RECENT DEVELOPMENTS IN LOUISIANA CASELAW

RELATING TO

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

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I. Secured transactions

A. Chapter 9 security interests.

1. Perfection.

First National Bank of Picayune v. Pearl River Fabricators, Inc., 2006-2195 (La. 11/16/07); 971 So. 2d 302, 64 UCC Rep. Serv. 2d 496. On July 24, 2001 (after the revision of Chapter 9 of the UCC became effective on July 1, 2001), a secured party holding a security interest in specified equipment filed a financing statement with the Chancery Clerk in Mississippi, thereby perfecting the security interest. A few months later, the debtor, without the knowledge or consent of the secured party, sold the equipment on credit to a buyer who never took physical possession of the equipment but who, the following month, re-sold it on credit to another buyer. This second buyer, Phoenix, was a Nevada corporation with its principal place of business in Madisonville, Louisiana. The equipment was then transported by the original debtor from Mississippi to Phoenix's location in Madisonville. On November 17, 2003, more than a year after the equipment had been transported to Louisiana, the secured party filed a financing statement with the St. Tammany Parish Clerk of Court. A few months later, after the original debtor defaulted, the secured party filed a "petition for executory process and sequestration", obtaining a writ of sequestration under which the equipment was seized. Phoenix then moved to dissolve the sequestration and sought damages for wrongful seizure, alleging that the secured party had failed to file its financing statement in Louisiana within one year of the date the collateral was transferred. The trial court rejected Phoenix's contention that it was necessary for the secured party to file its financing statement in Louisiana within one year, finding the security interest perfected in Mississippi to be valid and enforceable in Louisiana.

After an unsuccessful attempt at applying for supervisory writs, Phoenix devolutively appealed from the trial court judgment. In the court of appeal, the secured party filed an exception of no right of

action on the ground that Phoenix had no standing to appeal because it had failed to intervene in the lawsuit. Despite finding that the judgment in question was a non-appealable interlocutory order and that Phoenix was not entitled to appeal on the basis of a claim of irreparable injury, the court of appeal converted the appeal into a writ application and reversed the trial court's judgment, finding that the secured party's failure to re-perfect its security interest in Louisiana within one year after the transfer caused its security interest to become unperfected. While the devolutive appeal was pending, the sequestered property was sold at sheriff sale. The Supreme Court granted writs to consider primarily the issue of whether Phoenix's knowledge of the situs of the purchased property at the time of its purchase should have defeated its claim that the secured party failed to re-perfect its security interest after the property was moved to Louisiana.

The court first dealt with the procedural issues of mootness and Phoenix's failure to intervene. The court found that the controversy was not moot because, even though the property had been sold, a controversy remained alive as to whether there was any merit to Phoenix's request for damages. The court also found that, notwithstanding Phoenix's failure to file a pleading styled as a petition for intervention, "rules of procedure implement the substantive law and are not an end in themselves." Thus, Phoenix's motion to dissolve, which was properly served upon the secured party and resisted by the secured party in an opposition memorandum filed prior to the hearing on the contradictory motion, constituted an intervention. The court also rejected the secured party's contention that only a defendant-debtor can seek dissolution and damages for wrongful sequestration.

Central to the court's opinion on the merits was La. R.S. 10:9-316, which provides, in pertinent part, as follows:

> (a) A security interest perfected pursuant to the law of the jurisdiction designated in R.S. 10:9-301(1) or 9-305(c) remains perfected until the earliest of:
>
> (1) the time perfection would have ceased under the law of that jurisdiction;
>
> (2) the expiration of four months after a change of the debtor's location to another jurisdiction; or
>
> (3) the expiration of one year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.
>
> (b) If a security interest described in subsection (a) becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it remains perfected thereafter. If the security interest does not become

> perfected under the law of the other jurisdiction before the earliest time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

The secured party contended that this statute and its re-perfection requirements are applicable only to a purchase occurring in the destination state, after the collateral has already been moved there. In response, Phoenix argued that the 2001 revision of Chapter 9 effectively deleted the words "after removal" from former Section 9-103(d) (the analogous provision of pre-revision Chapter 9), which had provided that a security interest in goods brought into this state while the security interest was perfected elsewhere becomes unperfected after four months "as against a person who became a purchaser after removal." Phoenix also argued that the secured party became aware of the transfer within the one year period and its lack of diligence should not be rewarded.

With respect to the secured party's contention that the "plain meaning" of Section 9-316(3) is that the retroactive lapse rule did not come into play because there was no transfer of the property after it had entered Louisiana, the court observed that the revision of Chapter 9 reflects a change in the law. The legislature is presumed to enact each statute with deliberation and with full knowledge of all existing laws on the same subject. Considering the legislature's failure to carry forward the words "after removal" contained in the former version of Chapter 9, acceptance of the secured party's argument would require the court to interject language not contained in the statute. The retroactive lapse rule applies because a transfer was made to a purchaser located in a jurisdiction other than Mississippi. In this case, Phoenix's jurisdiction was the state of its incorporation, which was Nevada not Mississippi. The court felt it unnecessary to address arguments as to whether the one year period for re-perfection was triggered by the date of transfer of ownership or the date the collateral was actually moved to another jurisdiction, because under the facts of the case the secured party failed to perfect within one year of either triggering event.

On the issue of the effect to be given to the retroactive lapse rule, the secured party argued that the court should look to provisions of the uniform revision comments treating purchasers with notice of a security interest differently from those without notice. In support of this position, the secured party cited jurisprudence from other jurisdictions as well as the model revision comments accompanying model Section 9-317(b), which provides that a buyer of goods takes

free of an unperfected security interest if the buyer gives value and takes delivery of the goods *without knowledge* of the unperfected security interest. However, as the court noted, Louisiana's version of Section 9-317(b), as a departure from the uniform version, omits the qualifying words "without knowledge", and the Louisiana official revision comments specifically point out that the requirement of being "without knowledge" was deleted in order to comport with the Louisiana public records doctrine, which is predicated on filing and not knowledge. Thus, the secured party's reliance on the uniform comments was unwarranted. The court's holding on this point appears to have been buttressed, at least to some degree, by its finding that Phoenix did not have actual knowledge of the secured party's filed financing statement.

The court also brushed aside in a footnote an argument by the secured party that the UCC imposes an obligation of good faith, observing simply that the record was devoid of any evidence that Phoenix's purchase was made in bad faith.

2. Lease versus security interest.

Automotive Leasing Specialists, L.L.C. v. Little, 392 B.R. 222, (W.D. La. 2008); 66 UCC Rep. Serv. 2d 11. At the time of execution of an instrument entitled "Motor Vehicle Lease Agreement," the debtor made a $1,200 down payment. The lease agreement provided the lessee a purchase option at the end of the lease term for $206. The lease agreement further provided that, in the event of early termination, the lessee would owe a termination fee of $350, together with the amount by which the "Unpaid Adjusted Capital Cost" exceeded the vehicle's fair market wholesale value, plus "all other amounts then due under this lease". The lease agreement also contained a statement that the parties intended that the lease would be a "true lease" rather than a "financed lease" or security interest. Nonetheless, the lease provided that, if a court determined the lease to be a financed lease, the lessee granted a security interest in the vehicle to the lessor. In its Chapter 13 plan, the lessee proposed to treat the lease agreement as a secured transaction. The bankruptcy court denied the lessor's objection to this treatment and confirmed the plan. The district court affirmed.

Applying La. R.S. 10:1-207(37), as in effect at the time the lease was entered into (although the court observed that the 2001 revision of Chapter 9 did not effect a substantive change in the law), the court held that a lease creates a security interest if the lessee's obligations are not

subject to termination by the lessee and at least one of four factors is satisfied. The fourth of these factors is that the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration. Finding no Louisiana jurisprudence under this statute, the court looked to case law in other states, which had held that the nominal consideration test is satisfied "if only a fool would fail to exercise the option". Applying this test, the court held that the $206 purchase price was clearly nominal. With respect to the lessee's purported right of termination, the court held that the bankruptcy judge correctly construed the words "all other amounts then due under this lease" to include the remaining lease payments, in view of an admonition in the lease that "the earlier you end the lease, the greater this charge is likely to be." In any event, it was clear that the lessee would be liable to pay money to the lessor if she chose to terminate the lease early and the lessee therefore did not have a right to terminate her obligation (as opposed to the lease itself). The lessor's final argument was that, even if the lease created a security interest, the Lease of Movables Act, La. R.S. 9:3310(B), provides that a lessor retains full legal and equitable title and ownership even though a financed lease creates a security interest under Chapter 9. The court declined to rule on this issue, since the bankruptcy court had not substantively addressed the contention; however, the court mentioned that the lessor appeared to have contracted for a contrary result by including language in the lease to the effect that a security interest would be granted in the vehicle if it were determined that the lease constituted a financed lease.

3. Subrogation.

United States v. Jesco Construction Corporation, 528 F. 3d 372 (5th Cir. 2008). The Corps of Engineers commenced an interpleader action with respect to funds owed to Jesco Construction Corporation for the construction of pile dikes on the Mississippi River. Two of Jesco's creditors intervened seeking entitlement to the money: G.E., which claimed a perfected security interest in Jesco's accounts for the payment of unrelated loans, and Jesco's bonding company which asserted an equitable subrogation claim against Jesco's assets by virtue of having paid for the completion of an unrelated project in South Carolina. The district court granted summary judgment in favor of G.E., and the court of appeals affirmed. G.E. held a perfected security interest in all assets of Jesco, including the funds that had been deposited in the registry of the court in the interpleader action. By contrast, the bonding company held only a common law equitable

subrogation claim, which Louisiana courts have consistently declined to recognize. While the bonding company might have had a right of subrogation under La. Civ. Code art. 1829 to the rights of the Corps against Jesco arising out of the South Carolina project, that subrogation would have simply allowed the bonding company to recover from Jesco to the extent of the performance which the bonding company rendered to the Corps under that contract. Jesco's default under the South Carolina contract created no security interest in favor of the Corps to which the bonding company could be subrogated in order to assert a claim against the funds due Jesco in connection with the work in Louisiana.

4. Priority.

Irons v. U.S. Bank, Inc., 2007-0570 (La. App. 4th Cir. 8/14/07); 966 So. 2d 646. Following Hurricane Katrina, the plaintiff homeowners, who were dissatisfied with the amount of the initial settlement tendered to them by their insurance company, retained a law firm on a 25% contingency contract to pursue their claims against the insurer for increased insurance proceeds. The law firm then successfully obtained a settlement for an increased recovery from the insurer, which issued settlement checks payable to the homeowners, their attorney and their mortgagee. When the mortgagee refused to endorse the check, the law firm initiated a concursus proceeding, seeking a determination that the law firm's right to withdraw 25% of the amount deposited applied to the entire recovery and outranked the mortgagee's claim as loss payee. The trial court granted summary judgment in favor of the law firm, and the court of appeal affirmed. La. R.S. 37:218A, which allows an attorney under a contingency contract a privilege superior to all other privileges and security interests, gives the law firm first priority. The mortgagee in this case is not the owner of the insurance proceeds, but rather is required to hold them as security to ensure that the homeowners make the necessary repairs to their property. According to the court, it therefore follows that the mortgagee's status as loss payee does not trump the law firm's first ranking privilege. The court distinguished Hussain v. Boston Old Colony Insurance Co., 311 F. 3d 623 (5th Cir. 2002), on the ground that in that case the mortgagee was the first to pursue the claim and was active in protecting its interest. Applying Hussain to the facts in the present case would be patently unfair, because the mortgagee did nothing to protect its interest. Rather, the homeowners' law firm was the first and only attorney to expend resources and efforts to obtain a larger recovery on behalf of

the homeowners.

5. Rights of assignees.

a. <u>Greenfield Commercial Credit, L.L.C. v. Catlettsburg Refining, L.L.C.</u>, 2007 WL 97068 (E.D. La.), 61 UCC Rep. Serv. 2d 775. A subcontractor known as Pipeworks, Inc. and its affiliate, Pipeworks Reserve, Inc. entered into a factoring agreement by which their accounts receivable were assigned to Greenfield, which then caused a notice to be sent to the contractor to the effect that Pipeworks *Reserve*, Inc. had retained Greenfield's services to manage "our accounts receivable" and that this arrangement included an assignment of payments "on our accounts" to Greenfield under the Uniform Commercial Code. The notice, which was signed by Greenfield and Pipeworks Reserve, Inc., included wiring instructions that mentioned Pipeworks, Inc. When the contractor failed to honor the direct payment request on the basis that it had no contractual relationship with either Greenfield or Pipeworks Reserve, Inc., Greenfield filed suit against the contractor for $2,000,000 in past due invoices owing to Pipeworks, Inc.

Citing La. R.S. 10:9-406, the court observed that it is well established that an account debtor who fails to comply with a valid assignment and improperly pays the assignor is liable to the assignee for the amount of the improper payment. The court rejected the contractor's claim that the notice it received failed to reasonably identify the rights assigned because it identified the assignor as Pipeworks Reserve, Inc. According to the court, if an account debtor has doubt about the adequacy of the notification, it may not be safe in disregarding the notification unless it notifies the assignee with reasonable promptness as to the respects in which the account debtor considers the notification to be defective. In this case, if the contractor had contacted Greenfield, it would have learned that both Pipeworks, Inc. and Pipeworks Reserve, Inc. had executed the factoring agreement. The contractor never contacted Greenfield to request a copy of the assignment, but rather simply turned to Pipeworks, Inc. for clarification and accepted its representation that the notice was a mistake. The contractor's contention that the notice reasonably failed to notify the assignor was undermined by the fact that the wiring instructions specifically referenced Pipeworks, Inc., "thereby providing [the contractor]

with a frame of reference to identify the rights assigned." The court also rejected the contention that the notice did not adequately identify the rights assigned, since the term "our accounts" necessarily includes all accounts, thereby eliminating any uncertainty as to the accounts assigned. Finally, the court rejected Greenfield's contention that is was entitled to attorney's fees under the Open Account Statute, since the parties here had entered into construction contracts which contemplated specific construction projects, rather than a course of dealing over a period of time.

b. **Century Ready Mix Corp. v. Boyte, 42,634 (La. App. 2d Cir. 10/24/07); 968 So. 2d 893**. A bank gave notice to a general contractor that checks due to one of the subcontractors, a bank customer, should be made payable jointly to the subcontractor and the bank. Upon receipt of the checks, the bank applied the proceeds to the payment of the subcontractor's unrelated debt, with the apparent result that the subcontractor failed to pay its concrete supplier. The concrete supplier filed suit against the general contractor and owner. The owner then asserted a third party demand against the bank seeking damages for "acts of malfeasance, breach of contract, breach of fiduciary duty and indemnification." The bank filed an exception of no cause of action, which was sustained by the trial court and affirmed on appeal.

The owner's first contention was that the bank "subrogated itself to the rights and liabilities" of the subcontractor and stepped into its shoes by entering into an assignment agreement. The court disagreed. All that the bank did was send a letter requesting that payments be remitted to it, and the bank made no assertion of a security interest in the proceeds. There was no allegation that the bank was assigned or assumed the obligations of any contract. The owner also argued that it was entitled to indemnity "on equitable principles," a claim that the court construed as a claim for unjust enrichment. This claim was rejected since both the concrete supplier and the bank were ordinary creditors without any lawful cause of preference over the subcontractor's assets. Moreover, any enrichment of the bank was not without cause in that the bank received payment of a valid juridical act, which was its loan to the contractor. Finally, with regard to the claim of "malfeasance," the court observed that this tort theory had not been addressed in the

jurisprudence since the formulation of the modern duty-risk analysis. The duty for the protection of the owner against possible Private Works Act claims lay with other parties directly involved in the construction project and not with the bank.

c. **Cf. Boyte v. Wooten, 2007 WL 3023935 (W.D. La. 2007), affirmed 2008 WL 2660770 (5th Cir. 2008)**. In a federal case in which the contractor filed suit against the bank based on the very same facts involved in the preceding case in this outline, the bank ultimately fared differently. The facts of the case were more developed in the federal opinion, and it is clear that the subcontractor had executed a security agreement granting the bank a security interest in the subcontract as security for indebtedness that was unrelated to the current construction project. Even though it was not providing financing for the project, the notification that the bank sent indicated that the subcontractor had assigned the proceeds of the subcontract to the bank "in connection with the financing for the project" and requested that checks be made payable jointly to the bank and subcontractor and mailed directly to the bank. The bank was aware that the subcontractor was on shaky financial ground and had had serious problems in satisfying its obligations to the bank. The agreement between the bank and the subcontractor was that 50% of the proceeds would be applied to the subcontractor's unrelated debt.

The court rejected the contractor's claim that a contract between the contractor and the bank was confected when the subcontractor assigned the subcontract to the bank. The assignment in question was actually the subcontractor's pledge of the proceeds of the contract to secure its debt owing to the bank. There were no provisions in the security agreement obligating the bank to pay the subcontractor's suppliers. Thus, based on the plain language of the security agreement, the bank did not undertake the subcontractor's obligation. In addition, the contractor had no quasi-contractual claim under La. Civ. Code art. 2299, since the record clearly reflected that the subcontractor owed money to the bank. With regard to the malfeasance claim, the court found that the contractor failed to prove by a preponderance of the evidence that the bank's conduct was wholly wrongful or unlawful.

However, the court found that the contractor had proven a

negligent misrepresentation by the bank for which the contractor was entitled to recovery under La. Civ. Code art. 2315. Though the bank had no duty to supply information about its customer's financing to the contractor, it assumed the duty to provide correct information when it sent a letter to the contractor advising that the subcontractor had assigned the proceeds of the contract to the bank "in connection with the financing for the project." The bank thus misrepresented that the loan proceeds were used in connection with this project. The contractor testified that he never would have agreed to make checks jointly payable to the bank and the subcontractor if he had known the true nature of the agreement with the bank and the fact that money was not being loaned for this project. For similar reasons, the court found the bank liable for detrimental reliance. The court rejected the bank's defense that the owner, and *a fortiori* the contractor, were precluded from recovery against the bank because the owner failed to protect itself by requiring a bond. The court declined to extend the provisions of the Private Works Act to affirmatively prohibit the owner from pursuing a cause of action otherwise available under the law against a wrongdoer. Moreover, the Private Works Act protects the owner from personal liability, not a general contractor. Finally, the court refused to reduce the contractor's recovery on the basis of comparative negligence, finding not only that the contractor was guilty of no negligence but also that, even if he had been negligent, La. Civ. Code art. 2323 precludes a reduction of damages in a case of detrimental reliance.

d. **Private Capital, Inc. v. J&K Engine Rig Repair, 2007-1556 (La. App. 3d Cir. 5/28/08); 984 So. 2d 929, 65 UCC Rep. Serv. 2d 836.** An oil rig repair business granted an accounts receivable factor a security interest in all of its accounts. In the instance of the particular account involved in this case, the secured party sent to the account debtor, on the same day the invoice was issued, a notice of the assignment of the account directing payment to a specified address. The notice solicited an agreement from the account debtor not to assert against the assignee any defenses that the account debtor may have against the oil rig repair business. In accordance with a request made on the notice, the account debtor signed and returned the letter by fax. Subsequently, the account debtor discovered that the work represented by the invoice had not been performed and

refused payment. The secured party then filed suit against the account debtor, which reconvened seeking damages related to the defense of the litigation. Summary judgment was rendered in favor of the secured party, and the court of appeal affirmed.

La. R.S. 10:9-403 provides that an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment for value, in good faith, without notice of a claim to the property assigned and without notice of a defense of a type that could be asserted against a holder in due course of a negotiable instrument. In this case, the account debtor acknowledged signing a waiver, but contended that a waiver is effective only if bargained for contemporaneously with the underlying contract between the account debtor and the assignor; otherwise, it contended, there may be a problem with "consideration" for a waiver subsequently made. The court rejected this contention, finding that the validity of any agreement must be addressed in light of La. Civ. Code art. 1966, which requires the existence of lawful "cause" for an obligation. Here, the account debtor's election to acknowledge and accept the notice as part of its ongoing business relationship with the secured party's debtor established cause.

The account debtor also contended that the assignee had not taken the assignment in good faith, because the assignment was ostensibly taken in violation of its own agreement with the assignor. In support of this argument, the account debtor pointed to a provision of the financing agreement under which the assignor represented to the secured party that each account assigned would be based upon work actually performed and would not be subject to any defenses. In response to this contention, the court simply observed that the ultimate validity of an invoice is not pertinent to the issue of the secured party's taking of an assignment in good faith. The account debtor's next contention was that its defense of non-performance of the work was a "real defense" that could be asserted against a holder in due course, because the failure of the account debtor to perform the underlying work represented "illegality of the transaction which nullifies the obligation of the obligor." Finding this contention without merit, the court observed that the account debtor had pointed to no provision of law rendering

the underlying transaction illegal.

The court next addressed the account debtor's argument that it was entitled to rescind the waiver on the basis of error pursuant to La. Civ. Code art. 1949. In support of this argument, the account debtor pointed to testimony from its manager that it would not have signed a waiver requiring it to pay for work not performed. Finding no error vitiating consent, the court observed that the account debtor, which was familiar with factoring agreements, signed and returned the notice within the course of an ongoing business relationship.

The court summarily brushed aside an argument that the waiver of defenses was a unilateral modification of a pre-existing contract which must fall under La. Civ. Code arts. 2601 and 2602 (which deal with the issue of the "battle of forms" in the confection of a contract of sale of movables), observing simply that the modification in this case was not unilateral since the account debtor consented to the waiver without exception or alteration.

Finally, the court rejected the account debtor's contention that it was permitted to assert defenses against the secured party under La. R.S. 10:9-404 (which provides that the rights of an assignee are subject to all terms of the agreement between the account debtor and assignor and any defense arising out of the transaction giving rise to the contract) because that provision of law is specifically prefaced by the words "unless an account debtor has made an enforceable agreement not to assert claims or defenses." Since the account debtor had made such an agreement in this case, that provision was inapplicable by its own terms.

e. **CNH Capital America v. Wilmot Farming Ventures, LLC, 2008 WL 2386166 (W.D. La. 2008)**. A buyer purchased farm equipment on credit from an equipment dealer, signing a financing agreement that granted the dealer a security interest in the equipment. At the time the financing agreement was signed, the dealer's store manager gave the buyer a signed letter, printed on the dealer's letterhead, to the effect that the terms of the financing agreement were for 12 months and that, at the end of the 12-month period, the buyer could simply return the equipment. A provision of the financing agreement notified the

buyer that the financing agreement would be assigned to CNH Capital, which did in fact acquire the agreement by assignment. After 12 months, the buyer returned the equipment to the dealer and stopped making payments under the financing agreement. CNH Capital notified the buyer that it was in default and, after giving appropriate notices, disposed of the equipment through an online auction. CNH Capital then filed suit against buyer for the deficiency balance owing. Finding no issue of material fact, the court granted summary judgment in favor of CNH Capital.

The first issue decided by the court was CNH Capital's contention that the financing agreement was not effectively modified because, by its terms, any modification had to be in a writing signed by all parties and in this case the side letter was not signed by the buyer. The court rejected this contention, finding that longstanding Louisiana jurisprudence holds that, even if a written contract contains a provision prohibiting oral modifications, an oral agreement by the parties can nonetheless establish a modification. Thus, a reasonable jury could find the evidence to be indicative that the parties mutually consented to a modification that would release the buyer from liability upon returning the equipment after 12 months.

The financing agreement contained a "waiver of defenses agreement" under which the buyer agreed not to assert against the assignee any claim or defense against the dealer. The court thus turned to the issue of whether a reasonable jury could conclude that CNH Capital knew that the contract had been modified. In support of this argument, the buyer pointed to prior transactions in which it had successfully returned within 12 months equipment financed by this dealer and the same assignee. However, in those cases, the dealer simply paid off the buyer's debt on its behalf, and the assignee's records thus merely indicated that the contracts were paid early. To buttress its argument that the CNH knew of the side letter, the buyer sought to rely on an affidavit from the dealer's manager to the effect that he had personally spoken with representatives of Case New Holland, the parent company of CNH Capital, and discussed the fact that contracts for this particular buyer and other customers were for only one year and that this was "a customary means by which [the dealer] moved Case New Holland equipment." The court was thus faced with the issue of whether the parent company's knowledge of the contract

modification could be imputed to its CNH Capital, its wholly owned subsidiary. While Louisiana courts disregard the legal fiction of separate corporate existence for equitable reasons, such as "to defeat public convenience, justify wrong, protect fraud or defend crime," there was no evidence in this case justifying such an imputation of knowledge. CNH Capital often finances the sale of equipment manufactured by its parent, but it sometimes finances equipment by other manufacturers. The two companies were separately incorporated with separate and independent directors and officers. There was no evidence to establish the companies were attempting to commit fraud or some other wrongful act, nor any evidence that the parent was involved on its subsidiary's behalf in entering into financing contracts.

Pointing out that CNH Capital had admitted in its complaint that the dealer was its agent for purposes of the voluntary surrender of the equipment, the buyer next argued that the dealer was CNH Capital's agent for the purpose of modifying the financing agreement and that it was clothed with the apparent authority to do so. While the dealer may have been an agent of CNH Capital for the surrender of equipment, there was no evidence that it was an agent of CNH Capital for the purpose of modifying the contract. The apparent authority argument failed because the buyer had not directed the court to any conduct of CNH Capital upon which it relied, nor even that it believed at the time that the dealer was modifying the contracts on CNH Capital's behalf.

The buyer also argued that CNH Capital's disposition of the equipment was not commercially reasonable, relying on an affidavit from the dealer's manager to the effect that returned equipment was often successfully resold without a deficiency and that the manager was of the opinion that the equipment was not sold in a commercially reasonable manner because other equipment had commanded a higher price. In opposition to this contention, CNH Capital presented an affidavit from its representative that the equipment was disposed of in a recognized online market which it had found to be the most effective method of disposing of equipment. According to La. R.S. 10:9-627, the fact that a greater amount could be obtained by disposition at a different time or a in a different method is not of itself sufficient to preclude the secured party from

establishing that the disposition was commercially reasonable. Thus, there was no genuine issue of material fact on the commercial reasonableness issue.

B. Mortgages.

1. Reformation.

a. **<u>WMC Mortg. Corp v. Weatherly</u>, 07-0075 (La. App. 3d Cir. 6/13/07); 963 So. 2d 413**. In 1996, husband and wife executed a mortgage in favor of Southern Mortgage Company encumbering the wife's separate property as security for a $30,000 loan. In 1997, the husband alone executed a mortgage in favor of WMC Mortgage purporting to encumber the same property belonging to the wife. Even though the wife was present at closing, she did not execute the mortgage or the secured note. Most of the proceeds of the later borrowing transaction were disbursed to pay the earlier note and other debts the couple owed. Regular payments were made on the WMC Mortgage loan for a number of years but were discontinued in 2003. The following year, the husband and wife obtained a divorce. When the wife refused to recognize that her separate property was properly pledged as security for the 1997 loan, WMC Mortgage brought an action to reform the mortgage and note to reflect that the wife was a party to the transaction and that she understood that her separate property was to be used as security for the loan. After trial, the trial court granted judgment in favor of the mortgagee reforming the mortgage. The court of appeal reversed. Reformation is an equitable remedy that is available to correct errors or mistakes in written instruments only when the instruments as written do not reflect the true intent of the parties. The party seeking reformation bears the burden of establishing mutual error and mistake by clear and convincing proof. In this case, the trial court's holding was based upon its finding that the funds received by the husband and wife were used to pay community debts and therefore the note created a community obligation. However, the trial court's factual finding that the wife intended to sign the mortgage was not based on any evidence presented at trial. The wife was present at the loan closing but was informed by the mortgage company's loan officer that only the husband's signature was needed. The loan closing secretary immediately advised the loan officer that the wife's signature

was in fact necessary. The loan officer then protested that he did not want her signature on any documents "for credit reasons". The wife testified that she came to the closing to explain to the closing attorney that she did not want to mortgage her home and she denied that she ever gave her husband permission to use her separate property as security for the loan. She admitted, however, witnessing her husband signing the mortgage and acknowledged that she knew that a mortgage had been taken out on her separate property. The only evidence supporting the trial court's finding that the wife intended to sign the mortgage was the closing secretary's testimony that the wife did not make an active protest when her property was mortgaged. Because there was no evidence other than this silence to support the trial court's factual findings, the trial court was clearly wrong in finding that the wife intended to sign the mortgage. By adding the wife to the mortgage and promissory note, the trial court in effect made a new contract different from the one agreed to by the husband and mortgage company.

b. **Cannata v. Bonner, 2008-36 (La. App. 3d Cir. 5/7/08); 982 So. 2d 968**. Three years after the rendition of a judgment declaring that the lessee under a lease-purchase agreement was entitled to the ownership of certain property that had been the subject of a lease, the former lessor filed a motion to amend the judgment on the basis that only half of the property was intended to be covered by the lease-purchase agreement. The trial court denied the motion as untimely. In a prior unpublished decision, the court of appeal held that the motion to amend was in the nature of an action for reformation prescribed by ten years and, finding that all parties were well aware of the erroneous description, the court ordered the description reformed. No notice of lis pendens was ever filed. While an appeal of the trial court judgment denying the motion to amend was pending, the former lessee, which appeared of record to own the entirety of the property, executed a collateral mortgage encumbering the property in favor of a mortgagee. Shortly after the rendition of the reformation decision by the appellate court, the mortgagee filed an executory process petition, claiming that the mortgage was in default in view of a clause in the mortgage defining a default to include the filing of any legal proceeding to enforce a claim against the property. The former lessor sought to enjoin the executory proceeding with respect to the half of the property that the earlier opinion

had found was excluded from the sale. A permanent injunction was issued by the trial court and affirmed on appeal.

Although the court agreed that the description of the property could not be reformed to the prejudice of an innocent third party, it found that the mortgagee was not an innocent third party since his attorney was the same attorney who was representing the mortgagor (former lessee) in his dispute with the former lessor. An agent's knowledge acquired while the agency exists is notice to his principal. Thus, the mortgagee's counsel's knowledge of the pending lawsuit affecting ownership of the property was imputed to the mortgagee at the time the mortgage was executed in the attorney's office. Citing Richardson Oil v. Herndon, 102 So. 2d 310 (La. 1924) for the proposition that actual notice obviates the need for a notice of lis pendens, the court held that, although a notice of lis pendens "would have definitely put any third party on notice that there was pending litigation affecting title to the property," in this case a notice of lis pendens was unnecessary because the third person in question had actual notice of the pending litigation.

2. Judicial mortgages.

In re Ahern Enterprises, Inc., 507 F. 3d 817 (5th Cir. 2007). In the judgment debtor's Chapter 11 proceedings, a judgment creditor filed a proof of claim alleging the existence of a judicial mortgage in its favor. Upon objection by the debtor, the bankruptcy court reduced the judgment creditor's claim to a general unsecured claim, since there was no unencumbered property to which the judicial mortgage could attach. Subsequently, a Chapter 11 plan was confirmed under which court approval was granted to sell the debtor's manufacturing facility to a bank which held a priming mortgage upon the facility. When the bank later discovered that the judgment creditor's judicial mortgage had never been cancelled, it filed a complaint for declaratory relief in the bankruptcy court, seeking a ruling that the judicial mortgage had been voided. The district court held that the bankruptcy court's order sustaining the debtor's objection voided the judgment creditor's lien and that the bankruptcy court's confirmation of the Chapter 11 plan also voided the lien. Although the Fifth Circuit found the former ruling to be questionable, it affirmed the district court's holding that the confirmation of the Chapter 11 plan voided the judgment creditor's lien. 11 U.S.C. Section 1141(c) provides that, except as otherwise provided in a plan or order confirming a plan, after confirmation of the plan the property dealt with by the plan is free and clear of all claims and

interests of creditors. Following the lead of other circuits, the court held that Section 1141(c) means that confirmation of a Chapter 11 plan voids all liens not preserved by the plan, provided that (i) the plan has been confirmed, (ii) the property subject to the lien is dealt with by the plan, (iii) the lien holder participated in the reorganization; and (iv) the plan does not preserve the lien. Interpreting the second of these requirements, the court held that the "property" that must be dealt with by the plan is the underlying asset, rather than the lien upon it. The participation requirement is satisfied by the filing of a proof of claim. In a footnote, the court warned that its analysis was confined to the effect of a Chapter 11 plan, because different considerations may apply to a Chapter 13 plan.

3. Confusion.

Eakin v. Eakin, 2007-693 (La. App. 3d Cir. 12/19/07); 973 So. 2d 873. In 1997, a husband and wife borrowed money from Hibernia, executing promissory notes as solidary obligors as well as a multiple indebtedness mortgage on their community residence. Two years later, they divorced, though they continued to be co-owners of the residence. In 2001, the former wife obtained and recorded a money judgment against her former husband. Shortly thereafter, the husband sent a letter to Farmers Bank requesting a loan for the purpose of purchasing the Hibernia notes. Around this time he arranged for his second wife, who operated a business known as Hoffman Consulting as a sole proprietorship, to organize it as a limited liability company. In June of 2002, he executed, in his individual name, a promissory note in favor of Farmers Bank and purported to pledge the Hibernia notes as security for the loan. The loan proceeds were wired directly to Hibernia. which endorsed the notes the following month to the order of Hoffman Consulting, LLC and physically delivered them into the possession of Farmers Bank. Later in 2002, the former husband executed a dation en paiement conveying his undivided one-half interest in the property to Hoffman Consulting, LLC, though the dation was not recorded until early 2006. In late 2004, this time clearly acting on behalf of Hoffman Consulting, LLC, the husband contracted a loan from Red River Bank for the purpose of paying off the Farmers Bank note. As security for this new loan, the two Hibernia notes, ostensibly still secured by the residence, were again pledged. In May of 2006, the former wife instituted proceedings to seize the property in satisfaction of her judgment. During the pendency of the seizure, she obtained from Capital One, the successor to Hibernia, a request for cancellation of the Hibernia mortgage on the ground that the Hibernia notes had been

extinguished by payment. Apparently believing that the cancellation was improvidently issued, Capital One later unilaterally filed an instrument purporting to reinstate the Hibernia mortgage, asserting that it had been cancelled in error. Red River Bank then filed an intervention asking for a ranking of the various creditors' claims.

The trial court concluded that the Hibernia notes had been paid by the husband and thus were extinguished by confusion. The court of appeal affirmed. According to the court, the outcome of the case turned upon a determination of whether the former husband had acted on his own behalf or as agent for Hoffman Consulting, LLC when he signed the Farmers Bank note. The second wife never granted her husband any authority to act on behalf of the limited liability company. Moreover, when he signed the Farmers Bank note, he purported to do so only in his individual capacity, and there was no document indicating that he was acting on behalf of a limited liability company. Despite testimony from the husband and second wife that Farmers Bank had refused to make a loan to the husband individually, there was no documentation of that refusal. Hoffman Consulting, LLC never submitted a loan application and did not receive any funds from the Farmers Bank note. With regard to the claim of Hoffman Consulting, LLC that the subsequent endorsement and delivery of the notes to the limited liability company constituted its ratification of the husband's actions in signing the note, the court noted that, while the effects of ratification are retroactive to the date of the ratified obligation under La. Civ. Code art. 1844, the effects of ratification cannot impair the rights of third persons acquired in the interim. In this case, the former wife acquired the benefit of payment by a solidary obligor when her former husband paid the Hibernia notes with funds he personally borrowed from Farmers Bank for that purpose. No subsequent ratification could affect the benefit of the extinguishment of debt that the former wife received as a result of the payment. Finally, the court held the purported dation en paiement to be ineffective, since the beneficiary of the dation, Hoffman Consulting, LLC, did not own the Hibernia notes and the former husband was not otherwise indebted unto it.

B. Bonds for deed.

1. <u>Upton v. Whitehead</u>, 42,314 (La. App. 2d Cir. 8/15/07); 962 So. 2d 1168. Pursuant to a written lease with a two year term, the debtor entered into occupancy of a dwelling in 1993 and paid monthly rentals of $269.70. After the expiration of the term of the lease, the debtor

retained occupancy under a verbal agreement that the plaintiff would sell the property to the defendant and execute a deed of transfer upon receipt of the purchase price of $28,000 payable in monthly installments of $269.70. The defendant continued in possession of the property and continued paying these monthly amounts until December 2003. In 2005, the plaintiff sued for recognition as owner of the property and for an eviction of the defendant. The defendant reconvened, claiming that he had already paid the plaintiff $33,000, which was more than the agreed upon purchase price. The trial court granted summary judgment in favor of the plaintiff, holding that the purported oral agreement to sell immovable property was unenforceable.

In an opinion published at 935 So. 2d 746, the court of appeal reversed. Under La. Civ. Code art. 1839, an oral transfer is valid between the parties when the property has been actually delivered and the transferor recognizes the transfer when interrogated on oath. The trial court was incorrect in finding the absence of an admission under oath of the oral agreement, because the plaintiff's verified petition admitted an oral agreement by him as owner to convey rights in the immovable. With respect to the disagreement as to whether the unpaid balance of the purchase price would bear interest at 8%, as alleged in the verified petition, or 0% as the defendant alleged, the court found that the judicial admission of the contract by the plaintiff controlled and the 8% rate applied. Since the defendant thus had not fully paid out the amounts called for under the verbal agreement, the court then turned to the issue of whether his cessation of payments resulted in dissolution of the contract. The court found that the agreement was not a lease-purchase agreement or a lease with an option to purchase, as the plaintiff contended, but rather was a bond for deed contract governed by La. R.S. 9:2945, which requires an escrow agent to send notice to the bond for deed purchaser that the bond for deed will be canceled unless payment is made within 45 days. Since there was no showing that the plaintiff complied with this notice requirement, summary judgment granted by the trial court was improper.

Following remand, the trial court found that the mandatory notice required by La. R.S. 9:2945(A) had not been given but otherwise took no further action to resolve the dispute. The court of appeal affirmed the finding on the notice issue and ordered the defendants restored to possession. Though the plaintiffs testified on remand that they had notified the defendants each time a payment was late, their own testimony established that they had not complied with the notice

provisions in attempting to cancel the contract. Since the required 45-day notice was not given, the bond for deed contract was not cancelled, and the defendants therefore should not have been dispossessed of the property. Thus, the trial court should have ordered the defendants restored to possession of the property, subject to their becoming current on their payments. In lieu of any damages for wrongful eviction, the defendants were credited, out of the bond for deed payments, for each of the months that they were wrongfully dispossessed following the plaintiff's failure to provide the requisite notice. This credit was to be applied against the amount necessary to bring contractual payments current. On remand, the trial court was specifically instructed to determine the date from which the credit is due, the total amount of the credit due and the amount owed to bring the bond for deed contract current.

2. **H. J. Bergeron, Inc. v. Parker, 2006 CA 1855 (La. App. 1st Cir. 6/8/07); 964 So. 2d 1075.** The parties entered into an agreement entitled "Lease with Option to Purchase" pursuant to which defendant took possession of the immovable property purportedly leased. By its terms, the lease agreement provided for a price of $19,000 at 9%, described the property, provided for $1,200 down payment and provided for monthly payment of $200 for 146 months. The instrument further contained a waiver of redhibition, using the terms "buyer" and "seller". Four years later, the plaintiff filed suit against the defendant for back due rent and for eviction. At a rule for eviction, the trial court ordered the defendant to vacate. The court of appeal reversed on the ground that the document was a bond for deed and not a lease. The trial court erred in concluding that the instrument was not a bond for deed because it was not recorded and because the vendee did not apply for a homestead exemption. Recordation is for protection of the vendee and third parties and is not a requirement for the validity of the contract. Likewise, application for a homestead exemption does not affect the nature of the contract. Since the instrument was a bond for deed contract, the seller was required to give the 45-day mandatory notice provided under La. R. S. 9:2945(A). Judge Pettigrew concurred in order to suggest to the legislature that it revisit the issue of rescinding legislation on bonds for deed. "Louisiana has more adequate alternatives that safeguard both the vendor and vendee's rights under Louisiana law; such as a sale with mortgage. In my humble opinion, the bond for deed concept has led to nothing but confusion in real estate titles and abuse of various parties."

3. **Bayou Fleet Partnership v. Phillip Family, L.L.C., 07-CA-581 (La.**

App. 5th Cir. 2/6/08); 976 So. 2d 794. The parties in a commercial transaction entered into a contract entitled "lease agreement" pursuant to which the lessee made a cash payment of $100,000 and agreed to make monthly payments of $4,500 per month for 60 months commencing March 1, 2000 and ending February 31, 2005 [*sic*]. The lease included an option to purchase. Although the specific financial terms of the agreement are not further elucidated in the opinion, the court observed that part of the monthly payment was to be set aside toward the purchase of the property and the remaining balance was to be amortized pursuant to an attached amortization schedule. In 2004, shortly before the 60-month term was to expire, the lessee informed the lessor that "it intended to fulfill the contract," perceiving the contract as a bond for deed. The lessor responded with a letter characterizing the contract as a lease with an option to purchase. A monthly payment sent by the lessee in February of 2005 was returned unnegotiated. A few months later, the lessor filed a petition for declaratory judgment that the lease agreement expired at the end of the lease term and that the option to purchase lapsed when it was not exercised by the lessee within the term. Summary judgment granted in favor of the lessor was reversed on appeal.

Citing Upton v. Whitehead, supra, and H. J. Bergeron, Inc. v. Parker, supra, the court observed that the label placed on a transaction is not determinative, and a contract may be treated as a bond for deed where the legal requirements for a bond for deed are met, regardless of the characterization given to the transaction by the parties. While the court rejected the lessee's contention that the contract was a contract of adhesion (since both parties were sophisticated business enterprises), it nonetheless found the contract to be ambiguous in view of the lack of clarity as to whether the amortization listed the declining payments for a bond for deed sale or listed the balances that would be owed if the option to purchase were exercised on particular dates. Moreover, the purpose of the $100,000 payment was unclear. Consequently, material issues of fact precluded summary judgment.

4. **McCoy v. Robbins, 42,901 (La. App. 2d Cir. 1/9/08); 974 So. 2d 170.** The parties executed a buy/sell agreement providing for a $500 deposit by the purchaser and a purchase price of $60,000. The agreement did not provide for any payments, nor did the agreement provide for a closing date. After the agreement was executed, the purported buyer entered into occupancy of the property for about five months while remodeling it and paying no rent. During this period, he made several unsuccessful attempts to secure financing. At the end of

the five-month period, the seller agreed to accept $200 per month as rent until the buyer could obtain financing. After three and a half years, the buyer was still not able to do so, and the parties never closed the sale. The seller then delivered a notice to vacate to the buyer, who responded with a petition for injunction to prohibit him from selling the property. The trial court evicted the buyer from the premises, and the court of appeal affirmed. In this case, there was no evidence of any written modification of the original buy/sell agreement providing for installment payments toward the purchase price of the property. Nor was there no evidence of any credit sale or bond for deed arrangement for $200 per month or any other amount per month. The notations of "house payment" on some of the monthly rental payments remitted by the buyer were insufficient to support a finding of a bond for deed transaction, particularly in light of testimony that this notation was placed on the checks out of sympathy for the buyer, who had told her ailing mother that she was purchasing the property rather than renting it. The testimony also revealed that the $200 per month being paid was well below the rental value of the house and at that rate it would take 24 years to pay the purchase price, even if it bore no interest at all. The transaction was nothing more than a month-to-month lease at a rental rate of $200 per month, terminable at any time upon proper notice.

II. Foreclosure/collection procedure.

A. Executory process.

1. Waiver by filing ordinary process suit.

a. **Germania Plantation, Inc. v. Hayward, 2007-2572 (La. App. 1st Cir. 5/2/08); ___ So. 2d ___.** In 2005, the mortgagee filed a petition to enforce payment of a promissory note. Although the note was secured by a mortgage, the suit did not seek to enforce the mortgage, nor did the suit even mention the mortgage. The petition was answered by the mortgagor, but no further steps were thereafter taken in that proceeding. Over a year later, the mortgagee filed an executory process proceeding in the same court seeking enforcement of the mortgage. The mortgagor sought an injunction to arrest the seizure and sale, alleging, among other things, that the filing of the first suit constituted a waiver of the mortgagee's right to use executory process. The trial court granted the injunction, and the court of appeal affirmed but not on somewhat different grounds.

Citing Manuel Tire Co., Inc. v. J.W. Herpin, Inc., 627 So. 2d 526 (La. App. 3d Cir. 1993), the court held that the first suit did not constitute a waiver of subsequent executory process proceedings since the first suit did not seek to enforce a mortgage and therefore was not inconsistent with a subsequent suit to enforce the mortgage by executory process. Nonetheless, the court found the preliminary injunction proper on other grounds. In separate proceedings which were presently on appeal, a judgment had been rendered against the mortgagee in which the promissory note at issue was "disallowed." In view of this judgment, the court found that the mortgagor had made a prima facie showing that it would prevail on the merits of the case, and a preliminary injunction was therefore proper, "as [the mortgagor] stands to lose its historic immovable property."

b. **Marshall Investments Corporation v. Carbone Properties of Audubon, LLC, 2007-1505 (La. App. 4th Cir. 12/5/07); 973 So. 2d 816.** After the owner of Canal Street hotel fell into default of its mortgage loan, the lender brought suit against the guarantors of the loan in federal court. The borrower intervened in the federal suit in order to join as a party defendant. The lender then asserted a compulsory counterclaim on the note and mortgage in the federal proceedings. As that suit progressed without payments being on the loan, the lender commenced executory proceedings in state court. The borrower filed a petition to arrest the seizure and sale on the ground that the lender had forfeited its right to executory process by having proceeding in the federal action via ordinaria. The trial court denied the injunction, and the court of appeal affirmed. Although case law dating back to the early nineteenth century holds that a party who commences foreclosure by ordinary proceedings cannot thereafter convert the proceedings to executory proceedings, the borrower in this case failed to note the jurisprudence prohibiting a federal court from entertaining a petition for executory process. Once the borrower intervened in the federal proceedings, the lender was required by the Federal Rules to assert a counterclaim on the note and mortgage under penalty of being forever barred from doing so by the doctrine of res judicata. The lender's assertion of its claims under the mortgage and note in federal court was involuntary and was in fact provoked only by the borrower's decision to intervene in the federal suit.

2. Unavailability in federal court.

a. See Marshall Investments Corporation v. Carbone Properties of Audubon, LLC, supra.

b. First Bank & Trust v. Swope, 2008 WL 4059860 (E.D. La. 2008). A mortgagee, whose citizenship for diversity purposes was in Louisiana, commenced an executory proceeding against the mortgagors, a husband and wife who at the time of filing of the suit were domiciled in New York and Louisiana, respectively. Subsequently, the mortgagee converted the suit to an ordinary proceeding and added other defendants whose citizenship was diverse from the mortgagee. The defendants then removed the matter to federal court on the basis of diversity jurisdiction, claiming that between the filing of the original executory process petition and the filing of the amended petition converting the suit to ordinary process, the wife had become a citizen of Texas, thereby creating complete diversity. Remand was ordered. The court agreed with the contention of the defendants that a federal court cannot issue a writ of seizure and sale in an executory proceeding because the lack of a requirement of citation and judgment before seizure do not comport with Rules 4(b) and 12(a) of the Federal Rules of Civil Procedure. Thus, the executory process suit was not removable at the time it was filed. However, this does not answer the question of when the citizenship of the parties is tested. Under the 1960 comments to La. C.C.P. art. 2634, the petition in an executory proceeding is governed by the rules applicable to petitions in ordinary proceedings. Thus, the filing of a petition for executory process is treated the same as a filing of an ordinary proceeding under Louisiana law, and all subsequent filings by the plaintiff are amendments to the original petition. Finding no reason to deviate from the rule that diversity jurisdiction is determined at the time suit is filed, the court concluded that the relevant date to determine diversity was when the original executory process petition was filed, even though the suit would not then have been removable with even complete diversity of citizenship.

3. Injunctive relief.

a. Bank One, N.A. v. Payton, 2007-0139 (La. App. 4th Cir. 9/26/07); 968 So. 2d 202. In executory proceedings, the trial

court denied the mortgagor's petition for injunctive relief and claim for damages against the bank. While an appeal of that ruling was pending, the mortgagor approached another attorney about the dispute and was present when this second attorney placed a call to the bank's attorney. During that telephone conversation, it was agreed that the bank's foreclosure sale would be postponed in exchange for a dismissal of the pending appeal. The conversation was confirmed in a letter written by the second attorney to the bank's attorney. In reliance upon the letter, the bank upset the foreclosure sale; however, the appeal was not dismissed, apparently because the mortgagor's original attorney convinced him to go forward with the appeal. In connection with a hearing on the bank's ensuing exception of res judicata, a subpoena was issued to the second attorney. Over objections from the mortgagor, the trial court permitted the second attorney to testify and ultimately granted the exception of res judicata. Though the court of appeal found that the mortgagor did have standing to assert the preclusion of Code of Evidence art. 508 against the issuance of subpoenas to attorneys, it found that the conversations to which the attorney testified were unprotected by the attorney-client privilege not only because they were intended to be communicated to the bank by their very nature but also because there was a claim that the attorney had exceeded his authority, thus in effect alleging a breach of duty by the lawyer which removes the privilege under article 506(C)(3) of the Code of Evidence. On the substantive issue of whether a compromise had been reached, the mortgagor argued that there was no written agreement evidencing the compromise. The court disagreed. In his letter, the mortgagor's second attorney communicated to the bank that he would take whatever steps were necessary to abandon the appeal. The bank accepted this offer of compromise by postponing the sheriff sale. Thus, this was "as mutual and as bilateral of a settlement as one could imagine". There was also ample evidence to support the trial court's conclusion that the terms of the settlement were known to and agreed to by the mortgagor.

b. **<u>Liberty Bank & Trust Company v. Dapremont</u>, 2007-0518 (La. App. 4th Cir. 4/16/08); 984 So. 2d 152.** In an executory process suit, the mortgagor filed a petition to enjoin the sale on the ground that the mortgagee's verified petition did not satisfy the requirements for executory process. A preliminary

injunction was issued and upheld on appeal. Afterward, the mortgagee amended its petition, and a preliminary injunction was again entered by the trial court but this time reversed on appeal. Thereafter, the mortgagor filed a supplemental petition seeking to enjoin the sale and also seeking to recover damages. The mortgagee responded with an exception of res judicata. Subsequently, the mortgagee filed an ex parte motion to dismiss on the ground that it had resolved its dispute through arrangements made with the mortgagor's bankruptcy trustee. The trial court granted the motion and dismissed the case with prejudice, including the reconventional demand. The court of appeal reversed the dismissal of the reconventional demand on the basis of La. C.C.P. art. 1039, which provides that, if an incidental demand has been pleaded prior to motion by plaintiff in the principal action to dismiss the main demand, a subsequent dismissal of the main demand does not affect the incidental demand. The court refused to hear the mortgagee's exception of no right of action, which was predicated upon an assignment by the mortgagor's bankruptcy trustee of any damage claims that the mortgagor may have had against the mortgagee, remanding the case so that the exception could be heard by the trial court.

c. **River Parishes Financial Services, L.L.C. v. Goines, 07-CA-641 (La. App. 5th Cir. 2/6/08); 979 So. 2d 518.** A borrower signed a promissory note to finance a furniture purchase and to consolidate debts. As part of the transaction, she executed a collateral mortgage encumbering her one-half interest in a residence that was part of a community that had existed with her former husband. After default, the creditor obtained a money judgment and, in the enforcement of the judgment, executed a "writ of seizure and sale" on the residence. Her former husband intervened, seeking to enjoin the sale on the ground that he occupied the residence in question and that it was at issue in a pending community property partition suit. The trial court granted a preliminary injunction, which it later refused to dissolve on the creditor's motion. The court of appeal affirmed.

Citing La. C.C.P. art. 2752, which provides for the filing of a petition for injunction in an executory proceeding, the court held that the trial judge had correctly refused to dissolve the injunction because the former husband had shown irreparable harm. "If the injunction is dissolved, the home that is still part of the community would be seized and sold prior to the

partitioning of the community property, causing Mr. Goines to lose his one-half interest in the home."

4. Deficiency judgment.

Estate of Petrovich v. Jules Melancon, Inc., 08-185 (La. App. 5th Cir. 9/30/08); ___ So. 2d ___. The plaintiff had sold several state oyster bed leases to the defendant by an act of credit sale which recognized a vendor's privilege, granted the plaintiff a mortgage and waived the benefit of appraisal. After the defendant defaulted, the plaintiff sought to foreclose by executory process with benefit of appraisal. While the defendant's application for a preliminary injunction against the sale was pending, the state deposited into the registry of the court funds representing payment for its reclamation of two of the mortgaged oyster bed leases. After the defendant was unsuccessful in its attempt to obtain a permanent injunction, the plaintiff purchased the oyster bed leases at foreclosure sale, without benefit of appraisal, for less than $2,000. The plaintiff then filed, by summary process, a petition for deficiency judgment and a motion to withdraw the funds held on deposit in the registry of the court. The defendant excepted to the improper use of summary process and also asserted that the plaintiff was not entitled to a deficiency judgment because it had availed itself of a waiver of appraisement. Concluding that the amount of the deposit was an exchange of collateral, the trial court ruled in favor of the plaintiff. The court of appeal reversed.

The court first summarily rejected the plaintiff's contention that the funds on deposit were "substitute collateral." Remarking simply that the mortgage instruments did not contain any provision for "substitution of collateral," the court of appeal held that the trial court erred in awarding the entire amount of deposit to the plaintiff on that basis. The court then turned to the issue of whether the plaintiff was entitled to a deficiency judgment. Since the plaintiff had chosen to proceed to judicial sale without benefit of appraisal, the Deficiency Judgment Act barred it from a deficiency judgment. The provisions of La. R.S. 13:4108.1, allowing a creditor in commercial transactions to pursue a debtor for the amount of the secured obligation minus the reasonably equivalent value of the property sold, were unavailing to the plaintiff, since there was no evidence that the parties had entered into a debt reduction agreement or agreed to attribute value to the property for this purpose. The court also remarked that the trial court should have sustained the defendant's exception to the improper use of summary

proceedings.

Nonetheless, the court held that these rulings did not end its inquiry. The statute enabling the state to reclaim oyster bed leases provides that the state is to pay to the leaseholder the determined amount of compensation, less any amount due on recorded liens. According to the statute, funds representing the amount of recorded liens are to be paid directly to the lienholder. The trial court should have made a determination of the plaintiff's compensable interest, if any, in the leases in question. Citing an eminent domain case from New Jersey for the proposition that, when there has been a partial taking of mortgaged property, the lienholder cannot enforce his lien against the condemnation award unless the remaining collateral is of insufficient value to satisfy the lien, the court held that the mortgagee must prove impairment of collateral. Thus, the court remanded the matter to the trial court for a determination of whether the parties had an agreement with the state concerning the distribution of proceeds and whether the remaining collateral was of insufficient value to satisfy the mortgage.

B. Collection suits.

1. Summary judgment.

JPMorgan Chase Bank, N.A. v. Jones, 42,396 (La. App. 2d Cir. 12/5/07); 972 So. 2d 1172. In ordinary foreclosure proceedings, the mortgagee moved for summary judgment against the mortgagor on the basis of an affidavit from the mortgagee's officer as to the balance owing on the note. Summary judgment for the unpaid balance of the debt and recognition of a collateral mortgage securing the debt was granted by the trial court and affirmed on appeal. In affirming the judgment, the court rejected contentions by the mortgagor that an issue of material fact resulted from the mortgagee's failure to file into the record a statement of account or an amortization schedule showing a history of his loan. In opposition to the summary judgment motion, the mortgagor could not rest on the mere allegations of his pleadings but had the burden of establishing specific facts showing a genuine issue for trial. Since he failed to offer any specific facts to show that the statement of the mortgagee's officer as to the amount owed was incorrect or unreliable, summary judgment was proper.

2. Reconvention.

JPMorgan Chase Bank v. Smith, 2007-1580 (La. App. 3d Cir.

5/21/08); 984 So. 2d 209. Following Hurricane Katrina, the lender's ordinary process foreclosure proceedings were placed on hold in accordance with a mandatory moratorium issued by Fannie Mae and HUD. As a result of the moratorium, counsel for the lender requested the trial court to continue a hearing on its previously filed motion for summary judgment. Two weeks afterward, the mortgagor filed a reconventional demand against the lender and its counsel asserting wrongful seizure and a Section 1983 civil rights claim. Although the mortgagor originally requested service upon the defendants in reconvention, he requested the sheriff to withhold service before service was effected. A year later, and even though they had not been served, the lender and its attorney filed a motion to dismiss the reconventional demand because service had never been requested. The trial court granted the motion, and the court of appeal affirmed.

The court rejected an argument by the mortgagor that the filing of a motion to dismiss, rather than a declinatory exception, waived the lack of timely service. The motion to dismiss was, in essence, the same as a declinatory exception. The court also rejected the mortgagor's contention that its original request for service was sufficient to comply with La. C.C.P. art. 1201(C). There is no difference procedurally in requesting that service be withheld at the time an action is filed and originally requesting service before requesting that service be withheld prior to the time it is accomplished. With regard to the mortgagor's contention that delivery of a fax copy of the reconventional demand to counsel constituted service, the court observed that La. C.C.P. art. 1314 specifically requires service of incidental demands by the sheriff. Finally, the court rejected an argument that a verbal agreement between counsel to place the proceedings on hold while the mortgagor pursued an insurance claim was a waiver of the requirements of art. 1201(C). Not only does that article require a written waiver by the defendant, there was no evidence in this case of any specific agreement among counsel concerning waiver of the service requirements of the incidental demand.

3. Defenses.

a. Remission

Credit Recoveries, Inc. v. Crow, 43,314 (La. App. 2d Cir. 8/13/08); 989 So. 2d 233. In 1988, the bank made a loan to the debtor due in 90 days. The debtor failed to pay the loan, and, in early September 1994, the bank issued to him an IRS form

1099-C reciting cancellation of debt in the amount of $7,991 on September 8, 1994. The bank apparently at some point also returned three payments made in 1994 to the debtor, with a cover letter terming the attempted payments as "overpayments." On September 30, 1994, the bank sold the note and three dozen others to the plaintiff for $1,500, without recourse, representation or warranty of any kind. The plaintiff then brought suit upon the note. The trial court granted judgment in favor of the defendant on the basis of remission, and the court of appeal affirmed. Under La. Civ. Code art. 1888, a remission of debt may be express or tacit. "Real world consequences" follow actions such as returning proper note payments as overpayments and issuing an IRS form 1099-C with adverse tax impacts for the recipient.

b. Real defenses/holder in due course.

Whittington v. Patriot Homes, Inc., 2008 WL 1736820 (W.D. La.), 65 UCC Rep. Serv. 2d 488. In connection with the purchase of a mobile home, a consumer signed a financing agreement which contained an FTC holder notice. However, the notice language was presented in a box clearly stating that the notice applies to the loan only if an "X" appeared to the left and the lender signed at the right. Although the box did contain an "X", the lender did not sign to the right. The original holder of the financing agreement assigned it to a third party, which then sought to enforce it in the face of defenses asserted by the consumer. The court rejected arguments by the consumer that the contract was ambiguous because of the presence of the "X" but no signature, since the financing agreement plainly required both an "X" and a signature to effect the notice. Moreover, following Capital Bank and Trust Co. v. Lacey, 393 So. 2d 668 (La. 1980) and Jefferson Bank and Trust Co. v. Stamatiou, 384 So. 2d 388 (La. 1980), the court held that the FTC regulation does not automatically impress consumer transactions with the effect of the required FTC notice, nor does the regulation prevent commercial transactions from having the effect of the notice where the notice is inserted in a commercial contract even though not required by the regulation. The court rejected the consumer's argument that the absence of the FTC notice established a lack of good faith on the part of the assignee, who, according to the argument, could thus not satisfy the requirements of a holder in due course. To so hold would

accomplish under the commercial law what the FTC regulation itself cannot accomplish.

C. Sheriff's commission.

Riddle v. Simmons, 42,501 (La. App. 2d Cir. 9/19/07); 965 So. 2d 998. In the execution of two money judgments, the judgment creditor caused a writ of fieri facias to be issued to the sheriff, who served a notice to appoint appraiser and posted notices of seizure. However, before the sheriff's sale was advertised, the judgment creditor accepted from the judgment debtor a voluntary cash payment of $2,300,000, which was sufficient to pay the judgment in full, including the costs paid or advanced to the clerk and sheriff. Upon receipt of the payment, the judgment creditor executed a satisfaction of judgment in favor of the judgment debtor. Sometime afterward, the sheriff contacted the judgment creditor about his three percent commission. During the course of discussions, the sheriff offered to reduce his commission to $34,000, which was half of the three percent rate. Instead of accepting the offer, the judgment creditor filed a motion to fix the sheriff's commission, complaining that the $34,000 commission he was seeking was excessive and unreasonable. The motion also sought to tax the commission as costs payable by the judgment debtor. The sheriff filed a cross-motion for the amount of his full three percent commission. The trial court granted the sheriff's motion, holding also that the judgment creditor, rather than the judgment debtor, was liable for the commission. The court of appeal affirmed.

Under La. R.S. 33:1428(A), the seizing creditor is primarily responsible for the sheriff's commission, but Subsection (C), which was added to the statute in 1996, permits a court to tax the sheriff's fees as costs pursuant to La. C.C.P. art. 1920. In this case, the creditor executed a satisfaction of judgment before moving to have the sheriff's commission taxed as costs. That fact alone is dispositive of the issue of who must pay the commission. In arguing the unreasonableness of the amount of the commission, the judgment creditor attempted to make an analogy to cases allowing the judiciary to determine the reasonableness of fees charged by attorneys, arguing that this same supervision should be given to the fees of sheriffs, who are also officers of the court. Rejecting this contention, the court observed that it is not the fact that attorneys are officers of the court that allows a court to determine the reasonableness of their fees but rather the fact that the power to regulate the practice of law is reposed in the judicial branch. The court also rejected an argument that it had the authority to regulate the amount of the sheriff's commission under La. R.S. 33:1428(A)(7)(b), which allows the court to approve a lower commission negotiated between the sheriff and seizing

creditor. This provision gives the sheriff the sole discretion concerning lowering his fees or commissions. La. R.S. 33:1428(A) clearly provides that, once the sheriff is in the possession of a writ of fieri facias and the plaintiff receives cash pursuant to the judgment such that a sheriff's sale is no longer necessary, the sheriff is nonetheless entitled to his full commission. The sheriff's previous offer to accept half of the commission was nothing more than a compromise offer which was rejected when the creditor filed the motion to fix the sheriff's commission.

D. Nullity of sheriff's sales.

1. American Thrift & Finance Plan, Inc. v. Richardson, 07-CA-640 (La. App. 5th Cir. 1/22/08); 977 So. 2d 105. After executory proceedings were instituted, one of the mortgagors, acting in proper person, filed a petition for injunction alleging that his estranged wife had forged his signature on the mortgage and conspired with the lender to commit fraud in encumbering his separate property. The trial judge set the hearing on the injunction for five days after the scheduled sheriff's sale, with the result that the property was sold before the injunction petition could be heard. Later, the mortgagor filed a petition to annul the sheriff sale, asserting that the sale was null because the mortgagee had failed to comply with the requirements for the use of executory process, since there were variances between the note and multiple indebtedness mortgage and the note sued upon was not paraphed for identification with the mortgage. He also contended that he was legally blind and could not say that his purported signature on the mortgage was genuine. On the basis of discrepancies between the note and mortgage, the trial court nullified the sheriff sale, re-vested title in the mortgagor subject to the mortgage, and ordered to mortgagor to make future payments to the mortgagee according to prescribed payment terms. The judgment was vacated by the court of appeal.

The general rule is that the defenses and procedural objections to an executory proceeding may be asserted only through an injunction to arrest the seizure and sale or by a suspensive appeal. However, Reed v. Meaux, 292 So. 2d 557 (La. 1973) and its progeny hold that a mortgagor who failed to enjoin a sale by executory process or who did not take a suspensive appeal from the order directing executory process may nonetheless institute a direct action to annul the sale on the basis of substantive defects striking at the foundation of the executory proceeding, provided that the property was adjudicated to and remains in the hands of the foreclosing creditor. While the mortgagor in this

case pleaded fraud in his petition for injunction, he did not allege fraud in his petition to annul the sheriff sale; therefore, the trial court erred in nullifying the sale. Even if the mortgagor had properly pleaded fraud, the trial judge abused his discretion by ruling in favor of the mortgagor without first receiving evidence at a contradictory hearing.

2. **Washington Mutual Bank v. Monticello, 2007-1018 (La. App. 3d Cir. 2/6/08); 976 So. 2d 251, writ denied 970 So. 2d 369 (La. 4/25/08).** Following the mortgagor's default on a residential mortgage note, the mortgagee sent default notices to the mortgagor and, when the default went uncured, the mortgagee filed suit to enforce the mortgage and obtained a default judgment against the mortgagor for the balance due on the mortgage. After the appellate delays had run, the mortgagee obtained the issuance of a writ of fieri facias and caused a sheriff's sale to be scheduled. A few days before the sheriff's sale was to occur, the mortgagor sent a partial payment to the mortgagee; however, a long holiday weekend caused processing of the payment to be delayed until the day of the sheriff's sale. Despite the payment, the property was offered at sheriff's sale on the scheduled date and sold to a third person, who refused the mortgagee's request that she relinquish her right to acquire the property. The mortgagee then filed a motion to set aside the sheriff's sale based upon equitable grounds since the payment made by the mortgagor on the eve of the sheriff's sale was sufficient to cure the mortgagor's default. The court denied the motion, concluding that there was no basis under the law on which to set aside the judicial sale. After that judgment was rendered, the mortgagor's major daughter, who was living at the house with the mortgagor's permission, filed a reconventional demand arguing that the mortgagee had been negligent by failing to halt the sale. The mortgagee filed exceptions of no right and no cause of action, asserting that there was no privity of contract between the parties and that it did not owe any duty to her. Sustaining the exception of no right of action, the court of appeal found that the daughter had no right of action, since she did not prove she had any contractual relationship with the mortgagee and was unable to establish that she had any ownership or leasehold interest in the property or even a right to possess the property after foreclosure. The court then considered whether the trial court properly sustained the exception of no cause of action, embarking upon a duty-risk analysis. Even though the suit in question was one for an ordinary process foreclosure, the daughter sought to rely on the rule that executory process has many technical requirements that must be observed scrupulously and that seizure pursuant to executory process is wrongful if the procedure

required by law for an executory proceeding has not been followed. This court brushed aside this argument, holding that, even though the mortgagee in all likelihood owed a duty to the debtors to conduct due diligence to prevent the improper sale of their residence, there is no positive law or jurisprudence extending this duty to permanent occupants of the house who have no legal interest in the property. With respect to the daughter's conclusory argument that "numerous cases also affirm a cause of action under the Louisiana Unfair Trade Practices Act for wrongful foreclosure or seizure," the court noted that, to recover under that statute, a plaintiff must show that he is either a direct consumer or a business competitor. Since the daughter was neither, she lacked standing to assert a claim under that statute.

E. Nullity of judgments.

Spurlock v. JPMorgan Chase Bank, N.A., 2007 WL 27003155 (W.D. La. 2007). In converting an executory foreclosure to ordinary process, the lender added a guarantor as a defendant, achieved service upon the guarantor and obtained a default judgment against all defendants. In aid of execution of the judgment, the lender took the guarantor's judgment debtor examination and sought to garnish his bank account. Five years later, while applying for credit from another bank, the guarantor paid $30,000 in order to satisfy the judgment, which had been discovered by the other bank. The guarantor then filed suit for nullity of the judgment claiming that he was never served with process in the original suit as required by the U.S. Constitution and the Louisiana Code of Civil Procedure; rather he contended that service had been made upon his son, whose name was identical except for the appendage "Jr." The nullity action was removed to federal court and, when the guarantor moved for summary judgment in his favor, the court not only refused to grant his summary judgment but construed the lender's opposition as its own motion for summary judgment, which the court summarily granted in favor of the lender. Under La. C.C.P. art. 2003, a defendant who voluntarily acquiesces in a judgment, or who is present in the parish at the time of its execution and does not attempt to enjoin its enforcement, may not annul the judgment on any of the grounds enumerated in La. C.C.P. art. 2002. As the court held in DLJ of Louisiana #1 v. Green Thumb, Inc., 376 So. 2d 121 (La. 1979), when a judgment debtor pays a judgment "merely to buy time" so as not to subject himself to jeopardy on the auction block, there is no finding of acquiescence; however, courts have found have voluntary acquiescence where a debtor pays a judgment for reasons other than to prevent its execution. In this case, a default judgment was rendered against the guarantor in December of 1999. He submitted to a judgment debtor examination of June of 2000. While that alone does not constitute voluntary acquiescence, it certainly establishes that

he knew of the judgment and was aware that the lender was taking steps to enforce it. When his bank account was garnished, he made no attempt to prevent enforcement of the judgment, but simply opened a new bank account elsewhere. When the guarantor paid the judgment in 2005, he was not simply buying time, and he did not chose to institute the nullity action until February of 2006, seven years after the default judgment was rendered. Thus, the guarantor voluntarily acquiesced in the judgment and was barred from seeking its nullity.

F. Arbitration.

1. Coleman v. Jim Walter Homes, Inc., 2007-1574 (La. App. 3d Cir. 5/7/08); 982 So. 2d 341. In this case involving a redhibition claim arising out of the sale of a "build on your lot" home pursuant to a purchase agreement that contained an arbitration agreement, the court unabashedly began its opinion with an observation that it has "consistently refused to enforce an arbitration agreement, stripping the unsuspecting buyer of his right of access to the courts for redress of a grievance." Under the facts of the case, the lot owners had made several trips to the builder's place of business in Shreveport to discuss selecting a home and negotiating the terms of the sale. During these discussions, the fact that the financing agreement would contain an arbitration was never mentioned, though the house was agreed upon as was its purchase price. At the time of closing, the builder presented the lot owners with a purchase agreement which contained, in capital letters, a reference to an attached arbitration agreement. This arbitration agreement carved out exceptions under certain circumstances in favor of the builder, such as the right to foreclose. Testimony from the builder's officer indicated that the process would have stopped, and no sale would have occurred, if the lot owners had objected to the arbitration agreement. Following its earlier decision in Rodriguez v. Ed's Mobile Homes of Bossier City, Louisiana, 04-1082 (La. App. 3d Cir. 12/8/04); 899 So. 2d 461, and without even a passing mention of the Supreme Court's subsequent decision in Aguillard v. Auction Management Corp., 2004-2804 (La. 6/29/2005); 908 So. 2d 1, the court held that a party cannot unilaterally assign additional consideration for the perfection of a sale once all the terms of the contract of the sale have already been agreed upon. In this case, the lot owners were unaware that relinquishing their right of access to the courts was a condition of the sale when they were negotiating the terms of the contract. The defendant unilaterally added the arbitration clause to the final contract of sale and, had the owners refused to sign the document, the process would have stopped. Thus, the lot owners'

consent to arbitration was vitiated by error.

2. **NCO Portfolio Management, Inc. v. Gougisha, 07-604 (La. App. 5th Cir. 4/29/08); 985 So. 2d 731**. In these consolidated cases, various credit card companies filed petitions to confirm awards that had been rendered against consumer debtors in arbitration proceedings held pursuant to purported arbitration agreements contained in the credit card agreements. Since the debtors did not take action within 90 days of the arbitration awards to have the awards vacated or corrected, as required by the Federal Arbitration Act (9 U.S.C. Section 10), the creditors argued that the court was bound to confirm the awards. Rejecting this contention, the court held that the validity of the arbitration awards rested on whether there were valid arbitration agreements to start with and that the time limit imposed in the Federal Arbitration Act does not come into play unless there is a valid written agreement to arbitrate. The question of the existence of a binding arbitration agreement is reviewed independently by the courts, which are not bound by any finding of the arbitrator that arbitration was proper. The court analogized a motion to confirm an arbitration award to a motion to make a foreign judgment executory: Although a judgment debtor does not have the right to attack the merits of the judgment, he retains the right to contest the jurisdiction of the foreign court or, in the case of an arbitration proceeding, the power of the arbitrator to resolve the dispute. Thus, the creditors had the burden of proving that a valid arbitration agreement existed. In this case, the creditors sought to rely upon "barely legible" copies of credit card agreements and amendments thereto; however, the debtors' names or signatures did not appear anywhere on these documents, nor were supporting documents introduced to show a relationship between these documents and the defendants. There was no evidence that the credit card holders were put on notice of or agreed to the arbitration agreement. The court distinguished Aguillard v. Auction's Management Corp., 04-2804 (La. 6/29/05) 908 So. 2d 1, on the ground that the person against whom arbitration was sought in that case had signed a two-page document containing an arbitration provision and there was nothing in the contract document that "would call into question the validity of the plaintiff's consent to the terms of the agreement as indicated by his signature." The court also held that Buckeye Check Cashing, Inc. v.Cardegna, 546 U.S. 440 (2006) does not preclude judicial review of the validity of the arbitration agreement but actually supports the court's ability to do so, since the ruling in Buckeye was that contract validity is considered by the arbitrator in the first instance "unless the challenge is to the arbitration clause itself."

The dissent argued that, in one of the consolidated cases, the plaintiff had in fact proved the existence of a valid arbitration agreement, particularly in view of the defendant's failure to respond to a request for admission that his credit card agreement had authorized the arbitration process and the defendant's failure even to raise the issue of the existence of an arbitration agreement before appeal. In the other consolidated cases, the lower court had not actually even considered the issue of whether a valid arbitration agreement existed, and the dissent felt that the case should be remanded for a hearing and decision on that issue.

3. **Chase Bank U.S.A. v. Roach, 2007-1172 (La. App. 3d Cir. 3/5/08); 970 So. 2d 1103.** A credit card agreement contained a provision providing for arbitration under the Federal Arbitration Act in the federal judicial district that includes the credit card holder's billing address. When the credit card holder, who lived in Lafayette, defaulted in making her payments, the credit card issuer filed a claim for arbitration. When the card holder did not respond or appear, an award was issued out of the New Orleans office of the arbitrator. The credit card issuer then filed a suit in the city court of Lafayette to confirm the award. The city court dismissed the suit on the ground of improper venue in light of La. R.S. 9:4209, which provides that an arbitration award must be confirmed in the parish where the award was made. The court of appeal reversed. The arbitration clause on its face provided that it was governed by the Federal Arbitration Act, which provides for confirmation of an award in the county where the award is made, the county where the debtor resides or signed the contract, or the county designated in the agreement. However, the Fair Debt Collection Practices Act restricts confirmation to the county in which the contract was signed or the debtor resides. Thus, venue in Lafayette was proper. In a single paragraph, the court then rejected a contention that the award should not be confirmed. Since the defendant raised no challenge to the arbitration, the motion to confirm the arbitration award must be granted.

III. Tax sales/Mennonite claims.

A. **Fransen v. City of New Orleans, 2008-0076 (La. 7/1/08);988 So. 2d 225.** Acting pursuant to its home rule charter, the council of the City of New Orleans enacted an ordinance imposing a 3% penalty on delinquent ad valorem taxes, 1% per month interest, and a 30% penalty if a delinquency remaining after April 1 were referred for to an attorney or a collection agent

for collection. The ordinance also authorized the city to file suit to foreclose its lien securing payment of the tax, rather than resorting to traditional tax sale procedures. Upon discovering that their taxes were delinquent, two taxpayers paid the penalty under protest and then filed suit challenging the constitutionality of the ordinance. Even though the city had not actually resorted to foreclosure suits in these particular cases, the Supreme Court nonetheless held that the plaintiffs had standing because they were faced with the choice of either paying the penalty or having their property subjected to suit. On the merits, the court found the ordinance to be unconstitutional. When acting pursuant to a home rule charter, a municipality's home rule power is limited by the constitution, whether that limitation is express or implied. The provisions of Article VII, Section 25 of the 1974 Constitution implicitly prohibit any collection mechanism other than the tax sale procedure provided for in the constitution itself, in light of the long history of this provision in previous constitutions, the 1974 delegates' rejection of an amendment that might have permitted other means of collection, and a comment by the Law Institute in the projet to the 1974 Constitution. Likewise, the court held that the 30% penalty in the event of referral of delinquent taxes to an attorney for collection was also unconstitutional, since collection by an attorney or collection agency is unnecessary and prohibited. Finally, with respect to the penalties imposed by the ordinance, the constitution provides that the tax collector shall sell the property for the amount of the taxes, interests and costs. The exclusion of penalties from this provision was intentional; thus, the ordinance was unconstitutional to the extent that it imposed a penalty on delinquent ad valorem property taxes on immovables, as those penalties would not be collectible at a tax sale.

B. **Sutter v. Dane Investments, Inc., 2007-1268 (La. App. 4th Cir. 6/4/08); 985 So. 2d 1263.** Even though the act of sale by which it had acquired the property at issue was recorded in January 1992, the property owner, a corporation, was not given notice of the delinquency of unpaid taxes prior to a tax sale held in November 1995. Nearly nine years after the tax sale, the tax sale buyer brought an action to confirm his tax title and, after serving the property owner through the secretary of state, obtained a default judgment. The following year, the property owner filed suit to declare the tax sale a nullity. The trial court rendered judgment in favor of the property owner declaring the tax sale null and vacating the default judgment in favor of the tax sale buyer. The court of appeal affirmed. Since the uncontradicted evidence showed that the property owner did not receive prior notice of the tax sale, the tax sale offended the owner's right to due process under Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983). Moreover, analogizing to the rule of La. Civ. Code art. 2030 that an absolutely null contract cannot be confirmed, the court held that the invalid tax sale could not be confirmed by

a subsequent judgment since the tax sale was an absolute nullity.

C. **3525 North Causeway Blvd. Corp. v. Penney, 07-883 (La. App. 5th Cir. 3/11/08); 982 So. 2d 195.** Though the tax debtor was given notice of an impending tax sale, notice was not given to her mortgagee. In a suit to annul the tax sale, she claimed that the tax sale was an absolute nullity on account of the tax collector's failure to notify the mortgagee. In rejecting her claims, the court observed that La. R.S. 47:2180.1 provides a procedure by which a mortgagee can notify the tax collector of a recorded mortgage and thereby become entitled to notice. The statute specifically provides that a tax sale shall not be annulled due to lack of notice to the mortgagee. Following its own decision in the case of Hodges Ward Purrington Properties v. Lee, 601 So. 2d 358 (La. App. 5th Cir. 1992), while recognizing that other circuits had rendered contrary decisions, the court held that a tax sale cannot be annulled on account of failure of notice to the mortgagee. Moreover, with respect to the tax debtor's contention that this interpretation of the statute makes it unconstitutional, the court observed that an attack upon the constitutionality of a statute must first be presented in the trial court. Since the tax debtor failed to plead the unconstitutionality of the statute before the trial court and failed to serve the attorney general, the issue of constitutionality was not before the court.

IV. Lender liability.

A. Credit Agreement Statute.

1. **Davis v. Delta Bank, 42,529 (La. App. 2d Cir. 11/7/07); 968 So. 2d 1254, writ denied, 2007-2473 (La. 2/22/08); 976 So. 2d 1276.** In response to the plaintiff's claim that the defendant bank had breached an agreement to lend $50,000, the bank filed an exception of no cause of action, urging that the plaintiff's claims were barred by the Louisiana Credit Agreement Statute since there was no written contract to lend money to the plaintiff. The exception was granted, even though the plaintiff had filed a supplemental petition shortly before the hearing on the exception contending that he had entered into a written loan agreement which was in the possession of the bank and that the bank had attempted to hide evidence of the loan agreement in order to punish him for orchestrating protest marches against lending institutions. The plaintiff then took a suspensive appeal from the granting of the exception of no cause of action. However, the appeal was ultimately dismissed because of the plaintiff's failure to pay costs on appeal. About the same time as the dismissal, the defendant bank filed a motion for summary judgment claiming that the plaintiff had not provided

proof of a written agreement to lend money. The motion was supported by an affidavit from the bank officer that the only written documents in the bank's file were a loan application and an adverse action notice. Over objections by the plaintiff that the trial court had been divested of jurisdiction by the appeal, the trial court granted the bank's motion for summary judgment, and the court of appeal affirmed. The pendency of the prior appeal did not preclude summary judgment both because the prior appeal had already been dismissed by the time of the hearing on the motion for summary judgment and because the prior appeal divested the trial court only of jurisdiction concerning issues which were the subject of the appeal. Moreover, summary judgment was proper, since the affidavit submitted by the bank shifted to the plaintiff the burden of proving the existence of a written agreement. In support of its holding on the merits, the court of appeal cited its earlier opinion in Fleming Irrigation, Inc. v. Pioneer Bank and Trust, 27, 262 (La. App. 2d Cir. 8/23/95); 661 So. 2d 1035 for the proposition that an application to borrow money does not constitute a written credit agreement.

2. **Keenan v. Donaldson, Lufkin and Jenrette, Inc., 529 F. 3d 569 (5th Cir. 2008)**. When a corporate borrower fell into technical default of its loans from a banking syndicate, the borrower's founder and chief executive officer made a personal, unsecured loan of £6.6 million to the borrower, which used the proceeds of this personal loan to cure the alleged default and also to supply additional working capital. This personal loan was apparently made pursuant to an oral agreement between the chief executive officer and the banking syndicate to the effect that, if the loan were made, the banking syndicate would waive the technical default of the existing credit facility, develop a long term credit facility and provide further funding to the borrower until its liquidity crisis had been resolved. The banking syndicate did in fact waive the existing technical default, but refused to extend additional credit to the borrower, with the result that the borrower was forced into receivership in the United Kingdom. In the ensuing liquidation process, the banking syndicate was paid in full, but only a fraction of the chief executive officer's personal loan was repaid. The chief executive officer then brought suit against the banking syndicate alleging that it had failed to inform him that it had already decided not to extend further credit. The banking syndicate moved to dismiss on the basis of the Louisiana Credit Agreement Statute, which requires that "credit agreements" be in writing and defines a "credit agreement" as an agreement to lend or forbear repayment of money or to otherwise extend credit or to make any other financial accommodation. Under the statute, a "debtor" is defined to include any person who obtains

credit or seeks a credit agreement with a creditor or who owes money to a creditor. The district court treated the motion as one for summary judgment, which it granted in the favor of the banking syndicate, finding that, even though the chief executive officer had no debtor-creditor relationship with the banking syndicate as those terms are commonly understood, he did enter into a "credit agreement" as defined in the statute, and was therefore a statutory "debtor." The court of appeals reversed.

According to the court, the case presented a conceptual clash between common understandings of the terms "creditor" and "debtor" and the statutory definitions of those terms. The court looked first to Louisiana caselaw articulating the origin and purpose of the statute. As explained by the Louisiana Supreme Court in Whitney National Bank v. Rockwell, 661 So. 2d 1325 (La. 1995), Jesco Construction Corp. v. Nationsbank Corp., 830 So. 2d 989 (La. 2002) and King v. Parish National Bank, 885 So. 2d 540 (La. 2004), the statute was intended as a "statute of frauds" for the credit industry, designed to have the "primary purpose" of limiting lender liability lawsuits by preventing borrowers from bringing claims against lenders based upon oral agreements. Even though the court in Jesco used the term "primary purpose," it did not suggest any alternative purposes. In light of this understanding of the purpose of the statute, an application in this case of the statute to bar the claims of the chief executive officer, who is not a borrower in any sense and who does not bring a lender liability suit, would be inconsistent with the primary purpose of the statute.

The court then reviewed jurisprudence of other states having similar credit agreement statutes, but, even though some of those decisions had applied the statute to disputes between two creditors, the court found those decisions unpersuasive. According to the court, notwithstanding similarities in the language used in the statutes and the fact that they were enacted at approximately the same time, "each legislature may not have decided to make the same array of adjustments to business as usual in its respective state." Even though the banking syndicate's argument comports with the literal statutory definitions of the statute, "a literal fit is not always enough." The Louisiana Supreme Court's observations of the primary purpose of the statute, when combined with the directive of La. Civ. Code art. 11 to the effect that statutory words are to be construed in keeping with "their generally prevailing meaning," leaves the court to interpret the statute with the meaning that best conforms to the purpose of the law. This interpretation avoids any

bold departure from what the state courts of Louisiana has so far declared. The court was unwilling to "take the statute in such an uncertain direction, unmapped by either the state's legislature or judiciary." The defendants' construction of the definitions used in the statute "would give an unusual meaning to common terms, a meaning that is beyond the recognized statutory purpose and which modifies what has so far been established under the statute."

B. Fraud.

Martin v. JKD Investments, LLC, 42,196 (La. App. 2d Cir. 6/20/07); 961 So. 2d 575. Shortly after obtaining a residential construction loan from the defendant bank, the plaintiff acquired additional land by donation from his sister. On the same day as this donation, the plaintiff executed a document, which he did not read, by which he conveyed the mineral rights to the entire property to a limited liability company in exchange for $3,000. Several years later, the plaintiff discovered that the limited liability company was owned by his loan officer. He then brought suit against the loan officer and the bank seeking to have the mineral deed rescinded and damages awarded. The trial court granted the bank's motion for summary judgment, and the court of appeal affirmed. The plaintiff's contention that the mineral deed was not in fact executed in the presence of the purported witnesses and notary did not raise a material issue of fact, since a transfer of immovable property may be accomplished by authentic act or by act under private signature. Because the plaintiff acknowledged that the signature on the mineral deed was his, the absence of witnesses or a notary public were immaterial. Secondly, the plaintiff's admission that he signed the mineral deed without reading it "effectively quashes his fraud claim." Fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience or special skill. By showing that the plaintiff failed to ascertain what he was signing when he could easily have read the document, the defendants met their burden proving the lack of factual support for fraud.

C. Detrimental reliance.

1. **Doss v. Cuevas, 2007-1803 (La. App. 1st Cir. 3/26/08); 985 So. 2d 740.** At the time of their purchase of a home in Slidell in 2005, the homeowners determined that the property was located in a flood zone and contacted an agent to obtain flood insurance. A few months afterward, the property was damaged by Hurricane Katrina, and the homeowners then learned that the application for flood insurance had

never been processed and that the property was thus not covered by flood insurance. The homeowners brought suit against the agent for failure to process the application correctly, and also named their mortgage lender as a defendant, on the ground that the lender had failed to require or "force place" flood insurance on the property. Apparently, the reason that the lender had not required flood insurance was that the party it had engaged to issue a flood certification had improperly determined that the property was not in a special flood zone. After the lender's attempt to remove the matter to federal court on the basis of federal question jurisdiction under the National Flood Insurance Act resulted in a remand, the lender moved for summary judgment, which was granted by the trial court and affirmed on appeal. The plaintiffs primary theory was one of detrimental reliance, in that the lender had indicated on two "good faith estimates" that flood insurance would be a requirement of the loan. Finding this argument to be without merit, the court observed that the mortgage contract clearly placed the responsibility upon the homeowners for obtaining insurance on the property and explicitly stated that the lender was under no obligation to purchase insurance of any kind. Though the homeowners discussed the necessity of flood insurance with a representative of the lender, no evidence was offered to demonstrate that this representative suggested or agreed that the lender would obtain flood insurance. The homeowners thus failed to meet even the first element of detrimental reliance, i.e., that the defendant made any representation by conduct or word.

2. **Boyte v. Wooten, supra**.

V. Deposit account liability.

A. Peak Performance Physical Therapy & Fitness, L.L.C. v. Hibernia Corporation, 2007-2206 (La. App. 1st Cir. 6/06/08); ___ So. 2d ___, 2008 WL 2330192, 65 UCC Rep. Serv. 2d 1002. The bookkeeper of a professional physical therapy firm embezzled $182,000 over the course of more than three years by depositing checks made payable to the firm or its individual therapist members into her joint checking account at Hibernia. A large number of the checks at issue were deposited more than one year prior to the time the firm filed suit. The trial court denied the bank's exception of prescription as to those checks and rendered summary judgment in favor of the plaintiff for the full amount of all checks at issue. Reversing both rulings, the court of appeal held the suit prescribed as to all checks deposited more than one year before suit was filed and remanded for further proceedings on the checks that were embezzled less than one year before suit.

When a defendant establishes a prima facie case of prescription, as the bank did in this case with respect to all checks filed more than one year prior to suit, the burden shifts to the plaintiff to prove that its claim is not prescribed. To carry its burden of proof in this case, the plaintiff relied upon the doctrine of *contra non valentem*, which had been applied to check conversion claims in several cases including Lacombe v. Bank One Corp., 06-1374 (La. App. 3d Cir. 3/7/07); 953 So. 2d 161, writ denied 07-0746 (La. 6/1/07), 957 So. 2d 177. However, Lacombe and similar cases simply assumed, without analysis, that the doctrine was properly applicable. One of the goals of the Uniform Commercial Code is to promote interjurisdictional uniformity. Thus, the court felt persuaded by the holding of the Tennessee Supreme Court in Pero's Steak Spaghetti House v. Lee, 90 S.W. 3d 614 (Tenn. 2006), which had held that the "discovery rule", a common law equivalent to one component of Louisiana's doctrine of *contra non valentem*, was inapplicable, since the "vast majority of courts hold that in the absence of fraudulent concealment on the part of the defendant asserting the statute of limitations defense, the discovery rule does not apply to toll the statute of limitations on an action for conversion of negotiable instruments." The court further observed that application of the doctrine would circumvent the express policy of the UCC of allowing parties to determine their liability without resort to expensive and delaying litigation. Thus, the court held that the doctrine of *contra non valentem* applies to check conversion cases only in instances in which there is fraudulent concealment by the defendant asserting prescription.

Turning to the merits of the summary judgment motion with respect to the unprescribed checks, the court held that the evidence established a prima facie case of fault on the part of the bank since its employees consistently failed to follow the bank's own internal procedures on verification of the adequacy of endorsements. However, genuine issues of material fact existed on the issue of whether the employer could be faulted for entrusting a single staff member with the responsibility of handling its billing and reimbursement data and placing that employee in a position of unchecked control over its accounts receivable. Thus, genuine issues of material fact as to the adequacy of the plaintiff's managerial oversight of the employee and the degree and extent of the parties' respective comparative fault precluded summary judgment.

B. **Dean Classic Cars, L.L.C. v. Fidelity Bank, 2007 - 0935 (La. App. 1st Cir. 12/21/07); 978 So. 2d 393, 64 UCC Rep. Serv. 2d 925.** The plaintiff, an antique car dealer, brought suit against the bank under La. R.S. 10:3-420 for conversion of three checks which an employee of an affiliated company (a former state trooper) had fraudulently endorsed on behalf of the named payee and then deposited into his personal checking account at the defendant bank.

In allowing the deposit, the bank had simply taken at face value the employee's representation that he had the authority to make the endorsements, which the bank did nothing to verify. The bank defended on the ground that the employee had responsibility for the checks under La. R.S. 10:3-405 and that the employer should therefore bear the risk of loss. The bank also asserted, on the basis of La. R.S. 10:3-406(a), that the plaintiff's conduct had substantially contributed to the loss. The testimony at trial reflected that the employee did not have check signing authority for the plaintiff, did not have the authority to prepare deposit slips, did not have the authority to deposit corporate checks into his personal checking account, did not have authority to make endorsements and was not an authorized signatory on any of the plaintiff's bank accounts. The bank officer admitted at trial that it was a "total violation of acceptable bank practice" for the three corporate checks to be deposited into the employee's personal account without an officer's approval or without verification of the endorsements. The plaintiff also introduced testimony from a banking expert that the bank had failed to follow general banking practices. The bank attempted to rely upon an accounting expert for opinions that the employer should have had better internal controls with respect to receipt of mail, recording incoming checks, making restrictive endorsements on all checks that are received and following up to ensure that deposits were made. The trial court held in favor of the employer, and the court of appeal affirmed.

Under La. R.S. 10:3-420, an instrument is converted when it is taken by transfer from a person not entitled to enforce the instrument. The bank's defense of "responsible employee" under Section 3-405 was misplaced, since the evidence reflected that the employee did not have authority to process any received checks and his duties were limited simply to transporting checks to the bank. Moreover, the bank officer's admission of the bank's failure to exercise ordinary care precluded the bank from trying to shift full responsibility for the loss to the plaintiffs. The bank's expert testimony concerning internal controls was unpersuasive, because the expert based his opinion on what large car dealerships should do rather than private vehicle collectors having small inventory. Finally, according to the court, regardless of whether the plaintiff could have employed more rigorous internal auditing controls, the bank "simply cannot shift responsibility for this loss....since it completely failed to exercise ordinary care."

C. <u>Schulingkamp v. Carter</u>, 2007-1372 (La. App. 1st Cir. 2/20/08); 984 So. 2d 795. The plaintiff endorsed a check payable to her order with the words "for deposit only". She then gave the check to a Mr. Carter, who deposited the check into his personal account. The plaintiff brought a timely suit against Mr. Carter, who could not be served even after the appointment of a private process server. Three years later, the plaintiff filed an amended petition

adding the depositary bank as a defendant. The trial court granted summary judgment in favor of the plaintiff, and the court of appeal affirmed. The bank was liable under La. R.S. 10:3-206(c), which provides that a depositary bank converts an instrument that is endorsed with the words "for deposit" unless the amount paid by the bank with respect to the instrument is received by the endorser or applied consistently with the endorsement. The court rejected the bank's contention that the comparative fault principles of La. Civ. Code art. 2323 should apply, since the conversion claim was governed by Louisiana's Commercial Laws, which are designed to promote uniformity of the law in commercial transactions. (The opinion does not mention the comparative fault principles of La. R.S. 10:3-406). Even though the court refused to apply the Civil Code rules on comparative fault, in ruling on the issue of the date from which the bank owed judicial interest, it nonetheless observed that La. R.S. 10:1-103(b) provides that the other laws of Louisiana apply unless displaced by the particular provisions of Title 10. Thus, the court looked to the provisions of the Civil Code dealing with solidary liability to find that both the bank and Mr. Carter were solidarily bound. Accordingly, the court then applied the rule of Burton v. Foret, 498 So. 2d 706 (La. 1986) that solidary obligors are bound for the entire debt, including interest from the date on which the plaintiff makes judicial demand on the first of the obligors. The court rejected the bank's contention that the absence of evidence establishing Mr. Carter's knowledge or intent precluded summary judgment, since the bank pointed to no basis on which its statutorily-imposed liability would be spared.

Component Parts

Act 632 is a Louisiana State Law Institute-sponsored revision of Art. 466 of the Louisiana Civil Code. Under the revised article, as under prior law, things that cannot be removed from a building or other construction without substantial damage to themselves or to the immovable continue to be its component parts. In addition, under the revised article, things that are attached to a building and that serve to complete a building of the same general type, regardless of its specific use, are also its component parts. In the case of other constructions, things that are attached to the construction and that serve its principal use are also component parts.

Farm Products

Senate Concurrent Resolution 122 requests the Louisiana State Law Institute to study competing claims and security interests involving farm products.

Mandate/Unauthorized Representatives

Acts 367 and 361 amend La. R.S. 9:5682 to shorten from ten to five years the prescriptive period for bringing an action to set aside a sale, transfer, lease, mortgage, encumbrance or other document by an unauthorized person acting on behalf of a legal entity or purporting to act pursuant to a power of attorney (Note: Because of transitional rules contained in the Act, the statute will not actually have preclusive effect until 2013).

Mobile Homes; Immobilization

Act 299 requires that a certified copy of an act of immobilization of a manufactured home be filed with the Department of Public Safety and Corrections, though the failure to do so does not impair the validity or enforceability of the act of immobilization.

Mortgage registry

Act 651 amends La. R.S. 9:5168 to provide that the holder of a paraphed note may file a lost note affidavit in order to obtain the cancellation of a mortgage securing the note. If no note is paraphed for identification with the mortgage, or if the note, whether paraphed or not, was last held by a licensed financial institution, then the lost note affidavit procedure is not necessary, because existing law does not require surrender of the mortgage note. Until this enactment, there was no mechanism in the

law permitting a private holder of a paraphed note to cancel it when the note had been lost.

House Concurrent Resolution 57 requests the Louisiana State Law Institute to further review the laws on registry, particularly those involving cancellation of mortgage and privilege inscriptions.

Act 848 amends La. R.S. 9:5685 to impose a ten-year prescriptive period on the effect of recordation of all liens and privileges in favor of the state or any political subdivision. The state is not permitted to reinscribe any lien or privilege in its favor, but political subdivisions may do so.

Motor Vehicles

Act 689 requires the Department of Public Safety and Corrections to develop and implement a computer system permitting the electronic recording of information concerning motor vehicle security interests, with the system to be functional on a state-wide basis no later than January 1, 2010.

Act 236 amends La. R.S. 6:96.920(D) of the Motor Vehicle Sales Finance Act to impose a requirement that the holder of a retail installment contract covering a motor vehicle terminate the security interest and return the title to the consumer no later than the 14th day after the date upon which payment in full is received.

Residential mortgage loans/Certificates of occupancy

Act 375 enacts La. R.S. 40:1730.23(E) to require originators of residential mortgage loans for the purchase of new residential property to file a copy of the certificate of occupancy in the conveyance records; however the lender's failure to do so does not invalidate the legal effects of any transaction related to the property.

Sheriff's sales

Act 828 amends La. C.C.P. art. 2293 to provide for the cancellation of a sheriff's notice of seizure by making a request and paying all costs due to the clerk and sheriff. The act also provides for a 10-year reinscription period from the date of filing of the notice of seizure.

Act 895 amends La. R.S. 13:4366 to raise the fee of appraisers appointed by the sheriff to appraise movable property from $25 to not more than $50.

Act 339 allows cancellation from a mortgage certificate of the inscription of any legal or judicial mortgage upon filing by a title underwriter of an affidavit that the person

named in the mortgage is not the same person who owns the property being offered at sheriff's sale.

Among other things, Act 681 amends La. R.S. 9:3198 to require that the sheriff notify bidders present at a sheriff's sale if the property is listed as contaminated on the DEQ's website. Law enforcement agencies are now required to notify the sheriff and DEQ upon discovering a methamphetamine-contaminated home so that it can be listed on the DEQ website. The act also requires the seller of residential property to include with the property disclosure document a statement as to whether the property was used as a methamphetamine lab.

Act 623 allows sheriff's sales to be held at any courthouse annex if located in the same parish as the courthouse but not on the opposite side of any navigable river.

Tax Sales

Act 319 is a comprehensive Law Institute-sponsored revision of the law of tax sales and adjudications. The legislation introduces the concept of "tax sale title" and provides a post-sale mechanism by which taxing authorities or private persons can give notice to tax debtors and other interested persons in order to cure deficient pre-sale notices. The statute is an effort to make tax titles merchantable, thereby returning to commerce property sold at tax sale.

Venue

Act 357 provides that an action to enforce a promissory note may be brought in the parish where the promissory note was executed or in the parish of domicile of the debtor, enacting La. C.C.P. art. 74.4.

Vessel Titling

House Concurrent Resolution 25 suspends the provisions of the previously enacted vessel titling act until 60 days after adjournment of the 2009 regular legislative session in order to allow the Department of Wildlife and Fisheries further time to develop the titling system.

Act 138 amends La. R.S. 52:52 in order to provide that, notwithstanding the state's newly created vessel title law, a federal tax lien on titled vessels need be filed only with the clerk of court of any parish in order to affect titled vessels, without the need of separate registry in the vessel registry.