the involuntary servitude argument was unclear, but it appeared to the court that the plaintiff was arguing that because the only way he could earn money to repay the mortgage loan was to work for wages he was somehow being indentured. Nevertheless, in keeping with the Fifth Circuit's clear directive that a *pro se* plaintiff should be given an opportunity to amend his complaint to remedy any deficiencies, the court **granted leave to amend**.

IX. Deposit Account Liability

A. Conversion

<u>Anglin v. New Residential Mortgage, LLC</u>, 2025 WL 1685263 (E.D. La. 6/16/2025). A check was sent to the wrong address, stolen by a third party and deposited with forged endorsements, without ever having been received by the payee. The payee then brought suit against a number of parties, including the depository bank and the bank upon which the check was drawn. The drawee bank moved for, and was **granted, summary judgment**. UCC preemption is expansive, preempting not only any additional claim that is inconsistent with the text of the UCC but also any claim that is inconsistent with its overarching purposes and policies. The payee's claim is properly characterized as conversion of an instrument under UCC Section 3-420. As the drawee bank points out, UCC Section 3-420 expressly provides that a payee does not have a remedy against a drawee bank when the payee never received the check. Since the payee's right to enforce the underlying obligation is unaffected by the fraud committed by the thief, there is accordingly no reason to give any additional remedy to the payee.

B. Forged Maker's Signature/ Improper Withdrawals

1. **<u>Mid-South Metals, LLC v. Rodriguez</u>, 779 F. Supp. 3d 879 (W.D. La 4/3/2025).** A check issued by the drawer on its account at Regions Bank was physically intercepted, counterfeited and reprinted on a different check stock. This counterfeit check was then deposited into an account at Chase. Approximately a week later, the drawer detected the counterfeit check and reported it to Regions, which then emailed Chase to notify it of the counterfeit check and to request that Chase block access to the Chase account into which the check had been deposited. Regions attached to its email an indemnification agreement by which it agreed to indemnify Chase for any losses sustained in complying with Regions' request. At no point did Chase take any action to freeze this account or otherwise prevent that

account holder from accessing the funds, which were actually withdrawn over the ensuing week. Chase then denied Regions' request because there were no funds available. The drawer filed suit against Chase for negligence and failure to recognize its adverse claims to the funds on deposit in the deposit account at Chase into which the counterfeit check had been deposited, as allegedly required by the adverse claim statute, R.S. 6:315(a). Chase removed the case to federal court and filed a **motion to dismiss, which the court granted**.

Chase's defense was based on an argument that UCC articles 3 and 4 displaced the drawer's claims for negligence. The court did not agree that UCC article 3 applied, because the drawer did not allege that the bank was negligent for its acceptance, payment or presentment of the counterfeit check but instead argued that the bank was liable for negligently failing to freeze the funds in the account into which the counterfeit check was deposited. In other words, it was Chase's overall dealings with this account, rather than the handling of the specific check at issue, that were the thrust of the drawer's action. Nevertheless, the court agreed with Chase that UCC article 4 governs because that article provides the drawer with a remedy by allowing the drawer to demand that its own bank re-credit to its account the amount of the check at issue. This UCC remedy displaces the drawer's claims of negligence and its claims under R.S. 6:315(a). Common law negligence claims are preempted where the UCC offers a remedy. To the extent that any negligence claim is inconsistent with the UCC's remedial scheme for this type of transaction, so too is any claim under the adverse claim statute.

2. **Lamar v. JPMorgan Chase Bank, N.A., 2024 WL 4280938 (M.D. La. 9/24/2024).** The plaintiff, which had a checking account at the defendant bank, discovered various unauthorized charges totaling $250,000 made from his checking account. After the plaintiff reported these charges to the bank, it reimbursed the plaintiff only $50,000, which was the amount of the charges reported within the 60-day deadline contained in the governing deposit account agreement for contesting electronics funds transfers. The plaintiff then brought suit against the bank claiming that its firewall system failed to protect the plaintiff's funds and the bank should not be allowed to shorten the prescriptive period established by law for a customer to discover and report unauthorized signatures. The bank moved to dismiss under UCC Section 4-406, which requires a customer to exercise reasonable promptness in examining its bank statement to determine if a payment was not authorized and which provides that a customer who does not discover and report an unauthorized signature within one year is precluded from asserting against the bank the unauthorized signature or alteration.

   The court **denied the bank's motion to dismiss**, finding that both sides "appear to have missed the mark." Rather than items bearing a signature governed by UCC Section 4-406, the transactions at issue were effected entirely by electronic means, and under the UCC the term "item" does not include transactions effected entirely by electronic means. Payments that are made electronically are covered by a separate statute, the Electronic Funds Transfer Act. Both parties conceded that the deposit account agreement's 60-day notice provision for unauthorized electronic funds transfers applied to the transactions at issue. Despite this, and the nature of the unauthorized transactions, neither party addressed whether the transactions actually fall within the definition of "item" under the Uniform Commercial Code. Because this crucial issue was not properly before the court, and because the plaintiff was requesting leave to amend his original complaint to add claims, the court granted leave to amend and denied the motion without prejudice.

3. **B & C FDO Investments #2 LLC v. Regions Bank, 2025 WL 2257531 (W.D. La. 8/7/2025).** After the bank's fraud department notified a commercial depositor of apparently fraudulent charges being posted to its deposit accounts, the depositor notified the bank of additional fraudulent charges and engaged in continuing dialog with both the bank's fraud department and a local branch about the fraudulent transactions. Several months later, the depositor was informed that the receiving banks had requested indemnity but "nothing since then." According to the plaintiff's complaint, despite "multitudinous requests, personal meetings and inquiries" the bank had not further advised of the status of the fraud investigation. The plaintiff then filed suit more than a year after the fraud scheme was first detected, asserting a variety of state law claims including negligence, breach of contract and "legal fault." In prior rulings, the court held that the negligence claims had prescribed as to the original unauthorized transfers but that their remaining negligence claims survived. The plaintiff then amended to assert causes of action under the Gramm-Leach-Bliley Act and the Electronic Funds Transfer Act. In response, the bank filed a Rule 12(b)(6) motion to dismiss.

   The court granted dismissal of the Gramm-Leach-Bliley Act claims, holding that the statute did not create a private right of action. The Electronic Funds Transfer Act claims were also dismissed, because that act defines a "consumer" as a natural person and an "account" as an account established primarily for personal, family or household purposes. The contractual claims, which were loosely based upon an allegation that the bank had breached its obligation to establish sufficient safeguards to protect the plaintiff's account from fraudulent wire transfers, survived the motion to dismiss, because, reading the allegations as a whole and taking the facts pleaded as true, the court could reasonably infer that the plaintiff was alleging that its deposit account agreement with the bank included provisions governing their rights and obligations with respect to unauthorized wire transfers and that the bank's action or inaction cited in the complaint breached those obligations.

C. Negligent Misrepresentation

Dunlap v. Community Bank of Louisiana, 387 So. 3d 952 (La. App. 2d Cir. 6/5/2024). The account holder of two checking accounts and four certificates of deposit visited a local bank branch with one of his daughters, allegedly with the intention of donating the accounts to her. Ten months later, he passed away, without having ever done so. The daughter then filed a petition against the bank alleging that, although her father had indicated his desire to donate the accounts to the bank officer and/or to execute a payable on death provision, the bank failed to set up, advise or otherwise ensure that the depositor had fully and legally donated the sums to her and failed to advise him of the requirements for setting up a payable on death account. In an amended petition she alleged that the bank breached its duty to aid the depositor and/or negligently misrepresented to him that the funds in the certificates of deposit would be paid to her upon his death. The bank filed an exception of no cause of action, which the trial court sustained.

The court of appeal **affirmed**, distinguishing *Succession of McKnight*, 768 So. 2d 794 (La. App. 2d Cir. 2000) where, under somewhat similar facts, the court had recognized a tort cause of action for negligent misrepresentation. In this case, the depositor and the plaintiff had an in person meeting with the bank officer and executed account agreements, provided by the manager, that included the daughter as an additional owner of the two checking accounts. The daughter did not allege that the depositor had executed any documents purporting to create a payable on death feature. These facts differ from *McKnight*, where a revised signature card was executed for the account and the area on the signature card indicated "joint with survivorship". Furthermore, the record was devoid of any agreement by the bank in this case establishing POD accounts. Here, the record reflected only that the plaintiff was added as an additional account owner of the two checking accounts, as the bank possessed no agreement providing that in the event of the death of one tenant the balance of the account would pass to the surviving tenant instead of to the deceased tenant's estate. As the Louisiana Supreme Court has opined, without an express written agreement to the contrary, a bank has no duty to protect its customer "from himself." Although the plaintiff believed her father attempted to donate the funds in the two checking accounts to her, as a joint account holder she had the power to withdraw the funds at any time, and the bank owed no duty to protect her from herself. As for the certificates of deposit, the depositor was the sole owner and the record did not include any notarized language with the formality requirement for a donation.

In a footnote, the court pointed out that, even if the depositor had created payable on death accounts for the two checking accounts, the plaintiff would have to account for those funds according to R.S. 6:312(A) and R.S. 6:314(A), as seen by the intervention that had been filed in this case.