

CHAPTER 2

**STRATEGIES FOR
REPRESENTING
THE LOUISIANA CONSUMER**

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About The Author

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This chapter is dedicated to the memory of the late Patrick Breeden, 1932-2012, who was a trail-blazing consumer rights attorney in Louisiana for more than 40 years. Pat was a great friend to legal aid attorneys and a tireless advocate for consumers. His efforts to mentor and support legal aid and consumer rights attorneys were exceptional and generous. Pat, you did so much to mentor me. I am so honored to have had the opportunity to co-counsel with you and to have stood in court with you in advocating for our clients. We will all miss your friendship, advocacy, leadership and extraordinary knowledge of consumer law.

1. INTRODUCTION

Three strategies for representing a consumer are covered in this practice manual:

- “offense” or affirmative actions;
- “defense” or transaction avoidance; and
- exemption planning

Debt workout and bankruptcy should also be considered if necessary. This Chapter will only focus on Louisiana consumers’ non-bankruptcy strategies.

2. “OFFENSE” OR AFFIRMATIVE ACTIONS

2.1. HOW TO ANALYZE A CONSUMER CASE

Many statutes create affirmative consumer claims. Raise any claims the consumer has against the seller, creditor or collector in response to debt collection efforts. The best defense is a good offense. Assertion of an affirmative claim provides excellent leverage to settle a case or totally offset the alleged debt. The consumer’s claim, particularly if statutory attorney fees are available, may even exceed the creditor’s claim.

There are at least 6 separate stages of any consumer transaction to analyze for claims that a consumer may raise relative to a debt. These are the sale, the warranty, the credit terms, performance, debt collection tactics and seizure. Below is a brief overview of these 6 stages:

1. The original sale of goods or services

The major source of consumer claims for sale abuses or misrepresentations will be the Unfair Trade Practices and Consumer Protection Law (“UTPL”), La. R.S. 51: 1401 *et seq.* Use a “smell” test. Anything that you find outrageous, unfair, unjust or fraudulent is likely to constitute a viable UTP claim. May the contract be rescinded or cancelled? For example, door to door sales and transactions involving a non-purchase money security interest in the consumer’s primary residence may be subject to cancellation.

2. Subsequent warranty performance

Defective goods and services may provide a consumer claim. Do not assume that an “as is” or “warranty waiver” clause in the contract prevents a consumer from suing the creditor. Such waivers are often invalid. At this stage, the major consumer protections will be found in UTPL, redhibition, lemon law, Magnuson Moss Warranty Act and warranties of workmanlike performance under La. Civ. Code art. 2762 and 2769.

3. The credit terms

Again, anything you find outrageous, unfair or deceptive about the solicitation or terms of the credit agreement may be actionable. Also, technical or seemingly minor violations of statutory protections may be actionable. The federal Truth in Lending Act, Equal Credit Opportunity Act, Credit Repair Act, state usury and Consumer Credit Laws may apply

4. Creditor's subsequent performance

There may be claims based on a creditor's conduct in servicing a loan. The federal Real Estate Settlement Procedures Act imposes enforceable requirements on servicers.¹

5. Debt collection tactics

Unlawful collection practices are rampant and are often actionable.² The National Consumer Law Center's Fair Debt Collection manual has a helpful interview and case analysis checklists for identifying unlawful collection practices.³ Unlawful collection tactics expose the collector, its attorney or the creditor to statutory and actual damages under the federal Fair Debt Collection Practices Act, the Louisiana unfair trade practices act or Louisiana Civil Code art. 2315.

6. Enforcement of court order or security interest

A creditor's seizure of wages or property may violate the law. If so, the consumer may have a damage claim.

2.2 THE UNFAIR TRADE PRACTICES LAW

2.2.1. Scope

The Louisiana Unfair Trades Practices and Consumer Protection Law ("UTPL") makes "unfair or deceptive acts or practices in the conduct of any trade or commerce" unlawful.⁴ The UTPL broadly defines a "consumer transaction" to include any transaction involving trade or commerce to a natural person, the subject of which is primarily intended for personal, family or household use.⁵

The definition of an unfair trade practice is broadly and subjectively stated. What constitutes an unfair trade practice is determined on a case by case basis.⁶ The UTPL was modeled on the Federal Trade Commission Act, 15 U.S.C. § 45.⁷ Federal jurisprudence under the FTC Act is incorporated into the UTPL.⁸ Interpretations of the FTC Act should be considered to adjudge the scope and applicability of the UTPL.⁹ Also, court decisions on unfair trade practices laws of other states, identical or similar to Louisiana laws, are persuasive authorities.¹⁰

A mere breach of a contract, without more, is not an unfair or deceptive trade practice.¹¹ However, misrepresentation, deceit or fraud in a contract may be an

¹ See National Consumer Law Center, *Repossessions and Foreclosures* (7th ed. 2010).

² See National Consumer Law Center, *Fair Debt Collection* (7th ed. 2011).

³ National Consumer Law Center, *Fair Debt Collection* (7th ed. 2011), vol. 2, Appx. F1-F3.

⁴ La. R.S. 51: 1405 (A).

⁵ La. R.S. 51: 1402 (3).

⁶ *Risk Management Services, L.L.C. v. Moss*, 40 So.3d 176, 184-85 (5th Cir. 2010) *writ denied* 44 So.3d 683 (La. 2010); *Marshall v. Citicorp Mortgage, Inc.*, 601 So.2d 669, 670 (La. App. 5 Cir. 1992).

⁷ *Cheremie Services, Inc. v. Shell Deepwater Production, Inc.*, 35 So.3d 1053, 1056, n. 4 (La. 2010).

⁸ The Federal Trade Commission Act does not create a private cause of action for FTC Act violations. However, a violation of the FTC Act will often be considered a violation of state unfair trade practices laws which does provide private remedies to injured consumers.

⁹ *State ex rel Guste v. Orkin Exterminating Co., Inc.*, 528 So.2d 198, 200-01 (La. App. 4 Cir. 1988), *writ denied* 533 So.2d 18 (La. 1988); *Moore v. Goodyear Tire & Rubber Co.*, 364 So.2d 630, 633 (La. App. 2 Cir. 1978); *Capital Home Preservation Co. v. Perryman Consultants, Inc.* 47 So.3d 408 (La. App. 1 Cir. 2009) *writ denied* 27 So.3d 856 (La. 2010).

¹⁰ See *Brooks v. Transamerica Financial Advisors*, 57 So.3d 1153 (La. App. 5 Cir. 2011); *Fontenot v. New York Life Insurance Co.*, 357 So.2d 1185 (La. App. 3 Cir. 1978), *writ denied* 359 So.2d 622 (La. 1978).

¹¹ *State ex rel Guste v. Orkin Exterminating Co., Inc.*, 528 So.2d 198, 200-01 (La. App. 4 Cir. 1988), *writ denied* 533 So.2d 18 (La. 1988).

unfair or deceptive trade practice, as well as unfair or unconscionable contract terms.¹² Also, intentional or systematic breaches of contracts may violate unfair trade practice laws.¹³

2.2.2. Exempted persons or conduct

Certain banks, insurance companies and utilities are exempt from UTPL.¹⁴ With one exception, the exemption applies to these entities' activities that are subject to the regulator's jurisdiction. Thus, a UTPL claim against an insurer is not barred if the act or practice is not within the Insurance Commissioner's jurisdiction.¹⁵ The broader exemption is for certain banks or lenders: "Any federally insured financial institution, its subsidiaries, and affiliates or any licensee of the Office of Financial Institutions, its subsidiaries, and affiliates or actions" are exempted. This is broader than the exemption that was in effect until late 2006.¹⁶ Conduct which complies with section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) and rules promulgated thereunder is also exempt.¹⁷

2.2.3. Determine whether there is a UTPL claim

A right of action to enforce the UTPL is not limited to consumers and business competitors. La. R.S. 51: 1405(A) grants a right of action to any person who has suffered any ascertainable loss from a UTPL violation.¹⁸

You should look for a UTPL cause of action in consumer problems. Many consumer and credit transactions are covered by the unfair trade practice laws: automobile repair, warranty, sale, unfair contract clauses, home improvement scams, door-to-door sales, mail order, real estate sales/practices, collection, repossession, foreclosure, abuse of process, credit terms, credit card practices, mortgage assistance scams, landlord-tenant abuses, mobile home parks, nursing homes, attorney misconduct, etc.

Look for a potential UTPL violation in all aspects of the consumer transaction: advertising, sales presentation, consummation of the sale, credit terms, seller's performance and subsequent debt collection practices.

2.2.4. Practice tip: contract and tort defenses do not apply to deceptive trade practice claims

Waiver, ratification, the parol evidence rule, contractual limitations on liabilities, remedies and tort defenses will not defeat UTPL claims since they are based on misrepresentation or deceit and not on the contract. This fact makes the UTPL claim a powerful remedy even in the face of seemingly dispositive contract clauses.

¹² See e.g., *Laurents v. Louisiana Mobile Homes, Inc.*, 689 So.2d 536 (La. App. 3 Cir. 1997); *Marshall v. Citicorp Mortgage, Inc.*, 601 So.2d 669 (La. App. 5 Cir. 1992).

¹³ See e.g., *Orkin Exterminating Co., Inc. v. Federal Trade Commission*, 849 F.2d 1354 (11th Cir. 1988).

¹⁴ La. R.S. 51: 1406; *Bank of New York v. Parnell*, 32 So.3d 877, 887 (La. App. 5 Cir. 2010), *rev'd in part* 56 So.3d 160 (La. 2010).

¹⁵ *Lamarque v. Massachusetts Indem. & Life Ins.*, 794 F.2d 197 (5th Cir. 1986).

¹⁶ *Compare Levine v. First National Bank of Commerce*, 917 So.2d 1235 (La. App. 5 Cir. 2006), *aff'd in part, rev'd in part*, 948 So.2d 1051 (La. 2006); *Bank of New York v. Parnell*, 32 So.3d 877, 887 (La. App. 5 Cir. 2010), *rev'd in part* 56 So.3d 160 (La. 2010) *with Bank of New Orleans & Trust Co. v. Phillips*, 415 So.2d 973 (La. App. 4 Cir. 1982).

¹⁷ La. R.S. 51: 1406(4).

¹⁸ *Cheramide Services, Inc. v. Shell Deepwater Production, Inc.*, 35 So.3d 1053 (La. 2010).

2.2.5. Unfair trade practices

A practice is “unfair” when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.¹⁹

2.2.6. Deceptive trade practices

A practice is “deceptive” if it has a tendency or capacity to deceive even a significant minority of consumers.²⁰ Fraud, deceit or misrepresentations constitute “deceptive” trade practices.²¹ It is not necessary to prove the seller’s intent or sciemer (knowledge of the falsity), nor the consumer’s actual reliance or actual deception. The essential issue is whether the consumer was misled by the seller’s statements or actions.

2.2.7. Examples of unfair or deceptive trade practices

- a. Failure to notify borrower of decreasing nature of credit life insurance. *Marshall v. Citicorp Mortgage, Inc.*, 601 So.2d 669 (La. App. 5 Cir. 1992).
- b. Contracts or contract terms that are unlawful, unfair, deceptive or unconscionable. La. R.S. 51: 1403; La. Atty. Gen. Op. 81-201 (11/2/81); *Marshall v. Citicorp Mortgage, Inc.*, 601 So.2d 669 (La. App. 5 Cir. 1992).
- c. Forum selection clauses for plaintiff actions. La. R.S. 51: 1407; *Barrett Auto Brokers, Inc. v. Dealer Services Corp.*, 48 So.3d 322 (La. App. 2 Cir. 2010), *writ denied* 51 So.3d 734 (La. 2010).
- d. Unnecessary repairs. *Crown Buick, Inc. v. Bercier*, 483 So.2d 1310 (La. App. 4 Cir. 1986).
- e. Retention of vehicle for unauthorized repairs. *Slayton v. Davis*, 901 So.2d 1246 (La. App. 3 Cir. 2005); *Johnson Const. Co., Inc. v. Shaffer*, 2012 WL 638058 (La. App. 2 Cir. 2012).
- f. Retention of “trade in” car after car dealership was unable to obtain financing at agreed upon terms for car to be purchased. *McFadden v. Import One, Inc.*, 56 So.3d 1212 (La. App. 3 Cir. 2011).
- g. Wrongful seizure. *Bryant v. Sears Consumer Financial Corp.*, 617 So.2d 1191 (La. App. 3 Cir. 1993) *writ denied* 619 So.2d 533 (La. 1993).
- h. Self-help repossession of vehicle without judicial process. *Tyler v. Rapid Cash, L.L.C.*, 930 So.2d 1135, 1141 (La. App. 2 Cir. 2006).
- i. Repossession without buyer’s consent. *Jones v. Petty*, 577 So.2d 821 (La. App. 2 Cir. 1991).
- j. Overcharges and failure to make requested repairs. *Joseph v. Hendrix*, 536 So.2d 448 (La. App. 1 Cir. 1988).
- k. Failure to disclose reason for auto paint variation. *Vercher v. Ford Motor Co.*, 527 So.2d 995 (La. App. 3 Cir. 1988).
- l. Failure to disclose source of auto engine. *Gour v. Daray Motor Co., Inc.*, 373 So.2d 571 (La. App. 3 Cir. 1979).

¹⁹ *Cherame Services, Inc. v. Shell Deepwater Production, Inc.*, 35 So.3d 1053, 1059 (La. 2010); *McFadden v. Import One, Inc.*, 56 So.3d 1212 (La. App. 3 Cir. 2011); *Risk Management Services, L.L.C. v. Moss*, 40 So.3d 176, 184-85 (La. App. 5 Cir. 2010) *writ denied* 44 So.3d 683 (La. 2010).

²⁰ *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

²¹ *Risk Management Services, L.L.C. v. Moss*, 40 So.3d 176, 185 (La. App. 5 Cir. 2010) *writ denied* 44 So.3d 683 (La. 2010).

- m. Forfeiture clause in layaway contract to extent damages not compensatory. La. Atty. Gen. Op. 79-127 (2/19/79).
- n. Increase of guaranteed renewal rate. *State ex rel. Guste v. Orkin Exterminating Co., Inc.*, 528 So.2d 198 (La. App. 4 Cir. 1988) *writ denied* 533 So.2d 18 (La. 1988).
- o. Real estate agent's failure to tender prospective purchaser's offer to buy home to seller. *Harris v. Poche*, 930 So.2d 165 (La. App. 4 Cir. 2006).
- p. Misleading real estate purchaser as to outstanding mortgage to delay his seeking legal redress. *Egudin v. Carriage Court Condominium*, 528 So.2d 1043 (La. App. 5 Cir. 1988), *writ denied* 532 So.2d 136.
- q. False assertion of lien rights. *Atlas Amalgamated, Inc. v. Castillo*, 601 S.W.2d 728 (Tex App. 1980).
- r. Performance of work prior to 3 day cancellation period. *In the Matter of Fabbis, Inc.*, 81 FTC 678 (1972).
- s. Telling a consumer that he is liable for damages if he exercises his 3 day rescission right. *In the Matter of Certified Building Products, Inc.*, 83 FTC 1004, 1020-22 (1973), *aff'd* 512 F.2d 1278 (5th Cir. 1975), *cert. denied* 426 U.S. 906 (1976).
- t. Failing to deliver home per specifications and refusing to make refund or correct defects. *Laurents v. Louisiana Mobile Home, Inc.*, 689 So.2d 536, 547 (La. App. 3 Cir. 1997).
- u. Failure to return and complete home repairs after representing that project would be completed if last payment made. *See Crawford v. Pitts*, 99-0419 (La. App. 1 Cir., 3/31/00), cited in *In re Pitts*, 2004 WL 3244479 (Bankr. M.D. La. 2004).
- v. Violations of Louisiana unfair trade practice regulations, e.g., bait advertising, misrepresentation of old, used or secondhand goods, deceptive charitable solicitations. La. Administrative Code, Title 16, ch. 5.

2.2.8. Liability

The UTPL creates a statutory action against any "person" who engages in an unfair or deceptive trade practice or act.²² Thus, a corporate officer may have liability under the UTPL when he personally engages in unlawful acts.²³ But, you should expect most corporate officers to claim immunity from personal liability by a "no cause of action" exception or motion for summary judgment.

2.2.9. Remedies

a. Overview

Remedies for unfair trade practices are broad and powerful. Actual damages, treble damages, restitution, contract avoidance, civil penalties, injunctive relief and attorney fees may be available. The remedies under the UTPL are cumulative to each other and to any remedies or penalties available under all other Louisiana laws.²⁴

²² La. R.S. 51: 1409(A), 1402(8), 1405.

²³ *See e.g.*, *Laurents v. Louisiana Mobile Home, Inc.*, 689 So.2d 536, 547 (La. App. 3 Cir. 1997).

²⁴ La. R.S. 51: 1408 (B); *see Vercher v. Ford Motor Co.*, 527 So.2d 995 (La. App. 3 Cir. 1988) (damages for mental anguish available for UTPL violation even though unavailable in a redhibitory action).

b. Actual damages

The measure of damages under the UTPL is broad. For example, damages may include compensation for interruption of life, including lost wages, lost time and inconvenience.²⁵ Damages for emotional distress and humiliation are considered actual damages under Louisiana's unfair trade practices law (provided there has been a required loss of money or property as required for the act to apply).²⁶ UTPL creates statutory causes of action. Thus, these causes of action sound in tort and support tort theories of damages and are more extensive than damages allowed for breach of contract.²⁷

c. Treble damages

Treble damages must be awarded if the court finds an unfair trade practice after the defendant's receipt of the Attorney General's notice.²⁸ Attorneys filing a UTPL action should send a copy of the filed petition to the Attorney General to obtain this remedy.

d. Contract avoidance

Under La. R.S. 51: 1403, a consumer contract, express or implied, made by any person in violation of the UTPL is an illegal contract and no recovery may be had on the contract.²⁹ A contract that is unfair, deceptive or unlawful may violate the UTPL.³⁰ Forum selection clauses for a plaintiff action violate the UTPL and are unenforceable.³¹ An arbitration agreement that prohibits a consumer from seeking UTPL statutory remedies may violate R.S. 51: 1403.³² An unlawful or prohibited contract provision may render the entire contract unenforceable by the offending party.³³

e. Injunctive relief

The courts of appeal are split on whether private litigants are entitled to injunctive relief from unfair trade practices.³⁴ The First, Second and Fifth Circuits have held private litigants don't have a UTPL right of action for an injunction. The Third and Fourth Circuits have found a right to injunctive relief.³⁵

f. Attorney fees

If damages are awarded for an unfair or deceptive trade practice, the court must award reasonable attorney fees and costs to the prevailing

²⁵ See e.g., *Slayton v. Davis*, 901 So.2d 1246 (La. App. 2 Cir. 2005); see also National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 13.3.3.4 (7th ed. 2008).

²⁶ *Laurents v. Louisiana Mobile Homes, Inc.*, 689 So.2d 536 (La. App. 3 Cir. 1997); *Bank of New Orleans & Trust Co. v. Phillips*, 415 So.2d 973 (La. App. 4 Cir. 1982).

²⁷ *Harris v. Poche*, 930 So.2d 165 (La. App. 4 Cir. 2006).

²⁸ *McFadden v. Import, Inc.*, 56 So.3d 1212, 1221 (La. App. 3 Cir. 2011).

²⁹ La. R.S. 51: 1403; *Marshall v. Citicorp Mortgage, Inc.*, 601 So.2d 669 (La. App. 5 Cir. 1992) (unconscionable contract clause voided).

³⁰ La. Atty. Gen. Op. 81-201 (11/2/81).

³¹ La. R.S. 51: 1407 (A); *Thompson Tree & Spraying Service, Inc. v. White Spinning Const., Inc.*, 68 So.3d 1142 (La. App. 3 Cir. 2011). Note that many pre-2007 cases on forum selection may have been superseded by the 2006 amendments to La. R.S. 51: 1407(A).

³² See e.g., *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 671 (S.C. 2007), cert. denied 552 U.S. 990 (2007). In *Simpson*, the South Carolina Supreme Court interpreted a South Carolina statute, which was virtually identical to R.S. 51: 1403, to hold that arbitration agreement prohibiting unfair trade practice remedies was unconscionable and unenforceable.

³³ See e.g., *Baierd v. McTaggart*, 629 N.W.2d 277 (Wis. 2001).

³⁴ *Family Resource Group, Inc. v. Louisiana Parent Magazine*, 818 So.2d 28 (La. App. 1 Cir. 2001).

³⁵ See e.g., *Huey T. Littleton Claims Service, Inc. v. McGuffee*, 497 So.2d 790 (La. App. 3 Cir. 1986); *Reed v. Allison & Perrone*, 376 So.2d 1067 (La. App. 4 Cir. 1979).

plaintiff.³⁶ A prevailing defendant may only be awarded attorney fees if the court finds that the unfair trade practices action was groundless and brought in bad faith or for harassment.³⁷

2.2.10. Pleadings

The facts for a UTPL cause of action should be pleaded. Your petition should also cite the UTPL and be forwarded to the Louisiana Attorney General. The failure to expressly cite the unfair trade practices statute in the petition is not fatal to a UTPL cause of action so long as the petition sets forth sufficient facts to state a UTPL cause of action.³⁸

2.2.11. Arbitration

It is not clear whether an arbitrator has authority to award treble damages under La. R.S. 51: 1409, which states that the consumer must bring an “action” and the “court” shall make an award.³⁹ If only a Louisiana court may award treble damages, an arbitration agreement may be unenforceable as to an unfair trade practice claim, thus allowing the consumer to pursue his unfair trade practice claims in court. Furthermore, an arbitration clause is unenforceable if a consumer can’t use a statutory remedy, such as the unfair trade practices law, in arbitration.⁴⁰ Treble damages are mandatory under Louisiana law. So, there may be a strong argument for reversal of an arbitrator’s failure to award treble damages if an arbitrator has authority to handle unfair trade practice claims and award treble damages.

There may be a threat of prescription or preemption in the arbitration of an unfair trade practice claim if there is no underlying lawsuit that timely asserts an unfair trade practice claim. Arguably, the claim could prescribe or preempt during arbitration and the arbitrator might rule that he no longer had authority to render a decision.⁴¹ There is no Supreme Court case or statute that says that filing an arbitration claim prevents the running of preemption.⁴²

2.2.12. Prescription or Preemption?

Several circuit courts of appeal have long held that unfair trade practice claims are barred by “preemption” one year after the date of the transaction or act that gave rise to the right of action.⁴³ These rulings mean that interruption, suspension and contra non valentum will not apply to preemption of unfair trade practices.⁴⁴ However, some courts, but not all, have held that the preemptive

³⁶ La. R.S. 51: 1409 (A); *McFadden v. Import One, Inc.*, 56 So.3d 1212 (La. App. 3 Cir. 2011).

³⁷ La. R.S. 51: 1409(A); *Double-Eight Oil & Gas, L.L.C. v. Caruthers Producing Co.*, 942 So.2d 1279 (La. App. 2 Cir. 2006).

³⁸ *Dominion Exploration & Production, Inc. v. Waters*, 972 So.2d 350, 362, n. 12 (La. App. 4 Cir. 2007).

³⁹ See generally, *Peoples Security Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993). *But see* *Hodges v. Reasonover*, 103 So.3d 1069 (La. 2012), which expresses the view that unless limited by the parties’ contract or rules of the specific arbitral tribunal, arbitrators have the power to render whatever relief is justified by the record, to the full extent provided for by law and equity. *Hodges* further states that, depending on the contract, a party could be entitled to the same rights and remedies as if the case were being heard in state court.

⁴⁰ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), see also, *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 671 (S.C. 2007), cert. denied 552 U.S. 990 (2007).

⁴¹ See discussion of this possible issue by Justice Weimer in his concurring opinion in *Hodges v. Reasonover*, 2012 WL 2529403 (La. 2012).

⁴² *Hodges v. Reasonover*, 103 So.3d 1069 (La. 2012) (J. Weimer, concurring).

⁴³ *Miller v. Conagra, Inc.*, 991 So.2d 445, 455 (La. 2008)

⁴⁴ See *Morris v. Sears Roebuck & Co.*, 765 So.2d 419 (La. App. 4 Cir. 2000); *Tubos de Acero Mexico v. American International Investment Corp., Inc.*, 292 F.3d 471, 480-81 (5th Cir. 2002).

period does not begin to run where there is a continuing violation or a continuing tort.⁴⁵ Note, however, that a continuing tort is occasioned when the unlawful acts continue, as distinguished from the mere continuation of the ill effects of the original, wrongful act.⁴⁶ Also, a mere failure to correct a wrong may not be a continuing violation that would extend the preemptive period.⁴⁷

The Louisiana Supreme Court has not ruled on whether prescription or peremption applies to unfair trade practices.⁴⁸ Furthermore, La. R.S. 51: 1409(E) expressly uses the word, “prescribed”, when establishing the time limit to bring an unfair trade practices action.

The issue of when peremption of an unfair trade practice begins to run is complex. La. R.S. 51: 1409(E) states that prescription begins to run from the “time of the transaction or act which gave rise to *this right of action*.” La. R.S. 51: 1409(A) states that a person does not have a *right of action* until he suffers “any ascertainable loss of money or movable property ...as a result of the use or employment by another person of an unfair or deceptive practice, method, act or practice....” Thus, R.S. 51: 1409(A) and (E) could be subject to varying interpretations. Does peremption begin to run on the date of the deceptive act or transaction or the date of injury? Unfair trade practices often involve fraud or deceit which prevents the consumer from discovering the violation until he suffers injury.

Louisiana courts of appeal have held that peremption runs from the date of the transaction or act that gives rise to the right of action.⁴⁹ These courts have said that peremption runs from the date of the wrongful act even if the victim is unaware of the wrongful act. However, this narrow view seems incorrect under R.S. 51: 1409(A) to the extent that a court bases peremption on the date of an act or transaction before the unlawful act or transaction actually caused a legally compensable injury. Other states have held that the statute of limitations for an unfair trade practice claim does not begin to run until the consumer suffers a legally compensable injury (generally the trigger for an unfair trade practice right of action) or has a right of action.⁵⁰ Given the adverse Louisiana cases on when peremption begins to run, it is important to identify the act or transaction that gave rise to the “right of action.” Determine the last act or transaction that was an unfair or deceptive practice. Then, determine the date that the consumer suffered an ascertainable loss of money or property and any conduct that may constitute a “continuing violation.”

⁴⁵ *Miller v. Conagra, Inc.*, 991 So.2d 445, 456 (La. 2008); *Tubos de Acero Mexico v. American International Investment Corp., Inc.*, 292 F.3d 471, 480-81 (5th Cir. 2002) (tenant’s conduct during lease constituted continuing violation); *Davis v. Karl*, 2010 WL 3312587 (E.D. La. 2010); *but see Glod v. Baker*, 899 So.2d 642 (La. App. 3 Cir. 2005) *writ denied* 920 So.2d 238 (La. 2006) (continuing tort does not extend preemptive period).

⁴⁶ *Miller v. Conagra, Inc.*, 991 So.2d 445, 456 (La. 2008)

⁴⁷ *Cf.*, *Crump v. Sabine River Authority*, 737 So.2d 720, 728 (La. 1999).

⁴⁸ *Miller v. Conagra, Inc.*, 991 So.2d 445, 455-57 (La. 2008) (declining to decide whether R.S. 51: 1409(E) is prescriptive or preemptive).

⁴⁹ *See e.g.*, *Morris v. Sears Roebuck & Co.*, 765 So.2d 419 (La. App. 4 Cir. 2000); *Mayo v. Simon*, 646 So.2d 973 (La. App. 3 Cir. 1994).

⁵⁰ *See e.g.*, *Berg v. Byrd*, 720 A.2d 1283 (Md. App. 1998); *Gaidon v. Guardian Life Ins. Co.*, 727 N.Y.S.2d 30 (N.Y. 2001); *Salenga v. Mitsubishi Motors Credit of Am., Inc.*, 107 Cal. Rptr. 3d 836 (Cal. App. 2010); *Tiismann v. Linda Martin Homes Corp.*, 610 S.E.2d 68 (Ga. 2005); *see also*, National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 12.3.2.2 (7th ed. 2008). These cases are consistent with the general rule that a statutory claim does not arise until there is a violation of the statute and the plaintiff is entitled to bring an action and seek a remedy.

2.3 TRUTH IN LENDING ACT

2.3.1 Overview

The Truth in Lending Act (“TILA”) requires the accurate and meaningful disclosure of the costs of consumer credit.⁵¹ Congress enacted TILA to assure “meaningful disclosure of credit terms” and thereby enable consumers to make informed choices in the credit market place.⁵² The consumer should “be able to compare more readily the various credit terms available.”⁵³ Generally, creditors are individuals or businesses that (1) regularly offer or extend credit to consumers and (2) the credit is subject to a finance charge or is payable by written agreement in more than four installments.⁵⁴ The TILA is implemented by Regulation Z.⁵⁵ Interpretations of Regulation Z are now issued by the Consumer Financial Protection Bureau.

The TILA also contains several provisions unrelated to disclosures, but which give consumers important substantive rights. For example, TILA contains a provision which outlaws the use of the Rule of 78’s in any pre-computed consumer credit transaction with a term longer than 61 months.⁵⁶ It also contains certain substantive terms that are prohibited in high-cost mortgages.⁵⁷

TILA remedies are (1) actual damages, (2) statutory damages, and (3) reasonable attorney fees.⁵⁸

TILA actions generally prescribe in one year.⁵⁹ Home Ownership and Equity Protection Act (HOEPA) violations now have a three-year prescriptive period.⁶⁰ The TILA statute of limitations begins to run on the day after the “triggering event” and ends on the one year anniversary of the triggering event,⁶¹ but fraudulent concealment may toll the statute of limitations.⁶² Note, however, that other federal courts have held that the TILA statute of limitations commences on the date of the act or event.⁶³ Therefore, to be on the safe side, TILA actions should be asserted within the shorter statute of limitation period.

A TILA claim may be litigated in state courts. A state court is not bound by federal court of appeal decisions, but will review those opinions as further guidance for its analysis.⁶⁴ However, prescribed TILA claims may not be used as a defense in Louisiana state courts.⁶⁵

⁵¹ 15 U.S.C. § 1601(a).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 15 U.S.C. § 1602(f).

⁵⁵ 12 C.F.R. § 1026.

⁵⁶ 15 U.S.C. § 1615.

⁵⁷ See 15 U.S.C. § 1639(c)-(j); NCLC, TRUTH IN LENDING ch. 9 (8th ed. 2012).

⁵⁸ See NCLC, TRUTH IN LENDING ch. 11 (7th ed. 2010). Dodd-Frank increased statutory damages to \$2,000.

⁵⁹ 15 U.S.C. § 1640(e).

⁶⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1416, 124 Stat. 1376 (July 21, 2010). See also TIL Rescission Rights, *infra* at § 2.4.

⁶¹ See *Lawson v. Conyers Chrysler, Plymouth & Dodge Trucks, Inc.*, 600 F.2d 465, 466 (5th Cir. 1979), *cert. denied* 459 U.S. 858 (following Fed. R. Civ. P. 6(a)’s method for computing prescriptive periods).

⁶² See, e.g., *King v. California*, 784 F.2d 910 (9th Cir. 1984). *But see Moor v. Travelers Ins. Co.*, 784 F.2d 632 (5th Cir. 1986) (mere failure of creditor to make disclosures does not toll the statute of limitations).

⁶³ See, e.g., *In re Butcher*, 829 F.2d 596 (6th Cir. 1987), *cert. denied* 484 U.S. 1078 (1988); *cf. Pugh v. Brook*, 158 F.3d 530 (11th Cir. 1998); *Bartlik v. U.S. Dept. of Labor*, 62 F.3d 163 (6th Cir. 1995).

⁶⁴ *FIA Card Services, N.A. v. Weaver*, 62 So.2d 709, 711 (La. 2011).

⁶⁵ *La. Code Civ. Proc. art. 424. See Franklin State Bank & Trust Co. v. Herring*, 608 So.2d 643 (La. App. 2 Cir. 1992). *But see Ralph J. Rohner & Fred H. Miller, TRUTH IN LENDING*, § 12.05[4][6][iii] (2000) (discussing the unconstitutionality of state law because it applies solely to TILA claims).

2.3.2 Closed-End Credit

Closed-end credit is defined as consumer credit other than open-end credit.⁶⁶ Open-end credit is a plan under which the creditor reasonably contemplates repeated transactions, prescribes the terms of such transactions, and provides for a finance charge on the outstanding unpaid balance.⁶⁷ Closed-end credit usually involves one transaction such as an installment sale, mortgage, or a loan with a fixed repayment plan, e.g., car loans.

The most frequent TIL violations in closed-end credit are the failure to accurately disclose:

- Annual percentage rate
- Payment schedule
- Finance charge
- Amount financed
- Itemization of amount financed

Where there is a single creditor, disclosures must be made by that creditor.⁶⁸ Where there are multiple creditors, the creditors must agree amongst themselves as to which creditor must give the disclosures.⁶⁹ Disclosures must be made to the consumer who is obligated in the transaction.⁷⁰ If there is more than one consumer, then disclosures may be given to any one consumer who has primary liability on the obligation, not a surety or guarantor.⁷¹

The disclosures are to be:

- meaningful;⁷²
- clear and conspicuous;⁷³
- in written;⁷⁴
- segregated;⁷⁵
- made before the credit is extended⁷⁶ or before consummation;⁷⁷
- reflective of the terms of the legal obligation between the creditor(s) and the consumer(s);⁷⁸ and
- and various other items “as applicable.”⁷⁹

Disclosures of particular importance in closed-end transactions are those which are tied to special consumer relief when they are violated, such as amount financed, finance charge, annual percentage rate, payment schedule, total payments, and security interests. See NCLC, *TRUTH IN LENDING* ch. 5 (8th ed. 2012).

⁶⁶ 12 C.F.R. § 1026.2(a)(10).

⁶⁷ 12 C.F.R. § 1026.2(a)(20).

⁶⁸ 15 U.S.C. § 1631(b).

⁶⁹ 12 C.F.R. § 1026.17(d).

⁷⁰ 15 U.S.C. § 1631(a).

⁷¹ 12 C.F.R. § 1026.17(d); Official Interpretations § 1026.17(d)(2).

⁷² 15 U.S.C. § 1601(a).

⁷³ 15 U.S.C. § 1632(a); 12 C.F.R. § 1026.17(a).

⁷⁴ 12 C.F.R. § 1026.17(a)(1).

⁷⁵ 12 C.F.R. § 1026.17(a)(1).

⁷⁶ 15 U.S.C. § 1638(b)(1).

⁷⁷ 12 C.F.R. § 1026.17(b).

⁷⁸ 12 C.F.R. § 1026.17(c)(1).

⁷⁹ 12 C.F.R. § 1026.18. See NCLC, *TRUTH IN LENDING* ch. 4 (7th ed. 2010).

Special consumer relief for violations of these provisions include:

- statutory damages;⁸⁰
- an extended right of rescission for non-purchase money mortgage transactions;⁸¹ and
- enhanced damages.⁸²

There are many violations of TILA for which statutory damages are no longer available, and only actual damage relief is available.⁸³

For electronic disclosures, see NCLC, TRUTH IN LENDING § 4.3 (8th ed. 2012).

2.3.3 Open-End Credit

The TILA defines “open-end credit” as a plan in which a creditor (1) reasonably contemplates repeated transactions; (2) prescribes the terms of the transactions; and (3) provides for a finance charge which may be computed from time to time on an outstanding unpaid balance.⁸⁴

Regulation Z broadens this definition by defining “open-end credit” as: consumer credit extended by a creditor under a plan in which (1) the creditor reasonably contemplates repeated transactions; (2) the creditor may impose a finance charge from time to time on an unpaid balance. If the finance charge is precomputed at the inception of the transaction, it is not an open-end transaction; and (3) the amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.⁸⁵

It is important to recognize that the label of a plan or account does not determine its nature for TIL purposes.⁸⁶ Each plan must be independently measured against the definition of open-end credit, regardless of the terminology used in the industry to describe the plan.⁸⁷

The form and timing of initial disclosures in open-end transactions are to be:

- clear and conspicuous;⁸⁸
- more conspicuous for annual percentage rate and finance charge;⁸⁹
- in writing;⁹⁰
- in a form that the consumer may keep;⁹¹
- on an integrated document provided all at once to the consumer;⁹²
- before the first transaction;⁹³
- in each periodic statement thereafter.⁹⁴

⁸⁰ 15 U.S.C. § 1640(a)(2), (3).

⁸¹ 15 U.S.C. § 1602(u); 12 C.F.R. § 1026.23 n. 48.

⁸² 15 U.S.C. § 1640(a)(4).

⁸³ See 15 U.S.C. § 1640(a); NCLC, TRUTH IN LENDING § 11.6 (8th ed. 2012).

⁸⁴ 15 U.S.C. § 1602(i).

⁸⁵ 12 C.F.R. § 1026.2(a)(20); see also *In re Woods*, 66 B.R. 984 (Bankr. E.D. Pa. 1986).

⁸⁶ See Official Interpretations § 1026.2(a)(20) cmt. 7.

⁸⁷ Cf. 12 C.F.R. § 1026.5 (open end initial disclosures) to § 1026.18 (closed-end); NCLC, TRUTH IN LENDING § 5.5 (8th ed. 2012).

⁸⁸ 12 C.F.R. § 1026.5(a)(1)(i).

⁸⁹ 12 C.F.R. § 1026.5(a)(2)(ii); Official Interpretations § 1026.5(a)(2) cmt. 1-2.

⁹⁰ 12 C.F.R. § 1026.5(a)(1)(iii).

⁹¹ 12 C.F.R. § 1026.5(a)(1)(iii).

⁹² Official Interpretations § 1026.5(a)(1) cmt. 4.

⁹³ 12 C.F.R. § 266.5(b)(1)(i); Official Interpretations § 1026.6(b)(1)(i) cmt. 1.

⁹⁴ 15 U.S.C. § 1637(b).

The contents of initial disclosures in an open-end, charge card, or credit card transaction, to the extent applicable, are as follows:⁹⁵

- The conditions under which a finance charge may be imposed together with either the time period, if any, in which the customer may pay without incurring additional finance charges, or the fact that there is no free ride or grace period;
- The method of determining the balance on which the finance charge is imposed;
- The method of determining the amount of the finance charge, including any minimum or fixed amount;
- Each periodic rate, the range of balances to which it is applicable, and the corresponding nominal annual percentage rate;
- Identification of other charges which may be imposed and their method of computation in accordance with FRB regulations;
- If the indebtedness is or will be secured, a statement to that effect with an appropriate identification of the collateral; and
- A statement as to billing error rights and the right to assert claims and defenses in a form prescribed by the FRB (with periodic transmittal of a statement of such rights).

For credit cards and charge cards, The Fair Credit and Charge Card Disclosure Act, amending TILA, and enacted in 1988, provides for more detailed and uniform disclosure of rates, fees and other cost information in applications and solicitations to open credit card and charge card accounts.⁹⁶ The first set of disclosures includes the application and solicitation disclosures.⁹⁷

For home equity lines of credit (HELOC), creditors are required to make special “early disclosures” at the time a HELOC application is received as well as the “initial” disclosures generally required of all open-end creditors.⁹⁸

2.3.4 Fair Credit Billing Act

The Fair Credit Billing Act (“FCBA”) provides a resolution procedure for credit card billing disputes.⁹⁹ It was enacted by Congress to protect the consumer against inaccurate and unfair credit billing and credit card practices.¹⁰⁰ The FCBA requires creditors to inform consumers of the dispute procedures when an account is opened, compels creditors to investigate and respond to a consumer’s complaints within a set time, and forbids the collection of finance charges on incorrectly billed amounts.

The FCBA regulates open-end credit accounts as well as all consumer credit cards but not closed-end credit, and only applies to consumer accounts and not to business credit.¹⁰¹ The FCBA applies to numerous billing errors including extension of credit to an unauthorized user or extension of credit for property or services not accepted by the consumer, and provides for prompt crediting of payments, refund of credit balances, and a number of special protections for credit cards.¹⁰²

⁹⁵ 15 U.S.C. § 1637(a).

⁹⁶ Pub. L. No. 100-583, 102 Stat. 2960 (Nov. 3, 1988).

⁹⁷ See generally NCLC, TRUTH IN LENDING § 6.5 (8th ed. 2012).

⁹⁸ 15 U.S.C. § 1637a; NCLC, TRUTH IN LENDING § 8.3 (8th ed. 2012).

⁹⁹ 15 U.S.C. §§ 1666-1666j.

¹⁰⁰ 15 U.S.C. § 1601(a).

¹⁰¹ 15 U.S.C. § 1645.

¹⁰² 15 U.S.C. § 1666(b); see also NCLC, TRUTH IN LENDING § 7.9 (8th ed. 2012).

Because the FCBA protects both individuals who are actually liable on an account and those whom the creditor claims are obligors, it provides a potential avenue of relief for victims of identity theft when credit card fraud is involved.¹⁰³

The consumer's billing error rights may be exercised by sending a written notice of billing error to the creditor.¹⁰⁴ This notice must be received by the creditor no later than 60 days after the creditor first transmitted the first periodic statement in which the error appeared.¹⁰⁵ The consumer may withhold payment of the amount in dispute and its related charges, or pay the amount and charges without waiving its billing error rights.¹⁰⁶

First, the creditor must acknowledge receipt of the billing error notice within 30 days of receiving it.¹⁰⁷ Second, the creditor must conduct a reasonable investigation to determine whether a billing error occurred.¹⁰⁸ The creditor's investigation and resolution must occur within two complete billing cycles or ninety days, whichever is sooner.¹⁰⁹ A consumer may refuse to pay \$50 of the disputed amount, even if the amount was correct, when the creditor does not acknowledge within 30 days or determine a matter within 90 days.¹¹⁰

The creditor may not attempt to collect the amount in dispute pending the resolution of the billing error, but may reduce the consumer's credit limit by that amount.¹¹¹ A consumer's account may not be canceled, closed, restricted or accelerated because of a billing error notice.¹¹² The creditor may not threaten or make an adverse report regarding the disputed amount.¹¹³ However, the creditor may report the amount as in dispute.¹¹⁴

If the creditor determined that the billing error occurred, it must correct the error and credit the account with any disputed amount and related charges and mail or deliver a correction notice to the consumer.¹¹⁵ The creditor must report the resolution to each credit agency notified of the delinquency. If the creditor determines that there was no billing error or a different error, the creditor must mail or deliver an explanation to the consumer, furnish copies of documentary evidence if requested, and correct any different error discovered and credit the account with any disputed amount and related charges.¹¹⁶

The FCBA is a part of the TILA to which the one year statute of limitations generally applies. The limitations period may not begin to run on an alleged violation until the creditor's obligations under 15 U.S.C. § 1666a are satisfied.¹¹⁷

¹⁰³ 12 C.F.R. § 1026.12(b); *see also* *Stafford v. Cross Country Bank*, 262 F.Supp. 2d 776 (W.D. Ky. 2003); *Belmont v. Associates Nat'l Bank*, 119 F. Supp. 2d 149 (E.D.N.Y. 2000); NCLC, *Fair Credit Reporting*, § 13.5.5 (8th ed. 2012).

¹⁰⁴ 12 C.F.R. § 1026.13(b)(1).

¹⁰⁵ *Id.*; *see* *Dawkins v. Sears Roebuck & Co.*, 109 F.3d 241 (5th Cir. 1997).

¹⁰⁶ 12 C.F.R. § 1026.13(d)(1); *see also* Official Interpretations § 1026.13(d)(1) cmt. 2.

¹⁰⁷ 12 C.F.R. § 1026.13(e)(1).

¹⁰⁸ 12 C.F.R. § 1026.13(f).

¹⁰⁹ 12 C.F.R. § 1026.13(c)(2).

¹¹⁰ 15 U.S.C. § 1666(e).

¹¹¹ 12 C.F.R. § 1026.13(d).

¹¹² *Id.*

¹¹³ 12 C.F.R. § 1026.13(d)(2).

¹¹⁴ Official Interpretations § 1026.13(d)(2) cmt. 1. *But see* 12 C.F.R. § 1026.13(d)(4), which does not prevent a card issuer from pursuing normal collection routines on the undisputed amount, including filing suit or referral to a collection agency.

¹¹⁵ 12 C.F.R. § 1026.13(e).

¹¹⁶ 12 C.F.R. § 1026.13(g).

¹¹⁷ A claim for a violation of the limits on liability for unauthorized use provision accrues when the consumer's account is debited with the charge. *See* *Drainan v. American Express Travel Related Services Co.*, 892 F.Supp. 1096 (N.D. Ill. 1995).

Therefore, a claim may be filed considerably more than a year after the error first appeared on a periodic statement.¹¹⁸

FCBA's provisions place prohibitive and affirmative responsibilities on the creditor. As such, an important issue is whether the consumer can obtain injunctive relief forcing the creditor to comply with these requirements, which may be more effective than penalties that may not amount to much.¹¹⁹

The consumer is entitled to actual and statutory damages for any violation of the Act.¹²⁰ Also, any creditor who fails to comply with the FCBA forfeits any right to collect the disputed amount, up to \$50.¹²¹ To avoid liability for the disputed amount over \$50, the consumer will need to rely on another provision of TILA or another federal or state law.

2.3.5 Consumer Leasing Act

The Consumer Leasing Act ("CLA") of 1976 is Part E of TILA.¹²² The Act is administered not through Regulation Z, but separately through the Consumer Financial Protection Bureau's Regulation M, codified at 12 C.F.R. § 1013 and the CFPB Official Interpretations of Regulation M, found at 12 C.F.R. § 213 supp. I.

The CLA governs advertising and disclosures for those consumer leases of personal property with terms exceeding 4 months.¹²³ Because of the 4 months limitation, the Act is inapplicable to many consumer transactions. If the lease is terminable without penalty before 4 months, it is not covered by the CLA.¹²⁴ Unfortunately, the abusive rent-to-own transactions are generally structured to avoid CLA coverage. However, such rent-to-own transactions may be construed as credit sales and therefore subject to TILA.¹²⁵

Certain leases are exempt from CLA coverage. For example, the CLA does not apply to leases where the total contractual obligation exceeds \$51,800.¹²⁶ The total contractual obligation is not necessarily the same as the total of payments.¹²⁷ Generally, waivers of TIL rights are unenforceable.¹²⁸

The CLA does not apply to a credit sale as defined by TILA.¹²⁹ TILA defines a credit sale as a transaction where the consumer pays in the lease a sum at least substantially equivalent to the value of the property and has the option to become the owner of the property at the end of the lease for no additional consideration or for nominal consideration.¹³⁰ In this situation, the lease is covered by TILA and not CLA.

¹¹⁸ For a more detailed discussion on calculating the one year limitations period, see generally NCLC, TRUTH IN LENDING § 12.2 (8th ed. 2012).

¹¹⁹ See generally, *Beaumont v. Citibank (South Dakota) N.A.*, 2002 WL 87862 (S.D.N.Y. Jan. 22, 2002).

¹²⁰ 15 U.S.C. § 1640(a); see also NCLC, TRUTH IN LENDING ch. 11 (8th ed. 2012).

¹²¹ 15 U.S.C. § 1666(e).

¹²² 15 U.S.C. §§ 1667-1667f.

¹²³ 12 C.F.R. § 1013.2(e)(1).

¹²⁴ See, e.g., *Smith v. ABC Rental Systems of New Orleans, Inc.*, 618 F.2d 397 (5th Cir. 1980) (CLA does not apply to week-to-week rental).

¹²⁵ See *Davis v. Colonial Securities Corp.*, 541 F.Supp. 302 (E.D. Pa. 1982).

¹²⁶ 15 U.S.C. § 1667(1). This amount is adjusted annually for inflation.

¹²⁷ Official Interpretations § 1013.2(e) cmt. 3.

¹²⁸ NCLC, TRUTH IN LENDING § 12.5.4 (8th ed. 2012) (most waivers of TIL rights are generally ineffective). *But see id.* (specific signed waivers clearly referring to TIL claims may be upheld); *Jefferson Bank & Trust Co. v. Stamatiou*, 384 So.2d 388, 391 (La. 1980) (holding parties are free to govern their relationship through contract, and contractual provisions have effect of law on parties);

¹²⁹ 15 U.S.C. § 1667(1).

¹³⁰ 15 U.S.C. § 1602(g); Reg. M § 1026.2(a) (16).

The CLA defines consumer leases as being primarily for personal, family, or household purposes.¹³¹ The CLA does not apply to leases for agriculture, business, or commercial purposes.¹³² The CLA only applies to leases of personal property, not real property.¹³³ Only natural persons are protected under the CLA, not corporations, trusts, estates, partnerships, cooperatives, joint ventures, persons operating under a business name, associations, or government subdivisions, agencies or instrumentalities.¹³⁴ The CFPB Commentary states that a guarantor is not a lessee for purposes of the CLA, so that a natural person guaranteeing for an organization does not bring the lease within the Act's scope.¹³⁵

The CLA only applies to lessors who regularly engage in leasing, offering to lease, or arranging to lease under a consumer lease.¹³⁶ Assignees of the lessor are also covered if the assignees are substantially involved in the transaction.¹³⁷ Under CLA, assignees who are substantially involved with the lessor are defined as lessors, and they are liable even for violations not apparent on the face of the lease disclosures.¹³⁸

Auto leases are the most common transactions subject to the CLA. The CLA can be used to challenge excessive early termination penalties because it requires that such early termination penalties be reasonable.¹³⁹ Other common CLA violations involve the location of the consumer's signature, trade-ins and down payments, official fees and taxes, "other" charges, express warranties, excess mileage and early termination penalties.¹⁴⁰

The one year statute of limitations for private actions under the CLA does not begin until the lease is terminated.¹⁴¹ Equitable tolling and fraudulent concealment can toll the limitations period.¹⁴²

Remedies for violating the CLA can be found in Truth in Lending Part B. An unreasonable formula for calculating the early termination penalties leads to statutory damages (usually \$2,000) plus actual damages and attorney fees.¹⁴³ Failure to comply with any of the thirty disclosure requirements leads to an award for statutory damages (usually \$2,000) plus actual damages plus attorney fees. Statutory and actual damages and attorney fees are available for certain advertising violations.¹⁴⁴

For electronic disclosures, see NCLC, TRUTH IN LENDING § 13.3.2.4 (8th ed. 2012). Regulation M allows disclosures in electronic form subject to client consent and certain rules.¹⁴⁵ For consumer rights and remedies under Louisiana law, see La. R.S. 9:3301-3308.

¹³¹ 15 U.S.C. § 1667(1).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*; Reg. M 1013.2 (j); Official Interpretations 1013.2(j)-1.

¹³⁵ Official Interpretations § 1013.2(g) cmt. 1.

¹³⁶ 15 U.S.C. § 1667(3).

¹³⁷ Official Interpretations § 1013.2(h) cmt. 3.

¹³⁸ *Id.*

¹³⁹ 12 C.F.R. §1013.4(g)(1).

¹⁴⁰ See NCLC, TRUTH IN LENDING § 13.7 (8th ed. 2012).

¹⁴¹ 15 U.S.C. § 1667d(c); see, e.g., Carmichael v. Nissan Motor Acceptance Corp., 291 F.3d 1278 (11th Cir. 2002) (car lease terminated upon repossession); see also NCLC, TRUTH IN LENDING § 13.7.4 (8th ed. 2012).

¹⁴² See NCLC, TRUTH IN LENDING § 12.2.3 (8th ed. 2012).

¹⁴³ 12 C.F.R. §1013.4(g)(1) prohibits unreasonable early termination fees. 15 U.S.C. § 1667D imposes 15 U.S.C. § 1640 liability for violations of CLA.

¹⁴⁴ See NCLC, TRUTH IN LENDING § 13.4.1 (8th ed. 2012).

¹⁴⁵ 12 C.F.R. Part 1013.

2.3.6 Home Ownership and Equity Protection Act (HOEPA)

Elderly, low-income, minority, and other vulnerable homeowners who cannot obtain access to mainstream forms of credit are forced in many cases to turn to high rate home equity loans in order to finance home repairs, credit consolidation, or other important personal credit needs. Lenders often offer home equity loan products designed to hide the true costs and disadvantages of high rate credit to vulnerable consumers. These loans are secured by home equity so lenders are protected from risk because they either collect high rates from payments made from refinancing, or obtain repayment through foreclosure. The risk of foreclosure means that homeowners faced with unmanageable loans can and do lose their shelter. See *generally* NCLC, TRUTH IN LENDING, Ch. 8 (8th ed. 2012).

In 1994, Congress passed the Home Ownership and Equity Protection Act (“HOEPA”), which was designed to prevent some predatory lending practices targeted at vulnerable consumers. HOEPA created a special class of regulated closed-end loans made at high annual percentage rates or with excessive costs and fees.¹⁴⁶

In 2010, HOEPA was amended by the Dodd-Frank Act to also include purchase money mortgage loans, open-end credit plans and home equity lines of credit. HOEPA still excludes reverse mortgages from its coverage.¹⁴⁷ It is important to remember that loans which are not covered by HOEPA at all, or covered loans which contain abusive provisions not regulated by HOEPA, may nevertheless be challenged using other TIL remedies, consumer credit laws, or state unfair trade practice provisions. The HOEPA legislative history makes clear that the law is not intended to preempt other state or federal regulations which more stringently regulate consumer credit.¹⁴⁸

HOEPA, as amended by the Dodd-Frank Act of 2010, defines a special class of covered closed-end loans by setting up three triggers for the special protections of the law: (1) the annual percentage rate trigger, (2) the points and fees trigger and (3) the pre-payment trigger.¹⁴⁹ Dodd-Frank authorizes the CFPB to issue regulations to adjust the HOEPA triggers for high-cost mortgages.¹⁵⁰ All covered loans must be “consumer credit” transactions and must be secured by the consumer’s principal dwelling.¹⁵¹

If a lender has erroneously concluded that a particular loan is not a HOEPA loan, it is highly likely that the borrower will have an extended right of rescission, and a claim for damages, because the lender will not have provided the extra HOEPA disclosures.¹⁵²

HOEPA was governed by the same statute of limitations for damages and rescission as TILA, but the Dodd-Frank Act of 2010 extended the statute of limitations to 3 years for state attorney generals to enforce a violation of 15 U.S.C. § 1639.¹⁵³ The limitations period for damages claims is subject to the equitable tolling doctrine.¹⁵⁴ In most states, damage claims also can be asserted by way of recoupment after the statute of limitations has expired, but La. Code Civ. Proc. art. 424 prohibits the use of prescribed TILA claims as set-offs.

¹⁴⁶ HOEPA is an amendment to TILA, codified at 15 U.S.C. § 1639 and in Regulation Z at 12 C.F.R. §§ 1026.31, 1026.32, 1026.34. See *generally* NCLC, TRUTH IN LENDING § 9.6 (8th ed. 2012).

¹⁴⁷ Pub. L. 111-203.

¹⁴⁸ See NCLC, TRUTH IN LENDING § 9.6.1.4 (8th ed. 2012).

¹⁴⁹ 15 U.S.C. § 1602(aa).

¹⁵⁰ 15 U.S.C. § 1602(bb)(2) *et seq.* For regulations, see 12 C.F.R. § 1026.33.

¹⁵¹ 12 C.F.R. § 1026.32(a).

¹⁵² NCLC, TRUTH IN LENDING § 9.6.2.1 (8th ed. 2012).

¹⁵³ 15 U.S.C. § 1640(e).

¹⁵⁴ See NCLC, TRUTH IN LENDING § 12.2.3.1, nn. 84-85 (8th ed. 2012); *Deville v. Capitol One Bank*, 425 F.Supp.2d 744 (W.D. La. 2006); *Jackson v. Adcock*, 2004 WL 1900484 (E.D. La. 2004).

a. The Annual Percentage Rate Trigger

The Dodd-Frank Act of 2010 amended the annual percentage rate trigger to cover loans that exceed the average prime offer rate by 6.5 percentage points in most first lien loan mortgages and 8.5 percentage points for subordinate lien mortgages.

The application is received when it reaches the creditor in any one of the ways applications are normally transmitted, even if the application is incomplete.¹⁵⁵ The application date will then be determinative of which treasury rates to evaluate for determining coverage.¹⁵⁶ For a detailed analysis of computing the APR trigger, see NCLC, *TRUTH IN LENDING* § 9.7.2 (8th ed. 2012).

It will be the accurate rate which controls, so the APR must be evaluated for errors.¹⁵⁷ For example, when a creditor misallocates a component of the finance charge to the amount financed, the correct rate should be calculated and coverage should be evaluated based on the correct rate.¹⁵⁸ For adjustable rate loans, coverage will be determined by evaluating the APR on the date of consummation.¹⁵⁹ If a teaser rate is involved, the properly calculated composite APR is the relevant one.¹⁶⁰

b. The Points and Fees Trigger

The second trigger is based on the total amount of points and fees charged. Lenders charging total points and fees in excess of 5% of the “total transaction amount” for transactions \$20,000 or over or in excess of 8% or \$1,000 (or such other amount prescribed by the CFPB for transactions under \$20,000 violate the Act.¹⁶¹ The “total transaction amount” is the amount financed¹⁶² minus costs¹⁶³ which are included as both points and fees and financed by the creditor.¹⁶⁴ A charge cannot be both in the points and fees trigger and in the total loan amount.¹⁶⁵

Points and fees include:¹⁶⁶

- All finance charges as defined in 12 C.F.R. § 1026.4, except interest or the time-price differential;
- All compensation paid to mortgage brokers;
- All items listed in 12 C.F.R. § 1026.4(c)(7) (other than escrowed taxes) unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor;¹⁶⁷ and

¹⁵⁵ Official Interpretations § 1026.32(a)(1)(i) cmt. 1.

¹⁵⁶ See NCLC, *TRUTH IN LENDING* § 9.6.3.2 (8th ed. 2012).

¹⁵⁷ NCLC, *TRUTH IN LENDING* § 9.6.3.4 (8th ed. 2012).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ 15 U.S.C. § 1602(aa)(1)(B); 12 C.F.R. § 1026.32(a)(1)(ii).

¹⁶² As calculated according to 12 C.F.R. § 1026.18(b).

¹⁶³ Included costs are enumerated in 12 C.F.R. §§ 1026.32(b)(1)(iii), (iv).

¹⁶⁴ Official Interpretations § 1026.32(a)(1)(ii) cmt. 1.

¹⁶⁵ See generally NCLC, *TRUTH IN LENDING* §§ 9.6.4, 9.8 (8th ed. 2012).

¹⁶⁶ NCLC, *TRUTH IN LENDING* § 9.8.3.1 (8th ed. 2012).

¹⁶⁷ 15 U.S.C. § 1602(aa)(4); 12 C.F.R. § 1026.32(b)(1).

- Premiums or other charges for credit life, accident, health, or loss-of-income insurance, or debt-cancellation coverage (whether or not the debt-cancellation coverage is insurance under state law) that provides for cancellation of all or part of the consumer's liability in the event of the loss of life, health, or income or in the case of accident, written in connection with the credit transaction (for loans consummated after October 1, 2002).¹⁶⁸

You must determine whether the charges included in the point and fee trigger are "payable by the consumer at or before closing."¹⁶⁹

Lender attempts to avoid HOEPA coverage by undercounting the settlement charges relevant to the points and fees trigger is one of the most widespread abuses in the high-rate home-equity market. For this reason, it is critical that advocates carefully sift through the points and fees charged by the creditor to determine which can be counted toward this trigger.¹⁷⁰

c. The new prepayment penalty trigger

The Dodd-Frank Act added a new prepayment penalty trigger for high cost mortgages. A consumer loan secured by a principal residence is a high cost mortgage if the loan documents permit either (1) a prepayment penalty after 36 months or (2) a prepayment penalties that, in the aggregate, exceed more than 2% of the amount prepaid.

d. Expanded Definition of Creditor

HOEPA has a broader definition of "creditor" than TILA. Any person who makes two or more mortgages which qualify for coverage under the triggers or who makes one or more such mortgage through a mortgage broker is covered.¹⁷¹ Individuals or entities who meet this expanded definition of creditor under HOEPA are also creditors for all TILA purposes.¹⁷² The Dodd-Frank Act extends the definition of creditor to third party brokers.

e. Exempt Transactions

Loan products deliberately designed to evade the terms of the Act should be covered.¹⁷³ However, the following transactions are exempted:

- Residential mortgage transactions.¹⁷⁴ These transactions include purchase money security interests to finance the acquisition or initial construction of the consumer's dwelling.¹⁷⁵ Consequently, all refinancing and other home equity loans are covered, but purchase and construction loans are generally not;¹⁷⁶

¹⁶⁸ 12 C.F.R. § 1026.3(b)(iv).

¹⁶⁹ 15 U.S.C. § 1602(aa)(1)(B); 12 C.F.R. § 1026.32(a)(1)(ii).

¹⁷⁰ See generally NCLC, TRUTH IN LENDING § 9.8.3 (8th ed. 2012).

¹⁷¹ 15 U.S.C. § 1602(f); 12 C.F.R. § 1026.2(17).

¹⁷² *Id.*

¹⁷³ See NCLC, TRUTH IN LENDING §§ 2.1.2 (8th ed. 2012).

¹⁷⁴ 15 U.S.C. § 1602(aa)(1).

¹⁷⁵ 15 U.S.C. § 1602(w). See also Official Interpretations § 1026.2(a)(24).

¹⁷⁶ See *In re Crisomia*, No. 00-35085DWS, 00-0938, 2002 WL 31202722 (Bankr. E.D. Pa. 2002); *Flynn v. People's Mortgage, Inc.*, No. 98-C-3760, 1998 WL 831907 (N.D. Ill. 1998); NCLC, TRUTH IN LENDING §§ 9.6.2.4.1 (8th ed. 2012).

- Reverse mortgages.¹⁷⁷ However, other protections, including a counseling requirement, may apply;¹⁷⁸
- Open-end credit.¹⁷⁹ These transactions should be carefully examined to make sure that the regulation requirement that “the creditor reasonably contemplates repeated transactions” is met.¹⁸⁰

The CFPB has discretionary authority under the Act to exempt specific mortgages or categories of mortgages from some of the prohibitions under the Act, but not from the disclosures.¹⁸¹ In order to create an exemption, the CFPB must find that the exemption is in the interest of the borrowing public and is granted only to products that maintain and strengthen home ownership and equity protection.¹⁸²

f. Prohibited Terms

Inclusion of a prohibited term constitutes a failure to deliver required disclosures for the purposes of rescission under TILA.¹⁸³ Most of the prohibitions are not absolute. Care should be taken to make sure that where an exception is invoked, the creditor has met the preconditions to the exception.¹⁸⁴ Inclusion of a prohibited term gives rise to civil liability under 15 U.S.C. § 1640(a), enhanced damages under 15 U.S.C. § 1640(a)(4), and an extended right to rescind under 15 U.S.C. § 1635.¹⁸⁵ The following terms are prohibited in HOEPA loans:

- pre-payment penalties (there is a complex five-part exception);¹⁸⁶
- interest rate increasing upon default;¹⁸⁷
- most balloon payments.¹⁸⁸ Balloon payments must be disclosed in the HOEPA notice;¹⁸⁹
- negative amortization;¹⁹⁰
- taking more than two prepaid payments in covered loans;¹⁹¹
- “due-on-demand” or “call” provisions (allowing a creditor to call in the loan or accelerate the note at any time for loans entered into on or after October 1, 2002). There are 3 exceptions to this prohibition: consumer fraud, consumer default, consumer action or inaction that adversely affects the creditor’s security.¹⁹²

¹⁷⁷ 15 U.S.C. § 1602(aa)(1).

¹⁷⁸ See NCLC, *Reverse Mortgages: Mandatory Counseling and Other Protections for the Elderly Homeowner*, 27 CLEARINGHOUSE REV. 622 (Oct. 1993); AARP, *Home Made Money: A Consumer’s Guide to Reverse Mortgages* (2001), www.aarp.org/revmort.

¹⁷⁹ 15 U.S.C. §§ 1602(i), (aa)(1); 12 C.F.R. § 1026.2(a)(20).

¹⁸⁰ 12 C.F.R. § 1026.34(b). This is a question of fact which must be litigated on a case-by-case basis.

¹⁸¹ 15 U.S.C. § 1639(i)(1).

¹⁸² *Id.*

¹⁸³ 15 U.S.C. § 1639(j).

¹⁸⁴ NCLC, TRUTH IN LENDING § 2.4, 9.6.2.4 (8th ed. 2012).

¹⁸⁵ See 15 U.S.C. § 1639(j); 12 C.F.R. § 1026.23 n. 48; and NCLC, TRUTH IN LENDING § 9.6.11 (8th ed. 2012).

¹⁸⁶ 15 U.S.C. § 1639(c); 12 C.F.R. §§ 1026.32(d)(6), (7); Official Interpretations §§ 1026.32(d)(6), (7); NCLC, TRUTH IN LENDING § 9.6.9.2 (8th ed. 2012).

¹⁸⁷ 15 U.S.C. 1639(d); 12 C.F.R. § 1026.32(d)(4); NCLC, TRUTH IN LENDING § 9.6.9.3 (8th ed. 2012).

¹⁸⁸ 15 U.S.C. 1639(e); 12 C.F.R. § 1026.32(d)(1).

¹⁸⁹ 12 C.F.R. § 1026.32(d) (3); Official Interpretations § 1026.32(c)(3) cmt. 1(i); NCLC, TRUTH IN LENDING § 9.6.9.4 (8th ed. 2012).

¹⁹⁰ 15 U.S.C. 1639(f); 12 C.F.R. § 1026.32(d) (2); NCLC, TRUTH IN LENDING § 9.6.9.5 (8th ed. 2012).

¹⁹¹ 15 U.S.C. 1639(g); 12 C.F.R. § 1026.32(d)(3); NCLC, TRUTH IN LENDING § 9.6.9.6 (8th ed. 2012).

¹⁹² 12 C.F.R. § 1026.32(d)(8); NCLC, TRUTH IN LENDING § 9.6.9.7 (8th ed. 2012).

g. Prohibited Acts or Practices

Regulation Z titled “Prohibited Acts or Practices”¹⁹³ prohibits:

- extending credit without regard to ability to pay,¹⁹⁴
- payments from proceeds to home improvement contractors,¹⁹⁵
- notice to assignee,¹⁹⁶
- early refinancing except if it’s in the consumer’s best interest based on totality of circumstances at the time credit extended;¹⁹⁷
- structuring an open-end loan to evade HOEPA.¹⁹⁸

h. Disclosure Requirements

There are two sets of disclosure requirements. The first set is found at 15 U.S.C. § 1638. The second set, which is supplementary to the first set, is found at 15 U.S.C. § 1639.¹⁹⁹ These disclosures must be given not less than three days prior to consummation of the loan.²⁰⁰ For a discussion on HOEPA disclosure requirements, *see* NCLC, TRUTH IN LENDING § 9.6.5. (8th ed. 2012).

1. Conspicuous Type Size

A conspicuous type size must be used.²⁰¹ However, a particular type size is not required.²⁰² Guidance on the conspicuous requirement may be found in case law on the TILA “clear and conspicuous” standard at 15 U.S.C. § 1632(a).

2. Number of Copies

The creditor is required to provide only one copy of the HOEPA notice even if there are multiple borrowers.²⁰³ In rescindable transactions, the lender must give a copy of the HOEPA notice to all consumers to whom the right to rescind applies.²⁰⁴

3. Content of Disclosures

The creditor must use specific language in disclosing (1) that the borrower is not required to complete the agreement; and (2) the borrower could lose his/her home if he/she does not meet the obligations under the loan.²⁰⁵ For fixed-rate loans, the creditor must disclose the accurate APR and the amount of the regular monthly payment (which should include any balloon payment).²⁰⁶ Amounts for voluntary credit insurance should not be included because it has not yet been agreed to by the consumer.²⁰⁷

¹⁹³ 12 C.F.R. § 1026.34.

¹⁹⁴ 15 U.S.C. § 1639(h); 12 C.F.R. § 1026.34(a)(4); NCLC, TRUTH IN LENDING § 9.6.10.2 (8th ed. 2012).

¹⁹⁵ 15 U.S.C. § 1639(i); 12 C.F.R. § 1026.34(a)(1); NCLC, TRUTH IN LENDING § 9.6.10.3 (8th ed. 2012).

¹⁹⁶ 15 C.F.R. § 1026.34(a)(2); NCLC, TRUTH IN LENDING § 9.6.10.4 (8th ed. 2012).

¹⁹⁷ 12 C.F.R. § 1026.34(a)(3); NCLC, TRUTH IN LENDING § 9.6.10.5 (8th ed. 2012).

¹⁹⁸ 12 C.F.R. § 1026.34(b); NCLC, TRUTH IN LENDING § 9.6.10.6 (8th ed. 2012).

¹⁹⁹ 12 C.F.R. §§ 1026.31, 32.

²⁰⁰ 15 U.S.C. § 1639(b)(1).

²⁰¹ 15 U.S.C. § 1639(a)(1); 12 C.F.R. § 1026.32(c).

²⁰² Official Interpretations § 1026.32(c) cmt. 1.

²⁰³ 15 U.S.C. § 1631(a). 12 C.F.R. § 1026.31(e).

²⁰⁴ *Id.*

²⁰⁵ 15 U.S.C. § 1639(a)(1); 12 C.F.R. § 1026.32(c); NCLC, TRUTH IN LENDING § 9.6.5.4 (8th ed. 2012).

²⁰⁶ 15 U.S.C. § 1639(a)(2)(A); 12 C.F.R. § 1026.32(c).

²⁰⁷ Official Interpretations § 1026.32(c)(3) cmt. 1.

For variable rate loans, the additional disclosures include:²⁰⁸

- the annual percentage rate;
- the amount of the regular monthly payment;
- a statement that the interest rate and the monthly payment may increase; and
- the amount of the maximum potential monthly payment.

4. Timing of Disclosures

Disclosures must be given not less than three business days prior to consummation of the transaction.²⁰⁹ It is not adequate to mail them within that time frame. The timing rules in TILA are federal law which govern a particular class of transactions and pre-empt state law on this issue.²¹⁰ “Business day” is defined to exclude only Sundays and legal holidays.²¹¹ The Official Interpretations state that when one of these particular holidays falls on a weekend but is observed on the preceding or following weekday, the actual day is considered the holiday, not the observed day.²¹²

5. Modification or Waiver of Notice

Once made, loan terms may not be changed if they make the disclosures inaccurate. New disclosures must be given.²¹³ When required, new disclosures may be made by telephone under the following conditions:²¹⁴

- the change must be initiated by the consumer;
- the creditor must provide the new disclosures in writing at the time of consummation; and
- the creditor and consumer must certify in writing at the time of consummation that the new disclosures were provided by telephone not later than three days prior to the date of consummation of the transaction.

6. Electronic Disclosures

In 2001, the Federal Reserve Board issued an interim rule, governing electronic disclosures under TILA.²¹⁵ This interim rule is titled The Electronic Signatures in Global and National Commerce Act (E-Sign).²¹⁶

7. Consequences of Failure to Disclose

The creditor’s failure to give the consumer the proper disclosures gives rise to civil liability under 15 U.S.C. § 1640(a) and enhanced damages under 15 U.S.C. § 1640(a)(4). In addition, failure to make the advance-look disclosures will constitute a failure to make “material disclosures.”²¹⁷ Failure to properly make the HOEPA disclosures will give rise to an extended right to rescind the transac-

²⁰⁸ 15 U.S.C. § 1639(a)(2)(B); 12 C.F.R. § 1026.32(c)(4).

²⁰⁹ 15 U.S.C. § 1639(b)(1); 12 C.F.R. § 1026.31(c)(1).

²¹⁰ NCLC, TRUTH IN LENDING § 9.6.5.9 (8th ed. 2012).

²¹¹ 12 C.F.R. § 1026.2(a)(6).

²¹² Official Staff Commentary § 1026.2(a)(6) cmt. 2.

²¹³ 15 U.S.C. § 1639(b)(2)(A).

²¹⁴ 15 U.S.C. § 1639(b)(2)(B).

²¹⁵ 66 Fed. Reg. 17329 (Mar. 30, 2001). See generally See NCLC, TRUTH IN LENDING § 9.6.7 (8th ed. 2012).

²¹⁶ Pub. L. No. 106-229, 114 Stat. 464 (June 30, 2000), codified at 15 U.S.C. § 7001-06.

²¹⁷ 15 U.S.C. § 1602(u); 12 C.F.R. § 1026.23 n. 48.

tion for up to three years from the date of consummation.²¹⁸ This should apply equally to failure to make the necessary disclosures at all, failure to make accurate disclosures and failure to follow the proper disclosure procedures required under 1639(a).²¹⁹

8. Extension of Assignee Liability

A big problem for consumers is lenders transferring fraudulently obtained mortgages to assignees who then assert the defense of a holder in due course despite the consumer having perfectly valid claims. For some loans, the Federal Trade Commission's Holder Rule abrogates the traditional protections of a holder in due course.²²⁰ It may also be possible to prove that the assignee is not a holder in due course.²²¹ Also, assignees have some potential liability for TILA violations under existing law including liability for rescission when that remedy is available.²²² Assignees of HOEPA-covered loans are liable for all claims and defenses that the consumer could assert against the originator.²²³

9. Remedies

For violation of any provision of HOEPA, a consumer may claim actual damages, statutory damages, attorneys fees and costs under 15 U.S.C. § 1640(a). There are also special damages for violations of 15 U.S.C. § 1639 available under 15 U.S.C. § 1640(a)(4) unless the creditor demonstrates that the failure to comply is not material. The enhanced damages include all finance charges and fees paid by the consumer. The enhanced damages supplement existing civil liability provisions.²²⁴ Multiple violations of the substantive provisions of HOEPA may entitle a consumer to multiple statutory damage awards, but consumers are limited to a single recovery for multiple failures to disclose.²²⁵ A covered loan that includes prohibited terms is subject to the extended right to rescind under 15 U.S.C. § 1635.²²⁶

2.4 TRUTH IN LENDING RESCISSION RIGHT

The Truth in Lending Act provides a powerful remedy to a consumer whose family home is threatened by a nonpurchase money mortgage.²²⁷ So powerful a right that one court held it may be malpractice for an attorney to fail to advise a client of her rescission right. The possibility of a Truth in Lending rescission should be checked in every case involving a nonpurchase money mortgage entered within the prior 3 years.

The rescission right is specifically exempt from the general rule that TILA does "not affect the validity or enforceability of any contract or obligation under State or Federal law."²²⁸

²¹⁸ 15 U.S.C. § 1635(f); 12 C.F.R. § 1026.23(a)(3); Official Interpretations § 1026.23 (a)(3) cmt. 3.

²¹⁹ NCLC, TRUTH IN LENDING § 9.6.8 (8th ed. 2012).

²²⁰ See NCLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 11.6 (8th ed. 2012).

²²¹ *Id.*

²²² 15 U.S.C. § 1641(a), (c). See NCLC, TRUTH IN LENDING § 9.6.12 (8th ed. 2012).

²²³ 15 U.S.C. § 1641(d)(1).

²²⁴ 15 U.S.C. § 1640(a)(4); see, e.g., *Newton v. United Companies Fin. Corp.*, 24 F. Supp. 2d 444 (E.D. Pa. 1998).

²²⁵ 15 U.S.C. § 1640(g); see NCLC, TRUTH IN LENDING § 9.6.11.1.4 (8th ed. 2012).

²²⁶ See NCLC, TRUTH IN LENDING §§ 9.6.11.2 (8th ed. 2012).

²²⁷ See 15 U.S.C. § 1635; 12 C.F.R. §§ 1026.15, 1026.23, 1026.2(a)(11), (12), (14), (17).

²²⁸ 15 U.S.C. §1610(d). See *Stone v. Mehlberg*, 728 F.Supp. 1341, 1348 (W.D. Mich. 1989).

2.4.1 When TIL Rescission Applies

TIL rescission may be available where (1) the transaction is subject to the Truth in Lending Act, *see* § 2.3, *supra*, *e.g.*, a consumer credit transaction, and (2) whenever there is a nonpurchase money security interest in the consumer's principal dwelling.²²⁹ The TIL rescission remedy can apply to first or second mortgages,²³⁰ home equity loans, home improvement contracts and liens arising by operation of law, *e.g.*, mechanic's liens.²³¹ TIL rescission has even been applied to exempted transactions where a creditor gave a rescission notice.²³² This would undoubtedly be the result in Louisiana given *Jefferson Bank & Trust Co. Stamatiou*, 384 So.2d 388 (La. 1980) (erroneous inclusion of FTC preservation of defense language in a contract was enforced against the bank).²³³

2.4.2 The Extended Rescission Right

The creditor must deliver to each owner two copies of a notice of the right to rescind and one copy of the TIL disclosure statement containing the material disclosures.²³⁴ The notice of the right to rescind must be given "clearly and conspicuously in writing, in a form that the consumer may keep."²³⁵

The consumer has three business days to rescind from the latest of (1) consummation of the transaction, (2) delivery of proper notice of right to rescind, or (3) delivery of all material disclosures.²³⁶ The three days only begin to run when *all* material and accurate TIL disclosures and proper notice of the right to rescind have been given a consumer in a form he may keep.²³⁷ Sometimes, the rescission notice and material disclosures are not delivered until well after the transaction has been consummated, or a corrected disclosure is sent out after an error was discovered.²³⁸

If the creditor fails to properly deliver the proper notice of the right to rescind or to make any of the specified material disclosures,²³⁹ the consumer has a continuing right to rescind until whichever of the following event occurs first: (1) the expiration of three years after consummation of the transaction; (2) the transfer of all the consumer's interest in the property; or (3) the sale of the property.²⁴⁰

The three-year period limits only the consumer's right to rescind, not the consumer's right to seek judicial enforcement of that rescission.²⁴¹ Therefore, the key to a successful TIL rescission is finding a disclosure or notice violation that will support an extended three year right to rescind and then delivering a notice of rescission prior to the expiration of the three year period.²⁴²

²²⁹ 15 U.S.C. § 1635(a).

²³⁰ A first mortgage refinancing may be subject to the right of rescission

²³¹ 15 U.S.C. § 1635(a); 12 C.F.R. § 1026.2(25); *Gaines v. Phills*, 389 So.2d 445 (La. App. 2 Cir. 1980), *writ denied*, 395 So.2d 1363 (mechanic's liens subject to TIL rescission); *N.C. Freed Co., Inc. v. Board of Governors of Federal Reserve System*, 473 F.2d 1210 (2nd Cir. 1973), *cert. denied*, 414 U.S. 827 (same).

²³² *See, e.g.*, *Mutual Life Insurance Co. v. Bernasek*, 682 P.2d 667 (Kan. 1984).

²³³ *See also* *Capital Bank & Trust Co. v. Lacey*, 393 So.2d 668 (La. 1980) and *Chrysler Credit Corp. v. Sanders*, 545 So.2d 1167 (La. App. 4 Cir. 1989), *following* *Stamatiou*.

²³⁴ 12 C.F.R. §§ 1026.15(b), 1026.23(b).

²³⁵ 12 C.F.R. §§ 1026.5(a)(1), 1026.17(a)(1).

²³⁶ 15 U.S.C. § 1635(a); 12 C.F.R. § 1026.23(a)(3).

²³⁷ 12 C.F.R. §§ 1026.23(a)(3), 1026.17(a)(1).

²³⁸ 12 C.F.R. § 1026.19(a)(2).

²³⁹ Material disclosures are specifically defined by the statute and regulation. 15 U.S.C. § 1602(v); 12 C.F.R. § 1026.23(a)(3).

²⁴⁰ 15 U.S.C. § 1635(f); 12 C.F.R. §§ 1026.15(a)(3), 1026.23(a)(3).

²⁴¹ NCLC, Truth in Lending, § 10.3.2.1 (8th ed. 2012); 15 U.S.C. §§ 1635(f) - (g).

²⁴² NCLC, Truth in Lending, § 10.3.2.1 (8th ed. 2012).

2.4.3 Grounds for Extended Right to Rescind

The grounds for extending the right to rescind from three days to three years are:

- a. **Material TIL Violation** (failure by the creditor to make any of the specified material disclosures).²⁴³ Material disclosures are defined at 15 U.S.C § 1602(v); 12 C.F.R. § 1026.15 n.36; 12 C.F.R. § 1026.23 n.48. For example, disclosures are inaccurate because ineligible or unreasonable costs have been folded into the amount financed. If oral representations or other written document accompanying the notice are misleading or other written documents accompanying the notice are misleading or contradictory to otherwise accurate information in the notice, the clear and conspicuous requirement is violated.²⁴⁴ However, in such a case, the creditor is protected by the 1995 TIL amendments which establish different levels of tolerance for the finance disclosure, and other disclosures affected by the finance charge; the *de minimis* standard versus the *de maximus* standard.²⁴⁵
- b. **Performance of Work Before Expiration Of 3 Day Rescission Period** (“Spiking” or a variation of spiking such as the “two-contract dodge”) may extend the time for rescission, depending on the circumstances.²⁴⁶
- c. **No Notice or Defective Notice Of Right To Rescind.**²⁴⁷ The 1995 amendments give lenders a safe harbor only for use of the wrong model form in a transaction consummated prior to September 30, 1995.²⁴⁸

2.4.4 How Rescission Works

According to the Act and Regulation Z, the rescission process begins with the consumer giving notice to the creditor that she is rescinding the transaction.²⁴⁹ Once the creditor receives notice, the Act and Regulation require that the next three steps must occur.

First, the security interest automatically becomes void and the consumer is no longer obligated to pay any finance or other charge.²⁵⁰

²⁴³ 15 U.S.C. § 1635(a); 12 C.F.R. 1026.15(a), 1026.23(a); Official Staff Commentary §§1026.15(b)-1, 1026.23(b)-1.

²⁴⁴ 12 C.F.R. §§ 1026.17(a)(1); 1026.32(c).

²⁴⁵ See NCLC, Truth in Lending, § 10.4.3. (8th ed. 2012).

²⁴⁶ 12 C.F.R. §§ 1026.15(c), 1026.23(c); Official Interpretations §§ 1026.15(c)-3, 1026.23(c)-3; In Matter of Fabbis, Inc., 81 F.T.C. 678 (1972); Doggett v. County Savings & Loan Ass'n, 373 F.Supp. 774 (E.D. Tenn. 1973); cf. Cole v. Lovett, 672 F.Supp. 947 (S.D. Miss. 1987), *aff'd* 833 F.2d 1008 (5th Cir. 1987). *But see* Smith v. Fidelity Consumer Discount Co., 898 F.2d 896 (3rd Cir. 1989); Hunter v. Richmond Equity, 1987 WL 109703 (N.D. Ala. Nov. 23, 1987) (failure to obtain valid waiver and to observe waiting period for disbursement of funds by themselves do not extend rescission period; must have no delivery of notice and material disclosures). Cf. 15 U.S.C. § 1635(f) (right expires after 3 years, “notwithstanding the fact that the information and forms required under the section or any other disclosures required under this chapter have not been delivered”). See NCLC, Truth in Lending, § 10.5 (8th ed. 2012).

²⁴⁷ 12 C.F.R. §§ 1026.15(a)(3), 1026.23(a)(3). In re Michel, 140 B.R. 92 (Bankr. E.D. Pa. 1992) (any deficiency in the notice to rescind triggers the 3 year right to rescind). See also Jenkins v. Landmark Mortgage Corp., 696 F.Supp. 1089 (W.D. Va. 1988) (creditors' supplemental statements which contradicted or undermined the notice information may extend the rescission right); Rodash v. AIB Mortgage Co., 16 F.3d 1142 (11th Cir. 1994) (where creditor obtained a premature “election not to cancel” signature from consumer, that so undermined the notice of her right to cancel as to violate 12 C.F.R. § 1026.23(b)); Williamson v. Lafferty, 698 F.2d 767 (5th Cir. 1983) (failure to properly disclose expiration date for three-day cooling-off period).

²⁴⁸ 15 U.S.C. § 1649(a)(2); Pub. L. No. 104-208 § 2107 (Sept. 30, 1996). See NCLC, Truth in Lending, § 10.4.4 (8th ed. 2012).

²⁴⁹ See NCLC, Truth in Lending, § 10.6 (8th ed. 2012).

²⁵⁰ 15 U.S.C. § 1635(b); 12 C.F.R. 1026.15(d)(1), 1026.23(d)(1); NCLC, Truth in Lending, § 10.6.3 (8th ed. 2012).

Second, the creditor has 20 days from receipt of notice to return any money or property given to anyone, and to take any action necessary to reflect the termination of the security interest.²⁵¹

Third, after the creditor has complied with the preceding mandate, the consumer is to tender back to the creditor the principal amount of the loan, less closing costs, prepaid finance charges and payments made on the loan.²⁵² In this process, all of the consumer's prior payments get credited to principal, none to interest.

Finally the courts are given the authority to modify the process, at least to some degree.²⁵³ For detailed analysis of this process, see NCLC, *Truth in Lending*, § 10.7 (8th ed. 2012).

2.4.5 Relief Provided by TIL Rescission

- a. Automatically voids the security interest.²⁵⁴ The consumer may sue to enforce either in federal or state court.²⁵⁵
- b. Defeats foreclosure since security interest is cancelled.²⁵⁶
- c. Voids all finance and other loan charges. The creditor is only entitled to the unpaid load principal or the fair market value of the goods or services provided.²⁵⁷
- d. Statutory damages for noncompliance with rescission.²⁵⁸ Separate statutory damages are also available if the creditor fails to respond to the rescission notice.²⁵⁹
- e. Actual damages for noncompliance with rescission.²⁶⁰ Separate actual damages may also accrue under state law if there is a wrongful seizure based on a rescinded security interests.²⁶¹
- f. Explicit vesting. Forfeiture of the entire debt if the creditor refuses to accept a valid tender of the principal or goods within twenty days.²⁶² This remedy is subject to the court's equitable modification authority.
- g. Implicit vesting. Forfeiture of the property or proceeds if the creditor does not respond to the rescission notice.²⁶³ This remedy is subject to the court's equitable modification authority.
- h. Reasonable attorney fees. Some courts have determined that attorney fees are not available against an assignee. As a precaution, in cases

²⁵¹ 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(2), 1026.23(d)(2); NCLC, *Truth in Lending*, § 10.6.4 (8th ed. 2012).

²⁵² 15 U.S.C. 1635(b); 12 C.F.R. § 1026.15(d)(3), 1026.23(d)(3); NCLC, *Truth in Lending*, § 10.6.5 (8th ed. 2012).

²⁵³ 15 U.S.C. 1635(b); 12 C.F.R. § 1026.15(d)(4), 1026.23(d)(4).

²⁵⁴ 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(1); 1026.23(d)(1).

²⁵⁵ 15 U.S.C. § 1640(a); NCLC, *Truth in Lending*, § 10.9.2 (8th ed. 2012).

²⁵⁶ See NCLC, *Truth in Lending*, § 10.9.2 (8th ed. 2012).

²⁵⁷ 12 C.F.R. 1026.23(d)(3). See *Jackson v. US Bank Nat'l Ass'n* (In re Jackson), 245 B.R. 23 (Bankr. E.D. Pa. 2000).

²⁵⁸ 15 U.S.C. §§ 1635(f), 1640(g); NCLC, *Truth in Lending* § 10.9.3 (8th ed. 2012).

²⁵⁹ 15 U.S.C. § 1640(a) (text following subparagraph (a)(4)); In re Michel, 140 B.R. 92 (Bankr. E.D. Pa. 1992).

²⁶⁰ 15 U.S.C. §§ 1635(g), 1640(g); NCLC, *Truth in Lending*, § 10.9.3 (8th ed. 2012).

²⁶¹ *Anderson v. Lester*, 382 So.2d 1019, 1028-29 (La. App. 3 Cir. 1980).

²⁶² 15 U.S.C. § 1640(b); 12 C.F.R. § 1026.23(d)(3); *Arnold v. W.D.L. Inv., Inc.*, 703 F.2d 848, 851 (5th Cir. 1983); *Sosa v. Fite*, 498 F.2d 114 (5th Cir. 1974). See NCLC, *Truth in Lending*, § 10.9.5 (8th ed. 2012).

²⁶³ *Gerasta v. Hibernia Nat'l Bank*, 575 F.2d 580 (5th Cir. 1978) (§ 1640 does not provide for forfeiture; actual damages and attorney fees compensate the borrower); *Brown v. National Permanent Federal Sav. & Loan*, 683 F.2d 444 (D.C. Cir. 1982) (relying on *Gerasta*). See also *Bilal v. Household Fin. Corp.* (In re Bilal), 296 B.R. 828 (D. Kan. 2003) (only remedy for creditor's failure to satisfy its tender obligation is damages). These cases confuse remedies under § 1635 with those authorized by § 1640. However, these two cases can be challenged on several grounds. See NCLC, *Truth in Lending*, § 10.9.5 (8th ed. 2012).

where the underlying violations are not apparent on the face of the documents, attorneys may wish to rescind against both the original creditor and the assignee. The original creditor is still liable for rescission even though it no longer holds the obligation.²⁶⁴

2.4.6 Resources

For detailed information on how to analyze and handle a TIL rescission case, see NCLC, *TRUTH IN LENDING*, Ch. 10 (8th ed. 2012).

2.4.7 Additional state rescission rights

Additional rescission remedies to protect a consumer's home are available under La. R.S. 9:2711 and 3538-40.²⁶

2.5 DEBTOR HARASSMENT REMEDIES

2.5.1 Overview

The federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692o, protects consumers from unfair and deceptive collection tactics by "collectors." The FDCPA establishes general standards of proscribed conduct, defines and restricts abusive collection acts in detail, and provides specific rights for consumers.

FDCPA is a fertile source for monetary claims against collectors who violate the law. Carefully review the collection activity to determine whether a FDCPA lawsuit or reconvotional demand can be asserted against the collector. Also look at the Louisiana Unfair Trade Practices Act²⁶⁶ and Civil Code article 2315²⁶⁷ which provide consumers with remedies against creditors who engage in unfair and deceptive collection practices. The Louisiana Consumer Credit Law also has a procedure (albeit ineffectual like most LCCL provisions) which limits a creditor's collection contacts with a consumer. FDCPA claims should be specifically pleaded.²⁶⁸

2.5.2 How to stop debt collection harassment

The FDCPA does not apply to creditors. It only applies to debt collectors. The FDCPA requires collection agencies and attorneys to cease most contact with the consumer upon the consumer's written request.²⁶⁹ Also, the Louisiana Consumer Credit Law generally limits a creditor to one mail contact per month and four personal contacts after the consumer has notified the creditor to cease further contacts.²⁷⁰ Creditors will also usually honor a request from the consumer's lawyer that further contacts cease.

²⁶⁴ 15 U.S.C. § 1640(k), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1413, 124 Stat. 1376 (July 21, 2010). See *Myers v. Citicorp. Mort. Inc.*, 878 F.Supp. 1553 (M.D. Ala. 1995). See also NCLC, *Truth in Lending*, §10.9.4 (8th ed. 2012). See generally *Canal Mortgage and Finance Co., Inc. v. Jackson*, 390 So.2d 1347 (La. App. 4 Cir. 1980) and *Anderson v. Lester*, 382 So.2d 1019 (La. App. 3 Cir. 1980) for discussion of § 1635 remedies.

²⁶⁵ *Cole v. Lovett*, *supra*.

²⁶⁶ *Porter v. Somers*, 1993 WL 280118 (Conn. Super. Ct. 1993).

²⁶⁷ See e.g., *Conboy v. AT&T Corp.*, 84 F.Supp. 2d 492 (S.D.N.Y. 2000).

²⁶⁸ *Vollenweider v. Helwig Construction Co., Inc.*, 40 So.3d 185 (La. App. 5 Cir. 2010).

²⁶⁹ 15 U.S.C. § 1692c(c).

²⁷⁰ La. R.S. 9:3562(3).

2.5.3 Federal Fair Debt Collection Practices Act

a. Scope

The Federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692 et seq., prohibits use of deceptive and unfair debt collection practices by debt collectors. A “debt collector” is defined by the FDCPA as:

1. any person whose *principal business* is collecting debts, e.g., collection agencies;²⁷¹
2. any person who regularly collects debts owed to another;
3. creditors using false names;
4. creditors collecting for another person;
5. repossession companies;
6. suppliers or designers of deceptive forms;
7. debt buyers after default;²⁷²
8. debt poolers;
9. check guarantee services;
10. flat rate and other collectors;²⁷³
11. lawyers regularly collecting consumer debts.

The FDCPA does not apply to in-house collection activities by a creditor. 15 U.S.C. § 1692a(6)(A) generally excludes these persons from FDCPA coverage:

1. creditors (collecting their own debts), e.g., retail stores, banks, finance companies;
2. corporate collectors collecting only for their affiliates;
3. state and federal officials performing their duties;
4. process servers;
5. bona fide nonprofit consumer credit counselors;
6. persons collecting debts as part of bona fide fiduciary or escrow arrangements;
7. a credit extender’s collection (in its own name) of a debt that it originally extended and then sold or assigned to another creditor while remaining responsible for some or all aspects of collection;
8. assignees (before default), e.g., car finance companies, banks;
9. enforcer of a security interest in an account used as collateral for a commercial loan.

b. Application to attorneys

An attorney who *regularly* collects debts is subject to all provisions of the FDCPA.²⁷⁴ An attorney meets the “regularly” test if:

1. the attorney engages in debt collection in more than isolated instances, e.g., more than a handful of times per year;²⁷⁵

²⁷¹ *Pettit v. Retrieval Masters Creditors Bureau, Inc.*, 211 F.3d 1057 (7th Cir. 2000).

²⁷² *Ruth v. Triumph Partnerships*, 577 F.3d 790 (7th Cir. 2009); *Federal Trade Commission v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007).

²⁷³ *White v. Goodman*, 200 F.3d 1016 (7th Cir. 2000).

²⁷⁴ *Jerman v. Carlisle, McNellie, Rimi, Kramer & Ulrich, L.P.A.*, 130 S.Ct. 1605 (2010); *Heintz v. Jenkins*, 514 U.S. 291 (1995).

²⁷⁵ *Heintz v. Jenkins*, 514 U.S. 291 (1995). Only attorneys engaged in “isolated” collection activity may be exempt. *Crossley v. Lieberman*, 868 F.2d 566, 569 (3d Cir. 1989).

2. debt collection is a minor but regular part of the attorney's practice;²⁷⁶
3. the attorney collects debts more than a few times in a year.²⁷⁷

Attorneys often violate the FDCPA. Common violations by attorneys include failure to provide a validation rights notice in the initial communication²⁷⁸, filing suit in improper venue²⁷⁹, filing a time barred suit²⁸⁰, threat to take illegal or unintended action²⁸¹, failure of all communications (including follow-up letters) to include warning that it is an attempt to collect a debt, misleading communications that a document has been issued or approved by a court,²⁸² stating creditor's post-judgment remedies without disclosing debtor's exemptions or opportunity to defend suit,²⁸³ and communications with third parties.²⁸⁴

Attorneys must review their client's file before signing collection letters.²⁸⁵ Form letters sent by creditors and supplied by attorneys using the attorney's letterhead with no participation by the attorney in the manner implied by the letter violate the FDCPA.²⁸⁶

The creditor may be liable for its attorney's FDCPA violations.²⁸⁷ Under the Rules of Professional Conduct, a FDCPA claim against the attorney may require his withdrawal from representation of the creditor.²⁸⁸

c. Prohibited Collection Practices

The general categories of collection practices prohibited by the FDCPA are listed below. Hundreds of collection practices have been found unlawful by the courts. An extensive listing and discussion of FDCPA violations can be found in NCLC, *Fair Debt Collection* (7th ed. 2011). Volume Two of *Fair Debt Collection* has extensive case summaries by issue and state.

1. Failure to provide proper validation notice

The collector must notify the consumer within 5 days of the initial communication of the amount of the debt, name of creditor, the right to dispute the debt, the right to obtain verification (or "vali-

²⁷⁶ *Garrett v. Derbes*, 110 F.3d 317 (5th Cir. 1997) (attorney who collected against 639 different individuals in a nine month period satisfied regularly test even though this was only .5% of his practice); *Hester v. Graham, Bright & Smith, P.C.*, 289 Fed. Appx. 35 (5th Cir. 2008) (450 debt collection attempts over 2 years); *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, 374 F.3d 56 (2d Cir. 2004) (attorney who issued 145 rent demand notices was "regularly" collecting debt even though collection work was less than .5% of his practice).

²⁷⁷ *Franco v. Maraldo*, 2000 WL 288378 (E.D. La. 2000); *Garner v. Kansas*, 1999 WL 262100 (E.D. La. 1999).

²⁷⁸ 15 U.S.C. § 1692g; *Huff v. Dobbins, Fraker, Tennant, Joy & Perlstein*, 182 F.3d 922 (7th Cir. 1999); *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992). But, pleadings need not include the validation notice. 15 U.S.C. § 1692g(d).

²⁷⁹ 15 U.S.C. § 1692i; *Addison v. Braud*, 105 F.3d 223 (5th Cir. 1997); *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992).

²⁸⁰ 15 U.S.C. § 1692f; 15 U.S.C. § 1692e; *McCullough v. Johnson, Rodenburg & Lauinger, L.L.C.*, 637 F.3d 939 (9th Cir. 2011); *Freyermuth v. Credit Bureau Services, Inc.*, 248 F.3d 767 (8th Cir. 2001); *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D. Ala. 1987).

²⁸¹ 15 U.S.C. § 1692e; *U. S. v. Nat'l. Fin. Serv., Inc.*, 98 F.3d 131 (4th Cir. 1996); *Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989).

²⁸² *Johnson v. Eaton*, 873 F. Supp. 1019 (M.D. La. 1995).

²⁸³ *Prillerman v. Weltman, Weinberg & Assoc., Clearinghouse No. 42,629* (N.D. Ohio 1987) (law firm must provide notice of exemptions); *Florsheim v. F.T.C.*, 411 F.2d 874 (9th Cir. 1969) (failure to mention opportunity to defend in court).

²⁸⁴ 15 USC § 1692c(b); see also Ala. State Bar Opinion 87-93 (Nov. 20, 1987).

²⁸⁵ *United States v. Central Adjustment Bureau, Inc.*, 667 F. Supp. 370, 380-81 (N. D. Tex. 1986).

²⁸⁶ *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997); *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993).

²⁸⁷ *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D. Ala. 1987).

²⁸⁸ See *Miller v. Knepper & Moga*, 1999 U.S. Dist. LEXIS 16362 (N.D. Ill. 1999)

dation”) of the debt, and the right to obtain the name and address of the original creditor, if different from the current creditor.²⁸⁹ This is a strict liability provision and an unintentional violation of the validation requirements violates the FDCPA.²⁹⁰ Failure to provide this validation notice subjects the collector to statutory damages.²⁹¹

The language of the validation notice must be substantively the same as the statutory language and must not impose additional burdens on the consumer. The debt validation notice must be effective, conspicuous and cannot be overshadowed or contradicted by other messages in the initial communication from the collector.²⁹ Statutory notice under the Act is to be interpreted from the perspective of the least sophisticated debtor.²⁹³ Forms that suggest that harm may occur to the consumer before the expiration of the 30 day validation period have been held to violate Section 1692g(a).²⁹⁴ If the debt is disputed, the collection agency must cease collection efforts and investigate the consumer’s dispute.²⁹⁵

Each collector must provide a validation notice in connection with its initial communication but such notice may be on a separate sheet of paper. Validation notices must be sent in a post-judgment collection letter if it is the collector’s initial communication.²⁹⁶ The consumer is entitled to dispute a debt orally to overcome a collector’s assumption that a debt is valid, although only a written dispute of the debt triggers the collector’s duty to provide verification of the debt.²⁹⁷

2. Unfair Practices

The FDCPA prohibits collectors from using unfair or unconscionable means to collect any debt.²⁹⁸ The legal concept of unfairness is broadly construed by the courts to preclude practices that offend public policy, are immoral or oppressive, or cause substantial injury.²⁹⁹ The list of unfair practices in § 1692f is not exhaustive and applies to attempted collection as well as actual collection.³⁰⁰ In determining whether a practice is unfair, the FTC has established a three-prong test: (1) substantial injury to the consumer, (2) not outweighed by countervailing benefits to consumers or com-

²⁸⁹ 15 U.S.C. § 1692g(a)(3).

²⁹⁰ *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130 (2d Cir. 2010).

²⁹¹ *Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982).

²⁹² 15 U.S.C. § 1692g(a)(3); *Swanson v. Southern Credit Service, Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1988); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991); *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996) (validation notice printed on the back of a collection letter contradicted and overshadowed by the warning on front violated the FDCPA).

²⁹³ *Smith v. Computer Credit, Inc.*, 167 F.3d 1052 (6th Cir. 1999).

²⁹⁴ *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996); *Swanson v. Southern Credit Service, Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1988); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991).

²⁹⁵ 15 U.S.C. § 1692g(a)(3); *Jacobson v. Healthcare Fin. Serv. Inc.*, 516 F.3d 85 (2d Cir. 2008); *Shimek v. Forbes*, 374 F.3d 1011 (11th Cir. 2004); *Ford Motor Credit Co. v. Dunham*, 2009 WL 4981913, n. 7 (La. App. 1 Cir. 2009), writ denied 31 So.3d 367 (La. 2010).

²⁹⁶ *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992).

²⁹⁷ 15 U.S.C. § 1692a(4)-(5); *Camacho v. Brideport Finance Inc.*, 430 F.3d 1078 (9th Cir. 2005); *Reed v. Smith*, 1994 U.S. Dist. LEXIS 21463 (M.D. La. 2004).

²⁹⁸ 15 U.S.C. § 1692f.

²⁹⁹ *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185 (11th Cir. 2010).

³⁰⁰ *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364 (3d Cir. 2011).

petition, and (3) not reasonably avoidable by the consumer.³⁰¹ The least sophisticated consumer standard is applied.³⁰² The concept of unconscionable is generally defined by shocking to the conscience.” See the Uniform Commercial Code (UCC) sections 2-302 and 2-719(3).

Examples of unfair or unconscionable practices include:

- Suing on time-barred debts without proper inquiry³⁰³
- Using requests for admission containing false information, when litigating against a pro se defendant³⁰⁴
- Collection of unauthorized amounts.³⁰⁵ Possible illegal charges include:
 - a. noncontractual collection charges;
 - b. interest charges;
 - c. dishonored check charges;³⁰⁶
 - d. service charges;
 - e. attorney’s fees;³⁰⁷
 - f. litigation costs;
 - g. late fees;
 - h. prepayment fees;
 - i. charges under dispute; and
 - j. taxes.
- Taking or threatening nonjudicial action to repossess when (a) no present right to the collateral, (b) no present intent to exercise such rights or (c) property is exempt from seizure. 15 U.S.C. §1692f(6).
- Using any language or symbol, other than debt collector’s address, on any envelope mailed to consumer, except collector may use his name if it does not indicate that he is in the debt collection business.³⁰⁸
- Accepting, soliciting, depositing, or threatening to deposit any post-dated check. A collector’s acceptance of a postdated check violates the FDCPA unless it gave the consumer who wrote the check 3-10 business days notice prior to depositing the check.³⁰⁹
- Causing any charges to be made to the consumer, e.g., collect telephone calls or telegrams, unless the consumer is made aware of the collection purpose.³¹⁰

³⁰¹ FTC Official Staff Commentary § 808, 2.

³⁰² *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185 (11th Cir. 2010).

³⁰³ *McCullough v. Johnson, Rodenburg & Lauinger, L.L.C.*, 610 F.3d 939 (9th Cir. 2011); *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D. Ala. 1987).

³⁰⁴ *McCullough v. Johnson, Rodenburg & Lauinger, L.L.C.*, 610 F.3d 939 (9th Cir. 2011).

³⁰⁵ *McCullough v. Johnson, Rodenburg & Lauinger, L.L.C.*, 610 F.3d 939 (9th Cir. 2011); *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D. Ala. 1987).

³⁰⁶ *Byes v. Credit Bureau Enterprises*, 1996 WL 99360 (E.D. La. 1996).

³⁰⁷ *McCullough v. Johnson, Rodenburg & Lauinger, L.L.C.*, 610 F.3d 939 (9th Cir. 2011).

³⁰⁸ *Peter v. GC Services, L.P.*, 310 F.3d 344 (5th Cir. 2002); *Rutyna v. Collection Accounts Terminal*, 478 F.Supp. 980 (N.D.Ill. 1979) (use of “Collection Accounts Terminal” on envelope violated 1692f). Any business name with “debt” or “collector” in it may not be used. FTC Official Staff Commentary 808(8)-1.

³⁰⁹ 15 U.S.C. §1692f(2); *U.S. v. Central Adjustment Bureau, Inc.*, 667 F.Supp. 370, 376 (N.D. Tex. 1986), *aff’d per curiam*, 823 F.2d 880 (5th Cir.1987).

³¹⁰ 15 U.S.C. § 1692f(5).

- Communicating with the consumer by postcard.³¹¹
- Filing suit without legal authority or advising a creditor to sue, when such counseling by a collector constitutes unauthorized practice of law under state law. Louisiana recently amended its debt collection statute to specifically permit collectors who represent creditors to sue using a Louisiana licensed attorney.³¹²
- Threats to contact or contacting third parties, e.g., employer, neighbor, relative, except with the consumer's direct prior consent, court permission, or to effect a postjudgment judicial remedy.³¹³
- Dunning letters sent by a collector on law office stationary but actually from an in-house attorney, or signed by an outside attorney who had no knowledge of the debt.
- Filing suit (including a suit to confirm arbitration award) in a forum far from the consumer's residence or from where the contract was signed.³¹⁴
- Contacting a consumer known to be represented by an attorney.³¹⁵
- Arranging for a consumer to deposit her paycheck directly into an account from which it would be transferred to the lender and causing her to sign a waiver of her Electronic Funds Transfer Act right to cancel the transfer, where the EFTA forbids such a waiver.³¹⁶
- Use of harassing or abusive telephone calls or letters.³¹⁷

3. False or misleading representations

The FDCPA prohibits collectors from using false, deceptive or misleading representations or means in connection with the collection of any debt. 15 U.S.C. § 1692e. Here, the "least sophisticated consumer" standard is used to determine whether the representation is misleading.³¹⁸

There is no requirement of intent. Knowledge of a statement's falsity is not a necessary element.³¹⁹ That a practice is customary does not prevent it from being deceptive. Actual deception need not be shown except to establish damages.³²⁰ The failure to disclose

³¹¹ 15 U.S.C. § 1692f(7).

³¹² See La. Rev. Stat. Ann. 9:3576.19B & C. See also *Hoskin v. Plaquemines Parish Government*, 743 So.2d 736 (La. App. 4 Cir. 1999); *Alco Collections, Inc. v. Poirer*, 680 So.2d 735 (La. App. 1 Cir. 1996); *Poirier v. Alco Collections, Inc.*, 107 F.3d 347 (5th Cir. 1997); *Pisarello v. Administrator's Serv. Corp.*, 464 So.2d 917 (La. 4 Cir. App. 1985).

³¹³ *Swanson v. Southern Credit Service, Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1988).

³¹⁴ 15 U.S.C. § 1692i; *Addison v. Braud*, 105 F.3d 223 (5th Cir. 1997); *Chase Bank USA, N.A. v. Roach*, 978 So.2d 1103, 1104 (La. App. 3 Cir. 2008)(suit to confirm arbitration).

³¹⁵ 15 U.S.C. §1692c(a)(2).

³¹⁶ *Cobb v. Monarch Finance Corp.*, 913 F. Supp. 1164 (N.D. Ill. 1995).

³¹⁷ 15 USC § 1692d; *U.S. v. Central Adjustment Bureau, Inc.*, 667 F. Supp. 370 (N.D. Tex.1986), *aff'd per curiam*, 823 F.2d 880 (5th Cir. 1987).

³¹⁸ *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985).

³¹⁹ *But see Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997) *cert. denied*, 523 U.S. 1022 (1998) (a negligent misrepresentation did not state a claim under the FDCPA).

³²⁰ *Morgan v. Credit Adjustment Board, Inc.*, 999 F. Supp. 803 (E.D. Va. 1998) (that the consumer never read the collection letter had no bearing on whether the FDCPA was violated).

information is deceptive. The materiality of the deception may be inferred, and showing detrimental reliance is unnecessary. Truth and good faith are not defenses. Puffing” is not a defense unless the deception has no capacity to deceive.

Examples of false, deceptive or misleading representations include:

- Threat to sue for debt when no such intent exists.³²¹
- Unequivocal threat to sue in letter that failed to disclose that debt buyer would not sue consumer who disputed debt per 15 U.S.C. § 1692g³²²
- Threat of arrest or seizure unless such action is legal and collector plans to take such action.³²³
- Implied affiliation with government. For example, presence of State’s name or word “National“ in business name may violate 1692e.³²⁴
- Misrepresentation of character, amount, or legal status of debt.³²⁵
- Use of speed-o-gram or simulated telegram.³²⁶
- Simulation of legal process.
- That an individual is an attorney or that the communication is from an attorney when such is not the case.
- That a sale or other transfer of any interest in the debt will cause the consumer to lose any claim or defense to payment of the debt.³²⁷
- That the consumer committed a crime or other disgraceful conduct.³²⁸
- Threatens to or communicates false credit information.³²⁹
- Debt collectors using a name other than the true name of its business.³³⁰

4. Harassment

The FDCPA prohibits collectors from engaging in any conduct the natural consequence of which is to harass, oppress or abuse any person. 15 U.S.C. § 1692d. This section of the FDCPA protects any person, not just the debtor.³³¹ A 1692d harassment claim is viewed from the “perspective of a consumer whose circumstances

³²¹ *Brown v. Card Service Center*, 464 F.3d 450 (3d Cir. 2006); *United States v. National Financial Services, Inc.*, 98 F.3d 131 (4th Cir. 1996); *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989).

³²² *Wilhelm v. Credico, Inc.*, 519 F.3d 416 (8th Cir. 2008).

³²³ *Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982); *United States v. Central Adjustment Bureau*, 667 F.Supp. 370 (N.D.Tex. 1986) *aff’d* 823 F.2d 880 (5th Cir. 1987).

³²⁴ *Peter v. G.C. Services, L.P.*, 310 F.3d 344 (5th Cir. 2002).

³²⁵ *West v. Costen*, 558 F.Supp. 564 (W.D.Va. 1983).

³²⁶ *Romine v. Diversified Collection Services*, 155 F.3d 1142 (9th Cir. 1998).

³²⁷ *Lawson v. Management Adjustment Bureau, Inc.*, 1997 WL 283027 (N.D. Ill. 1997).

³²⁸ *Professional Check Service v. Dutton*, 560 So.2d 755 (Ala. 1990); *United States v. Central Adjustment Bureau, Inc.*, 667 F. Supp. 370 (N.D. Tex. 1987).

³²⁹ *Vidrine v. American Professional Credit, Inc.*, 477 S.E.2d 602 (Ga. App. 1996).

³³⁰ 15 U.S.C. § 1692e(14).

³³¹ *West v. Costen*, 558 F.Supp. 570 (W.D. Va. 1983); *Dutton v. Wolhar*, 809 F.Supp. 1130 (D.Del. 1992), *aff’d*, 5 F.3d 649 (3d Cir. 1993).

make him relatively more susceptible to harassment, oppression or abuse.”³³² Specific 1692d prohibitions include, but are not limited to:

- Threat of use of violence or other criminal means to harm person, reputation or property.
- Use of obscene, profane or abusive language.
- Repeated or continuous telephone calls.
- Publishing lists of defaulting debtors.
- Threats to contact third parties.
- Telephone messages left with neighbors when the collector could have reached the consumer directly.
- Intimidating, belittling, and insulting behavior.
- Calling the consumer at work despite prior warnings that the consumer cannot talk at work.³³³

5. Communications with Consumer

The FDCPA places various restrictions on a collector’s communications with a consumer. 15 U.S.C. § 1692c. Specific examples of 1692c restrictions include:

- Communications at unusual or inconvenient times and places, e.g., between 9 p.m. and 8 a.m. or at the consumer’s place of employment.³³⁴
- Communications with a consumer represented by an attorney.³³⁵
- Communications after consumer notifies collector to cease.³³⁶
- Communications with third parties.³³⁷

Cell phone communications

A recent phenomenon that may arise in debtor harassment cases is the use of the caller ID service that allows a subscriber to view automatically the telephone numbers from which incoming telephone calls are placed, including unlisted numbers. This technology is particularly troublesome for a consumer who may wish to preserve the privacy of his or her telephone number and location.³³⁸

Consumers should be aware that the FCC has responded to this problem by requiring carriers to provide calling parties with a method of blocking caller ID. In many states, telephone companies also offer line blocking, which blocks caller ID for all calls from that line. Line blocking, however, will not protect the privacy of callers who dial an 800, 888, 887 or 866 number.

³³² *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985).

³³³ *Austin v. Great Lakes Collection Bureau, Inc.*, 834 F. Supp. 557 (D. Conn. 1993).

³³⁴ *United States v. Central Adjustment Bureau*, 667 F.Supp. 370 (N.D. Tex. 1986).

³³⁵ *Hartman v. Meridian Fin. Servs., Inc.*, 191 F.Supp. 2d 1031 (W.D. Wis. 2002).

³³⁶ 15 U.S.C. § 1692c(c); *Carrigan v. Central Adjustment Bureau, Inc.*, 494 F.Supp. 824 (N.D. Ga. 1980).

³³⁷ 15 U.S.C. § 1692c(b); *Henderson v. Eaton*, 2002 WL 31415728 (E.D. La. 2002); *Austin v. Great Lakes Collection Bureau, Inc.*, 834 F.Supp. 557 (D. Conn. 1993)(communications with secretary).

³³⁸ See NCLC, *Fair Debt Collection* (7th ed. 2011), 9.3 *et seq.* See also *Romine v. Diversified Collection Services, Inc.*, 155 F.3d 1142 (9th Cir. 1998). *Accord*, *Udis v. Universal Communications Co.*, 56 P.3d 1177 (Colo. App. 2002) (holding that business that sent telegram-like messages to individuals, without consumers’ knowledge or consent, to capture phone numbers when a special number was dialed to retrieve a message, was a collection agency under state fair debt collection law).

6. Obtaining location information about consumer from third parties

The FDCPA strictly regulates how a collector may obtain location information about a consumer. Collectors may not directly contact a consumer's employer except for location information in some circumstances. 15 U.S.C. § 1692c(b). A collector may contact a third party to obtain a consumer's residential address and phone number or work address. 15 U.S.C. §§ 1692a(7), 1692b.

A collector shall:

- Identify himself.
 - State that he is confirming or correcting location information.
- A collector shall not:
- State that the consumer owes a debt.
 - Use the collection company's name unless it is requested.
 - Use language or symbols in the envelope or contents that indicate that it is in the collection business.
 - Communicate with a third party more than once unless requested to do so or unless he reasonably believes the person has correct or complete information.
 - Communicate by post card.
 - Communicate with a third party once he knows the consumer is represented by an attorney unless the attorney fails to respond within a reasonable time.

d. Actual Damages

Actual damages are available to any person injured by a FDCPA violation. 15 U.S.C. § 1692k(a)(1). Actual damages generally include pecuniary losses, e.g., lost wages, out of pocket expenses, and physical injuries such as ulcers, vomiting and insomnia. Actual damages may include personal humiliation, embarrassment, mental anguish or emotional distress.³³⁹ Clients who have suffered emotional distress may have substantial damage claims.³⁴⁰ Jury trials are available for FDCPA claims in federal court.³⁴¹

e. Statutory Damages

Statutory damages of up to \$1,000, in addition to actual damages (and other statutory or punitive damages under state law), are available for FDCPA violations.³⁴² An award of maximum statutory damages is appropriate if a violation of the FDCPA is proved. Proof of actual damages is not a prerequisite for statutory damages.³⁴³ Multiple statutory awards are appropriate if there are multiple plaintiffs or multiple defendants.³⁴⁴ However, most courts limit an individual plaintiff to \$1,000 in statutory damages in an action against one defendant even if there are multiple FDCPA violations.³⁴⁵

³³⁹ Southern Siding Co. v. Raymond, 703 So.2d 44 (La. App. 1 Cir. 1997) writ denied 709 782 (La. 1998) (damages of \$5,000 for emotional distress in FDCPA suit upheld without medical evidence).

³⁴⁰ See NCLC, *Fair Debt Collection* (7th ed. 2011), §§ 2.5.4, 6.3.1, 6.3.2.

³⁴¹ Sibley v. Fulton Dekalb Collection Service, 677 F.2d 830 (11th Cir. 1982).

³⁴² 15 U.S.C. § 1692k(a)(1)-a(2)(A).

³⁴³ Beaudry v. Telecheck, 579 F.3d 702 (6th Cir. 2009).

³⁴⁴ Armbruster v. Hecker, 2010 WL 1643599 (M.D. Pa. 2010) (\$1000 to each named plaintiff); Ganske v. Checkrite, Ltd., 1997 WL 33810208 (W.D. Wis. 1997) (each debt collector defendant liable for \$1,000 statutory damages).

³⁴⁵ See e.g., McDaniel v. Asset Retrieval, Inc., 1996 WL 7001 (E.D. La. 1996).

The FDCPA requires courts to consider four factors in determining the amount of statutory liability in individual actions: (1) intent, (2) frequency, (3) persistence, and (4) nature of the collector's noncompliance. The FDCPA imposes liability for any failure to comply, without regard to the violator's intent. However, the collector's intent is one factor considered in determining the amount of statutory damages (but not actual damages). The collector can defend itself from liability for violations by showing that they were unintentional, that they resulted from good faith error, and that he maintained procedures reasonably adapted to avoid such errors.³⁴⁶

A Louisiana federal court awarded the consumer FDCPA statutory damages of \$1,000 on a default judgment.³⁴⁷ No actual damages were awarded as plaintiff's complaint did not request any. The court found that the maximum statutory damages were per proceeding and not per violation.³⁴⁸

f. Attorney's Fees

Several circuits have held that reasonable attorney's fees must be awarded in "any successful action" to enforce liability even though neither actual nor statutory damages were awarded.³⁴⁹ However, in the Fifth Circuit, attorneys' fees may be reduced or denied if there is nominal relief or no award of actual damages.³⁵⁰ Attorney fees may be awarded to a legal services attorney.³⁵¹ The lodestar approach (reasonable hours x prevailing hourly rate) is used to calculate attorney fees in FDCPA suits.³⁵² If a case is settled, counsel should take appropriate steps to preserve the attorney fee claims.³⁵³

g. Res judicata and compulsory counterclaims

Res judicata prevents a party from relitigating any matter of fact or law that was or should have been adjudicated in a prior action. Is a FDCPA claim a compulsory counterclaim to a state court debt action against the consumer? The federal appellate courts have held that FDCPA claims are not compulsory counterclaims and, therefore, could be adjudicated in federal court subsequent to a state court judgment or suit, if the FDCPA claim was not actually litigated in state court.³⁵⁴ Therefore, so long as not contesting the amount of the debt, a consumer should have the choice of raising a FDCPA claim as a reconventional demand in state court lawsuit or by an independent federal court lawsuit.

³⁴⁶ 15 U.S.C. § 1692k(c).

³⁴⁷ *McDaniel v. Asset Retrieval, Inc.*, 1996 WL 7001 (E.D. La. 1996).

³⁴⁸ *Accord*, *Wright & Financial Services, Inc.*, 22 F.3d 647 (6th Cir. 1994).

³⁴⁹ *Zagorski v. Midwest Billing Services, Inc.*, 128 F.3d 1164 (7th Cir. 1997); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991); *Pipiles v. Credit Bureau, Inc.*, 886 F.2d 22 (2d Cir. 1989).

³⁵⁰ *Johnson v. Eaton*, 80 F.3d 148 (5th Cir. 1996); *McGowan v. Credit Center*, 546 F.2d 73 (5th Cir. 1977); *see also* *Neyland v. Balsano*, 2009 WL 2762817 (E.D. La. 2009).

³⁵¹ *Bingham v. Collection Bureau*, 505 F. Supp. 864 (D. N. D. 1981).

³⁵² *Johnson v. Eaton*, 80 F.3d 148 (5th Cir. 1996); *McDaniel v. Asset Retrieval, Inc.*, 1996 WL 7001 (E.D. La. 1996).

³⁵³ *NCLC, Fair Debt Collection* (7th ed. 2011), § 6.8.3.

³⁵⁴ *Whitaker v. Ameritech Corp.*, 129 F.3d 952 (7th Cir. 1997); *Cousins v. Duane St. Assoc.*, 7 Fed. Appx. 85 (2d Cir. 2001); *Peterson v. United Accounts, Inc.*, 638 F.2d 1134 (8th Cir. 1981); *Azar v. Hayter*, 874 F.Supp. 1314 (N.D. Fla. 1995), *aff'd without op.* 66 F.3d 342 (11th Cir. 1995).

h. Rooker-Feldman doctrine

A debt collector may seek to defend a FDCPA lawsuit by claiming that the Rooker-Feldman doctrine bars a federal FDCPA lawsuit after a state court judgment against the consumer on the underlying consumer debt. Under the *Rooker-Feldman* doctrine, lower federal courts lack jurisdiction to review of state court judgments.³⁵⁵ The doctrine applies to claims that were actually raised before the state court and claims that are inextricably intertwined with state court determinations. The *Rooker-Feldman* doctrine has been narrowed by more recent Supreme Court decisions, and probably has little application to FDCPA lawsuits that do not contest the accuracy of the amount of debt.³⁵⁶ Many courts, including those in the Fifth Circuit, have rejected the *Rooker-Feldman* defense to a FDCPA lawsuit.³⁵⁷ However, an Eastern District of Louisiana case applies *Rooker-Feldman* to bar a FDCPA lawsuit in a case where there was a final state court order in a foreclosure suit and the federal plaintiff tried to challenge the validity of the debt.³⁵⁸

i. Statute of Limitations

A FDCPA claim must be brought within one year from the date on which the violation occurred.³⁵⁹ The courts have split on whether an FDCPA complaint may be filed on the anniversary date of the violation or must be filed the day before the anniversary date. The Fifth Circuit has followed the anniversary date rule under Rule 6(a) of the Federal Rules of Civil Procedure.³⁶⁰

Courts have reached different conclusions on when a violation occurs. For example, one court has ruled that the violation occurs when the collection letter is sent while another has opined that the violation occurs upon receipt.³⁶¹ Some courts add 5 days to the mailing of the of the collection letter where the FDCPA violation arises under § 1692g.³⁶² La. Code Civ. Proc. art 424 prohibits the use of prescribed FDCPA claims as set-offs.³⁶³ However, many FDCPA violations create a cause of action under the Louisiana Unfair Trade Practices Act. Prescribed unfair trade practice claims may be raised as set-offs.

j. State law remedies for creditors' unfair collection practices

Unfair or deceptive collection practices may violate the Louisiana Unfair Trade Practices Act. A FDCPA violation should be an unfair or deceptive

³⁵⁵ *Rooker v. Fidelity Trust Co.*, 263 U.S.413, 415-16, (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86 (1983).

³⁵⁶ *See Exxon Mobil Corp. v. Arabia, Inc.*, 544 U.S. 280 (2005); *Lance v. Dennis*, 546 U.S. 459 (2006); see also, NCLC, *Fair Debt Collection* (7th ed. 2011), § 7.4.4.

³⁵⁷ *Brooks v. Flagstar Bank, FSB*, 2011 WL 2710026 (E.D. La. 2012)(J. Vance). *Garcia v. Jenkins Babb LLP*, 2012 WL 3847362 (N.D. Tex. 2012)(collecting cases); see also *Jenkins v. General Collection Co.*, 538 F.Supp.2d 1165 (D. Neb. 2008)(FDCPA claims were based on the collector filing time-barred collection lawsuits and obtaining judgments against the consumers in state court).

³⁵⁸ *Wylie v. The Bank of New York Mellon*, 856 F. Supp.2d 837 (E.D. La. 2012)(J.Brown). Note that Judge Brown's decision is contrary to the *Brooks* decision, *supra*, by another Eastern District of Louisiana judge.

³⁵⁹ 15 U.S.C. § 1692k(d).

³⁶⁰ *Souife v. First Nat'l Bank of Commerce*, 452 F. Supp. 818 (E.D. La. 1978) *aff'd* 653 F.2d 142 (5th Cir. 1981).

³⁶¹ *Compare Mattson v. U.S. West Communications, Inc.*, 967 F.2d 259 (8th Cir. 1992) with *Seabrook v. Onondaga Bureau of Medical Economics*, 705 F.Supp. 81, 83 (N.D.N.Y 1989) (dicta); *Maloy v. Phillips*, 64 F.3d 607 (11th Cir. 1995).

³⁶² *Maloy v. Phillips*, 64 F.3d 607 (11th Cir. 1995); *Russell v. Bowman, Heintz, Boscica & Vician, P.C.*, 744 N.E. 2d 467 (Ind. App. 2001).

³⁶³ La. Code Civ. Proc. 424 may be unconstitutional since it discriminates against use of certain federal consumer protection laws as set-offs.

trade practice. Several Louisiana courts have found debt collection practices outlawed under the FDCPA to be unfair trade practices when committed by a creditor.³⁶⁴ A creditor or collector may also be liable in tort under La. Civil Code art. 2315 for abusive collection practices.³⁶⁵

2.6 CREDIT INSURANCE

In Louisiana, the average consumer is charged almost twice what consumers in most other states are charged for credit life insurance.³⁶⁶ Louisiana has the lowest (worst for consumers) credit life insurance loss-ratio³⁶⁷ in the nation.³⁶⁸ Millions of dollars in excessive credit life insurance premiums are charged annually to poor Louisiana consumers. There are several possible remedies for credit life insurance abuse.

2.6.1 Violation of Fiduciary Duty

A lender, in effect, acts as an insurance salesman when it sells credit life insurance. Therefore, the lender has a concomitant fiduciary duty to the customer.³⁶⁹ A credit life insurance policy can be voided if a reasonable man, knowing the terms and results, would not have purchased it.³⁷⁰ Some courts have found the sale of credit life insurance to be a breach of the lender's fiduciary duty when the lender failed to disclose the availability of cheaper insurance³⁷¹ or sold more expensive separate policies instead of joint policies.³⁷² Remedies for these violations of fiduciary duty can arise under the Louisiana UTPL, usury, and unconscionability.³⁷³

2.6.2 Failure to Disclose

The failure to disclose the nature and terms of the credit life insurance to the consumer may be a violation of unfair trade practices law.³⁷⁴ Is it also a UTPL violation to engage in costly refinancing without informing consumers that separate loans would have been cheaper.³⁷⁵

³⁶⁴ See *BNO v. Phillips*, 415 So.2d 973 (La. App. 4 Cir. 1982); *Jones v. Petty*, 577 So.2d 821 (La. App. 2 Cir. 1991).

³⁶⁵ *Booty v. American Finance Corp.*, 224 So.2d 512 (La. App. 2 Cir. 1969); *Boudreaux v. Allstate Fin. Corp.*, 217 So.2d 439 (La. App. 1 Cir. 1968).

³⁶⁶ Louisiana allows lenders to charge up to \$1.00 per \$100 of single credit life insurance. La. R.S. 9:3332(A) (2010). This is about double the national average.

³⁶⁷ Loss ratio is the ratio of benefits (claims) paid by insurers to premiums paid by consumers.

³⁶⁸ Louisiana's loss ratio is 24.85%. The National Association of Insurance Commissioners recommends a 60% minimum loss ratio. The national average in 2007 was 42.85%. NAIC, *Credit Life Insurance and Credit Accident & Health Insurance Experience 2005-2009*, at 27-28 (April 1, 2009).

³⁶⁹ See *Sun Finance Co., Inc. v. Briscoe*, 384 So.2d 555 (La. App. 4 Cir. 1980) (failure to obtain credit life insurance violated lender's duty to customer). Louisiana law imposes a fiduciary duty on insurance agent to place requested insurance and to promptly notify consumer if he failed to obtain requested insurance. *Dahan v. Novelties & Co., LLC v. Ohio Cas. Ins. Co.*, 51 So.3d 129, 133 (La. App. 4 Cir. 2010).

³⁷⁰ *Marshall v. Citicorp Mortgage, Inc.*, 601 So.2d 669 (La. App. 5 Cir. 1992); see also *Wallace v. First Assurance Life of America*, 862 So.2d 374 (La. App. 2 Cir. 2003) (where dealer filled in insurance section on contract, and both consumer and dealer understood the consumer to want coverage on the full amount of the debt, the insurer was required to pay the full amount upon the consumer's disability).

³⁷¹ See, e.g., *Browder v. Hanley-Dawson Cadillac*, 379 N.E.2d 1206 (Ill. App. 1978) (failure to disclose cheaper coverage is UDAP violation); *Robinson v. Rebsamen Ford, Inc.*, 530 S.W.2d 660 (Ark. 1975) (policy sold at \$.75 per \$100 without informing consumer of similar insurance available at \$.44 per \$100).

³⁷² See *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 553 P.2d 423 (Wash. 1976) (selling separate policies without informing consumers of availability of cheaper joint policy is a deceptive practice).

³⁷³ See NCLC, *THE COST OF CREDIT* §§ 8.7.1, 8.7.2, 8.7.4, 8.7.5 (4th ed. 2009).

³⁷⁴ See *Marshall v. Citicorp Mortgage, Inc.*, 601 So.2d 669 (La. App. 5 Cir. 1992) (failure to disclose decreasing nature of credit life insurance).

³⁷⁵ *In re Milbourne*, 108 B.R. 522 (Bankr. E.D. Pa. 1989); see also *Bair v. Public Service Emp. Credit Union*, 709 P.2d 961, 962 (Colo. App. 1985) (failure to disclose that monthly disability did not cover monthly obligation); see generally NCLC, *THE COST OF CREDIT* §§ 8.7.3, 8.7.4 (4th ed. 2009); Dwight Golann, *Beyond Truth in Lending: the Duty of Affirmative Disclosure*, 46 BUSINESS LAWYER 1307 (1991).

2.6.3 Unconscionability

In *Marshall v. Citicorp Mortgage, Inc.*, the court held that the sale of decreasing insurance for a term and balance less than the loan in combination with the Rule of 78's was unconscionable under La. R.S. 9:3516(36) since a reasonable man, knowing the results, would not have purchased the insurance.³⁷⁶ The court then held the life insurance terms of the loan agreement unenforceable in accordance with La. R.S. 9:3551 and allowed the consumer to recover the premium costs and interest.³⁷⁷

It has also been held unconscionable for a lender to finance a loan over a 6 year period without informing the borrower that a 3 year loan would have a lower monthly payment and would have cost less overall.³⁷⁸ In *Besta v. Beneficial Loan Co. of Iowa*, the longer term loan cost the borrower an additional \$3,000 from which she received no additional benefit. The *Besta* court found the longer loan unconscionable because no reasonable person would have accepted the more expensive term. The creditor was only allowed to collect as if the cheaper 3 year loan had been written.³⁷⁹

For further explanation on credit insurance and unconscionability, see NCLC, THE COST OF CREDIT § 8.7.5 (4th ed. 2009).

2.6.4 Voluntariness and Truth in Lending

Creditors who require credit insurance but do not include the premiums in the finance charge violate the Truth in Lending Act.³⁸⁰ Such a violation would entitle the consumer to statutory damages (probably the statutory maximum of \$2,000), rebate of the premiums and related interest (which could easily be 1/3 to 1/2 of the loan) and attorneys' fees.

The relevant question is whether the creditor's conduct undermines or negates the import of the voluntariness disclosure. The proof requirements for a TIL claim based on coerced insurance purchase are: (1) the lender affirmatively represented, by words or conduct, that insurance was in fact required and (2) as a result, the borrower purchased insurance coverage that he would not likely have otherwise purchased.³⁸¹ For more on proof of coercion, see generally NCLC, TRUTH IN LENDING, § 3.9.4.5.2.4.

The Fifth Circuit held in *USLIFE Credit Corp. v. FTC* that parol evidence is inadmissible to contradict voluntariness disclosures absent allegations of illiteracy, fraud, or duress.³⁸² Fortunately, given subsequent developments, *USLIFE* is now questionable law. A FRB Official Staff Commentary § 216.4(d)-5 states that "[w]hether insurance is in fact required or optional is a factual question." The Supreme Court held in *Ford Motor Credit v. Milhollin* that FRB opinions interpreting the TILA are to be given the greatest deference unless demonstrably irrational.³⁸³

³⁷⁶ *Marshall*, 601 So.2d at 671-72.

³⁷⁷ *Id.*

³⁷⁸ *Besta v. Beneficial Loan Co. of Iowa*, 855 F.2d 532 (8th Cir. 1988).

³⁷⁹ *Id.* at 535-36.

³⁸⁰ 12 C.F.R. § 1026.4(d)(1)(i); Official Staff Commentary § 1026.4(d)-5; cf. *In re Peacock Buick, Inc.*, 86 FTC 1532, 1541 (1975).

³⁸¹ *In re Milbourne*, 108 B.R. 522, 541 (Bankr. E.D. Pa. 1989).

³⁸² *USLIFE Credit Corp. v. FTC*, 599 F.2d 1387 (5th Cir. 1979).

³⁸³ *Ford Motor Credit v. Milhollin*, 444 U.S. 555 (1980). This holding should apply to interpretations by the new Consumer Financial Protection Bureau which now regulates Truth-in-Lending. See 12 C.F.R. § 1026, Supplement I-Official Interpretations.

Several courts have declined to follow *USLIFE* since *Milhollin*.³⁸⁴ Consideration should be given to litigating TIL credit insurance claims in state courts since they are not bound by federal court of appeal decisions.³⁸⁵

2.6.5 Other Issues

A creditor may have an implied obligation to seek credit disability benefits before repossessing a mortgaged vehicle.³⁸⁶ If a creditor has sold a consumer a policy for which he is ineligible, the creditor may be estopped from denying coverage.³⁸⁷

2.7 FAIR CREDIT REPORTING

2.7.1 Federal Fair Credit Reporting Act

2.7.1.1 Scope

The Fair Credit Reporting Act (“FCRA”)³⁸⁸ regulates the activities of consumer reporting agencies, the users of reports, and those who furnish information to consumer reporting agencies. It also provides rights to consumers affected by such reports. Its purpose is to “require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.”³⁸⁹ The Consumer Financial Protection Bureau issues Regulation V, 12 C.F.R. § 1022, which implements the FCRA.

The FCRA applies when a person collects information on a “consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living” and such information is used (1) by a third party for denying or increasing the charge for “credit or insurance to be used primarily for personal, family, or household purposes”, or (2) for purposes relating to employment opportunities, government benefits, or certain other business transactions.³⁹⁰

2.7.1.2 What is a consumer?

The FCRA applies to “consumers,” and the Act defines a consumer broadly as any individual.³⁹¹ This definition only includes natural persons.

2.7.1.3 What rights do consumers have?

The FCRA creates the following consumer rights relative to credit reporting:

- Notice of adverse action on credit, insurance, or employment,³⁹²

³⁸⁴ See, e.g., *In re Milbourne*, 108 B.R. 522; *Marine Midland Bank v. Burley*, 425 N.Y.S.2d 429, 431 (N.Y. 1980).

³⁸⁵ See, e.g., *Anderson v. Lester*, 382 So.2d 1019 (La. App. 3 Cir. 1980).

³⁸⁶ See *Reed v. Peninsular Life Ins. Co.*, 367 So.2d 89 (La. App. 4 Cir. 1979). Under La. R.S. 10:9-609 (2010), a secured party’s right to possession appears to accrue on default unless otherwise agreed to in the security agreement. Other courts have interpreted UCC 9-503 to require the creditor to allow the debtor an opportunity to establish eligibility for disability insurance coverage before repossessing the collateral. See *Carter v. U.S. Nat’l Bank of Oregon*, 768 P.2d 930 (Or. App. 1989). La. R.S. 10:1-304 imposes an obligation of good faith in the performance of enforcement of any contract under Title 10. See *National Safe Corp. v. Benedict & Myrick, Inc.*, 371 So.2d 792 (La. 1979) for a definition of good faith.

³⁸⁷ See, e.g., *Larr v. Minn. Mutual Life Ins. Co.*, 924 F.2d 65 (5th Cir. 1991).

³⁸⁸ 15 U.S.C. §§ 1681-1681x.

³⁸⁹ 15 U.S.C. § 1681(b).

³⁹⁰ 15 U.S.C. §§ 1681a(d)(1), 1681b.

³⁹¹ 15 U.S.C. § 1681a(c); *Korotki v. Attorney Services Corp.*, 931 F.Supp. 1269, 1277 n. 23 (D.Md. 1996).

³⁹² 15 U.S.C. § 1681m(a); see, e.g., *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143 (5th Cir. 1983).

- Notice of the nature of the information being disseminated;³⁹³
- The consumer's current credit score or the score most recently calculated by the agency for a credit-related purpose;³⁹⁴
- Access to information in credit file.³⁹⁵ The consumer cannot be charged for information within 60 days of adverse action or notification that credit rating has been adversely affected;³⁹⁶
- Reporting agencies are obligated to reinvestigate disputed credit entries.³⁹⁷ They must also inform users of the report of the dispute;³⁹⁸
- Reporting agencies must use reasonable procedures to insure maximum possible accuracy;³⁹⁹
- Reporting agencies must eliminate false, outdated, misleading or obsolete data;⁴⁰⁰
- Right to dispute credit entries;⁴⁰¹
- User obtaining information under false pretenses;⁴⁰²
- Officer or employee of a reporting agency furnishing information to an unauthorized person.⁴⁰³

2.7.1.4 What is a consumer reporting agency?

A consumer reporting agency means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.⁴⁰⁴

The FCRA also created a category called "nationwide specialty consumer reporting agencies."⁴⁰⁵ A nationwide specialty consumer reporting agency is defined as a consumer reporting agency that compiles and maintains files on a nationwide basis relating to medical records or payments, residential or tenant histories, check-writing histories, employment histories or insurance claims.⁴⁰⁶ These agencies must provide the consumer with a free credit report.⁴⁰⁷

Person is broadly defined to include any individual, partnership, corporation, trust, estate, cooperative, association, government or government subdivision or agency, or other entity.⁴⁰⁸ No FCRA cases have decided when a person "regularly

³⁹³ 15 U.S.C. §§ 1681d, 1681g, 1681h.

³⁹⁴ 15 U.S.C. § 1681g(g)(1)(A).

³⁹⁵ 15 U.S.C. § 1681g(a)(1).

³⁹⁶ 15 U.S.C. §§ 1681a(a)(3)(A), 1681j(b).

³⁹⁷ 15 U.S.C. § 1681a(1)(A).

³⁹⁸ 15 U.S.C. § 1681a(2).

³⁹⁹ 15 U.S.C. §§ 1681e(b); see, e.g., *Pinner v. Schmidt*, 805 F.2d 1258 (5th Cir. 1986). *But see* *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 105 (2d Cir. 1997) (credit reporting agency followed reasonable procedures to assure maximum accuracy by relying on erroneous updates of consumer's indebtedness provided by creditors, despite having received prior information indicating that reports of consumer's indebtedness were in error).

⁴⁰⁰ See 15 U.S.C. §§ 1681e.

⁴⁰¹ 15 U.S.C. § 1681a.

⁴⁰² 15 U.S.C. § 1681q.

⁴⁰³ 15 U.S.C. § 1681r.

⁴⁰⁴ 15 U.S.C.A. § 1681a(f).

⁴⁰⁵ 15 U.S.C. § 1681a(w).

⁴⁰⁶ *Id.*

⁴⁰⁷ 15 U.S.C. § 1681j(a)(1)(C).

⁴⁰⁸ 15 U.S.C. § 1681a(b).

engages” in consumer reporting activities and the FTC Commentary provides little guidance as well. However, given the similarity of the language between the Truth in Lending Act and the FCRA and their equally broad remedial purposes, courts should interpret this language liberally. Compare 15 U.S.C. § 1601 with 15 U.S.C. § 1681.

The terms “assemble” and “evaluate” are not defined in the Act, nor in the legislative history. However, if a person retains the information in files or collects information from multiple sources and formats it in a report for a customer, the information is being assembled; the person is thereby a consumer reporting agency, and the protections of the Act apply.⁴⁰⁹

There is a statutory exception in the definition of consumer report for information from a business’ own experience with the consumer.⁴¹⁰ Thus, a creditor reporting its own experience to a consumer reporting agency does not thereby become a consumer reporting agency under the Act.⁴¹¹ The FCRA also has a statutory exception that allows consumers to prohibit an affiliate from using information on a consumer report for solicitation for marketing purposes when the information being used avoids being a consumer report because of the affiliation exception.⁴¹²

2.7.1.5 What is a “permissible purpose”?

The FCRA does prohibit a consumer reporting agency from disclosing accurate, non-obsolete information to those deemed to have a permissible purpose. Permissible purposes are:

- credit or insurance to be used primarily for personal, family or household purposes;⁴¹³
- employment purposes;⁴¹⁴
- other purposes authorized under 15 U.S.C. § 1681b dealing with permissible purposes:
 - to review or collect current accounts;
 - to establish eligibility for government licenses or other benefits;
 - to evaluate credit and prepayment risks of existing credit obligations;
 - to respond to a legitimate business need for the information in connection with a transaction initiated by a consumer;
 - for use by government officials in setting or modifying child support payment levels;
 - to respond to a court order;
 - in accordance with the written instructions of the consumer to whom it relates.

⁴⁰⁹ See *Lewis v. Ohio Professional Electronic, Network LLC*, 190 F. Supp. 2d 1049 (S.D. Ohio 2002) (defendants who assemble information about arrests from sheriffs in two states and furnish it for monetary compensation are subject to the FCRA).

⁴¹⁰ 15 U.S.C. § 1681a(d).

⁴¹¹ *Rush v. Macy’s New York, Inc.*, 596 F. Supp. 1540, 1543 n.2 (S.D. Fla. 1984).

⁴¹² 15 U.S.C. § 1681s-3.

⁴¹³ 15 U.S.C. § 1681a(d).

⁴¹⁴ *Id.*

2.7.1.6 Consumer's File vs. Consumer Report

A consumer's file is all information on that consumer recorded and retained by a consumer reporting agency.⁴¹⁵ A consumer's file is not communicated to a third party. The disclosure to the consumer of information in a consumer's file may not be a consumer report.⁴¹⁶

A consumer report is information from the consumer's file which is communicated to a third party and involves "written, oral, or other communication of any information."⁴¹⁷

2.7.1.7 Obsolete information

Consumer reporting agencies have two separate obligations: (1) they cannot supply obsolete information, and (2) must follow reasonable procedures designed to avoid violations of the FCRA's obsolete information requirements.⁴¹⁸ Therefore, even if a reporting agency has reasonable procedures in place, if they are negligent in reporting obsolete information, they have committed a violation of the FCRA.

Consumers frequently ask how long credit information can be kept in their files. All applicable dates relate to the occurrence of events involving adverse information; the date the consumer reporting agency acquired the adverse information is irrelevant. The general rule is that any adverse item cannot be reported if it is more than 7 years old.⁴¹⁹ For example, a delinquent account may be reported for seven years from the date of the last regularly scheduled payment before the account became delinquent.

The following types of information are exceptions to the general rule:

- Bankruptcies can only be included for 10 years from the date of entry of the order of relief.⁴²⁰ In a voluntary bankruptcy, the filing by the consumer of the bankruptcy petition itself is the entry of the order for relief from which the ten-year limitation is measured;
- Lawsuits and judgments are obsolete after seven years from their date of entry or until the governing statute of limitation has expired, whichever is longer.⁴²¹ For suits, the date of entry is the date the suit was initiated and for judgments the date of entry is the date judgment was rendered;
- Paid tax liens may not be reported more than seven years after the date of payment;⁴²²
- If an account is placed for collection, charged to profit or loss, or subjected to similar action (e.g., voluntary and involuntary repossessions) more than 180 days after the preceding delinquency, the debt may still be included in consumer reports for only seven years and 180 days from

⁴¹⁵ 15 U.S.C. § 1681a(g).

⁴¹⁶ See *Cousin v. Trans Union Corp.*, 246 F.3d 359 (5th Cir. 2001); see also *State v. Credit Bureau of Nashua, Inc.*, 342 A.2d 640 (N.H. 1975) (sale of files from one credit reporting agency to another does not involve a consumer report).

⁴¹⁷ 15 U.S.C. § 1681a(d).

⁴¹⁸ See 15 U.S.C. §§ 1681c, 1681e(a), 1681o.

⁴¹⁹ 15 U.S.C. § 1681c(a).

⁴²⁰ 15 U.S.C. § 1681c(a)(1).

⁴²¹ 15 U.S.C. § 1681c(a)(2); see also *Beaver v. TRW Corp.*, No. CIV-87-1214E, 1988 WL 123636 (W.D.N.Y. 1988) (a satisfied judgment less than seven years old may be reported).

⁴²² 15 U.S.C. § 1681c(a)(3).

the beginning of the delinquency.⁴²³ This limit, created by 1996 legislation, is effective for any item added to a consumer's reporting agency file after December 29, 1997;⁴²⁴

- Under the Higher Education Act, if a loan is a Federal Family Loan (Stafford, SLS, PLUS), reports on defaults may be included in consumer reports for seven years from the last of three dates. The first date occurs when the Secretary of Education or the guaranty agency pays a claim to the loan holder on the guaranty, and is, in effect, the date that the U.S. takes over the loan. The second date occurs when the Secretary of Education, guaranty agency, lender, or any other loan holder first reported the account to the consumer reporting agency. The third date occurs if a borrower re-enters repayment after defaulting on a loan and subsequently goes into default on the loan.⁴²⁵ Perkins loans are not subject to any limit on reporting;⁴²⁶
- No limit applies to criminal convictions.⁴²⁷

There are three exemptions to the FCRA's requirements on obsolete information: (1) a "credit transaction involving, or which may reasonably be expected to involve, a principal amount of \$150,000 or more;" (2) the "underwriting of life insurance involving, or which may reasonably be expected to involve, a principal amount of \$150,000 or more;" or (3) the "employment of any individual at an annual salary which equals, or which may reasonably be expected to equal, \$75,000 or more."⁴²⁸

2.7.1.8 Statute of Limitations

The statute of limitations is generally 2 years from the violation.⁴²⁹ The Supreme Court has determined that the 2 years begins to run from the date of the violation not from the date of discovery.⁴³⁰ An exception to this statute of limitations is where a defendant has materially and willfully misrepresented any information required under the FCRA to be disclosed and that information is material to the establishment of the defendant's FCRA liability. Under these circumstances, the discovery rule applies such that the action may be brought within two years after discovery by the individual of the misrepresentation.⁴³¹ Each transmission of an erroneous credit report triggers a new statute of limitations period.⁴³²

2.7.1.9 Damages

A consumer reporting agency or user of information who negligently fails to comply with any requirement of the FCRA is liable for actual damages, attorney's

⁴²³ Any person who provides information about a delinquent account placed for collection or written off, must also inform the reporting agency when the preceding delinquency commenced within 90 days of reporting the information. Any agency which does not receive the date of delinquency within 90 days risks reporting obsolete information. The furnisher of information is not liable to the consumer, but the reporting agency is. FCRA § 623(a)(5), 15 U.S.C. §1681s-2(a)(5).

⁴²⁴ FCRA § 605(c), 15 U.S.C. § 1681c(c), added by Pub. L. No. 104-208 § 2406, 110 Stat. 3009 (Sept. 30, 1996).

⁴²⁵ 20 U.S.C. § 1080a.

⁴²⁶ 20 U.S.C. § 1087cc(c)(3).

⁴²⁷ 15 U.S.C. § 1681c(a)(5).

⁴²⁸ 15 U.S.C. §§ 1681c(b).

⁴²⁹ 15 U.S.C. § 1681p.

⁴³⁰ *Andrews v. TRW, Inc.*, 534 U.S. 19 (2001).

⁴³¹ 15 U.S.C. 1681p. *Hyde v. Hibernia Nat'l Bank*, 861 F.2d 446 (5th Cir. 1988).

⁴³² *Hyde*, 861 F.2d at 450.

fees and court costs.⁴³³ Actual damages may include emotional distress.⁴³⁴ If the violation is willful, a consumer is entitled to actual damages (pecuniary losses or intangible injury) or statutory damages ranging from \$100 to \$1,000, and punitive damages at the court's discretion.⁴³⁵ Each violation of the FCRA is a separation violation.⁴³⁶ Jury trials are permitted.⁴³⁷

2.7.2 Louisiana's Fair Credit Reporting Statute

Louisiana's fair credit reporting statute is La. R.S. 9:3571.1. This statute mandates that "[e]ach credit reporting agency shall, within five business days of receipt of a written request from a consumer, mail, first class, to that consumer a copy of his credit report, including the nature and substance of any information being provided to credit reporting agency customers of the agency."⁴³⁸ The fee for such credit report shall not exceed \$8 and is subject to increase based upon the annual percentage increase in the retail Consumer Price Index in the preceding year.⁴³⁹

Louisiana law creates a private right of action for violation of its credit reporting statute, and allows for recovery of actual damages, plus reasonable attorney fees, court costs, and other reasonable costs of prosecution of the suit.⁴⁴⁰ The consumer must show that the credit reporting agency violated its duty of ordinary care in obtaining or amassing information or that it failed to exercise due diligence in discovering such error. La. R.S. 9:3571.1G(1), (2).

2.7.3 Federal Credit Repair Organization Act

The Federal Credit Repair Organization Act (CROA),⁴⁴¹ adopted in 1996, became effective April 1, 1997. The purpose of the CROA is to provide consumers "with the information necessary to make an informed decision regarding the purchase of [credit repair] services" and "to protect the public from unfair or deceptive advertising and business practices by credit repair organizations."⁴⁴²

The CROA broadly applies to any person who performs or offers to perform any services, for a fee or other valuable consideration for the express or implied purpose of:

- improving any consumer's credit record, credit history, or credit rating;⁴⁴³ or

⁴³³ 15 U.S.C. § 1681o; see, e.g., *Pinner v. Schmidt*, 805 F.2d 1258 (5th Cir. 1986).

⁴³⁴ *Pinner*, 805 F.2d at 1265.

⁴³⁵ 15 U.S.C. § 1681n(a); see *Sapia v. Regency Motors of Metairie*, 276 F.3d 747, 753 (5th Cir. 2002) ("For the violation to be willful, thereby justifying an award of punitive damages under the Fair Credit Reporting Act, a defendant's course of conduct must exhibit a conscious disregard for or entail deliberate and purposeful actions taken against a plaintiff's rights.") (internal quotation marks omitted) (citing *Cousin v. Trans Union Corporation*, 246 F.3d 359, 372 (5th Cir. 2001); *Sapia*, 276 F.3d at 753, where the court held that "Even with no actual damages, we have allowed recovery for humiliation and mental distress and for injury to one's reputation and creditworthiness.") (citing *Fischl*, 708 F.2d at 151); *Cousin*, 246 F.3d at 372 ("Malice or evil motive need not be established for a punitive damages award, but the violation must have been willful.") (citing *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 151 (5th Cir. 1983)); *Phillips v. Grendahl*, 312 F.3d 357 (8th Cir. 2002) (requiring knowing and intentional commission of an act that violates the law.

⁴³⁶ *White v. Imperial Adjustment Corp.*, No. 00-35085DWS, 00-0938, 2002 WL 1809084 (E.D. La. Aug. 6, 2002).

⁴³⁷ *Coletti v. Credit Bureau Services*, 644 F.2d 1148 (5th Cir. 1981).

⁴³⁸ La. R.S. 9:3571.1.

⁴³⁹ La. R.S. 9:3571.1(A)(1), (3).

⁴⁴⁰ La. R.S. 9:3571.1(F).

⁴⁴¹ 15 U.S.C. § 1679.

⁴⁴² 15 U.S.C. § 1679(b).

⁴⁴³ 15 U.S.C. § 1679a(3)(A)(i).

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- providing advice and assistance to any consumer with regard to any activity or service described in clause (i).⁴⁴⁴

There are several exceptions:⁴⁴⁵

- section 501c(3) non-profit organizations;
- a creditor restructuring a consumer's debt;
- any depository institution.

A credit repair organization must provide a form disclosure to the consumer prior to executing any agreement or contract with the consumer.⁴⁴⁶ The form disclosure must contain specific language as set forth by the statute.⁴⁴⁷ The consumer must sign the disclosure statement to acknowledge receipt, and a copy of same must be kept by the credit repair organization for two years.⁴⁴⁸

The credit repair contract must disclose the following information:⁴⁴⁹

- name and principal business address of the organization;
- terms and conditions of payment;
- total of all payments;
- full and detailed description of services to be provided;
- a conspicuous, bold face notice of a three day right to cancel placed in immediate proximity to the consumer's signature.

A contract that does not contain the required disclosures is void and unenforceable.⁴⁵⁰ Thus, the 3 day right to rescind is effectively extended until three days after the credit repair organization complies with the Act.

The CROA prohibits:⁴⁵¹

- untrue or misleading statements to potential and actual customers, to consumer reporting agencies, and to creditors, e.g., statements regarding the consumer's creditworthiness, standing or capacity;
- actions intended to alter a consumer's identification for the purpose of concealing adverse information which is accurate and current, e.g., establishing a new credit identity by using an Employer Identification Number instead of social security number;
- counseling or advising consumers to take actions that would fall into the two preceding bulleted prohibitions, *supra*;
- credit repair organizations from making untrue or misleading representations about the services it provides;
- credit repair organizations from charging or receiving payment for their services until the service is fully performed.

These prohibitions apply to statements made to any person who has extended credit or to whom the consumer has applied or is applying for credit, but not to a third party who has purchased a debt from the original creditor.

⁴⁴⁴ 15 U.S.C. § 1679a(3)(A)(ii).

⁴⁴⁵ 15 U.S.C. § 1679a(3)(B).

⁴⁴⁶ 15 U.S.C. § 1679c(a).

⁴⁴⁷ *Id.*

⁴⁴⁸ 15 U.S.C. § 1679c(c).

⁴⁴⁹ 15 U.S.C. § 1679d(b).

⁴⁵⁰ 15 U.S.C. § 1679f(a)-(c).

⁴⁵¹ 15 U.S.C. § 1679d(b).

Private remedies allowed by CROA are (1) the right to cancel the contract,⁴⁵² and (2) a private cause of action for actual and punitive damages.⁴⁵³ A consumer may not waive any other protection provided by the Act and any attempt to obtain a waiver is itself a violation of the Act.⁴⁵⁴

The statute of limitations for an action under the CROA is five years from the occurrence of the violation.⁴⁵⁵ Where the violation relates to the organization's material and willful failure to disclose, the five years begin to run from when the consumer discovers the misrepresentation.⁴⁵⁶

Auto dealers are subject to the CROA. The used car market targets those perceived as having bad credit and promises to find those consumers financing and help them reestablish or improve their credit records. Two cases found auto dealers liable under the Ohio Credit Service Organization Act.⁴⁵⁷ In these cases, dealers' advertisements promised an improved credit record, credit was provided or arranged, and money exchanged hands. The courts found that even if no separate, identifiable fee is charged for arranging credit, remuneration was provided for a transaction which included the provision of credit.

2.7.4 Louisiana's Credit Repair Statute

Louisiana's credit repair statute is entitled the Credit Repair Services Organizations Act (CRSOA).⁴⁵⁸ The statute defines a credit repair services organization as a person who, with respect to a buyer, in return for the payment of money or other valuable consideration, directly or indirectly, provides or represents that he can or will; directly or indirectly, provide any of the following services:

- Improving a buyer's credit record, history or rating;
- Advice or assistance to a buyer with regard to improving a buyer's credit record, history or rating. La. R.S. 9:3573.2(A)(3).

"Buyer" is defined as "an individual who is solicited to purchase or who purchases the services of a credit repair services organization."⁴⁵⁹ "Person" means an individual, corporation, partnership, trust, association, joint venture pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity not specifically listed herein.⁴⁶⁰

Exempt entities include licensed lenders, banks or savings associations whose deposits are federally insured, credit unions; nonprofit attorneys, consumer reporting agencies, and nonprofit certified public accountants.⁴⁶¹

Louisiana's statute prohibits the following conduct by a credit repair services organization:⁴⁶²

- charging or receiving money from a buyer without having obtained a surety bond;

⁴⁵² 15 U.S.C. § 1679e.

⁴⁵³ 15 U.S.C. § 1679g.

⁴⁵⁴ 15 U.S.C. § 1679f.

⁴⁵⁵ 15 U.S.C. § 1679i.

⁴⁵⁶ *Id.*

⁴⁵⁷ *Hall v. Jack Walker Pontiac, Toyota, Inc.*, Clearinghouse No. 52,143 (Ohio C.P. Mar. 15, 1999) (relying in part on legislative history of the federal statute); *Sannes v. Jeff Wyler Chevrolet, Inc.*, Clearinghouse No. 42,144 (Ohio C.P. Mar. 15, 1999).

⁴⁵⁸ La. R.S. 9:3573.1-3573.16.

⁴⁵⁹ La. R.S. 9:3573.2(A)(1).

⁴⁶⁰ La. R.S. 9:3573.2(A)(5).

⁴⁶¹ La. R.S. 9:3573.2(B).

⁴⁶² La. R.S. 9:3573.3.

- making or using false or misleading representations;
- engaging, directly or indirectly, in a fraudulent or deceptive act, practice, or course of dealing;
- making or advising a buyer to make a statement that is false or misleading;
- advertising services without filing a registration statement;
- making nonessential requests for credit information relating to a buyer from any source providing such information for no cost.

Louisiana's statute further requires that credit repair services organizations do the following:

- obtain a surety bond or establish a trust account;⁴⁶³
- before executing a contract or agreement with a buyer or receiving valuable consideration, provide the buyer with a disclosure statement;⁴⁶⁴
- the contract must be in writing, dated, signed by the buyer, and must include:⁴⁶⁵
 - A five-day right of rescission;
 - terms and conditions of payment;
 - a full and detailed description of services to be performed;
 - the address of the credit repair services organization principal place of business and the name and address of its agency for service of process.

A waiver of a buyer's rights is prohibited and void.⁴⁶⁶ A breach by the credit repair services organization of the contract or of any obligation required by law is a violation of the statute.⁴⁶⁷

A credit repair services organization's violation of the statute or breach of contract gives rise to a private action by the buyer for actual damages, costs, and reasonable attorney fees.⁴⁶⁸ Actual damages shall not be less than the amount paid by the buyer to the credit repair services organization.⁴⁶⁹ A buyer may also request injunctive relief.⁴⁷⁰ The statute of limitations for bringing an action under this statute is four years after the date of the execution of the contract for services to which the action relates.⁴⁷¹ Louisiana's statute also provides for criminal penalties for willful violations of its provisions.⁴⁷²

2.7.5 Telemarketing of Credit Repair Services

The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 directs the Federal Trade Commission to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices"⁴⁷³ and to enforce those rules.⁴⁷⁴ The Act further allows states to bring a

⁴⁶³ La. R.S. 9:3573.4(A).

⁴⁶⁴ La. R.S. 9:3573.6(A).

⁴⁶⁵ La. R.S. 9:3573.7.

⁴⁶⁶ La. R.S. 9:3573.8.

⁴⁶⁷ La. R.S. 9:3573.7(D).

⁴⁶⁸ La. R.S. 9:3573.10(A).

⁴⁶⁹ *Id.*

⁴⁷⁰ La. R.S. 9:3573.10(C).

⁴⁷¹ La. R.S. 9:3573.12.

⁴⁷² La. R.S. 9:3573.13.

⁴⁷³ 15 U.S.C. § 6102(a)(1).

⁴⁷⁴ 15 U.S.C. § 6105.

civil action for violation of those rules,⁴⁷⁵ and provides consumers a private right of action for telemarketing fraud, but only if the amount in controversy exceeds \$50,000.⁴⁷⁶ Thus, if a consumer's damages are not large enough to bring a claim under the Act, then consumers may invoke the rule as a per se violation of state UDAP statutes, thereby entitling the consumer to actual or statutory damages, attorneys fees and costs.

The FTC adopted its Telemarketing Rule, which applies to credit repair services that are marketed through at least one interstate telephone call without a face-to-face meeting.⁴⁷⁷ It specifically covers cases where the consumer makes the first call to the credit repair clinic in response to an advertisement or a direct mail solicitation, including by fax, e-mail or similar method. It does not cover 900-number calls to credit repair clinics because these are regulated by different statutes and rules.⁴⁷⁸ Although it does not cover charitable organizations,⁴⁷⁹ it does cover for-profit organizations that solicit contributions or sell goods or services on behalf of non-profit organizations.⁴⁸⁰

Although the Rule provides no direct private remedy, the Rule does provide greater protection than the Act regarding payment for services. The Rule prohibits a credit repair organization from requesting or receiving any payment for the services until it has provided the consumer a credit report, issued at least six months after the credit repair services were provided, that demonstrates that the promised results have been achieved.⁴⁸¹

For a discussion of credit repair organizations, see James P. Nehf, *Legislative Framework for Reducing Fraud in the Credit Repair Industry*, 70 N.C.L. REV. 781 (1992); see also NCLC, FAIR CREDIT REPORTING ACT (7th ed. 2010).

2.8 EQUAL CREDIT OPPORTUNITY ACT

2.8.1 The Federal Equal Credit Opportunity Act

2.8.1.1 Overview

The Equal Credit Opportunity Act⁴⁸² (ECOA) is a discrimination and disclosure statute. The ECOA prohibits discrimination against a credit applicant at any stage of a credit transaction⁴⁸³ on the basis of race, color, religion, national origin, sex, marital status, age, income based on public assistance, and good faith exercise of Consumer Credit Protection Act remedies.⁴⁸⁴ The Consumer Financial Protection Bureau issues Regulation B, 12 C.F.R. § 1002, which implements the ECOA.

The ECOA is important for low-income clients because of its potential remedies for women, minorities, young persons and welfare recipients who are discriminatorily denied credit. Much of the ECOA litigation involves sex or marital status discrimination or the failure to provide specific reasons for credit denial.

⁴⁷⁵ 15 U.S.C. § 6103.

⁴⁷⁶ 15 U.S.C. § 6104.

⁴⁷⁷ 16 C.F.R. § 310.

⁴⁷⁸ See 47 U.S.C. § 228.

⁴⁷⁹ 16 C.F.R. § 310.6(a).

⁴⁸⁰ 68 Fed. Reg. 4530, 4589-90 (2003).

⁴⁸¹ 16 C.F.R. § 310.4(a)(2).

⁴⁸² 15 U.S.C. § 1691.

⁴⁸³ 12 C.F.R. § 1002.4. This section of the code is also known as "Regulation B."

⁴⁸⁴ 12 C.F.R. § 1002.2(z).

Before bringing an ECOA action, an advocate must consider three preliminary questions:

- Has there been an extension of “credit” covered by the ECOA? If so, is the transaction fully subject to the requirements of the ECOA, or has the FRB exempted the transaction from certain Regulation B requirements?
- Is the client an “applicant” who can invoke the statute’s protection and recover under its remedy provisions?
- Is the party being sued a “creditor” under the ECOA definition, and therefore subject to the statute’s requirements and liable for damages?

All three of these initial issues must be affirmatively resolved before the advocate begins to consider specific ECOA violations.

2.8.1.2 Credit

1. ECOA generally only applies to credit transactions.⁴⁸⁵ Credit is the right granted by a creditor to: (1) defer payment of a debt; (2) incur debt and defer its payment; or (3) purchase property or services and defer payment.⁴⁸⁶ ECOA’s definition is broader than TILA’s.
2. ECOA also covers commercial credit, such as credit for business, agricultural or investment purposes.⁴⁸⁷
3. Deferral of payment requires no formal agreement.
4. Leases:
 - If a lease is a disguised credit sale, it should fall within ECOA’s definition of credit.
 - ECOA also applies to personal property leases covered by the Consumer Leasing Act.⁴⁸⁸
 - Residential leases almost always involve deferred payment of an obligation, and thus credit.⁴⁸⁹
 - Rent-to-own transactions are terminable at will without penalty, and therefore, are not covered by the Consumer Leasing Act.⁴⁹⁰ Consequently, the holding in *Brothers* does not apply explicitly, and the ECOA’s coverage is left unclear.⁴⁹¹
5. Utility Service

The ECOA generally applies to utility service. A utility company is a creditor when it supplies utility service and bills to the user after the service has been provided.⁴⁹² This is because ECOA applies to any deferral of payments. The CFPB has exempted most forms of government regulated utility service from a few particular ECOA provisions.
6. Transactions Exempted

The CFPB has created partial exemptions for: public utility, incidental consumer, business, securities and credit extended to the government. However, these creditors must still comply with all other ECOA requirements.

⁴⁸⁵ 12 C.F.R. § 1002.4.

⁴⁸⁶ 15 U.S.C. § 1691a(d); 12 C.F.R. § 1002.2(j).

⁴⁸⁷ See Official Interpretations § 1002.1(a)-1, 1002.2(j)-1.

⁴⁸⁸ See *Brothers v. First Leasing*, 724 F.2d 789 (9th Cir. 1984).

⁴⁸⁹ See *Ferguson v. Park City Mobile Homes*, 1989 WL 111916 (N.D. Ill. 1989).

⁴⁹⁰ NCLC, TRUTH IN LENDING § 13.2.1 (8th ed. 2012).

⁴⁹¹ See NCLC, CREDIT DISCRIMINATION (5th ed. 2009).

⁴⁹² Official Interpretations § 1002.3(a)-2.

2.8.1.3 Applicants

1. An applicant is “any person who requests or who has received an extension of credit” and any person who is or may become contractually liable regarding an extension of credit.⁴⁹³
 - a. “Contractually liable” means being expressly obligated to repay all debts on an account, pursuant to an agreement.⁴⁹⁴
 - b. “Extension of credit” means the granting of credit in any form, including but not limited to credit granted in addition to existing credit, open-end credit, refinancing or renewal of other credit, consolidation of obligations, or the continuation of existing credit.⁴⁹⁵
 - c. One need not submit a full application to a creditor.⁴⁹⁶
 - d. “Applicant” includes the following:
 - persons applying for a “renewal or continuation of credit;”
 - one who “has received an extension of credit;”
 - one who “applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit;”
 - a person who inquires about credit;
 - a person who requests credit;
 - a person whose application is approved but who decides not to accept the offer;
 - a person who requests an increase of an existing credit limit;
 - a person who just has existing credit with a creditor;
 - a homebuyer where the buyer seeks to assume the seller’s mortgage unless the creditor’s policy is to not permit assumption; or
 - potential applicants, so that creditors who discourage applications on a prohibited basis will be liable.
2. Applicants include persons who are or may become contractually liable for extensions of credit. Guarantors, sureties, endorsers and similar parties are applicants for purposes of 12 C.F.R. § 1002.7(d) [dealing with spouses’ signatures].⁴⁹⁷ Guarantors (who are not initially liable but who may become liable) are applicants.
3. Cosigners, who are immediately liable before another party defaults, are applicants.

2.8.1.4 Creditors

1. There are 3 types of creditors covered by ECOA:⁴⁹⁸
 - Any person who regularly extends, renews, or continues credit;
 - Any person who regularly arranges for the extension, renewal, or continuation of credit; or
 - Any person, such as an assignee of an original creditor, who participates in the decision to extend, renew, or continue credit.

⁴⁹³ 12 C.F.R. § 1002.2(e).

⁴⁹⁴ 12 C.F.R. § 1002.2(i).

⁴⁹⁵ 12 C.F.R. § 1002.2(q).

⁴⁹⁶ *Cragin v. First Federal Savings & Loan Ass’n*, 498 F. Supp. 379 (D. Nev. 1980).

⁴⁹⁷ 12 C.F.R. § 1002.2(e).

⁴⁹⁸ 15 U.S.C. § 1691a(e).

2. There are 2 exclusions from the definition of creditor:⁴⁹⁹
 - A person whose only participation in a credit transaction involves honoring a credit card; and
 - Where a transaction involves more than one creditor, and one creditor violated ECOA, the other creditors are not liable to the extent they lacked “reasonable notice” of the violation before becoming involved in the transaction.

2.8.1.5 Prohibited Bases for Discrimination

1. Sex

- Sex and marital status discrimination go hand-in-hand and both should be considered when a case involves either.⁵⁰⁰
- Creditor inquiries or decisions based on an individual’s child bearing or rearing intentions or maternity leave are prohibited.⁵⁰¹
- Differential treatment of income sources traditionally associated with women is prohibited.⁵⁰²
- Discrimination based upon sexually defined occupations is prohibited.⁵⁰³
- Factors that appear sex neutral may have a disparate impact on women, e.g., accounts historically listed in only the husband’s name thereby eliminating any credit history for the wife.⁵⁰⁴
- Considering the name that a telephone account is listed in is prohibited.⁵⁰⁵

2. Familial Status

ECOA does not expressly prohibit discrimination based upon familial status. However, some forms of familial status discrimination may be challenged under the ECOA as discrimination based on sex or marital status. For example, discrimination based on an applicant being pregnant should be challenged under the ECOA as sex discrimination, and discrimination based on having or not having children could be considered discrimination based on marital status.⁵⁰⁶

3. Marital Status

ECOA expressly prohibits discrimination based upon marital status.⁵⁰⁷ Marital statuses include single, divorced, separated, married, or widowed. ECOA also prohibits discrimination based on an applicant’s income that is associated with alimony, child support and separate maintenance payments.⁵⁰⁸ Discrimination based on co-applicants who are not married but wish to share an account is prohibited. However, a creditor may refuse to combine incomes of individuals who are applicant and cosigner, or applicant and guarantor.⁵⁰⁹ A government-authorized special purpose credit program is permitted to favor married couples over unmarried couples.⁵¹⁰

⁴⁹⁹ 12 C.F.R. § 1002.2(l).

⁵⁰⁰ NCLC, CREDIT DISCRIMINATION § 3.3.4.1 (5th ed. 2009).

⁵⁰¹ *Id.* at § 5.5.2.2.3.

⁵⁰² *Id.* at § 6.5.2.6.

⁵⁰³ *In re Alden’s, Inc.*, 1978 WL 206105 (FTC 1978).

⁵⁰⁴ NCLC, CREDIT DISCRIMINATION § 6.2.2.4, 6.5.3. (5th ed. 2009).

⁵⁰⁵ *Id.* at § 6.5.4.

⁵⁰⁶ NCLC, CREDIT DISCRIMINATION § 3.5.1. (5th ed. 2009).

⁵⁰⁷ 12 C.F.R. § 1002.2(z).

⁵⁰⁸ NCLC, CREDIT DISCRIMINATION § 3.3.4 (5th ed. 2009).

⁵⁰⁹ See Official Interpretations, 12 C.F.R. § 1002.6(b)(1)-1.

⁵¹⁰ See Official Interpretations 12 C.F.R. § 1002.7(a)-2; *Diaz v. Va. Hous. Dev. Auth.*, 101 F.Supp.2d 415 (E.D. Va. 2000).

A married applicant may seek credit as an individual.⁵¹¹ The statute explicitly overrides any state laws prohibiting the separate extension of consumer credit to spouses. The creditor may not ask about the applicant's marital status unless:

- The applicant resides in a community property state or is relying on any property located in such a state to establish creditworthiness.⁵¹²
- To ascertain the creditor's rights and remedies upon default.⁵¹³ This provision must be read in conjunction with the provision that requires a spouse to cosign and applicable state law.⁵¹⁴
- The credit involves a regulated public utility company, incidental consumer credit, or securities credit.⁵¹⁵
- The creditor seeks the information solely to determine eligibility and premium rates for insurance.⁵¹⁶
- The information is required for monitoring purposes.⁵¹⁷
- The creditor seeks the information solely to determine eligibility for a special purpose credit program.⁵¹⁸

Requiring a non-borrowing spouse's signature on a credit instrument constitutes marital status discrimination under the ECOA unless the creditor reasonably believes that the signature is necessary to make the secured property available to satisfy the debt.⁵¹⁹ The joint signature requirement should be an ECOA violation in Louisiana since one spouse can create an enforceable lien on community property without the other's signature.⁵²⁰

A utility company's⁵²¹ failure to provide gas service to a woman whose husband owed utility arrearages unless the husband moved out constituted unlawful marital status discrimination under the ECOA.⁵²²

4. Public Assistance Status

ECOA prohibits discrimination based upon a consumer receiving income from ". . . any public assistance program."⁵²³ Under Regulation B, a protected public assistance program is "[a]ny federal, state, or local governmental assistance program that provides a continuing, periodic income supplement, whether premised on entitlement or need."⁵²⁴ Examples of such programs are FITAP, KCSP, food stamps, rent, mortgage supplement or assistance programs, Social Security, SSI, unemployment benefits, veterans' benefits, emergency relief programs, and federal fuel assistance.⁵²⁵

⁵¹¹ 15 U.S.C. § 1691d(c); *see also* 12 C.F.R. § 1002.7(a).

⁵¹² 12 C.F.R. § 1002.5(d)(1).

⁵¹³ Official Interpretations §1002.6(b) (1)-1.

⁵¹⁴ 12 C.F.R. § 1002.7(d).

⁵¹⁵ *See* NCLC, CREDIT DISCRIMINATION § 2.2.6.2 (5th ed. 2009).

⁵¹⁶ Official Interpretations §1002.7(e)-2.

⁵¹⁷ *See* NCLC, CREDIT DISCRIMINATION § 5.5.3 (5th ed. 2009).

⁵¹⁸ *Id.* at § 5.5.3.4.

⁵¹⁹ *See* 12 C.F.R. § 1002.7; *cf.* *Evans v. Centralfed Mortg. Co.*, 815 F.2d 348 (5th Cir. 1987).

⁵²⁰ *See* *Kerico v. Doran Chevrolet, Inc.*, 572 So.2d 103 (La. App. 1 Cir. 1990).

⁵²¹ Utility companies can be considered "creditors" under the ECOA. *See* *O'Dowd v. South Central Bell*, 729 F.2d 347 (5th Cir. 1984).

⁵²² *In re Brazil*, 21 B.R. 333 (Bankr. N.D. Ohio 1982).

⁵²³ 15 U.S.C. § 1691(a)(2); 12 C.F.R. § 1002.2(z).

⁵²⁴ Official Interpretations § 1002.2(z)-3.

⁵²⁵ *Id.*

However, there are certain circumstances when a creditor may inquire about a consumer's income from public assistance. Under these circumstances, ECOA limits the information that a creditor may request about an applicant's public assistance status. The information that a creditor may request depends on what kind of scoring system the creditor uses. If the creditor uses an empirically sound credit scoring system, then it may not ask the applicant's public assistance status at all. However, if the creditor does not use such a system, then it is using a "judgmental system" and may ask about the applicant's public assistance status.⁵²⁶

2.8.1.6 Notification of Action Taken On An Application

Failure to give notice to credit applicants of non-consummation of their loan violates the ECOA.⁵²⁷ Vague or nonspecific reasons for credit denial also violate the ECOA.⁵²⁸ An ECOA notice must be given within thirty days of a credit application.⁵²⁹

2.8.1.7 Private Remedies

ECOA provides for actual and punitive damages, equitable relief, and attorney fees for successful claims, but limits the size of punitive damages.⁵³⁰ ECOA's private remedies are similar to those provided in TILA,⁵³¹ FDCPA,⁵³² and FCRA.⁵³³ In many situations, it is possible to use case law under these statutes to support an ECOA claim.⁵³⁴ Actual damages, including personal affront, embarrassment, humiliation, are available for procedurally flawed denials of credit.⁵³⁵ The Dodd-Frank Act extended the ECOA statute of limitations from two years to five years.

See NCLC, CREDIT DISCRIMINATION ch. 11, (5th ed. 2009) for a more detailed discussion on private remedies under ECOA. See also Louisiana's Equal Credit Opportunity Act.⁵³⁶

2.9 PAYDAY LOANS

If possible, consumers should be advised to avoid payday and similar loans, which are usually short-term, high-interest cash advances against the borrower's paycheck. Usually, clients receive no paperwork whatsoever – they just receive cash in return for a postdated check far exceeding the amount of the cash received. \$150 in cash for a \$250 postdated check is a typical example. Less costly alternatives include negotiating a payment plan, using credit cards, and negotiating an advance from an employer.

Many states ban these loans, but Louisiana does not. For those who have entered into a payday-type loan, the following subsections explain the limits on charges for such loans. Note also that in Louisiana, virtually all small loans are regulated by state law, even if not tied to a payday.

⁵²⁶ 12 C.F.R. § 1002.2(y); see Official Interpretations 1002.6(b) (2)-5.

⁵²⁷ *Jochum v. Pico Credit Corp. of Westbank, Inc.*, 730 F.2d 1041 (5th Cir. 1984).

⁵²⁸ *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143 (5th Cir. 1983).

⁵²⁹ 12 C.F.R. § 1002.9(a)(1)(i). See NCLC, CREDIT DISCRIMINATION ch. 10 (5th ed. 2009) for a further discussion on notification requirements.

⁵³⁰ 12 C.F.R. § 1002.16.

⁵³¹ 15 U.S.C. § 1640(a).

⁵³² 15 U.S.C. §§ 1692k(a), (b).

⁵³³ 15 U.S.C. § 1681n.

⁵³⁴ See generally NCLC, CREDIT DISCRIMINATION, § 11.7.1 (3d ed. 2009).

⁵³⁵ See, e.g., *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082 (5th Cir. 1987); *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143 (5th Cir. 1983).

⁵³⁶ La. R.S. 9:3583.

1. Current law

The Federal Reserve Bank has issued a rule that payday loans are covered by the Truth in Lending Act.

The Louisiana Deferred Presentment and Small Loan Act⁵³⁷ covers loans of \$350 or less made after January 1, 2000 if they are made for relatively short periods of time. In the case of deferred presentment of a check, the lender agrees to hold the check for no more than thirty days prior to negotiation or presentment; in the case of a small consumer loan (as defined in La. R.S. 9:3516(14)), loans for 60 days or less are covered.⁵³⁸ Persons and entities making such loans must be licensed under the Act, and are subject to Rules issued by the commissioner of the office of financial institutions.

For loans covered by the Act, a licensee may charge an initial flat fee of up to 16.75% of the face amount of the check or the amount loaned (not 16.75% per annum), but with a dollar maximum of \$45.⁵³⁹ However, if the loan remains unpaid at contractual maturity, the licensee may charge an amount equal to the rate of 36% per annum for a period not to exceed one year and beginning one year after contractual maturity, the rate shall not exceed 18% per annum.⁵⁴⁰ No other charges are permitted except for a single fee for a NSF or otherwise dishonored check.⁵⁴¹

In addition to the above limits on charges, the lender is prohibited from:⁵⁴²

- selling any goods or services in connection with the loan or transaction;
- refusing a partial payment of \$50 or greater;
- dividing a transaction or loan into multiple agreements;
- threatening or referring a customer for prosecution for an NSF check;
- structuring the repayment of a loan in such a manner as to attempt to circumvent the Act;
- renewing or rolling over the loan, except that if the customer pays at least 25% of the amount advanced plus fees charged, the transaction or loan can be renewed to the extent of the balance owed.

The borrower is entitled to a refund of unearned charges if he prepays in full on or before the fifth day after the loan.⁵⁴³

A lender is prohibited from accepting as payment, offering to accept as payment, or requiring for use as security any check issued pursuant to the federal Social Security Act, as well as accepting any check issued pursuant to the federal Social Security Act while acting as a depository institution (unless such lender is a federally insured financial institution).⁵⁴⁴

⁵³⁷ La. R.S. 9:3578.1-.8.

⁵³⁸ La. R.S. 9:3578.3(2), (6).

⁵³⁹ La. R.S. 9:3578.4(A).

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*

⁵⁴² La. R.S. 9:3578.6(A).

⁵⁴³ La. R.S. 9:3578.5 (less \$20, which is considered earned and not subject to refund).

⁵⁴⁴ La. R.S. 9:3578.6(B).

2.10 ODOMETER ACT

In 1994, Congress repealed the existing federal odometer disclosure law, the “Motor Vehicle Information and Cost Savings Act,”⁵⁴⁵ but reenacted virtually the same set of laws in 49 U.S.C. §§ 32701-32711. This new federal odometer disclosure law still prohibits odometer tampering and requires transferors of cars to disclose the true mileage. Cases decided under the previous Act should still be good law under the new one.

The importance of the law should not be underestimated. Legislative history of the 1986 amendments to the Motor Vehicle Information and Cost Saving Act stated that 7.5% to 15% of all used cars and about 70% of all leased cars had their odometers rolled back prior to sale;⁵⁴⁶ and there is no reason to believe sellers have become more ethical in recent years.

A car dealer’s constructive knowledge of an incorrect odometer reading requires him to disclose this to the purchaser.⁵⁴⁷ Violation of the odometer disclosure law entitles the consumer to a minimum of treble actual damages or \$3,000, plus reasonable attorney’s fees.⁵⁴⁸ Even if the Plaintiff cannot prove actual damages, he may still be able to recover the statutory minimum of \$3,000.⁵⁴⁹ Actual damages are generally the difference between the purchase price and fair market value with the true mileage.⁵⁵⁰

A consumer may recover damages from each transferor who made false mileage statements with intent to defraud. “Intent to defraud” need only be proved by a preponderance of evidence.⁵⁵¹ The courts find intent to defraud when the transferor either knew that a mileage disclosure was false or recklessly disregarded obvious indications of its falsity.⁵⁵² Marking all mileage disclosures as “unknown” will not protect a dealer from liability.⁵⁵³ False disclosures also constitute unfair trade practices.⁵⁵⁴ Vehicle history reports with odometer information may be obtained from private companies.⁵⁵⁵

Several non-mileage disclosures are also required under the federal odometer law, such as the transferor’s printed name, address and signature, and the identity of the vehicle, including make, model and year.⁵⁵⁶ This may expand a consumer’s judicial remedies for some unfair trade practices since the statute of limitations for Odometer Act violations is 2 years after the claim accrues (date of discovery)⁵⁵⁷ – a longer period than the one year allowed under the state unfair trade practices act.⁵⁵⁸

⁵⁴⁵ 15 U.S.C. §§ 1901, 1981-91.

⁵⁴⁶ Sen. Rep. No. 47, 99th Cong. 1st. Session.

⁵⁴⁷ *Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081 (E.D. La. 1987).

⁵⁴⁸ 49 U.S.C. § 32710; *see, e.g.*, *Saber v. DiLeo*, 723 F. Supp. 1167 (E.D. La. 1989) (\$10,500 treble damages and \$13,555 attorney fees); NCLC, *AUTOMOBILE FRAUD* § 6.8.1.1-6.8.1.10 (4th ed. 2011);

⁵⁴⁹ *Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081 (E.D. La. 1987) (granting \$1500 statutory damage when odometer was broken).

⁵⁵⁰ *See, e.g.*, *Haluschak v. Dodge City of Wauwatosa, Inc.*, 909 F.2d 254 (7th Cir. 1990) (\$22,500 treble damages awarded). NCLC, *AUTOMOBILE FRAUD* § 6.8.1.2 (4th ed. 2011).

⁵⁵¹ *Landrum v. Goddard*, 921 F.2d 61 (5th Cir. 1991).

⁵⁵² *Nieto v. Pence*, 578 F.2d 640 (5th Cir. 1978).

⁵⁵³ *Denmon v. Nick’s Auto Sales*, 537 So.2d 796 (La. App. 2 Cir. 1989).

⁵⁵⁴ *Cf. Boudreaux v. Puckett*, 611 F.2d 1028 (5th Cir. 1980).

⁵⁵⁵ *See e.g.*, www.search.dmv.org.

⁵⁵⁶ *See* NCLC, *AUTOMOBILE FRAUD* § 5.6.7 (4th ed. 2011); for other disclosure requirements, *see generally* 49 U.S.C. § 32705(a)(2).

⁵⁵⁷ 49 U.S.C. § 32710(b). NCLC, *AUTOMOBILE FRAUD* § 6.4.1 (4th ed. 2011);

⁵⁵⁸ *See, e.g.*, *Tye v. Spitzer-Dodge*, 499 F. Supp. 687 (S.D. Ohio 1980).

The Motor Vehicle Information and Cost Savings Act prohibits more than odometer tampering. It also prohibits a dealer, while selling a vehicle, from giving a false statement to the buyer in making the required disclosures on the title reassignment.⁵⁵⁹ Actionable false statements can be found in advertising, oral claims, or documents other than the title assignments. The misstatement can relate to the vehicle's make, mileage, model, year, VIN or the transferor's identity. Dealers also violate the Act routinely in the procedures they use in transferring title. Violations, if with intent to defraud, can result in \$3,000 minimum damages, treble damages and attorney fees.

The state statute that prohibits odometer tampering provides for criminal but not civil penalties.⁵⁶⁰ Nevertheless, violation of the statute would constitute error or fraud sufficient to vitiate the contract.

For further information and case authority, see NCLC, *AUTOMOBILE FRAUD* (4th ed. 2011).

2.11 LOUISIANA LEMON LAW

Louisiana's lemon law⁵⁶¹ governs a manufacturer's duties with respect to a new motor vehicle, including the chassis and drive train of a motor home.⁵⁶² Both sales and leases are covered.⁵⁶³ A manufacturer's duties with respect to a new motor vehicle include:⁵⁶⁴

- Repairing the vehicle,⁵⁶⁵
- Replacing the vehicle with a comparable vehicle;⁵⁶⁶
- Refund the full purchase price.⁵⁶⁷

The manufacturer must replace the defective vehicle or give a refund if the nonconformity has been subject to 4 or more repair attempts without repair of the nonconformity, or the vehicle has been out of service for a cumulative total of 45 or more days during the warranty period.⁵⁶⁸ If the manufacturer has an informal dispute resolution procedure which complies with the Magnuson-Moss Warranty Act, the consumer may not seek a §1944A-C refund or replacement until he has first resorted to such procedures.⁵⁶⁹

The definition of "nonconformity" under the lemon law has been broadly construed. In *Williams v. Chrysler Corp.*, the court held that defective exterior paint could qualify as a "nonconformity" where the vehicle was out of service for 40 days for repainting.⁵⁷⁰ On the other hand, in *Johns v. American Isuzu Motors, Inc.*, the court held that the purchaser did not establish the grounds for recovery where essentially all problems were satisfactorily repaired by the dealership – 90 to 95 percent of her dissatisfaction concerned a rattle, and she did not prove that her vehicle had defects substantially impairing its use and/or market value.⁵⁷¹

⁵⁵⁹ 49 U.S.C. § 32705(a)(2).

⁵⁶⁰ La. R.S. 32:726.1.

⁵⁶¹ La. R.S. 51:1941-48.

⁵⁶² La. R.S. 51:1941(3).

⁵⁶³ La. R.S. 51:1944(B); *Guidry v. Ford Motor*, 868 So.2d 945 (La. App. 5 Cir. 2004).

⁵⁶⁴ See generally *Ford Motor Credit Co. v. Bower*, 589 So.2d 571 (La. App. 1 Cir. 1991).

⁵⁶⁵ La. R.S. 51:1942.

⁵⁶⁶ La. R.S. 51:1944A(1).

⁵⁶⁷ La. R.S. 51:1944A(2).

⁵⁶⁸ La. R.S. 51:1943; see also *Rhodes v. All Star Ford, Inc.*, 599 So.2d 812, 815 (La. App. 1 Cir. 1992).

⁵⁶⁹ La. R.S. 51:1944D.

⁵⁷⁰ 530 So.2d 1214 (La. App. 2 Cir. 1988).

⁵⁷¹ 622 So.2d 1208 (La. App. 2 Cir. 1993).

A consumer shall be entitled to attorney fees if judgment is rendered in part or whole in his favor.⁵⁷²

Louisiana prohibits the sale of a vehicle with a lemon buyback history without disclosing this history.⁵⁷³ Violation of this statute should also be an Unfair Trade Practice by both the dealer and the manufacturer.⁵⁷⁴

The prescriptive period for lemon law rights seems to be three years from purchase or one year from the end of the warranty period, whichever is longer.⁵⁷⁵

2.12 REDHIBITION

1. Definition

Redhibition is the avoidance of the sale of a thing for defects which make it useless or its use so inconvenient and imperfect that a knowledgeable buyer would not have bought it.⁵⁷⁶

Redhibition is available in any of the following situations:

- latent defects that are neither discoverable by simple inspection nor declared by the seller,⁵⁷⁷ or
- seller's bad faith misrepresentation of thing's quality.⁵⁷⁸

Redhibition is available where a seller, knowing of a buyer's intended use of a thing, declares that it is satisfactory for that purpose.⁵⁷⁹

Defects discoverable by ordinary laymen upon an inspection reasonable under the circumstances are not actionable.⁵⁸⁰ Whether an inspection is reasonable depends on the facts of each case and includes such factors as the knowledge and expertise of the buyer, the opportunity for inspection, and the assurances made by the seller.⁵⁸¹ One court has interpreted the duty to inspect to bar a purchaser of a home from recovering for a leaky roof because he failed to hire a roof inspector.⁵⁸²

2. Waiver or Renunciation

It is very difficult for a seller to establish that the consumer waived or renounced the redhibition warranty. The waiver language must be in the key sale document, be clear and unambiguous, and must be brought to the buyer's attention.⁵⁸³ General language that an immovable is being sold "as is" does not waive the warranty against redhibitory defects.⁵⁸⁴

A sale made "as is" is a waiver of some but not all warranties. The vendor is not relieved of the implied warranty that the good must be fit for the use for which

⁵⁷² La. R.S. 51:1947; *see also Williams*, 530 So.2d 1214.

⁵⁷³ La. R.S. 51:1945.1, 51:1946.

⁵⁷⁴ *See* NCLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 5.4.3 (8th ed. 2012).

⁵⁷⁵ La. R.S. 51:1944(E). *See, e.g., Guidry v. Ford Motor*, 868 So.2d 945 (La. App. 5 Cir. 2004); *Ford Motor Credit Co.*, 589 So.2d 571 (La. App. 1 Cir. 1991); *Manning v. ScottHopkins, Inc.*, 605 So.2d 233 (La. App. 2 Cir. 1992).

⁵⁷⁶ La. Civ. Code art. 2520; *see, e.g., Encalade v. Coast Quality Const. Corp.*, 772 So.2d 244 (La. App. 5 Cir. 2000).

⁵⁷⁷ La. Civ. Code art. 2521.

⁵⁷⁸ La. Civ. Code art. 2545.

⁵⁷⁹ *See Morris, Dicksson v. Jones Bros.*, 691 So.2d 882 (La. App. 2 Cir. 1997); *Gates v. Dykes*, 338 So.2d 1190 (La. App. 2 Cir. 1976).

⁵⁸⁰ *See Triche v. Shore*, 380 So.2d 1255 (La. App. 4 Cir. 1980).

⁵⁸¹ *See, e.g., Morrison v. Allstar Dodge, Inc.*, 792 So.2d 9, 14 (La. App. 1 Cir. 2001).

⁵⁸² *Lemaire v. Breaux*, 788 So.2d 498 (La. App. 5 Cir. 2001). *But see McGough v. Oakwood Mobile Homes, Inc.*, 779 So.2d 793 (La. App. 2 Cir. 2000) (mobile home buyer was not required to climb on the roof to inspect it prior to purchase).

⁵⁸³ La. Civ. Code art. 2474; *see, e.g., Mitchell v. Popiwchak*, 677 So.2d 1050 (La. App. 4 Cir. 1996); *Weber v. Crescent Ford Truck Sales, Inc.*, 393 So.2d 919 (La. App. 4 Cir. 1981).

⁵⁸⁴ *Tarifa v. Riess*, 856 So.2d 21 (La. App. 4 Cir. 2003).

it is intended.⁵⁸⁵ Thus, even used equipment must operate reasonably well for a reasonable period of time.⁵⁸⁶ The “as is” stipulation, especially in the sale of used goods, means that the good is not warranted to be in perfect condition and free of all defects which prior usage and age may cause.⁵⁸⁷

A waiver of the warranty against redhibitory defects does not protect the seller from liability for fraud.⁵⁸⁸

3. Proof of Defects

a. Existence of defect at time of sale

The buyer must prove that a redhibitory defect existed at the time of delivery.⁵⁸⁹ If the defect appears within 3 days of delivery, there is a presumption that it existed at the time of the delivery.⁵⁹⁰ Failure within the design life or a relatively short time after delivery also creates a reasonable inference that the defect existed at the time of the sale. In the absence of some other explanation, defects which do not usually result from ordinary use for the amount of time passed may be inferred to have pre-existed the sale.⁵⁹¹

b. Nature of defect

Defects in essential function or safety are redhibitory.⁵⁹² In addition, cumulative minor defects are redhibitory if they render the thing’s use so inconvenient and imperfect that it must be supposed that the buyer would not have bought it. It does not matter that the defects have been repaired.⁵⁹³ The buyer must prove that some redhibitory defect exists, but does not have to prove the specific cause of the thing’s failure.⁵⁹⁴ Some testimony, whether expert or lay, concerning the nature of the defects is required. Repairs or replacements by a seller may constitute an admission that there is a redhibitory defect.⁵⁹⁵ The absence of expert testimony is not fatal to a buyer’s case.⁵⁹⁶

Regarding redhibition actions involving mobile homes, La. R.S. 51:911.23(B), provides that “[i]n any redhibitory action brought against the seller of a manufactured home or mobile home, the standards set forth in the Code shall be considered in establishing whether or not a defect exists.” The Code referred to is the National Mobile Home Construction and Safety Standards Act.⁵⁹⁷

⁵⁸⁵ La. Civ. Code art. 2520.

⁵⁸⁶ *Berney v. Rountree Olds-Cadillac Co., Inc.* 763 So.2d 799 (La. App. 2 Cir. 2000).

⁵⁸⁷ *See, e.g., Bond v. Broadway*, 607 So.2d 865 (La. App. 2 Cir. 1992); *Creger v. Robertson*, 542 So.2d 1090 (La. App. 2 Cir. 1989).

⁵⁸⁸ *Shelton v. Standard/700 Associates*, 798 So.2d 60 (La. 2001).

⁵⁸⁹ La. Civ. Code arts. 2530.

⁵⁹⁰ *Id.*

⁵⁹¹ *See, e.g., Granger v. Deville*, 583 So.2d 583 (La. App. 3 Cir. 1991) (leaky water pump was first noticed about six days after the sale; since this is the type of problem which results from long use, and since the problem arose such a short time after sale, the court assumed it existed at the time of sale); *Rhodes v. All Star Ford, Inc.*, 599 So.2d 812 (La. App. 1 Cir. 1992) (broken gas gauge and shaky steering wheel were inferred to have preexisted the sale when such defects do not usually result from ordinary use).

⁵⁹² *Prince v. Paretto Pontiac Co.*, 281 So.2d 112 (La. 1973); *Joseph v. Ford Motor Co.*, 499 So.2d 428 (La. App. 4 Cir. 1986).

⁵⁹³ *See, e.g., Miller v. Ford Motor Co.*, 815 So.2d 997 (La. App. 3 Cir. 2002) (new car repainted prior to sale due to cosmetic damage on the sales lot is a redhibitory defect); *Morrison v. Allstar Dodge, Inc.*, 792 So.2d 9(La. App. 1 Cir. 2001); *Fidele v. Crescent Ford Truck Sales, Inc.*, 786 So.2d 147 (La. App. 5 Cir. 2001).

⁵⁹⁴ *Prince*, 281 So.2d 112.

⁵⁹⁵ *See, e.g., Kennedy v. Vidalia Home Serv. Inc.*, 256 So.2d 827 (La. App. 3 Cir. 1972).

⁵⁹⁶ *See, e.g., Guidry v. St. John Auto Exch.*, 379 So.2d 878 (La. App. 4 Cir. 1978) (buyer won on his own testimony despite seller’s expert testimony).

⁵⁹⁷ 42 U.S.C. §§ 5401-26; La. R.S. 51:911.22 (1).

4. Good Faith Seller's Obligation/Right To Repair

A buyer is not required to give a seller in bad faith (including a manufacturer) an opportunity to repair the defects in the thing sold.⁵⁹⁸

a. Where buyer seeks rescission

La. Civ. Code art. 2522 provides in pertinent part:

The buyer must give the seller notice of the existence of a redhibitory defect in the thing sold. That notice must be sufficiently timely as to allow the seller the opportunity to make the required repairs. A buyer who fails to give that notice suffers diminution of the warranty to the extent the seller can show that the defect could have been repaired or that the repairs would have been less burdensome, had he received timely notice.

Formal notice by the buyer to the seller is not required if the seller otherwise receives notice, and a formal request to repair is not required if the seller had adequate time to make repairs.⁵⁹⁹ A request for a replacement or for return of the purchase price satisfies the requirement for tender.⁶⁰⁰

If entitled to or given the opportunity to make repairs, a good faith seller is only required to restore or reduce the price if he is unable or fails to repair.⁶⁰¹ An important issue is how many repair opportunities must be given to a seller before the buyer can get a refund or go elsewhere for repairs. In some cases, one repair opportunity may be sufficient.⁶⁰² Most consumer redhibition cases involve cars. The lemon law's previous presumption of 4 or more repair attempts (or 45 days cumulative "out of service")⁶⁰³ was adopted by several courts in Civil Code article 2531 redhibition cases involving cars.⁶⁰⁴

A seller's conditional offer to repair will allow the buyer to immediately sue for a refund or reduction in price.⁶⁰⁵ Conditional offers to repair, which involve a splitting of costs, may be rejected by the buyer if they violate the Civil Code article 2475 warranty obligation.

b. Where buyer seeks reduction in price (*quanti minoris*).

While a tender of the object sold for repair of vices is usually a condition precedent to an action for rescission based on redhibition, it is not required to maintain an action in *quanti minoris*, or a reduction in the purchase price.⁶⁰⁶

⁵⁹⁸ See, e.g., *Dalme v. Blockers Manufactured Homes, Inc.*, 779 So.2d 1014 (La. App. 3 Cir. 2001).

⁵⁹⁹ *Lafleur v. Desormeaux* 692 So.2d 617 (La. App. 3 Cir. 1997).

⁶⁰⁰ See, e.g., *Lindy Investments v. Shakertown Corp.*, 209 F.3d 802 (5th Cir. 2000); *Mitchell v. Popiwchak*, 677 So.2d 1050 (La. App. 4 Cir. 1996).

⁶⁰¹ La. Civ. Code art. 2531.

⁶⁰² See, e.g., *Hi Pure Industries v. Ecco High Frequency Corp.*, 356 So.2d 1043 (La. App. 1 Cir. 1977).

⁶⁰³ La. R. S. 51:1943(A).

⁶⁰⁴ See, e.g., *Webb v. Polk Chevrolet Inc.*, 509 So.2d 139 (La. App. 1 Cir. 1987).

⁶⁰⁵ *Kennedy v. Jacobson Young Inc.*, 151 So.2d 368 (La. 1963) (offer to repair on 50-50 basis); *Davis v. Bryan Chevrolet*, 148 So.2d 800 (La. App. 4 Cir. 1963).

⁶⁰⁶ See, e.g., *Creger v. Robertson*, 542 So.2d 1090 (La. App. 2 Cir. 1989); *Abercrombie v. Pierret Realty & Const.*, 532 So.2d 212 (La. App. 3 Cir. 1988); *Broussard v. Breaux*, 412 So.2d 176 (La. App. 3 Cir. 1982).

5. Items of Buyer's Recovery

In some situations, such as the purchase of a new car, if the defects are such that the buyer would not have purchased the item, he may be entitled to rescission.⁶⁰⁷ Rescission may require the buyer to return the goods, even if they are attached to his home, and to give seller credit for their use, but seller has to pay for the reasonable costs of removal.⁶⁰⁸ In general, a party who legitimately rescinds a transaction is entitled to legal interest from the date of judicial demand until rescission.⁶⁰⁹

A buyer may recover the price (or reduction of price if the defects are not sufficient for rescission) and expenses of the sale, e.g., finance charges, in a redhibition case against a seller who was ignorant of the defect.⁶¹⁰ Although both the good and bad faith seller may be entitled to a credit against the buyer's recovery for the value of the use of thing under La. Civ. Code arts. 2531 and 2545, the Louisiana Supreme Court has held: "Compensation for the buyer's use, however, ought not be granted automatically by the courts; even the value of an extensive use may be overridden by great inconveniences incurred because of the defective nature of the thing and constant interruptions in service caused by the seller's attempts to repair."⁶¹¹

The calculation of the reduction in price to which the buyer is entitled has been variously stated to be the difference between the sale price and the price a reasonable buyer and seller would have agreed upon if they had known of the defects,⁶¹² and the cost of repairs.⁶¹³

If the seller is in bad faith, a buyer may also recover consequential damages, including for mental anguish, aggravation, inconvenience, and attorney's fees.⁶¹⁴ "Manufacturers" are presumed to know of redhibitory defects of products they sell.⁶¹⁵ Damages for mental anguish under article 2545 are limited to situations where at least one object of the contract is the gratification of some "significant non-pecuniary interest."⁶¹⁶ In *Chaudoir v. Porsche Cars*, the court upheld an award of damages for mental anguish arising from redhibitory defects in the purchase of a "top of the line" Porsche because it was purchased in part for show, not just as transportation.⁶¹⁷ In addition to recovery of the purchase price, a court may award interest from the time it was paid, reimbursement of reasonable expenses occasioned by the sale and by preservation of the thing, damages caused by the defect and reasonable attorney fees.⁶¹⁸

⁶⁰⁷ See *Morrison v. Allstar Dodge, Inc.*, 792 So.2d 9 (La. App. 1 Cir. 2001).

⁶⁰⁸ *Lindy Investments v. Shakertown Corp.*, 209 F.3d 802 (5th Cir. 2000).

⁶⁰⁹ *Carpenter v. Lafayette Woodworks, Inc.*, 653 So.2d 1187 (3 Cir. 1995).

⁶¹⁰ La. Civ. Code arts. 2531; see, e.g., *Aucoin v. Southern Quality Homes, LLC*, 984 So.2d 685 (La. 2008); *Carpenter v. Lafayette Wood*, 653 So.2d 1187 (La. App. 3 Cir. 1995); *Blue v. Schoen*, 556 So.2d 1364 (La. App. 5 Cir. 1990); *Florane v. Griffis*, 476 So.2d 4 (La. App. 5 Cir. 1985); *Alexander v. Burroughs*, 359 So.2d 607 (La. 1978).

⁶¹¹ *Capitol City Leasing Corp. v. Hill*, 404 So.2d 935, 939 (La. 1981); see, e.g., *Pruge v. Toyota Motor Sales*, 692 So.2d 467 (La. App. 3 Cir. 1997) (upholding the denial of a credit, noting that "the vehicle was in and out of the repair shop at least twelve (12) times over a 2 1/2 year period and that plaintiff suffered a grave inconvenience as a result of the vehicle problems."); *Parish v. Bill Watson Ford, Inc.*, 354 So.2d 727 (La. App. 4 Cir. 1978) (setting the credit at 10-15 cents per mile); *Lindy Investments v. Shakertown Corp.*, 209 F.3d 802 (5th Cir. 2000).

⁶¹² *Agee v. Speers*, 803 So.2d 406 (La. App. 2 Cir. 2001).

⁶¹³ *Sanders v. Earnest*, 793 So.2d 393 (La. App. 2 Cir. 2001).

⁶¹⁴ La. Civ. Code art. 2545; see also *Aucoin v. Southern Quality Homes, LLC*, 984 So.2d 685 (La. 2008); *Pratt v. Himel Marine, Inc.*, 823 So.2d 394 (La. App. 1 Cir. 2002); *Morrison v. Allstar Dodge, Inc.*, 792 So.2d 9 (La. App. 1 Cir. 2001).

⁶¹⁵ La. Civ. Code. Art 2545. See, e.g., *Phillippe v. Browning Arms Co.*, 395 So.2d 310 (La. 1980); *Pratt v. Himel Marine, Inc.*, 823 So.2d 394 (La. App. 1 Cir. 2002).

⁶¹⁶ *Young v. Ford Motor Co., Inc.*, 595 So.2d 1123, 1133 (La. 1992).

⁶¹⁷ 667 So.2d 569 (La. App. 3 Cir. 1995).

⁶¹⁸ *Dalme v. Blockers Manufactured Homes, Inc.*, 779 So.2d 1014 (La. App. 3 Cir. 2001).

6. Solidary liability

The courts are split on whether a seller and manufacturer are liable in *solido*.⁶¹⁹

7. Prescription

By statute, prescription as to a good faith seller is, with one exception, four years from the date of delivery or one year from the day the defect was discovered by the buyer, whichever occurs first.⁶²⁰ The exception is for a defect of residential or commercial immovable property, where the period as to a good faith seller is one year from delivery.⁶²¹ When attempts to repair are performed, prescription does not commence until the seller “tenders it back to the buyer or notifies the buyer of his refusal or inability to make the required repairs.”⁶²²

Redhibition prescribes against bad faith sellers one year from the discovery of the defect⁶²³ or five years if the vice is concealed by false representations.⁶²⁴ Here too, repair efforts will toll the commencement of the prescriptive period.

2.13 MAGNUSON-MOSS WARRANTY ACT

The Magnuson-Moss Warranty Act⁶²⁵ does not require warranties or prescribe their duration. It does, however, provide that if a manufacturer chooses to give a written warranty, certain disclosures and substantive provisions must be met. It also provides for an award of attorney fees for breach of any written or implied warranty or service contract. Otherwise, relief under the Act does not differ substantially from the relief that is available to a purchaser of defective goods under redhibition. However, where a seller attempts to reduce the consumer’s rights under redhibition (such as a waiver), the Act can be helpful since it prohibits restrictions on implied warranties (such as redhibition) where a written warranty or service contract has been given. For a written limitation to be valid, it must be available to the consumer prior to the sale.

If a seller issues a written warranty, it must comply with the applicable disclosure requirements promulgated by the FTC. Suit may be brought in state or federal court, but as to the latter, only for claims in excess of \$50,000.⁶²⁶

For more information on the Act generally, see NCLC, *CONSUMER WARRANTY LAW* (4th ed. 2010).

2.14 HOME IMPROVEMENT CONTRACTOR CLAIMS

2.14.1 Warranty of workmanlike performance

Contractors must perform their work in a good and workmanlike manner free from defects in materials and workmanship and suitable for its intended purpose.⁶²⁷ This duty is implicit in every home improvement contract.

⁶¹⁹ *Aucoin v. Southern Quality Homes, LLC*, 984 So.2d 685, 693, n.12 (La. 2008).

⁶²⁰ La. Civ. Code art. 2534(A)(1).

⁶²¹ La. Civ. Code art. 2534(A)(2).

⁶²² La. Civ. Code art. 2534(C); *see, e.g., Dixie Roofing Co. v. Allen Parish School Board*, 690 So.2d 49 (La. App. 3 Cir. 1996); *see also, de la Houssaye v. Star Chrysler, Inc.*, 284 So.2d 63 (La. App. 4 Cir. 1973).

⁶²³ La. Civ. Code art. 2534(B).

⁶²⁴ La. Civ. Code art. 3542; *see Keaney v. Maloney*, 296 So.2d 865 (La. App. 4 Cir. 1974).

⁶²⁵ 15 U.S.C. §§ 2301-2312.

⁶²⁶ 15 U.S.C. § 2310(d)(3)(B).

⁶²⁷ La. Civ. Code art. 2762, 2679; *Lang v. Sproull*, 36 So.3d407, 414 (La. App. 2 Cir. 2010); *Austin Homes, Inc. v. Thibodeaux*, 821 So.2d 10 (La. App. 3 Cir. 2002).

2.14.2 Homeowner's right to cancel contract

A home owner has an absolute right to cancel a home improvement contract for no cause, even if the work has commenced.⁶²⁸ La. Civ. Code art. 2765. Cancellation under Civil Code art. 2765 will limit the contractor's claim to actual labor, materials and lost profits measured by the unpaid balance minus the costs to complete the work.⁶²⁹ If a contract is cancelled for cause, the contractor will not be entitled to lost profits.

2.14.3 Unlicensed or unregistered home improvement contractors

A home improvement contractor must register with the Louisiana State Licensing Board for Contractors in order to engage in "home improvement contracts" in excess of \$7,500. See La. R.S. 37: 2150.1 (7)-(8); 2175.1. In Louisiana, many home improvement contractors fail to register with the Licensing Board.⁶³⁰ Check www.lslbc.louisiana.gov to see if a contractor is licensed or registered.⁶³¹

Persons who violate any of the provisions of R.S. 37: 2175.1 *et seq.* are subject to suspension of their state registration (which is required for them to engage in home improvement contracting services) and administrative penalties equal to 25% of the price of the unlawful contract. See R.S. 37: 2175.4. Contracts must comply with the requirements of R.S. 37: 2175.1. Note, however, that a contract with a licensed or registered contractor will not be null if the contract does not comply with R.S. 37:2175.1.⁶³²

Complaints may be filed with the State Licensing Board which could result in fines or cease and desist orders against a contractor. However, the Board does not pursue all violations and the Board does not grant relief to an owner, other than suspension of a license for failure to pay a judgment.⁶³³

If a home repair contractor is unlicensed or unregistered, the contract is null and void and he loses his contract and lien rights. Arbitration and attorney fees clauses, based on the null and void contract, should also be null. *Cf., West Baton Rouge School Board v. T.R. Ray, Inc.*, 367 So.2d 332, 334 (La. 1979) (arbitration clause voided because architect was unlicensed).

If the contract is null, the contractor is limited to unjust enrichment, at best, and may even be zeroed out under the *malum in se* doctrine. See *e.g., Dennis Talbot Construction Co. v. Privat General Contractors, Inc.* 60 So.3d 102 (La. App. 3 Cir. 2011)(subcontractor totally barred from recovery under contract and unjust enrichment doctrine).⁶³⁴

⁶²⁸ Representations by the contractor that the owner may not cancel should constitute an actionable unfair trade practice.

⁶²⁹ *Kinchen v. Gilworth*, 454 So.2d 1130 (La. App. 4 Cir. 1984), *writ denied* 458 So.2d 478 (La. 1984).

⁶³⁰ Based on experience, it would appear that most home improvement contractors are unlicensed or unregistered.

⁶³¹ Click on the box "is a contractor licensed or registered?" Louisiana State Licensing Board of Contractors, Rules and Regulations, Section 109, require that a contractor conduct business in the properly licensed name. Licensed individuals may add DBA to their individual name. But, they may not sign a contract only in their DBA name. LSLBC Bulletin 11-07 (July 15, 2011).

⁶³² See R.S. 37: 2175.1 (C).

⁶³³ Like any government enforcement agency, the Licensing Board has priorities that vary from time to time. Check with the Board to see if an owner's complaint is the type that the Board would consider. Check the Board's monthly bulletins for information on prosecution policies. In 2011, the Governor issued Executive Order BJ 11-18 relative to the Hazard Mitigation Grant Program, which created new priorities for prosecution of "home raising" contractors.

⁶³⁴ See also *Alonzo v. Chifci*, 526 So.2d 237, 240-43 (La. App. 5 Cir. 1988), *writ denied* 527 So.2d 307 (La. 1988); *Hagberg v. John Bailey Contractor*, 435 So.2d 580, 584-88 (La. App. 3 Cir. 1983), *writ denied* 444 So.2d 1245 (La. 1984); *Tradewinds Environmental Restoration, Inc. v. St. Tammany Park LLC*, 578 F.3d 255 (5th Cir. 2009).

An unlicensed contractor has the burden of proving the amount of unjust enrichment. His recovery, if any, is limited to the lesser of the owner's enrichment or the contractor's impoverishment.⁶³⁵ A mere showing of impoverishment is insufficient.⁶³⁶ The contractor must prove unjust enrichment with specificity and detail.⁶³⁷ Many contractors don't have records for labor since they pay laborers in cash and off the books.⁶³⁸ A contractor could be totally barred from recovery if his work was so substandard and negligent that it was of no benefit or use to the homeowner.

2.14.4 Damages for breach of workmanlike standards or contract

Damages suffered by homeowner because of contractor's breach of contract or other wrongful acts are calculated as follows:

If the contractor is licensed and the contract valid, the issue is generally the homeowner's cost to repair the defects or finish the work if the contractor substantially performed the contract.⁶³⁹ If the contractor has "substantially performed" a valid contract, he will usually be entitled to his contract price. If there is an unpaid balance on a substantially performed contract, the homeowner's damages may be reduced by the unpaid balance. For example, if the cost of remedying the defects is \$12,000, and there is an unpaid balance of \$3,000, the homeowner will be entitled to a \$9,000 judgment.

If the contractor did not "substantially perform" the contract, he may not recover on the unpaid balance of the contract.⁶⁴⁰ The contractor has the burden of proving substantial performance. If "substantial performance" is not proven, the contractor is limited to a claim for unjust enrichment.⁶⁴¹ If the contractor fails to prove unjust enrichment beyond what the owner has already paid on the contract, he will be denied any recovery whatsoever.⁶⁴²

In cases with an unpaid contract balance, the contractor's claim is generally easy to prove. The contractor must prove the contract, that the work was substantially performed and the unpaid balance. If the contractor meets his burden, the homeowner must then prove: (1) the existence and nature of the defects; (2) that the defects are due to faulty materials or workmanship; and (3) the cost of repairing the defects.⁶⁴³ The litigants' respective burdens should be factored into the assessment of the contingencies of the litigation.

The factors for determining "substantial performance" include the extent of defect or nonperformance, degree to which nonperformance has defeated purpose of contract, ease of correction, and use or benefit to owner of work already performed.⁶⁴⁴

⁶³⁵ See *Moroux v. Toce*, 948 So.2d 1263, 1273 (La. App. 3 Cir. 2006), writ denied 952 So.2d 698 (La. 2007).

⁶³⁶ See *e.g.*, *Brignac v. Boisdore*, 288 So.2d 31, 35-36 (La. 1974).

⁶³⁷ *Alonzo v. Chifit*, 526 So.2d 237 (La. App. 5 Cir. 1988), writ denied 527 So.2d 307 (La. 1988). In *Alonzo*, the contractor was disallowed recovery for his cash expenditures. He did not have invoices or apportioned checks for his alleged cash expenditures.

⁶³⁸ Many contractors are tax cheaters who do not pay income or employment taxes. This violation of federal and state tax laws makes it risky for them to litigate their cases in court. The crimes will come out during a trial and the judge is required to report the crimes to law enforcement.

⁶³⁹ See *e.g.*, *National Tea Co. v. Plymouth Rubber Co., Inc.*, 663 So.2d 801 (La. App. 5 Cir. 1995).

⁶⁴⁰ *Ocmand v. Lubrano*, 78 So.3d 783 (La. App. 5 Cir. 2011).

⁶⁴¹ *Ocmand v. Lubrano*, *supra*.

⁶⁴² *Jackson v. Spurlock*, 424 So.2d 1088, 1089 (La. App. 1 Cir. 1982).

⁶⁴³ La. Civ. Code art. 2769; *Regions Bank v. Ark-La-Tex Water Gardens, L.L.C.*, 997 So.2d 734 (La. App. 2 Cir. 2008), writ denied 5 So.3d 119 (La. 2009).

⁶⁴⁴ *Airco Refrigeration Service, Inc. v. Fink*, 134 So.2d 880 (La. 1961). The *Airco* test is regularly cited in construction cases involving an issue of "substantial performance." See also *Mayeaux v. McInnis*, 809 So.2d 310 (La. App. 1 Cir. 2001).

In some cases, there may be a claim that the entire work must be replaced and redone, or that the contractor is not entitled to any of the unpaid balance on the contract. *See e.g., Taafe v. Factory Direct Installations, Ltd.*, 13 So.3d 562 (La. App. 4 Cir. 2009) (only way to correct defective workmanship was to remove and replace roof).

2.14.5 Unfair Trade Practices

An additional inquiry is whether any of contractor's acts constituted unfair or deceptive trade practices which may entitle the owner to enhanced damages. *See e.g., Laurents v. Louisiana Mobile Homes, Inc.*, 689 So.2d 536 (La. App. 3 Cir. 1997) (failure to build home per specifications).

The advantages of an unfair trade practice claim may include "emotional anguish" damages, inconvenience, owner's lost time, treble damages, attorney fees and personal liability for corporate officers and agents. Emotional distress is considered "actual damage" under the unfair trade practices law.⁶⁴⁵ Awards for emotional distress for property damage have run up to \$45,000 per person.⁶⁴⁶ Treble damages are mandatory if a court finds that the unfair trade practice continued after receipt of the Attorney General's notice which is issued when a consumer files an unfair trade practice lawsuit.⁶⁴⁷ Some unfair trade practices may be non-dischargeable in bankruptcy.⁶⁴⁸

Generally, a mere breach of a contract, without more, is not an unfair or deceptive trade practice.⁶⁴⁹ However, misrepresentation, deception or fraud in connection with the contract may constitute an unfair or deceptive trade practice.⁶⁵⁰ A contract that violates the unfair trade practices law may be an illegal contract under which recovery is barred.⁶⁵¹

2.14.6 Lien Rights

An unlicensed home improvement contractor may not file a lien against the owner's home. La. R.S. 37: 2175.6.⁶⁵² Filing an unauthorized or false lien may constitute an actionable unfair trade practice.⁶⁵³

Generally, a contractor has 60 days after the work is "substantially completed" to file his lien. La. R.S. 9: 4822. A construction job may be "substantially completed" even if minor curative work is needed.⁶⁵⁴ A contractor may file a lien before the work is completed. *Paul Hyde, Inc. v. Richard*, 854 So.2d 1000 (La. App. 4 Cir. 2003). *Paul Hyde, Inc.*, also noted in dicta that an agreement to arbitrate does not preclude a contractor from filing a lien.⁶⁵⁵ If the contract was for more than \$25,000, a general contractor must file a "notice of contract" before the work begins to preserve his lien rights. *See* La. R.S. 9: 4811; 4822 (B).⁶⁵⁶

⁶⁴⁵ *Laurents v. Louisiana Mobile Homes, Inc.*, 689 So.2d 536 (La. App. 3 Cir. 1997).

⁶⁴⁶ *Holsenthal v. Sewerage & Water Board of New Orleans*, 950 So.2d 55 (La. App. 4 Cir. 2007) (quantum review).

⁶⁴⁷ *McFadden v. Import, Inc.*, 56 So.3d 1212, 1221 (La. App. 3 Cir. 2011).

⁶⁴⁸ *Cf., In re Hebert*, 2011 WL 361667 (Bankr. E.D. La. 2011)

⁶⁴⁹ *See e.g., State ex rel Guste v. Orkin Exterminating Co., Inc.*, 528 So.2d 198 (La. App. 4 Cir. 1988), *writ denied* 533 So.2d 18 (La. 1988).

⁶⁵⁰ *See e.g., Laurents v. Louisiana Mobile Homes, Inc.*, 689 So.2d 536 (La. App. 3 Cir. 1997).

⁶⁵¹ La. R.S. 51: 1403.

⁶⁵² *South Louisiana Ethanol, LLC v. Whitney National Bank*, Adv. Proc. No. 09-1119 (Bankr. E.D. La.) (Rec Doc. 529); *In re South Louisiana Ethanol, LLC*, 2011 WL 3047805 (Bankr. E.D. La. 2011)

⁶⁵³ *See e.g., Atlas Amalgamated Inc. v. Castillo*, 601 S.W.2d 728 (Tex. App. 1980).

⁶⁵⁴ *See* La. R.S. 9: 4822 (H); *C & S Safety Systems v. SSEM Corp.*, 843 So.2d 447 (La. App. 4 Cir. 2003).

⁶⁵⁵ No other Louisiana appellate court has taken a position on this issue. Some other states' courts have ruled that arbitration precludes the filing of a lien.

⁶⁵⁶ Whether a claimant is a general contractor, contractor or subcontractor for lien rights analysis is a complex question. *See e.g., Burdette v. Drushell*, 837 So.2d 54 (La. App. 1 Cir. 2002); *Executive House Building, Inc. v. Demarest*, 248 So.2d 405 (La. App. 4 Cir. 1971).

Subcontractors and laborers only have 30 days after the filing of notice of termination of work to file their liens if a “notice of contract” was properly and timely filed under R.S. 9: 4811. If a “notice of contract” was not filed, subcontractors would have 60 days after the notice of termination of substantial completion of the work to file their liens.

Lien rights under La. R.S. 9:4801-02 are extinguished if the claimant does not file an action against the owner within one year after the filing of the statement of claim or privilege.⁶⁵⁷ The law is not clear whether the filing of an arbitration claim will preserve lien rights.⁶⁵⁸

The Residential Truth in Construction Act, La. R.S. 9: 4851 *et seq.*, requires that notice of lien rights be given to owners in residential home construction and improvement contracts. Damages and attorney fees are available if this mandatory notice is not given and the owner’s property is liened.⁶⁵⁹

2.14.7 Criminal remedies against home improvement contractors

It is a violation of criminal law, La. R.S. 14:202(A), for a contractor to fail to pay his subcontractors.⁶⁶⁰ Therefore, an owner may file a criminal complaint against the contractor if subcontractors file liens on his house. Such complaints may lead to removal of the subcontractors’ liens. Remember that attorneys may not threaten criminal prosecution to gain advantage in a civil case. La. Rules of Professional Conduct, Rule 8.4(g).

Act 156 of 2009, codified at La. R.S. 37: 2158, made it a crime to engage in business of contracting without the authority provided in La. R.S. 37:2160 if the contractor caused more than \$300 damage to a person. This crime applies to persons who must be licensed contractors for contracts in excess of \$75,000.

2.14.8 Piercing the corporate veil of home improvement companies

In a home improvement contract dispute with a limited liability company, consideration should be given to also suing the company owner as an individual defendant. Some contractors see their limited liability company as a vehicle for defrauding their creditors. They thinly capitalize the limited liability company. Then, they shut the company down if judgment is entered against the company and start a new limited liability company.⁶⁶¹ Therefore, it is important to plead a basis for piercing the corporate veil when available.

Several courts have held that professionals, including contractors regulated under R.S. 37, are not shielded by La. R.S. 12: 1320 from personal liability when they commit negligence.⁶⁶² This approach is the simplest way of seeking personal liability against a construction company owner. In addition, the corporate veil is pierced if the officer engaged in fraud, malfeasance or criminal wrongdoing.⁶⁶³

⁶⁵⁷ La. R.S. 9:4823, as amended by Act 394 of 2012.

⁶⁵⁸ Because of the uncertainty of the law, some contractors will file both an arbitration claim and a lawsuit, and seek to stay the litigation pending arbitration.

⁶⁵⁹ La. R.S. 9:4855; *Landry v. Racca*, 386 So2d 1013 (La. App. 3 Cir. 1980).

⁶⁶⁰ Many district attorneys’ offices prosecute this crime.

⁶⁶¹ Failure to properly liquidate a limited liability company may create personal liability for a company member. *See e.g.*, La. R.S. 12: 1335.1, 1338, 1341.

⁶⁶² *See e.g.*, *In re Hebert*, 2011 WL 351667 (Bankr. E.D. La. 2011); *WJ. Spano Co., Inc. v. Mitchell*, 943 So.2d 1131, 1133 (La. App. 1 Cir. 2006); *Regions Bank v. Ark-La-Tex Water Gardens, LLC*, 997 So.2d 734 (La. App. 2 Cir. 2008).

⁶⁶³ *See Carter v. State Dept. of Transp & Development*, 46 So.3d 787, 792 (La. App. 2 Cir. 2010); *see also* La. R.S. 12: 95 (corporation law does not shield an officer from personal liability for fraud)

The existence of a cause of action under the Louisiana unfair trade practices law may obviate the need to pierce the corporate veil. The unfair trade practices statute imposes liability on any “person” who engages in unfair or deceptive trade practices or acts. La. R.S. 51:1409(A), 1402(8), 1405. A general manager has been held to be personally liable for a construction company’s unfair trade practice of failing to build a mobile home according to specifications.⁶⁶⁴ Other grounds for piercing the corporate veil may also be available.

2.14.9 Prescription

Generally, there is a 10 year prescription for breach of home improvement contracts or failure to perform construction work in a good and workmanlike manner.⁶⁶⁵ However, lawsuits should be filed within 1 year if there are unfair trade practice claims against the contractor. Also, new home construction is governed by special rules for prescription.⁶⁶⁶

2.15 RENT TO OWN CONTRACTS

2.15.1 Covered Transactions

The Louisiana Rental-Purchase Act⁶⁶⁷ governs agreements for a consumer’s use of personal property that: (1) are for an initial period of four months or less; (2) are automatically renewable with each payment after the initial period; (3) do not require the consumer to continue renting the property after the initial period; and (4) permit the consumer to become the owner of the property.⁶⁶⁸ If an agreement satisfies all four of these prerequisites, then it must contain certain disclosures, and is also prohibited from containing certain provisions.

Renegotiations are to be treated as new agreements which require new disclosures.⁶⁶⁹ However certain events, such as the substitution of property, addition or return of property in a multiple-item agreement are not to be treated as renegotiations.⁶⁷⁰ Extensions do not require new disclosures.⁶⁷¹

2.15.2 Required Disclosures

The disclosures required by the Rental-Purchase Agreement Act (“Act”) must be made as part of the agreement in writing, on the face of the contract, above the line for signature of the consumer, and must be conspicuous.⁶⁷² The twelve required disclosures are listed in La. R.S. 9:3355 and include:

1. the total number, amount, and timing of all payments necessary to acquire ownership;
2. a statement that the consumer will not own the property until all payments necessary to acquire ownership are made;
3. a statement that the consumer is responsible for the Fair Market Value of lost, stolen, or damaged property;
4. a description of the property, including whether new or previously rented;

⁶⁶⁴ *Laurents v. Louisiana Mobile Homes, Inc.*, 689 So.2d 536, 547 (La. App. 3 Cir. 1997).

⁶⁶⁵ *Creighton v. Karlin*, 225 So.2d 288 (La. App. 4 Cir. 1969).

⁶⁶⁶ La. R.S. 9: 3150 *et seq.*

⁶⁶⁷ La. R.S. 9:3351-3362.

⁶⁶⁸ La. R.S. 9:3352(6).

⁶⁶⁹ La. R.S. 9:3359(A).

⁶⁷⁰ La. R.S. 9:3359(A)(1)-(4).

⁶⁷¹ La. R.S. 9:3359(B).

⁶⁷² La. R.S. 9:3354(C).

5. the cash price of the property;
6. the total of initial payments required at or before consummation of the transaction;
7. a statement that the total of payments does not include other charges, such as late payment, default, pickup, etc;
8. a clear summary of the terms of the option to purchase, including the right to exercise an early purchase option;
9. the identity of the party responsible for maintaining or servicing the property;
10. the date of the transaction and identities of the parties;
11. notice of right to terminate;
12. disclosure of the right of the lessee to reinstatement.

The right to reinstatement allows the consumer to “cure” overdue payments within a certain period of time by paying all past due rental charges, late fees, and, if the property has been picked up by the lessor, any applicable pick-up fees.⁶⁷³

2.15.3 Prohibited Provisions

The provisions which are forbidden in a rental-purchase agreement include confession of judgment, negotiable instrument, security interest in other goods, wage assignment, waiver of claims or defenses, right to enter without permission, and mandated insurance or waiver of liability for damage to or loss of the property.⁶⁷⁴ The lessor may, however, require the consumer to provide proof of insurance.

2.15.4 Remedies

Any violation of the Act is a prohibited practice under the Louisiana Unfair Trade Practices and Consumer Protection Act and is subject to the enforcement provisions of that statute.⁶⁷⁵

2.15.5 Prescription

Since violation of the Act is an unfair trade practice, the one year period provided by that Act applies. In some circumstances, the acts or omissions of the rental company may be continuing violations so that the preemptive period arguably begins anew as to each such violation.

2.15.6 Protections Afforded to Sellers

This provision of the Act is unfavorable to consumers. Agreements which comply with the requirements of the Act are exempt from eight specified laws, including those governing consumer credit sales, consumer credit transactions, consumer loans and consumer leases.⁶⁷⁶

2.15.7 Additional Resources

For more information on Rent to Own abuses and claims, see NCLC, *UNFAIR AND DECEPTIVE ACTS AND PRACTICES* (8th ed. 2012); NCLC, *TRUTH IN LENDING* (8th ed. 2012); NCLC, *CONSUMER BANKRUPTCY LAW AND PROCEDURE* (9th ed. 2009); *FORECLOSURES* (4th ed. 2012).

⁶⁷³La. R.S. 9:3357.

⁶⁷⁴La. R.S. 9:3356.

⁶⁷⁵La. R.S. 9:3361.

⁶⁷⁶La. R.S. 9:3353(A); cf. *Smith v. ABC Rental Systems of New Orleans, Inc.*, 618 F.2d 397 (5th Cir. 1980).

2.16 HEALTH INSURANCE

In recent years, there has been tremendous litigation concerning health insurance coverage issues. These contracts are heavily regulated in Louisiana.⁶⁷⁷ Consumer advocates estimate that 40%-50% of claims denials are wrongful. Exclusionary clauses in health insurance policies are narrowly construed by the courts.⁶⁷⁸ Where an exclusion is ambiguous, it will be interpreted against the insurer.⁶⁷⁹

State insurance law mandates certain types of coverage and prohibits or limits cancellations in other cases. For example, cancellation is prohibited after a claim is made for a terminal, incapacitating, or debilitating condition.⁶⁸⁰ La. R.S.22:887(A)(1) regulates the notice of cancellation. Under La. R.S.22:975, cancellation shall not prejudice any "benefit accrued or expenses incurred for services rendered prior to cancellation." In addition, laws such as COBRA or ERISA may entitle an insured to continued insurance or payment for benefits covered under the health insurance plan. An insured may bring a civil action under ERISA, 29 U.S.C. § 1132(a)(1)(B) to recover benefits due under the health insurance plan if denial of the coverage was arbitrary and capricious.⁶⁸¹

State law requires that group health insurance be determined by conditions pertaining to employment or age.⁶⁸² Therefore, an insurer may not exclude an insured's child based on alleged misrepresentations concerning the child's health status in a form adding the child as a dependent.⁶⁸³ Also, a health insurance policy may not "deny, exclude or limit benefits for a covered individual for losses due to a preexisting condition incurred more than twelve months following the effective date of the individual's coverage."⁶⁸⁴

2.17 CLIENT RESTITUTION FUNDS

Some occupational licensing agencies may have either restitution funds for consumers victimized by their professionals or the authority to condition relicensing on restitution to the victims. For example, the Real Estate Commission may reimburse persons who have suffered monetary damages from acts committed by licensed real estate brokers or salesmen.⁶⁸⁵

2.18 FTC PRESERVATION OF CONSUMERS' CLAIMS AND DEFENSES RULE

The FTC Preservation of Consumers' Claims and Defenses Rule⁶⁸⁶ (the "Holder Rule"), makes even holders in due course of a consumer credit contract or note subject to many claims and defenses which the debtor could assert against the seller who extended credit in payment for his services. Note that a creditor must satisfy La. R.S. 10:3-302(a)(2) to be considered a holder in due course. Thus, if it did not purchase the note for value, in good faith and without knowledge of other parties'

⁶⁷⁷ See, e.g., La. R.S. 22:975, 1000, 1012.

⁶⁷⁸ See, e.g., *Oxner v. Montgomery*, 794 So.2d 86 (2d Cir. 2001); *Tally v. BC/BS of Louisiana*, 760 So.2d 1193 (La. App. 3 Cir. 2000); *Sanders v. Home Indemn. Ins. Co.*, 594 So.2d 1345 (La. App. 3 Cir. 1991).

⁶⁷⁹ *Robarts v. Blue Cross*, 821 So.2d 87 (La. App. 5 Cir. 2002).

⁶⁸⁰ La. R.S. 22:1012; see also *Gahn v. Allstate Life Insurance Co.*, 926 F.2d 1449 (5th Cir. 1991).

⁶⁸¹ *Welch v. HMO Louisiana Blue Cross*, 2008-cv-04576 (E.D. La. 11/20/09).

⁶⁸² La. R.S. 22:1000.

⁶⁸³ *Korman v. Blue Cross/Blue Shield of La.*, 662 So.2d 498 (La. App. 5 Cir. 1995).

⁶⁸⁴ La. R.S. 22:1029.

⁶⁸⁵ La. R.S. 37:1461.

⁶⁸⁶ 16 C.F.R. § 433.1-3.

defenses or recoupment claims, it may not even be a holder in due course. In any event, if it is a holder in due course, it is still subject to the FTC Holder Rule and any claims or defenses that the debtor could have asserted against the seller. The FTC Holder Rule prohibits a creditor from asserting its normal holder in due course rights under La. R.S. 10: 3-305.⁶⁸⁷ The holder's refusal to accept liability under the Holder Rule may be an independent UTPL violation.⁶⁸⁸ Absent FTC Holder Rule language in a contract or note, a holder in due course would only be subject to the defenses of infancy, duress, lack of capacity, illegality which nullifies the obligation, fraud in the factum, and discharge of the obligor in insolvency proceedings.⁶⁸⁹

The FTC preservation language must be included in any consumer credit contract for the sale of goods or services.⁶⁹⁰ The presence of the FTC language in the contract gives the buyer a contractual right to assert seller-related claims against holders.⁶⁹¹ Transactions that would normally be beyond the FTC Holder Rule are also covered if the agreement contains the FTC notice preserving claims and defenses.⁶⁹² In a pre-2001 decision, the Louisiana Supreme Court held that the consumer is precluded from asserting his defenses against a holder if the seller unlawfully omitted the FTC notice.⁶⁹³ In 2001, the Legislature adopted Article 9 of the Uniform Commercial Code which reads omitted language required by law (e.g., the FTC Holder Rule as expressly noted in the UCC comments) into the contract or note.⁶⁹⁴ If the seller omitted the FTC Holder Rule from a contract or note, a UTPL claim for omission of the Holder Rule language may exist against the seller or holder/creditor.⁶⁹⁵ If you discover a seller who omits the FTC Holder Rule from a consumer credit contract or note, consider filing a complaint with the FTC which has the power to enforce its Holder Rule.

Two courts have improperly allowed holders to use La. Code Civ. Proc. art. 424 to avoid the debtor's redhibition claims despite the existence of Holder Rule defenses.⁶⁹⁶ Art. 424 states that a prescribed redhibition claim cannot be raised as a defense to a negotiable instrument. A contract containing the FTC preservation language, however, is not a negotiable instrument.⁶⁹⁷

Consumers may use the Holder Rule to obtain an affirmative recovery from the creditor of all amounts paid on the debt, relief from the amount outstanding on the note, and any statutory attorney fees.⁶⁹⁸ In a May 3, 2012 advisory opinion,

⁶⁸⁷ Jefferson Bank & Trust Co. v. Stamatiou, 384 So.2d 388, 392 (La. 1980).

⁶⁸⁸ NCLC, FEDERAL DECEPTION LAW, §§ 4.3.14 (1st ed. 2012).

⁶⁸⁹ See La. R.S. 10:3-305.

⁶⁹⁰ 16 C.F.R. § 433.2; see, e.g., Jefferson Bank & Trust Co. v. Stamatiou, 384 So.2d 388 (La. 1980) (holding that defendant could raise defense of redhibition due to the holder language in the note).

⁶⁹¹ See General Motors Acceptance Corp. v. Johnson, 426 So.2d 691 (La. App. 1 Cir. 1982) (warranty claims); Aillet v. Century Finance Co., 391 So.2d 895 (La. App. 2 Cir. 1980) (nonperformance of seller's refund obligations); First Homestead Fed. Sav. & Loan v. Boudreaux, 450 So.2d 995 (La. App. 1 Cir. 1984) (arbitration requirements); see also *The FTC Legend in Louisiana*, 48 La. L. Rev. 1435(1988).

⁶⁹² Jefferson Bank & Trust Co. v. Stamatiou, 384 So.2d 388 (La. 1980).

⁶⁹³ Capital Bank & Trust Co. v. Lacey, 393 So.2d 668 (La. 1981).

⁶⁹⁴ La. R.S. 10: 9-403 (d), 10: 9-404(d); UCC Comment 5 to 9-403 and UCC Comment 4 to 9: 404; NCLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 11.6.4.2 (7th ed. 2008); but see *Whittington v. Patriot Homes, Inc.*, 2008 WL 1736820 (W.D. La. 2008) (court refused to read FTC Holder Rule into finance contract, but seemed totally unaware of La. R.S. 10: 9-403(d), 10:9-404(d) requirements).

⁶⁹⁵ See NCLC, FEDERAL DECEPTION LAW, §§ 4.4.1 (1st ed. 2012).

⁶⁹⁶ First Homestead Federal Savings v. Dent, 459 So.2d 689 (La. App. 4 Cir. 1984); General Motors Acceptance Corp. v. Johnson, 426 So.2d 691 (La. App. 1 Cir. 1982) writ denied 433 So.2d 151 (La. 1983) (denying constitutional challenge).

⁶⁹⁷ See *Dent*, 459 So.2d 689, 692 (La. App. 4 Cir. 1984) (Redmann, J., dissenting).

⁶⁹⁸ See NCLC, FEDERAL DECEPTION LAW, §§ 4.3.4 (1st ed. 2012)..

the FTC has held that the Holder Rule does not limit a consumer's affirmative recovery to situations where rescission is warranted or where the goods or services sold to the consumer were worthless. The FTC advisory opinion rejected contrary interpretations by some courts.

Generally, the consumer cannot raise seller-related claims when the creditor has a non-purchase money security interest in the collateral or when the consumer obtains a purchase money loan independent of the seller's referral or recommendation. However, a lender may be solidarily liable with a contractor if the contractor routinely refers homeowners to that lender.

2.19 NEGLIGENT MISREPRESENTATION

The Louisiana Supreme Court has employed standard duty-risk analysis to this delictual action and held that for the cause of action of negligent misrepresentation to arise, there must be a legal duty on the part of the defendant to supply correct information, there must be a breach of that duty, and the breach must have caused plaintiff damage.⁶⁹⁹ The legal duty may arise under factual scenarios of both non-disclosure and misinformation.

2.20 SPOT DELIVERY

2.20.1 Overview

Spot delivery or "yo-yo sales" is one of the most widespread automobile dealer abuses today. A dealer will supposedly finalize an installment sale of a car, give the consumer possession of the car "on the spot," even transfer title to the consumer, and then later tell the consumer to return the car because the financing has fallen through. This could lead to (1) the consumer agreeing to rewrite the loan at higher payments, (2) the lender's repossession of the vehicle, (3) the consumer losing his trade-in.

In the typical motor vehicle installment sales agreement, the dealer is the lender and has agreed to the credit contract by signing it. The lender is the dealer's assignee. If the lender declines the assignment, there is still a binding credit agreement between the consumer and dealer. The consumer simply makes payments to the dealer. The consumer is not in default of this agreement simply because the dealer fails to assign the agreement to a third party.⁷⁰⁰

2.20.2. Louisiana Law

La. R.S. 32:1261(2)(f) requires, where a sale is conditioned on financing, that the following provisions shall be in writing and shall be a part of the conditional sales contract:

- if the sale is not concluded by the financing of the sale to the purchaser within 25 days of the delivery, the sale contract shall be null and void;
- the trade-in shall not be sold by the dealer until the conditional sale is complete;

⁶⁹⁹ *Daye v. General Motors Corporation*, 720 So.2d 654, 659 (La. 1998); *Barrie v. V.P. Exterminators, Inc.*, 625 So.2d 1007 (La. 1993); *accord Smith v. Roussel*, 809 So.2d 159 (La. App. 1 Cir. 2001); see also *Kadlec Medical Center v. Lakeview Anesthesia Associates*, 2005 WL 1309153 (E.D. La. 2005).

⁷⁰⁰ See *Walker Mobile Home Sales v. Walker*, 965 S.W.2d 271 (Mo. Ct. App. 1998) (consumer not liable to dealer where consumer offered to make installment payments to dealer, but dealer refused to accept payments because prospective assignee refused to take assignment).

- there shall be no charge to the consumer if the conditional sale is not completed, including, but not limited to, mileage charges or charges to refurbish the trade-in vehicle;
- if the conditional sale is not completed, the dealer shall refund all sums placed as a deposit or for any other purpose;
- the purchaser shall return the vehicle to the dealer within 48 hours of notification by the dealer that the conditional sale will not be completed.

This statute applies to new and used car dealers and their salesman or agents. It also applies to new or used vehicles.

2.20.3 Information on spot delivery abuses

Look in the National Consumer Law Center's manuals for more information on various spot delivery abuses:

NCLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES §§ 7.1-7.3 (8th ed. 2012).

NCLC, AUTOMOBILE FRAUD ch. 4 (4th ed. 2011).

NCLC, CREDIT DISCRIMINATION ch. 10 (5th ed. 2009).

2.21 EXPANDED LIABILITY FOR ACTS OF A CORPORATION

2.21.1 Overview

Are persons other than the corporation or limited liability company liable to the consumer? If the contract was with a corporation or limited liability company, any suits against other persons, e.g., company owners or corporate officers, will be met with an exception of no cause of action or a motion for summary judgment on the issue of personal liability. If you name an individual defendant, pleadings and discovery should be conducted to establish the theory of the defendant's personal liability.

Normally, only the corporation is liable. However, liability may be imposed on other defendants under several doctrines or theories, e.g., (1) successor or transferee liability, (2) statutory causes of action against a person, usually a corporate officer or agent, (3) lack of personal immunity for regulated professionals, (4) piercing the corporate veil, (5) establishing the existence of a single business enterprise where two or more superficially independent corporations operate as a single business, and (6) establishing a joint venture among generally independent entities who jointly agree to work on a particular project (at least as to contractual liability).⁷⁰¹

2.21.2 Successor or transferee liability

In a corporate reorganization, a successor corporation is generally liable for the former corporation's obligations.⁷⁰² Members of a limited liability company may have some personal liability for the company's debts after liquidation.⁷⁰³ Failure to follow the statutory requirements for liquidation may expose an LLC member to greater personal liability. Claims against a limited liability company in liquidation (and ultimately the members) must be presented or suit filed within certain time limits.⁷⁰⁴ Unscrupulous contractors may close a limited liability company in an attempt to avoid collection of judgments and other claims.

⁷⁰¹For theories for personal liability without piercing the corporate veil, see G. Morris, Personal Liability for Corporate Participants without Corporate Veil-Piercing: Louisiana Law, 54 La. L. Rev. 207 (1993).

⁷⁰²La. R.S. 12: 115(D); *but see* Morrison v. C.A. Guidry Produce, 856 So.2d 1222 (La. App. 3 Cir. 2003).

⁷⁰³La. R.S. 12: 1335.1, 1341.

⁷⁰⁴La. R.S. 12: 1341, 1338(C)-(D).

2.21.3 Statutory cause of action

The existence of a statutory cause of action may obviate the need to pierce the corporate veil if the corporate officer personally participated in the wrongful act. For example, the unfair trade practices statute imposes liability on any “person” who engages in unfair or deceptive trade practices or acts.⁷⁰⁵ A general manager has been held to be personally liable for a construction company’s unfair trade practice of failing to build a mobile home according to specifications.⁷⁰⁶

2.21.4 Regulated professionals

Several courts have held that professionals are not shielded by La. R.S. 12:1320 from personal liability when they commit negligence.⁷⁰⁷ This approach is often the simplest way of seeking personal liability against a company owner if the business is a regulated profession.

2.21.5 Piercing the corporate veil

The theory of piercing the corporate veil applies to limited liability companies and corporations.⁷⁰⁸ The corporate veil may be pierced if the officer engaged in fraud, malfeasance or criminal wrongdoing.⁷⁰⁹ Fraud is a “misrepresentation or a suppression of the truth made with the intent either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other.”⁷¹⁰ The Louisiana courts have not defined “malfeasance” in the context of piercing the corporate veil. However, the common meaning of “malfeasance” is a wrongful or unlawful act. When fraud, deceit or malfeasance are pleaded and proved, the plaintiff does not have to plead and prove “alter ego” status to pierce the corporate veil and hold an officer personally liable for the his acts or omissions.⁷¹¹

Finally, the corporate veil may be pierced if the corporation is the alter ego of the member or owner. It is not easy to pierce the corporate veil under the “alter ego” doctrine. The totality of circumstances is determinative of “alter ego” status.⁷¹² The Louisiana Supreme Court has identified 5 non-exclusive factors to be used in applying the alter ego doctrine (1) commingling of assets, (2) failure to follow statutory formalities for incorporating and transacting corporate affairs, (3) undercapitalization, (4) failure to provide separate bank accounts and bookkeeping records, and (5) failure to hold regular shareholder and director meetings.⁷¹³

2.21.6 Single business enterprise

The “single business enterprise” or “instrumentality” theory has been employed to extend liability beyond a separate entity where two or more corpora-

⁷⁰⁵ La. R.S. 51:1409(A), 1402(8), 1405.

⁷⁰⁶ *Laurents v. Louisiana Mobile Homes, Inc.*, 689 So.2d 536, 547 (La. App. 3 Cir. 1997).

⁷⁰⁷ *See e.g.*, *Matherne v. Barnum*, 94 So.3d 782 (La. App. 1 Cir. 2012) *writ denied* 90 So.3d 447 (La. 2012); *In re Hebert*, 2011 WL 351667 (Bankr. E.D. La. 2011); *W.J. Spano Co., Inc. v. Mitchell*, 943 So.2d 1131, 1133 (La. App. 1 Cir. 2006); *Regions Bank v. Ark-La-Tex Water Gardens, LLC*, 997 So.2d 734 (La. App. 2 Cir. 2008); *but see Mentz Construction Services, Inc. v. Poche*, 2010 WL 5187721 (La. App. 4 Cir. 2010).

⁷⁰⁸ *ORX Resources, Inc. v. MBW Exploration, LLC*, 32 So.3d 931, 935 (La. App. 4 Cir. 2010) *writ denied* 34 So.3d 862 (La. 2010).

⁷⁰⁹ *See Carter v. State Dept. of Transp & Development*, 46 So.3d 787, 792 (La. App. 2 Cir. 2010); *see also* La. R.S. 12: 95 and La. R.S. 12: 1320 (D) (corporation law does not shield an officer from personal liability for fraud).

⁷¹⁰ La. Civ. Code art. 1953.

⁷¹¹ *Indest-Guidry, Ltd. v. Key Office Equipment, Inc.*, 997 S.2d 796, 812 (La. App. 3 Cir. 2008) *writ denied* 999 So.2d 782 (La. 2009).

⁷¹² *Riggins v. Dixie Shoring Co., Inc.*, 590 So.2d 1164 (La. 1991).

⁷¹³ *Riggins v. Dixie Shoring Co., Inc.*, 590 So.2d 1164 (La. 1991), *ORX Resources, Inc. v. MBW Exploration, LLC*, 32 So.3d 931 (La. App. 4 Cir. 2010) *writ denied* 34 So.3d 862 (La. 2010) (corporate veil of LLC pierced under alter ego doctrine).

tions operate as a single business.⁷¹⁴ Unlike piercing the corporate veil, it is not used to impose personal liability on a corporation's shareholders. Rather, it extends liability to each of the affiliated corporations. The influential *Green v. Champion Insurance Co.* case established 18 factors to determine whether a group of affiliated entities constitute a "single business enterprise."⁷¹⁵ The list is illustrative, not exhaustive, and no one factor is dispositive of the issue of "single business enterprise."⁷¹⁶ A parent company will be liable for the subsidiary's debts where it disposed of all of the subsidiary's assets.⁷¹⁷

2.21.7 Joint venture

Companies may be jointly liable where there is a joint venture.⁷¹⁸ The existence of a joint venture is determined by the intent of the parties as manifested by their agreement, express or implied. A joint venture exists when the parties have contributed capital, labor, skill and industry in a common effort with a view to participate in profits and share losses.⁷¹⁹ The intent is determined by the facts and circumstances of each case.⁷²⁰

3. DEFENSES AND TRANSACTION AVOIDANCE

3.1 OVERVIEW

Contracts have the effect of law for the parties, but may be dissolved on grounds provided by law.⁷²¹ As discussed herein, there are various Louisiana and federal laws that permit rescission. In addition, Civil Code rules on contract interpretation may sometimes be used to limit or bar the application of an adverse contractual provision.

3.2 INCAPACITY

Unemancipated minors, interdicts and persons deprived of reason do not have the capacity to contract.⁷²² A contract made by a person without capacity can be rescinded at the request of that person or his legal representative.⁷²³

"Deprived of reason" may include mental conditions such as limited intellectual capacity,⁷²⁴ illiteracy,⁷²⁵ heavy sedation,⁷²⁶ etc. A non-interdicted party claiming he was deprived of reason must show that the other party knew or should have known of his incapacity by convincing evidence⁷²⁷ in order to rescind the contract.⁷²⁸

⁷¹⁴ *Green v. Champion Insurance Co.*, 577 So.2d 249, 258 (La. App. 1 Cir. 1991), writ denied 580 So.2d 668 (La. 1991); *In re New Orleans Train Car Leakage Fire Litigation*, 690 So.2d 255, 257 (La. App. 4 Cir. 1997).

⁷¹⁵ *Green v. Champion Insurance Co.*, 577 So.2d 249, 257-58 (La. App. 1 Cir. 1991), writ denied 580 So.2d 668 (La. 1991).

⁷¹⁶ *Green v. Champion Insurance Co.*, 577 So.2d 249, 258 (La. App. 1 Cir. 1991), writ denied 580 So.2d 668 (La. 1991).

⁷¹⁷ *Amoco Production Co., v. Texaco, Inc.*, 838 So.2d 821 (La. App. 3 Cir. 2003), writ denied 845 So.2d 1096 (La. 2003).

⁷¹⁸ *Comeaux v. C.F. Bean Corp.*, 750 So.2d 291, 298 (La. App. 4 Cir. 1999); *American Fidelity Fire Ins. v. Atkinson*, 420 So.2d 691 (La. App. 2 Cir. 1982).

⁷¹⁹ *Penn v. Burk*, 152 So.2d 16 (La. 1963).

⁷²⁰ *Gilbeau v. Liberty Mutual Insurance Co.*, 324 So.2d 571 (La. App. 1 Cir. 1975).

⁷²¹ La. Civ. Code art. 1983.

⁷²² La. Civ. Code art. 1918.

⁷²³ La. Civ. Code art. 1919.

⁷²⁴ See, e.g., *In re Adoption of Smith*, 578 So.2d 988 (La. App. 4 Cir. 1991), writ denied, 581 So.2d 687.

⁷²⁵ See, e.g., *Higgins v. Spencer*, 531 So.2d 768 (La. App. 1 Cir. 1988), writ denied, 532 So.2d 106.

⁷²⁶ See, e.g., *King v. Our Lady of the Lake Reg'l Med. Ctr.*, 623 So.2d 139 (La. App. 1 Cir. 1993) (citing *Brumfield v. Paul*, (La. App. 4 Cir. 1962).

⁷²⁷ *Smith*, 578 So.2d 988.

⁷²⁸ La. Civ. Code art. 1925.

It is difficult to establish incapacity after the death of the alleged incompetent. The acts of a deceased person may not be attacked for lack of mental capacity unless a petition for his interdiction was filed or a judgment of interdiction was rendered before his death, the contract was gratuitous, the contract itself contains evidence that he was lacking understanding, or it was confected within 30 days of the alleged incompetent's death.⁷²⁹

3.3 ERROR

Consent for a contract may be vitiated by error only when the error concerns a cause without which the obligation would not have been incurred, and that cause was known or should have been known by the party not in error.⁷³⁰ An inability to understand English may support a finding of lack of consent.⁷³¹ A calculated risk which turns out to have been ill-advised is not "error" which will permit rescission.⁷³²

The party in error, who obtains rescission because of his own error, is liable for the other party's losses.⁷³³ If rescission is denied in order to protect the other party's interests, the party in error may nevertheless receive reasonable compensation for losses he has sustained.⁷³⁴ The prescriptive period for rescission based on error is 10 years.⁷³⁵

Examples of transactions subject to rescission for error include:

- Sale of automobile with different color than buyer ordered. *Ray Chevrolet-Olds, Inc. v. Garbarino*, 479 So.2d 374 (La. App. 3 Cir. 1985).
- Sale of truck without extended warranty. *Jeansonne v. Leon Pichard Chevrolet*, 447 So.2d 551 (La. App. 1 Cir. 1984).
- Business school tuition where the school did not assist student in finding employment as promised. *Delta School of Business v. Shropshire*, 399 So.2d 1212 (La. App. 1 Cir. 1981).
- A commercial lease where the lessor was aware that proper permits and parking were unavailable for the use intended. *Fuller v. Barattini*, 574 So.2d 412 (La. App. 5 Cir. 1991).
- Redhibitory defect in residence at time of sale. *Nesbitt v. Dunn*, 672 So.2d 226 (La.App. 2 Cir.1996).
- Purchaser unable to obtain construction permit. *Insurance Storage Pool, Inc. v. Parish Nat. Bank*, 732 So.2d 815, (La. App. 1 Cir.1999).

In general, a party who legitimately rescinds a transaction is entitled to legal interest from the date of judicial demand until rescission.⁷³⁶

⁷²⁹ La. Civ. Code art. 1926; see, e.g., *Gipson v. Fortune*, 30 So.3d 1076 (La. App. 2 Cir. 2010), writ denied, 34 So.3d 298 (La. 2010); *Atkins v. Bridgewater*, (La. App. 2 Cir. 2001) (deed not open to attack on the grounds of incapacity after grantor's death because it was not gratuitous).

⁷³⁰ Civil Code art. 1948-49.

⁷³¹ See e.g., *Duong v. Salas*, 877 So.2d 269 (La. App. 4 Cir. 2004), writ denied 885 So.2d 590 (La. 2004); *Lerrick v. White Top Cabs*, 10 So.2d 67 (La. App. 4 Cir. 1942).

⁷³² *St. Charles Ventures, L.L.C. v. Albertsons, Inc.*, 265 F. Supp.2d 682 (E.D. La. 2003) (retailer's subjective belief that a major competitor would probably not enter the local market).

⁷³³ Civil Code art. 1952.

⁷³⁴ Civil Code art. 1952; see, e.g., *Twin City Pontiac, Inc. v. Pickett*, 588 So.2d 1125 (La. App. 2 Cir. 1991) (purchaser who knew or should have known of dealer's subtraction error has to pay the correct price).

⁷³⁵ See *Insurance Storage Pool, Inc. v. Parish Nat. Bank*, 732 So.2d 815 (La. App. 1 Cir. 1999).

⁷³⁶ *Carpenter v. Lafayette Woodworks, Inc.*, 653 So.2d 1187 (La. App. 3 Cir. 1995).

3.4 FRAUD

Fraud is a misrepresentation made with the intention to obtain an unjust advantage and may vitiate consent for a contract.⁷³⁷ Fraud must be pleaded with specificity, needs to be proven by a preponderance of evidence, and may be established by circumstantial evidence.⁷³⁸ The courts have held that fraud may be inferred from the “existence of highly suspicious conditions or events.”⁷³⁹ Rescission, damages and attorney fees may be granted for fraud.⁷⁴⁰ Many cases of fraud can also be attacked as unconscionable or a violation of the Unfair Trade Practices Act.

Generally, the prescriptive period for fraud is 1 year.⁷⁴¹ However, an action for annulment of an absolutely null contract does not prescribe and an action for annulment of a relatively null contract for fraud is 5 years.⁷⁴² A fraud that constitutes a breach of fiduciary duty may be governed by a 10 year prescriptive period.⁷⁴³

Examples of transactions rescinded by the courts for fraud include:

- Selling an air conditioning system as manufactured when it was shop made by seller. *Organ v. Covington Heating & Air Conditioning*, 552 So.2d 759 (La. App. 1 Cir. 1989).
- Selling what was primarily a life insurance policy as a purported investment contract to plaintiffs. *Landreneau v. Nat. Investors Life Insurance Co.*, 692 So.2d 464 (La. App. 3 Cir. 1997).
- Selling a used vehicle with a repair history as new. *Bingham v. Ryan Chevrolet*, 691 So.2d 817 (La. App. 2 Cir. 1997).
- Appeal bond where surety was told that his signing of bond would not affect him in any way. *Lupo v. Lupo*, 475 So.2d 402 (La. App. 1 Cir. 1985).
- Sale of mineral rights for \$100 by elderly woman who had no formal education and was ignorant of the value of her interests. *Placid Oil Co. v. Taylor*, 345 So.2d 254 (La. App. 3 Cir. 1977), writ denied 347 So.2d 261.
- Note and mortgage signed by elderly woman, who had 4th grade education, where nature of documents and extent of her liability thereon were misrepresented or not explained to her. *Chrysler Credit Corp. v. Henry*, 221 So.2d 529, 533 (La. App. 4 Cir. 1969).
- Failure to disclose true cost of home improvement contract to illiterate elderly man. *Carter v. Foreman*, 219 So.2d 21 (La. App. 4 Cir. 1969).
- Note and mortgage signed by payee who was told that documents were only to insure payment of \$25 check. *X-L Finance Co. v. Carrier*, 215 So.2d 185 (La. App. 3 Cir. 1968).
- Unknowing execution of mortgage on home. *Fidelity Credit Corp. v. Bradford*, 177 So.2d 635 (La. App. 3 Cir. 1965).

⁷³⁷ La. Civ. Code art. 1948, 1953.

⁷³⁸ La. Civ. Code art. 1957; *Perot v. Perot*, 71 So3d 1123, 1125 (La. App. 2 Cir. 2011).

⁷³⁹ See, e.g., *Vanguard Finance, Inc. v. Smith*, 256 So.2d 662, 664 (La. App. 4 Cir. 1972).

⁷⁴⁰ La. Civ. Code art. 1958.

⁷⁴¹ *Simmons v. Templeton*, 723 So.2d 1009, 1012 (La. App. 4 Cir. 1998) (citing La. Civ. Code art. 3492).

⁷⁴² La. Civ. Code art. 2032.

⁷⁴³ *Simmons v. Templeton*, 723 So.2d 1009, 1013 (La. App. 4 Cir. 1998) (citing La. Civ. Code art. 3492). Note that some claims for breach of fiduciary duty may be governed by a shorter prescriptive period, e.g., 4 years for a suit against a tutor.

- Life insurance policy sold to uneducated farmer where insurance agent misrepresented that large dividends would be paid on policy. *Broussard v. Fidelity Standard Life Insurance Co.*, 146 So.2d 292 (La. App. 3 Cir. 1962).

3.5 DURESS

Duress vitiates consent when it is of such nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property or reputation.⁷⁴⁴ When rescission is granted because of duress, damages and attorney fees may be awarded.⁷⁴⁵

Examples of duress found sufficient by the courts for rescission include:

- Continuing demands by others for execution of "donation," combined with donor's medical problems and personal tragedies. *Poole v. Ward*, 576 So.2d 1089 (La. App. 3 Cir. 1991).
- Deprivation of economic security by threat to fire if employment contract not signed. *Standard Coffee Service Co. v. Babin*, 472 So.2d 124 (La. App. 5 Cir. 1985).
- Threat of criminal charges when no evidence that charges were justified. *Wuertz v. Craig*, 458 So.2d 1311 (La. 1984).
- Fear of economic deprivation. *Wolf v. La. State Racing Commission*, 545 So.2d 976 (La. 1989).

3.6 UNLAWFUL CAUSE

A contract is void when it violates a rule of public order or public policy.⁷⁴⁶ A cause of an obligation is unlawful when enforcement would produce a result prohibited by law or against public policy.⁷⁴⁷

Examples of contracts voided for unlawful cause include:

- Construction contract with unlicensed contractor. *Dennis Talbot Constr. Co. v. Privat General Contractors, Inc.*, 60 So.3d 102 (La. App. 3 Cir. 2011); *Hagberg v. John Bailey Contractor*, 435 So.2d 580 (La. App. 3 Cir. 1983) writ denied 444 So.2d 1245 (La. 1984).
- Arbitration clause with unlicensed professional. *West Baton Rouge School Bd. v. T.R. Roy, Inc.*, 367 So.2d 332, 334 (La. 1979).
- Contract with forum selection clause. *Thompson Tree & Spraying Service, Inc. v. White Constr. Spinning Co.*, 68 So.3d 1142 (La. App. 2011).
- Contract for real estate commission not from licensed broker. *Towne Center, Ltd. v. Keyworth*, 618 So.2d 467 (La. App. 4 Cir. 1993).
- Loan transaction conditioned on release of Truth in Lending claim. *Owens v. Magee Finance Serv. of Bogalusa, Inc.*, 476 F.Supp. 758 (E.D. La. 1979).
- *Mobley v. Harrel*, 571 So.2d 662 (La. App. 2 Cir. 1990) (promissory note for unlawful gambling debt);

⁷⁴⁴La. Civ. Code art. 1948, 1959. The reasonable fear and injury must be related. See *Zamjahn v. Zamjahn*, 839 So.2d 309 (La. App. 5 Cir. 2003) (a threat by one spouse to tell the parties' children of the other spouse's visits to internet adult sites was insufficient to invalidate a donation on the ground of duress because court found other overriding motivations).

⁷⁴⁵*Id.* at 1964.

⁷⁴⁶La. Civ. Code art. 7, 2030.

⁷⁴⁷*Id.* at 1968.

- *U.S. Leasing Corp. v. Keiler*, 290 So.2d 427 (La. App. 4 Cir. 1974) (lease provision that allowed both repossession and acceleration of future rentals).
- *Aufrichtig v. Aufrichtig*, 796 So.2d 57 (La. App. 2 Cir. 2001) (agreement to pay \$100 per month in alimony for 172 weeks, terminable only upon death of either party, and to maintain health insurance on ex-wife until her remarriage, regardless of fault, need, ability to pay, or open concubinage, did not violate public policy, as agreements were conected in anticipation of or after dissolution of marriage, when the marriage was irretrievably and irreparably broken).
- *Executone of Central Louisiana, Inc. v. Hospital Service Dist. No. 1 of Tangipahoa Parish*, 798 So.2d 987 (La. App. 1 Cir. 2001) (award of a contract to an unlicensed contractor, when a license is statutorily required, would be an award in contravention of prohibitory law, and the court, on its own motion, and any interested person, may attack a contract as an absolute nullity on those grounds).
- *Patterson v. Martin Forest Products, Inc.*, 774 So.2d 1148 (La. App. 2 Cir. 2000) (a minor, whose very employment is in contravention of the Child Labor Law and who sustains injury while so employed, may elect to recover in either workers' compensation, which has the effect of ratifying or confirming the relatively null contract of hire, or in tort by filing suit, and thus, tacitly invoking the relative nullity of his employment contract).

3.7 FAILURE AND WANT OF CONSIDERATION

Failure of consideration and want of consideration are separate defenses.⁷⁴⁸ Failure of consideration is when consideration was present at the time of contract formation, but has since partially or wholly ceased to exist.⁷⁴⁹ Failure of consideration is an affirmative defense and must be set forth in the answer.⁷⁵⁰ The appropriate remedy for a partial failure of consideration is a reduction in the purchase price.⁷⁵¹

Want of consideration is a defense that asserts that no consideration ever existed.⁷⁵² La. Code Civ. Proc. art. 1005 makes no reference to want of consideration; therefore, it is not required to be set forth in the answer.⁷⁵³

Parole evidence is admissible between the parties to the instrument to show failure or want of consideration.⁷⁵⁴

3.8 STANDARD FORM AND ADHESIONARY CONTRACTS

It is a general principle of contract law that ambiguous provisions in a contract which cannot otherwise be resolved must be interpreted against the drafter.⁷⁵⁵ Thus, when there is doubt, standard form contracts are interpreted

⁷⁴⁸Smith v. La. Bank & Trust Co., 272 So.2d 678, 683 (La. 1973).

⁷⁴⁹*Id.*

⁷⁵⁰La. Code Civ. Proc. art. 1005.

⁷⁵¹*See, e.g.*, Jackson v. Slidell Nissan, 693 So.2d 1257 (La. App. 1 Cir. 1997); Decuir v. Sam Broussard, Inc., 459 So.2d 1375 (La. App. 3 Cir. 1984).

⁷⁵²Smith, 272 So.2d at 683.

⁷⁵³*Id.*

⁷⁵⁴Azreme v. Esquire Title, 731 So.2d 422 (La. App. 5 Cir. 1999).

⁷⁵⁵La. Civ. Code art. 2056; *see also* Sims v. Mulhearn Funeral Home, Inc., 956 So.2d 583, 589-90 (La. 2007); Safeguard Storage Properties, L.L.C. v. Donahue Favret Contractors, Inc., 60 So.3d 110, 119 (La. App. 4 Cir. 2011).

against the drafter.⁷⁵⁶ When there are two conflicting, but reasonable interpretations, the court must adopt the interpretation most favorable to the non-preparer.⁷⁵⁷

A related principle is that contracts must be interpreted in favor of the obligor when there is doubt that cannot otherwise be resolved unless the obligor was at fault in creating the doubt.⁷⁵⁸

Contracts of adhesion must also be interpreted against the preparer.⁷⁵⁹ A contract of adhesion is a take-it-or-leave-it standard contract prepared by the party with superior bargaining power.⁷⁶⁰ They raise the question as to whether the party with weaker bargaining power actually consented to the terms.⁷⁶¹

3.9 UNENFORCEABLE WAIVERS OF RIGHTS

The Louisiana Supreme Court has stated that “[s]afeguards protecting consumers must be more stringent than those protecting businessmen.”⁷⁶² Waivers of warranty are strictly construed against the seller.⁷⁶³ They must be contained in the contract, clear and unambiguous, and brought to the attention of the buyer.⁷⁶⁴ Also, oral assurances that goods are in “good condition” can qualify any otherwise effective renunciation of warranties.⁷⁶⁵ An “as is” clause may be ineffective if it fails to clearly state that the buyer waives both express and implied warranties.⁷⁶⁶

3.10 UNCONSCIONABILITY

Contracts or terms that are unconscionable may be voided or modified under La. R.S. 9:3516(36), which states that “a contract or clause is unconscionable when it is so onerous, oppressive or one-sided that a reasonable man would not have freely given his consent to it.”⁷⁶⁷ A combination of legal terms or practices may be unconscionable.⁷⁶⁸ However, there is a strong presumption favoring arbitration. When interpreting arbitration clauses, courts resolve doubt in favor of arbitration.⁷⁶⁹

3.11 DEBT BUYER LAWSUITS

Debt buyers buy old credit card debt for pennies on the dollar. They then file suit or an arbitration claim against consumers many years after the last transaction. They often lack competent evidence to prove the alleged debt. In such cases, the alleged debt can be successfully defended. The National Consumer Law Center’s *Collection Actions* (2d ed. 2011) has comprehensive strategies for defending debt buyer lawsuits.

⁷⁵⁶ La. Civ. Code art. 2056; *Professional Dental Health Network, Inc. v. Advantage Health Plan, Inc.*, 782 So.2d 1068 (La. App. 5 Cir. 2001); *Centanni v. A.K. Roy, Inc.*, 258 So.2d 219 (La. App. 4 Cir. 1972).

⁷⁵⁷ See, e.g., *Rayford v. Louisiana Savings Ass’n*, 380 So.2d 1232, 1238 (La. App. 3 Cir. 1980).

⁷⁵⁸ La. Civ. Code art. 2057. See also *Carter v. BRMAP*, 591 So.2d 1184 (La. App. 1 Cir. 1991); *Lakewood Estates v. Seale*, 649 So.2d 17 (La. App. 4 Cir. 1994); *Kenner Industries, Inc. v. Sewell Plastics, Inc.*, 451 So.2d 557 (La. 1984); *Pittman v. Pomeroy*, 552 So.2d 983 (La. App. 2 Cir. 1989) (purchase option construed in tenant’s favor).

⁷⁵⁹ *Golz v. Children’s Bureau of New Orleans, Inc.*, 326 So.2d 865 (La. 1976).

⁷⁶⁰ *Id.*

⁷⁶¹ *Id.*; *Lafleur v. Law Offices of Anthony G. Buzbee*, 960 So.2d 105 (La. App. 1 Cir. 2007).

⁷⁶² *La. Nat’l Leasing Corp. v. ADF Serv. Inc.*, 377 So.2d 92 (La. 1979).

⁷⁶³ *Boos v. Benson Jeep-Eagle Co.*, 717 So.2d 661, 664 (La. App. 4 Cir. 1998).

⁷⁶⁴ See, e.g., *id.*; *Moses v. Walker*, 715 So.2d 596 (La. App. 3 Cir. 1998); *Bowes v. Fox-Stanley Photo Products, Inc.*, 379 So.2d 844 (La. App. 4 Cir. 1980) (disclaimer on customer receipt did not exonerate merchant).

⁷⁶⁵ See, e.g., *Harvell v. Michelli*, 500 So.2d 871, 873 (La. App. 1 Cir. 1986).

⁷⁶⁶ *Id.* See also the discussion of waiver of redhibitory defects, *supra* at I.K.

⁷⁶⁷ See, e.g., *Marshall v. Citicorp Mortgage, Inc.*, 601 So.2d 669, 671 (La. App. 5 Cir. 1992); *Community Acceptance Corp. v. Kinchen*, 417 So.2d 22 (La. App. 1 Cir. 1982).

⁷⁶⁸ *Marshall*, 601 So.2d at 671.

⁷⁶⁹ *Aguillard v. Auction Management Corp.*, 908 So.2d 1, 24-25 (La. 2005) (adopting United States Supreme Court’s interpretation of federal arbitration law).

In Louisiana, a suit on credit card debt is considered a suit on an open account.⁷⁷⁰ A debt buyer must prove ownership of the account.⁷⁷¹ In many cases, particularly where the debt has been sold more than once, it will be difficult or impossible to prove a chain of title. Also, the debt buyer must prove the agreement and the amount of the debt.⁷⁷² An unauthenticated generic form agreement is not sufficient proof of a credit card agreement.⁷⁷³ As plaintiff, the debt buyer must prove a prima facie case by competent evidence. The burden of proof does not shift to the debtor until the plaintiff has proved a prim facie case by competent evidence.⁷⁷⁴ A prima facie case as to the amount due will require an itemized statement of account that is verified by a competent testimony or affidavit.⁷⁷⁵ The itemized statement of account should show all the debits and credits which produce the balance due. Discrepancies in the balance due in the invoices, affidavits and pleadings will be insufficient for a prima facie case unless the disparity is adequately explained.⁷⁷⁶

Discovery can reveal the lack of competent evidence for ownership, agreement and the amount of the debt. Debt buyers generally file motions for summary judgment with incompetent affidavits to prove the debt. The debtor should timely oppose the motion for summary judgment. Also, it is important to file a motion to strike the incompetent affidavits prior to the hearing on the motion for summary judgment.⁷⁷⁷ If the motion for summary judgment is defeated, the debt buyer generally abandons or dismisses the lawsuit.

Debt buyers commonly sue on time-barred debts or the wrong person. The Louisiana prescriptive period for suits on open accounts is three years from the last payment or credit entry on the account.⁷⁷⁸ They may even use false affidavits in their efforts to prove the debt. Later payments do not revive a prescribed debt. Some debt buyers may serve requests for admission with the petition which seek to establish false facts, e.g., that the suit is not time-barred. Debt buyers that engage in collection activities are subject to the federal Fair Debt Collection Practices Act.⁷⁷⁹ Suits on time-barred debts without proper inquiry, use of requests for admission containing false information and use of false affidavits may constitute violations of the FDCPA.⁷⁸⁰

Debt buyers may seek to collect by filing arbitration claims. Often, consumers don't receive notice of an arbitration claim or fail to defend. The consumer may raise the lack of an agreement to arbitrate as a defense to a lawsuit to confirm

⁷⁷⁰ *CACV of Colorado, LLC v. Spiehler*, 11 So.3d 673 (La. App. 3 Cir. 2009)

⁷⁷¹ *CACV of Colorado, LLC v. Spiehler*, 11 So.3d 673 (La. App. 3 Cir. 2009); *Bureau Investment Group #2 L.L.C. v. Howard*, 947 So.2d 37, 38-39 (La. 5 Cir. 2006) (did not reference individual account).

⁷⁷² *Citibank South Dakota, N.A. v. Stanford*, 956 So.2d 756 (La. App. 2 Cir. 2007); *CACV of Colorado, LLC v. Spiehler*, 11 So.3d 673 (La. App. 3 Cir. 2009).

⁷⁷³ *FIA Card Services, N.A. v. Weaver*, 62 So.3d 709, 718 & n. 8 (La. 2011).

⁷⁷⁴ *Walker v. Kropp*, 678 So.2d 580 (La. App. 4 Cir. 1996); *St. Tammany Parish Hospital v. Burris*, 804 So.2d 960, 964 (La. App. 1 Cir. 2001).

⁷⁷⁵ *HTS, Inc. v. Seahawk Oil & Gas Co.*, 889 So.2d 442 (La. App. 3 Cir. 2004); *Gulf States Asphalt Co., Inc. v. Baton Rouge Services, Inc.*, 572 So.2d 148 (La. App. 1 Cir. 1990).

⁷⁷⁶ *HTS, Inc. v. Seahawk Oil & Gas Co.*, 889 So.2d 442 (La. App. 3 Cir. 2004).

⁷⁷⁷ *Samaha v. Rau*, 977 So.2d 880, 890 (La. 2008). A model motion to strike and memo are on www.probono.net/la.

⁷⁷⁸ La. Civ. Code art. 3494; *Chrysler Financial Co., LLC v. Gene Ducote Automotive, LLC*, 900 So.2d 119 (La. App. 5 Cir. 2005).

⁷⁷⁹ *Federal Trade Commission v. Check Investors, Inc.* 502 F.3d 159 (3d Cir. 2007); *McKinney v. Cadwaley Properties, Inc.*, 548 F.3d 496 (7th Cir. 2008); *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480, 1484 (M.D. Ala. 1987); *NCLC, Fair Debt Collection* (7th ed. 2011), §§ 4.2.4, 1.5.4, Appx. K.1.2.2.6.

⁷⁸⁰ *McCough v. Johnson, Rodenburg & Lauinger, L.L.C.*, 610 F.3d 939 (9th Cir. 2011) (time barred suit and improper use of requests for admission); *Gionis v. Javitch, Block, Rathbone, L.L.P.*, 238 Fed. Appx. 24 (6th Cir. 2007), *cert. denied* 552 U.S. 1185 (2008) (use of false affidavits).

the arbitration award even if the time to file a motion to vacate an arbitration award has expired.⁷⁸¹ The debt buyer must present competent evidence of the agreement to arbitrate. Often, they fail to offer competent evidence.

3.12 HOME SOLICITATION SALES

The FTC Rule on “Cooling Off Period For Door-To-Door Sales” provides a right to cancel within 3 days any home solicitation, lease or rental, whether cash or credit, for goods or services greater than \$25.⁷⁸² Mail order and telephone buying are not covered,⁷⁸³ but see the discussion of Louisiana law immediately below, and also § 3.14 *infra* regarding mail or telephone orders. If the seller does not pick up the goods within 20 days of the cancellation, the goods become the buyer’s property without any obligation to pay for them.⁷⁸⁴ Violation of this FTC Regulation is a deceptive trade practice under § 5 of the FTC Act.⁷⁸⁵

Louisiana law provides a right to cancel both cash and credit home solicitation sales of goods and services until midnight of the third business day after execution of an agreement to purchase.⁷⁸⁶ La. R.S. 9:3538(E) exempts from this right some sales pursuant to the consumer’s request for goods or services “without delay because of an emergency.” A home solicitation sale is a personal solicitation of the sale at any place other than the seller’s business establishment.⁷⁸⁷ It includes sales from the seller’s place of business if the consumers’ agreement to purchase is made at the consumer’s home.⁷⁸⁸ The definition of “home solicitation sale” expressly includes telephone sales. The general definition may include sales made via the Internet. Also, sales outside the consumer’s home, e.g., at his place of employment or in a hotel room, should be covered.⁷⁸⁹

Violations of La. R.S. 9:3539-40, e.g., failure to provide cancellation notice or refund down payments, constitute unfair trade practices and subject the seller to damages and attorney fees.⁷⁹⁰ The consumer has an extended right to cancel the sale beyond the 3 day period until the seller provides the notice of the consumer’s right to cancel.⁷⁹¹

3.13 TRUTH IN LENDING RESCISSION

The Truth in Lending Act provides a right to cancel transactions subject to the TILA whenever a non-purchase money security interest is taken in the consumer’s primary residence.⁷⁹² For a detailed discussion of TIL rescission rights, see TIL Rescission Right, *supra* at § 2.4.

3.14 MAIL OR TELEPHONE ORDERS

16 C.F.R. § 435.2 states that mail order or telephone sellers have a reasonable basis to expect that it will be able to deliver ordered merchandise within the advertised deadline or 30 days if no time is specified. If the deadline cannot be met, the seller must give the consumer the option of canceling the order or accept-

⁷⁸¹ FIA Card Services, N.A. v. Weaver, 62 So.3d 709 (La. 2011).

⁷⁸² 16 C.F.R. § 429.

⁷⁸³ *Id.* at § 429.0.

⁷⁸⁴ *Id.* at § 429.1.

⁷⁸⁵ See NCLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 9.2.7 (8th ed. 2012).

⁷⁸⁶ La. R.S. 9:3538.

⁷⁸⁷ La. R.S. 9:3516(20).

⁷⁸⁸ La. R.S. 9:2711.1A(1).

⁷⁸⁹ See, e.g., Louis Luskin & Sons, Inc. v. Samovitz, 212 Cal. Rptr. 612, 617 (Cal. App. 1985).

⁷⁹⁰ La. R.S. 9:2711.1C (granting relief under La. R.S. 51:1409).

⁷⁹¹ La. R.S. 9:3539(c).

⁷⁹² 15 U.S.C. § 1635.

ing the delay.⁷⁹³ The Rule is written broadly enough to apply to internet sales and fax orders. Sending only part of what was ordered within 30 days is not sufficient. The Louisiana statute governing home solicitation sales will also apply if the consumer was at home when the agreement to purchase was made by telephone.⁷⁹⁴

3.15 UNSOLICITED GOODS

Goods sent without order or request by the consumer may be considered a gift.⁷⁹⁵ Federal law also prohibits the use of the mails to send unordered merchandise with the exception of free gifts and requires a notice disclosing that the consumer may treat the merchandise as a gift.⁷⁹⁶ The consumer has a remedy under 39 U.S.C. § 3009 or the state unfair trade practices act for violations.⁷⁹⁷

3.16 FTC CREDIT PRACTICES RULE

The FTC Credit Practices Rule, 16 C.F.R. § 444, is the most important precedent dealing with unfair remedies used by creditors in enforcing consumer credit contracts.⁷⁹⁸ It prohibits, *inter alia*, the following:

- Waiver of exemptions from execution (security interests in exempt property are not, however, prohibited). 16 C.F.R. § 444.2(a)(2).
- Non-purchase money security interests in certain household goods. 16 C.F.R. § 444.2(a)(4).
- Failure to provide cosigners with a specified warning as to potential liability. 16 C.F.R. § 444.3(a)(2).
- The pyramiding of late charges. 16 C.F.R. § 444.4(a).

3.17 PROTECTION FOR NONENGLISH SPEAKERS

The FTC Door-to-Door Sales Rule requires sellers to provide a buyer with a copy of the contract in the language used in the sales presentation.⁷⁹⁹

3.18 OTHER CANCELABLE CONTRACTS

A consumer has a 3 day right to cancel any contract in excess of \$500 resulting from a sales presentation or promotional program as a condition of receiving a prize or a gift.⁸⁰⁰ A violation of this right constitutes an unfair trade practice under La. R.S. 51:1405(A).⁸⁰¹ Physical fitness service contracts are likewise subject to a 3-day cancellation right, and may also be cancelled if the center moves more than 10 miles away, etc.⁸⁰² No physical fitness services contract can have a duration greater than 36 months.⁸⁰³

A consumer also has a right to cancel most mail and check solicitation sales.⁸⁰⁴ A mail and check solicitation arises from a solicitation received by a con-

⁷⁹³ 16 C.F.R. § 435.1(b).

⁷⁹⁴ See Home Solicitation Sales, *supra* at § 3.12.

⁷⁹⁵ La. R.S. 51:461.

⁷⁹⁶ 39 U.S.C. § 3009.

⁷⁹⁷ *Kipperman v. Academy Life Ins. Co.*, 554 F.2d 377 (9th Cir. 1977)(private cause of action under 39 U.S.C. § 3009); *Crosley v. Lens Express, Inc.*, 2001 WL 650728 (W.D. Tex. 2001)(same); *Sunshine Art Studio, Inc.*, 81 FTC 836 (1972), *aff'd* 481 F.2d 1171 (1st Cir. 1973); *contra Wisniewski v. Rodale, Inc.*, 510 F.3d 308 (3d Cir. 2007)(no private cause of action under 39 U.S.C. § 3009).

⁷⁹⁸ For more information on this FTC Rule, see NCLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 6.11 (8th ed. 2012).

⁷⁹⁹ 16 C.F.R. § 429.1(a).

⁸⁰⁰ La. R.S. 51:1721.

⁸⁰¹ La. R.S. 51:1722.

⁸⁰² La. R.S. 51:1577 (contract cancelled unless center provides center provides close alternative within 30 days).

⁸⁰³ La. R.S. 51:1578.

⁸⁰⁴ See La. R.S. 9:3541.1.

sumer through the mail and through the cashing of a check sent with the solicitation.⁸⁰⁵ Such checks may contain specific warnings about the effect of cashing the check.⁸⁰⁶ A consumer who has a pre-existing credit relation with the sender loses the right to cancel a mail and check solicitation.⁸⁰⁷

A home owner has an absolute right to cancel a home improvement contract for no cause, even if the work has commenced.⁸⁰⁸ La. Civ. Code art. 2765. Cancellation under Civil Code art. 2765 will limit the contractor's claim to actual labor, materials and lost profits measured by the unpaid balance minus the costs to complete the work.⁸⁰⁹ If a contract is cancelled for cause, the contractor will not be entitled to lost profits.

3.19 USURY

Interest that may be charged on a loan or a debt is generally limited to 12% per annum, except for loans made by banking institutions or for consumer credit.⁸¹⁰ Charging 18% on a balance due for services rendered is illegal.⁸¹¹ An employer, however, may not lend or advance money to any one of his employees at an interest rate greater than just 8% per annum.⁸¹²

The maximum rates for consumer loans by finance companies and banks and for consumer credit sales are very high.⁸¹³ For example, the maximum loan finance charge for a loan not exceeding \$1,400 is 36% per year; for amounts between \$1,400 and \$4,000 it is 27%.⁸¹⁴

The penalty for charging a usurious interest rate is the forfeiture of all interest.⁸¹⁵ Even an attempt to charge usurious interest can result in the forfeiture of the right to any interest on the debt.⁸¹⁶ If a person pays a higher rate of interest, he may sue to recover that payment within two years.⁸¹⁷

The interest rates that national banks may charge on loans or credit cards are limited to the rates state banks, where the bank is located, are permitted to charge for similar loans.⁸¹⁸ Where excess interest has been charged, the entire interest is forfeited.⁸¹⁹ Where excess interest has been charged and actually paid, the borrower is entitled to twice the total interest paid.⁸²⁰ A method of calculating interest may also violate the 12 U.S.C. § 85.⁸²¹ The limitation period is two years.⁸²²

The charging of interest on interest is prohibited.⁸²³

⁸⁰⁵ *Id.*

⁸⁰⁶ *Id.*

⁸⁰⁷ *Id.*

⁸⁰⁸ Representations by the contractor that the owner may not cancel should constitute an actionable unfair trade practice.

⁸⁰⁹ *Kinchen v. Gilworth*, 454 So.2d 1130 (La. App. 4 Cir. 1984), *writ denied* 458 So.2d 478 (La. 1984).

⁸¹⁰ La. R.S. 9:3500.

⁸¹¹ *See, e.g., Lyons v. Sapp*, 862 So.2d 414 (La. App. 2 Cir. 2003) (legal fees); *Beber-Guillory v. Aswell*, 723 So.2d 1145 (La. App. 3 Cir. 1998) (decorating).

⁸¹² La. R.S. 23:691; *Richard v. Vidrine Auto.*, 729 So.2d 1174 (La. App. 1 Cir. 1999).

⁸¹³ *See* La. R.S. 9:3519-20. For definitions of terms, *see generally* La. R.S. 9:3516.

⁸¹⁴ La. R.S. 9:3519.

⁸¹⁵ La. R.S. 9:3501. *Thrift Funds of Baton Rouge, Inc. v. Jones*, 274 So.2d 150 (La. 1973); *Richard v. Vidrine Auto.*, 729 So.2d 1174 (La. App. 1 Cir. 1999); *Ganus v. Jopes*, 470 So.2d 237 (La. App. 4th Cir. 1985).

⁸¹⁶ *Beber-Guillory v. Aswell*, 723 So.2d 1145 (La. App. 3 Cir. 1998).

⁸¹⁷ La. R.S. 9:3500(C)(2).

⁸¹⁸ 12 U.S.C. § 85.

⁸¹⁹ 12 U.S.C. § 86 (usury must be committed knowingly).

⁸²⁰ *Id.*; *see also Haas v. Pittsburgh National Bank*, 526 F.2d 1083 (3d Cir. 1975) (an unlawful charge does not warrant multiple statutory penalties even if unlawful for multiple reasons).

⁸²¹ *See, e.g., Partain v. First Nat'l Bank of Montgomery*, 467 F.2d 167, 174-75 (5th Cir. 1972).

⁸²² 18 U.S.C. § 86.

⁸²³ *Reynolds v. Succession of Williams*, 628 So.2d 1 (La. App. 2 Cir. 1993).

3.20 REPOSSESSIONS

3.20.1 Law for security agreements entered into before January 1, 2005

A buyer's default does not allow a seller to repossess collateral without resort to proper legal process unless the buyer consents to the method of repossession.⁸²⁴ The consent of the owner must be shown by the seizing creditor in order to avoid legal liability.⁸²⁵ Repossession over the buyer's objection subjects the seller to damages; the measure of damages for the wrongful taking of a movable is the value of the property seized.⁸²⁶ Where the defendant holds a security interest in the seized property, the value of this seized property for damages purposes corresponds with the equitable interest the plaintiff has acquired in it.⁸²⁷ General damages may also be awarded for the plaintiff's embarrassment, humiliation, or inconvenience as a result of the wrongful seizure, plus attorney fees and costs.⁸²⁸

Contractual provisions purporting to irrevocably authorize a creditor's entry into the debtor's home without debtor's consent have been invalidated as against public policy.⁸²⁹ Unauthorized entry into a debtor's home infringes upon his constitutional guarantee to privacy.⁸³⁰ Regardless of whether a debt is justly due, a debtor has a right to be free from unreasonable coercion and unreasonable violations of his right to privacy in his personal affairs.⁸³¹ The debtor is entitled to general and special damages in tort for violations these rights.⁸³²

Licensed or regulated lenders and financial institutions may obtain and sell collateral through a summary procedure under the "Additional Default Remedies Act" in addition to the procedures provided by the statutes mentioned therein.⁸³³ The secured creditor using La. R.S. 6:966 does not have the right to a deficiency judgment.⁸³⁴ In 2003, the legislature amended La. R.S. 6:966(A) to limit the use of the procedures in the Act for seizure and disposition of collateral without previous citation and judgment following default to situations where the security agreement imports a confession of judgment.⁸³⁵

Article 9 of the Uniform Commercial Code, contains savings clauses for re-perfection of many pre-effective-date transactions.⁸³⁶ It provides creditors with the following rights to repossess collateral:

- Self-help repossession that does not "breach the peace." The courts have interpreted this rule under the UCC to mean that the creditor cannot use force or threats, cannot enter the debtor's home and cannot seize any property over the debtor's objections.⁸³⁷
- Executory or ordinary process.⁸³⁸

⁸²⁴ *Biggs v. Prewitt*, 669 So.2d 441 (La. App. 1 Cir. 1995); *Jones v. Petty*, 577 So.2d 821 (La. App. 2 Cir. 1991).

⁸²⁵ *Cook v. Spillers*, 574 So.2d 464 (La. App. 2 Cir. 1991) ("Mere inaction or the absence of protests to the taking does not imply consent.").

⁸²⁶ *Id.*

⁸²⁷ *Id.*; see also *Bryant v. Sears Consumer Financial*, 617 So.2d 1191 (La. App. 3 Cir. 1993).

⁸²⁸ La. R.S. 51:1409(A).

⁸²⁹ *Fassitt v. United T.V. Rental, Inc.*, 297 So.2d 283 (La. App. 4 Cir. 1974).

⁸³⁰ See *St. Julien v. South Cent. Bell Tele.*, 433 So.2d 847 (La. App. 3 Cir. 1983).

⁸³¹ *Pack v. Wise*, 155 So.2d 909 (La. App. 3 Cir. 1963).

⁸³² *Id.*

⁸³³ La. R.S. 6:965-67.

⁸³⁴ La. R.S. 6:966(E) (formerly La. R.S. 6:966(J)).

⁸³⁵ Act 646, effective August 15, 2003.

⁸³⁶ La. R.S. 10:9-601 to 10:9-624.

⁸³⁷ La. R.S. 6:965(B).

⁸³⁸ La. R.S. 10:9-629.

- Private or public sale of any goods in his possession or that have been voluntarily surrendered to him for purposes of sale, provided such sale is conducted in good faith and in a commercially reasonable manner.⁸³⁹
- “Strict foreclosure” or retention of the collateral in full or partial discharge of obligation.⁸⁴⁰

A client who does not want to surrender the secured property should not allow the creditor into his home or otherwise consent to repossession. If voluntary surrender is in the client’s interest, care should be taken to insure a full release (or maximum credit) for surrender so that a deficiency judgment will be barred. See Deficiency Judgments, *infra* at § 3.22.

The 2001 revisions include a change in the law regarding partial dation en paiements. Now, specific terms pertaining to the proposed dation and the proposed remaining deficiency must be explained to and consented to by a consumer debtor.⁸⁴¹ The creditor’s right to obtain a deficiency judgment is then governed by Chapter 9 of the Louisiana Commercial Laws rather than the Louisiana Deficiency Judgment Act.⁸⁴²

Responsibility lies with the seizing creditor for all personal effects located inside seized collateral for only 72 hours following seizure.⁸⁴³

If the secured party fails to comply with Article 9 procedures for selling or disposing of collateral, he may be enjoined or sued for damages caused by his wrongful actions.⁸⁴⁴ There is no requirement in Article 9 that the debtor seek a preliminary injunction rather than a TRO.⁸⁴⁵

3.20.2 Law for security agreements entered into on or after January 1, 2005

The following modifications to existing law were all enacted by Act 191 of the 2004 Regular Session. They govern security agreements entered into on or after January 1, 2005, provided that with respect to motor vehicles, the secured party seeking to utilize the new remedies to repossess a motor vehicle must include a notice in the security agreement that “Louisiana law permits repossession of motor vehicles without judicial process.”⁸⁴⁶ A secured party for these purposes includes the lessor of a motor vehicle.⁸⁴⁷

Financial institutions chartered under the laws of any state or the United States may use the new procedures.⁸⁴⁸ The definition of “default” has been modified to mean non-payment of two consecutive payments or 60 days, whichever is shorter.⁸⁴⁹

Under the new La. R.S. 6:966(E), which replaces 9:966(J), the secured party will have a right to a deficiency judgment.

⁸³⁹ La. R.S. 10:9-601, 610, 611, 615, 617, 618.

⁸⁴⁰ La. R.S. 10:9-620-21.

⁸⁴¹ La. R.S. 10:9-620.

⁸⁴² Ford Motor Co. v. Melancon, 677 So.2d 145, 148 (La. App. 3 Cir. 1996).

⁸⁴³ La. R.S. 6:966(I).

⁸⁴⁴ La. R.S. 10:9-625.

⁸⁴⁵ For more information on Article 9 procedures, see 8-9 William D. Hawkland, UNIFORM COMMERCIAL CODE SERIES (West 2011); Andrew A. Braun, Executory Process and Self-Help Remedies Under UCC Article 9, 38 La. B.J. 315 (1991); John Pierre & M. R. Franks, *Consequences of Default to the Debtor Under Part 5, Chapter 9 of Louisiana’s Commercial Laws*, 18 S.U. L. REV. 21 (1991); NCLC, FORECLOSURES (4th ed. 2012).

⁸⁴⁶ La. R.S. 6:966 (A)(2).

⁸⁴⁷ La. R.S. 6:965 (C)(5).

⁸⁴⁸ La. R.S. 6:966(C).

⁸⁴⁹ La. R.S. 6:965(C)(4).

The new procedures for seizure and disposition of collateral without previous citation and judgment following default apply even if the security agreement does not include a confession of judgment.⁸⁵⁰ The motor vehicle debtor will no longer be entitled to notice immediately prior to repossession if they have received a general notice of the secured party's right to repossession upon default without further notice or judicial process.⁸⁵¹ Within 3 days of repossessing collateral without judicial process, a secured party must file a "Notice of Repossession" with the recorder of mortgages and with an appropriate official (constable, marshal or sheriff) where the collateral is located.⁸⁵²

A person repossessing collateral must obtain a repossession agent license.⁸⁵³ Previous case law regarding the prohibition on breach of peace has essentially been codified in La. R.S. 6:965(C)(1). This provision defines a breach of peace to include unauthorized entry into a closed dwelling, whether locked or unlocked, as well as repossession following oral protest against seizure of the collateral by the debtor.

Effective January 1, 2005, the owner of personal property located within seized collateral has 10 days to contact the secured party to demand its immediate return.⁸⁵⁴ After 30 days, the property is deemed abandoned and the secured party no longer responsible for it.⁸⁵⁵ It is unclear what the secured party's rights and duties are between the 11th and 29th days.

Unlike under prior law, the collateral may also be sold at judicial sale.⁸⁵⁶

3.21 EXECUTORY PROCESS

A debtor must assert defenses to executory process by injunction or suspensive appeal.⁸⁵⁷ If a suspensive appeal is filed, it must be taken within 15 days of the signing of the order of seizure, with security exceeding by one half the balance due on the debt.⁸⁵⁸ Unless the defect in the proceedings is apparent on the face of the pleadings, an injunction generally should be sought rather than a suspensive appeal so that affirmative defenses may be raised. However, if the injunction is denied, a devolutive appeal will not stop the sale from proceeding.

A temporary restraining order is unavailable for executory process involving immovable property, but the debtor may apply for a preliminary injunction under La. Code Civ. Proc. art. 3602.⁸⁵⁹ The grounds for the defense are itemized in art. 2751. The grounds for injunction without security listed in art. 2753 are useful but not exclusive.⁸⁶⁰ The sale may also be enjoined "if the procedure required by law for an executory proceeding has not been followed."⁸⁶¹ Thus, defects in authentic evidence or service may bar executory process.⁸⁶² If a preliminary injunction

⁸⁵⁰ See La. R.S. 6:966(A).

⁸⁵¹ *Id.* at (2).

⁸⁵² La. R.S. 6:966.1.

⁸⁵³ La. R.S. 6:966(D).

⁸⁵⁴ La. R.S. 6:966(F).

⁸⁵⁵ *Id.*

⁸⁵⁶ La. R.S. 6:966(A)(3).

⁸⁵⁷ La. Code Civ. Proc. art. 2642; *First Guaranty Bank v. Baton Rouge Petroleum Center*, 529 So.2d 834 (La. 1987); *Read v. Meaux*, 292 So.2d 557 (La. 1974).

⁸⁵⁸ La. Code Civ. Proc. art. 2642.

⁸⁵⁹ La. Code Civ. Proc. art. 2752(A).

⁸⁶⁰ La. Code Civ. Proc. art. 2751, Official Comments; *Schacklette & Emmanuel*, 35 La. B.J. 436-37 (1988).

⁸⁶¹ La. Code Civ. Proc. art. 2751.

⁸⁶² *First Guaranty Bank*, 529 So.2d 834; see also *Ford Motor Credit Co. v. Savoie*, 532 So.2d 820 (La. App. 4 Cir. 1988) (illegible signatures on mortgage invalidate executory process).

to enjoin the executory process is denied, a suspensive appeal of the order denying the injunction does not suspend the executory process proceeding.⁸⁶³

In general, when property has been sold under executory process after appraisal and in accordance with statutory provisions governing appraisal, the creditor may obtain a personal judgment against the mortgagor for any deficiency remaining after the application of the net proceeds of sale to the secured debt.⁸⁶⁴ Appraisals must be completed at least two days before the sale.⁸⁶⁵ Untimely appraisals will deprive the creditor of his right to a deficiency judgment.⁸⁶⁶ For more information on executory process, see generally Patrick S. Ottinger, *Enforcement of Real Mortgages by Executory Process*, 51 LA. L. REV. 87 (1990).

Seizure of property under executory process without authentic evidence will give rise to a damages claim for wrongful seizure, and possibly a 42 U.S.C. § 1983 civil rights action.⁸⁶⁷ The creditor's attorney may also be liable for damages.

3.22 DEFICIENCY JUDGMENTS

3.22.1 Overview

In assessing whether there is a defense to a deficiency judgment, one must first determine whether La. R.S. 10:9-601-24, La. R.S. 6:966, La. R.S. 13:4106, or federal common law applies. The applicable law will depend on the nature of the transaction or repossession and the date of the security interest.

La. R.S. 10:9-601-24 governs deficiency judgments for security interests under Article 9 of the UCC except to the extent that executory process is used. The Deficiency Judgment Act, La. R.S. 13:4106 is limited to judicial sales of mortgaged property and does not apply to public or private sales subject to Article 9. La. R.S. 13:4106(C), 13:4108. As to such property, see La. Code Civ. Proc. art. 2771.

3.22.2 Repossession under La. R.S. 6:966

Seizure under La. R.S. 6:966 does *not* bar the recovery of a deficiency judgment.⁸⁶⁸

3.22.3 Repossession under Article 9 of the UCC - La. R.S. 10:9

This subject is covered under Repossessions, *supra* at § 3.20. *See also* James A. Stuckey, *Louisiana's Non-uniform Variations in U.C.C. Chapter 9*, 62 LA. L. REV. 793 (2002).

3.22.4 Judicial Sales of Mortgaged Property - The Deficiency Judgment Act

The Deficiency Judgment Act bars a deficiency judgment if mortgaged property is judicially sold without appraisal.⁸⁶⁹ It only applies to sales of mortgaged property by executory process and does not apply to sales pursuant to writs of fieri facias.⁸⁷⁰

⁸⁶³United Companies v. Hall, 722 So.2d 48 (La. App. 1 Cir. 1998); Acme Mortgage Co., Inc. v. Cross, 464 So.2d 945, 946-47 (La. App. 4 Cir. 1985).

⁸⁶⁴La. C.C.P. art. 2771. Jackson v. Slidell Nissan, 693 So.2d 1257, 1262 (La. App. 1 Cir. 1997).

⁸⁶⁵La. R.S. 13:4363.

⁸⁶⁶Williams v. Perkins-Seigne Partner, 633 So.2d 1247 (La. 1994).

⁸⁶⁷Bank of New York Mellon, 71 So.3d 1034 (La. App. 3 Cir. 2011) *writ denied* 75 So.3d 462 (La. 2011).

⁸⁶⁸La. R.S. 6:966(E) (amends former 6:966(J), which *does* bar recovery of a deficiency judgment).

⁸⁶⁹La. R.S. 13:4106.

⁸⁷⁰*See* Guaranty Bank of Mamou v. Community Rice Mill, 502 So.2d 1067 (La. 1987).

The Supreme Court's decision in *First Guaranty Bank* significantly limited the situations in which a deficiency judgment will be barred.⁸⁷¹ Under *First Guaranty Bank*, the lack of authentic evidence in executory process does not bar deficiency judgments.⁸⁷² The debtor may only assert the lack of authentic evidence as a defense to executory process by injunction or through appeal of the sale.⁸⁷³

First Guaranty Bank held that an appraisal in accordance with the law (La.Code Civ. Proc. art. 2723, La. R.S. 13:4363-65) is still a condition precedent for a deficiency judgment.⁸⁷⁴ To obtain a deficiency, a creditor must plead and prove that the property was sold after appraisal in accordance with codal and statutory laws.⁸⁷⁵ Several courts have held after *First Guaranty Bank* that a deficiency judgment will be barred unless there is strict or full compliance with the appraisal process.⁸⁷⁶

However, two courts have held that only fundamental defects in the appraisal process will bar a deficiency judgment.⁸⁷⁷ *Citicorp Acceptance Co. v. Roussell* cites various examples of fundamental and non-fundamental defects:

- Fundamental Defects: *Citizens Bank of Ville Platte v. American Druggists Ins. Co.*, 471 So.2d 1119 (La. App. 3 Cir. 1985) (appointment of unqualified appraiser); *Ardoin v. Fontenot*, 374 So.2d 1273 (La. App. 3 Cir. 1979) (failure to describe property on appraisal form).
- Non-fundamental Defects: *American Bank & Trust Co. v. Bandaries*, 552 So.2d 621 (La. App. 2 Cir. 1989) (delayed judicial sale without notice to debtor); *Louisiana National Bank v. LaBorde*, 527 So.2d 41, 44 (La. App. 3 Cir. 1988) (failure to type in the appraiser's name in an appraisal form); for additional non-fundamental defects, see *Citicorp*, 601 So.2d at 355.

A creditor may not obtain a deficiency judgment against an original or the second of three mortgagors who was not made a party to the executory process and who did not receive notice to appoint an appraiser and notice of seizure.⁸⁷⁸

3.23 REMISSION OF A DEBT

A secured party may tacitly or expressly remit a debt gratuitously, thereby extinguishing it.⁸⁷⁹ An obligee's voluntary surrender to the obligor of the instrument evidencing the obligation gives rise to a presumption that the obligee intended to remit the debt.⁸⁸⁰ No consideration is required for remission of a debt.⁸⁸¹ No particular form is required to establish a remission, but the obligor has

⁸⁷¹ *First Guaranty Bank v. Baton Rouge Petroleum Center*, 529 So.2d 834 (La. 1987).

⁸⁷² *Id.* at 844; see also *Security Homestead Fed. Savings Co. v. Ullo*, 589 So.2d 5 (La. App. 5 Cir. 1991).

⁸⁷³ *Ford Motor Credit Co. v. Savote*, 532 So.2d 820 (La. App. 4 Cir. 1988).

⁸⁷⁴ 529 So.2d at 844.

⁸⁷⁵ *First Acadiana Bank v. Bieber*, 582 So.2d 1293, 1296-97 (La. 1991).

⁸⁷⁶ See, e.g., *Echo v. Power Equip. Distr.*, 719 So.2d 79 (La. App. 1 Cir. 1998) ("The debtor protection policy of the Deficiency Judgment Act requires strict compliance with its provisions because a deficiency judgment is a harsh remedy."); *Samco Mortgage Corp v. Armstrong*, 579 So.2d 521 (La. App. 4 Cir. 1991) (notice of private sale misled debtor as to right to appoint appraiser); *Security Homestead*, 589 So.2d at 5.

⁸⁷⁷ *American Bank and Trust Co. v. Price*, 688 So.2d 536 (La. App. 2 Cir. 1996); *Citicorp Acceptance Co. v. Roussell*, 601 So.2d 350, 355 (La. App. 1 Cir. 1992).

⁸⁷⁸ *Jefferson Bank v. Bart Dev.*, 648 So.2d 989 (La. App. 5 Cir. 1994); *Citizens Sav. & Loan Ass'n v. Kinchen*, 588 So.2d 1214 (La. App. 1 Cir. 1991); see also *Small Engine Shops, Inc. v. Cascio*, 878 F.2d 883, 885 (5th Cir. 1989).

⁸⁷⁹ La. Civ. Code art. 1888; *Discover Bank v. Nelson*, 86 So.3d 80 (La. App. 4 Cir. 2012).

⁸⁸⁰ La. Civ. Code art. 1889.

⁸⁸¹ *Brown v. Adolph*, 691 So.2d 1321, 1326 (La. App. 1 Cir. 1997).

the burden of proving the remission.⁸⁸² On the other hand, the obligee has the burden of proving that a remission was a mistake or unintentional.⁸⁸³ However, the release of a real security given for the performance of an obligation does not give rise to a presumption of remission of the debt.⁸⁸⁴

3.24 HUSBAND-WIFE ISSUES

Husband-wife issues may provide relief for one spouse. Examples include:

- The failure to notify a spouse of the sale of community property voids the sale.⁸⁸⁵
- Seizure of one spouse's wages and income without prior notice to and joinder of the other spouse has been upheld, although there is some authority to the contrary.⁸⁸⁶
- A mortgage executed on community property by one spouse alone is invalid.⁸⁸⁷ However, the underlying debt may still be enforceable against the community and can lead to the innocent spouse's loss of her interests through seizure and sale.⁸⁸⁸ The innocent spouse may be able to protect her homestead exemption if she is the occupant.⁸⁸⁹ If the spouse's signature was forged, she may sue her husband, the lender and notary for the notary's negligence.⁸⁹⁰ A bank may be liable for damages if it fails to release a void mortgage.⁸⁹¹ Effective August 15, 2004, "if the homestead is the separate property of one of the spouses, the homestead exemption may be waived by that spouse alone in any mortgage granted on the homestead, without the necessity of obtaining a waiver from the non-owning spouse."⁸⁹²
- Except in very limited circumstances set forth in La. Civil Code art. 2357, a non-debtor spouse may not be personally liable on a debt incurred by the other spouse.⁸⁹³
- Credit cardholder could not be held liable for balance due on account when spouse forged his name on credit card because the presumption of community benefit does not apply to "[a]n obligation resulting from an intentional wrong not perpetrated for the benefit of the community."⁸⁹⁴

⁸⁸² *Simpson v. Goodman*, 727 So.2d 555 (La. App. 1 Cir. 1998); *Arledge v. Bell*, 463 So.2d 856 (La. App. 2 Cir. 1985) (remission may occur by either oral declaration or in writing).

⁸⁸³ See *United Cos. v. Falterman*, 656 So.2d 1090 (La. App. 5 Cir. 1995).

⁸⁸⁴ La. Civ. Code. Art. 1891.

⁸⁸⁵ See *Magee v. Amiss*, 502 So.2d 568, 572 (La. 1987) (the notice must meet the standards set forth in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 796-801 (1983)).

⁸⁸⁶ See *Price v. Secretary, Dept. of Revenue and Taxation*, 664 So.2d 802 (La. App. 3 Cir. 1995); *Hebert v. Unser*, 593 So.2d 977 (La. App. 5 Cir. 1992); *Kerico v. Doran Chevrolet, Inc.*, 572 So.2d 103 (La. App. 1 Cir. 1990); *Shel-Boze, Inc. v. Melton*, 509 So.2d 106 (La. App. 1 Cir. 1987); but see *Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989); *Williams v. First Nat'l Bank of Commerce*, USDC No. 79-3185 (E.D. La., Mar.11, 1981) (class action judgment that nonparty spouse must be served with petition and allowed legal delays before community property seized).

⁸⁸⁷ La. Civ. Code art. 2347; *Bridges v. Bridges*, 692 So.2d 1186 (La. App. 3 Cir. 1997); *Webb v. Pioneer Bank & Trust Co.*, 530 So.2d 115 (La. App. 2 Cir. 1988).

⁸⁸⁸ *Webb*, 530 So.2d at 118.

⁸⁸⁹ See *Exemptions, infra* at § 4.2.

⁸⁹⁰ *Id.* at 118-19.

⁸⁹¹ *Coburn v. Commercial National Bank*, 453 So.2d 597 (La. App. 2 Cir. 1984).

⁸⁹² Act 481 of the Regular Session, 2004, amending La. R.S. 20:1(D).

⁸⁹³ *Finance One v. Barton*, 769 So.2d 739 (La. App. 1 Cir. 2000); *Tri-State Bank And Trust v. Moore*, 609 So.2d 1091 (La. App. 2 Cir. 1992); *Lawson v. Lawson*, 535 So.2d 851 (La. App. 2 Cir. 1988).

⁸⁹⁴ *First Nat'l Bank of Commerce v. Ordoyno*, 528 So.2d 1068 (La. App. 5 Cir. 1988).

- A bankruptcy discharge preventing recovery of the debtor's community property acquired after the commencement of the case also protects the non-debtor spouse's interest in the same property.⁸⁹⁵

3.25 CREDITOR'S ATTORNEY FEES

Contractual attorney fees may be challenged as unreasonable.⁸⁹⁶ Under certain attorney fee statutes, a creditor's fee claim must be denied if his demand notice erroneously states the debt amount.⁸⁹⁷ Also in a suit on an open account, the plaintiff has the burden of proving its entitlement to attorney fees under La. R.S. 9:2781 by proof of either the defendant's receipt of written demand or proof that plaintiff exercised due diligence in attempting delivery of the written demand.⁸⁹⁸ In general, statutes authorizing awards of attorney fees must be strictly construed because of their penal nature.⁸⁹⁹

3.26 DEFAULT JUDGMENTS

Many clients do not consult an attorney until after a default judgment has been entered. Fortunately, Louisiana has very liberal procedures for nullifying default judgments for lack of jurisdiction, service of process, fraud or ill practices.⁹⁰⁰ The "fraud or ill practices" grounds in Code Civ. Proc. art. 2004 are generally the most helpful. "Ill practice" has been broadly defined as any improper practice or procedure which operates, even innocently, to deprive a litigant of some legal rights.⁹⁰¹

Louisiana courts have even allowed nullifications of judgments where the defendant was served and failed to appear if the plaintiff had no cause of action.⁹⁰² The two criteria used to determine whether a judgment has been obtained by actionable fraud or ill practices are: (1) when the circumstances under which the judgment was rendered show the deprivation of legal rights of the litigant who seeks relief, and (2) when the enforcement of the judgment would be unconscionable and inequitable.⁹⁰³ A lawsuit or judgment on a nonexistent cause of action may even subject the plaintiff to liability under the Unfair Trade Practices Act.

Always check to see if notice of judgment was sent to a defendant who was defaulted. If there was no notice of judgment, a motion for new trial or appeal may be available since the legal delays for those post-judgment remedies generally don't commence until there has been a notice of judgment.⁹⁰⁴ A new trial must be granted for peremptory grounds such as the judgment is contrary to the law and evidence or for discretionary grounds if there is a good ground for a new trial.⁹⁰⁵

⁸⁹⁵ 11 U.S.C. § 524(a)(3).

⁸⁹⁶ See, e.g., *Central Progressive Bank v. Bradley*, 502 So.2d 1017 (La. 1987); *Discover Bank v. Rusher*, 53 So.3d 651 (La. App. 4 Cir. 2010) (attorney fees reduced from \$4,585 to \$1,000 in simple suit on open account).

⁸⁹⁷ See, e.g., *Frank L. Beier Radio, Inc. v. Black Gold Marine, Inc.*, 449 So.2d 1014 (La. 1984); *Dutel v. Suc. of Touzet*, 649 So.2d 1084 (La. App. 4 Cir. 1995).

⁸⁹⁸ *Jefferson Door Co. v. Lewis*, 713 So.2d 835, 837 (La. App. 5 Cir. 1998).

⁸⁹⁹ *Frank L. Beier Radio*, 449 So.2d at 1015-16.

⁹⁰⁰ See La. Code Civ. Proc. arts. 2001-06.

⁹⁰¹ *Foret v. Terrebone, Ltd.*, 631 So.2d 103, 105 (La. App. 5 Cir. 1994); *Homer National Bank v. Nix*, 566 So.2d 1071 (La. App. 2 Cir. 1990).

⁹⁰² See, e.g., *Johnson v. Jones-Journet*, 306 So.2d 827 (La. App. 4 Cir. 1974), rev'd on other grounds, 306 So.2d 827 (La. 1975).

⁹⁰³ *Id.*

⁹⁰⁴ *Argence LLC v. Box Opportunities*, 980 So.2d 786 (La. App. 4 Cir. 2008).

⁹⁰⁵ La. Code Civ. Proc. art. 1972-73.

Also, an appeal may be an effective remedy if the creditor failed to prove a prima facie case by competent evidence.⁹⁰⁶ Default judgments are often reversed for the plaintiff's failure to prove its case by competent evidence.

3.27 SCHOOL LOAN DEFENSES

School loan law is the subject of an entire volume published by NCLC, but defense issues will be briefly summarized below.⁹⁰⁷ Because remedies vary with the type of loan, advocates should determine what type the client has. See www.nsls.ed.gov or call (800) 433-3243 for a central database on student aid.

3.27.1 Fair Debt Collection Practices Act

The Federal Fair Debt Collection Practices Act (FDCPA) is the key statute offering students protection from debt collection harassment.⁹⁰⁸ It does not, however, apply to any officer or employee of the United States or any state to the extent that their activities are in the performance of their official duties.⁹⁰⁹ Nor does it apply to creditors themselves, such as a lender who has not yet turned a Federal Family Educational Loan over to a guarantor or where a school's in-house staff is collecting on a Perkins Loan.⁹¹⁰ The Act covers third party collection agencies, and should also cover private guaranty agencies, such as USA Funds.⁹¹¹

While the FDCPA is covered elsewhere in this manual, there are some abusive collection practices which are unique to the student loan area.⁹¹²

3.27.2 Closed School Discharge

The Secretary shall discharge most types of student loans if the borrower was unable to complete the program due to the school's closure while he was enrolled.⁹¹³ Closure within 90 days of the student's withdrawal will also be covered; this period can be extended by the Secretary.⁹¹⁴ A school's closure date is usually the date when it ceases offering all programs at a particular branch, not just the program in which the student is enrolled. For a list of school closure dates in Louisiana, contact the Collections Section of the Louisiana Department of Justice.

3.27.3 False Certification Discharge

False certification of ability to benefit from the school's program may be a basis for discharge of the loan, depending on the type of loan and the nature of the falsity.⁹¹⁵ Proof of false certification may require more than the borrower's own statement to that effect.⁹¹⁶

⁹⁰⁶ *Arias v. Stolthaven New Orleans LLC*, 9 So.3d 815 (La. 2009) (inadmissible evidence will not support a default judgment). *Moore Finance Co., Inc. v. Ebarb*, 70 So.3d 856 (La. App. 2 Cir. 2011) (default judgment reversed on appeal because affidavit did not make a prima facie case for suit on promissory note—creditor's affidavit failed to state that debtor had failed to pay debt).

⁹⁰⁷ NCLC, *STUDENT LOAN LAW* (4th ed. 2010). In addition, a helpful article may be found at 37 Clearinghouse Review 583 (March-April 2004).

⁹⁰⁸ 15 U.S.C. §§ 1692a-1692o.

⁹⁰⁹ 15 U.S.C. §§ 1692a(6). The United States, however, may be subject to suit under other laws, such as the Federal Tort Claims Act or the Privacy Act. See the most recent NCLC volume on Fair Debt Collection.

⁹¹⁰ *Id.*

⁹¹¹ *Rowe v. Educational Credit Mgt. Corp.*, 559 F.3d 1028 (9th Cir. 2009); *Brannan v. United States Aid Funds*, 94 F.3d 120 (9th Cir. 1996); *Murungi v. Texas Guaranteed*, 693 F.Supp.2d 597 (E.D.La. 2010) *aff'd* 402 Fed Appx. 849 (5th Cir. 2010) (guaranty agency not a debt collector under FDCPA where collection is incidental to bona fide fiduciary obligation; see also *Murungi v. Texas Guaranteed*, 646 F.Supp.2d 804 (E.D.La. 2009) (guaranty agency not a debt collector where it acquired loan before it was placed in default).

⁹¹² See NCLC, *STUDENT LOAN LAW* § 7.4 (4th ed. 2010).

⁹¹³ 20 U.S.C. § 1087(c)(1); see generally NCLC, *STUDENT LOAN LAW* § 9.3 (4th ed. 2010).

⁹¹⁴ 20 U.S.C. § 1087(c)(1).

⁹¹⁵ *Id.*

⁹¹⁶ See generally NCLC, *STUDENT LOAN LAW* § 9.4 (4th ed. 2010).

3.27.4 General Contract Law Defenses

Contract law defenses such as fraud, error, failure of consideration, and unconscionability, may be available to the debtor.⁹¹⁷ For example, infancy can be raised as a defense to dispute private loans but not Perkins loans.⁹¹⁸ Courts have, however, held that an unsatisfactory education does not constitute lack of consideration because the student receives the funds in exchange for a promise to pay it back.⁹¹⁹

For more information on state law claims such as unfair trade practice violations, see generally NCLC, STUDENT LOAN LAW § 7.4 (4th ed. 2010).

For more information on raising defenses when federal Family Education Loans have lost their guaranteed status, see generally NCLC, STUDENT LOAN LAW § 7.5.4.3 (4th ed. 2010).

For more information on raising defenses after a loan has been consolidated, see generally NCLC, STUDENT LOAN LAW § 7.5.4.4 (4th ed. 2010).

3.27.5 Discharge Based on Disability

Generally, if the borrower becomes permanently and totally disabled, payment on her loan will be excused.⁹²⁰ The regulations regarding disability discharge have changed several times, most recently in 2010. For a discussion of the changes, see NCLC, STUDENT LOAN LAW § 9.7.4.1 (4th ed. 2010).

3.27.6 Discharge in Bankruptcy

A student loan may be discharged in bankruptcy only if the debtor can show that repayment would impose an “undue hardship on the debtor and the debtor’s dependents.”⁹²¹

3.27.7 Prescription

The Higher Education Technical Amendments of 1991 eliminated all statutes of limitations for any collection action by a school, guaranty agency, or the United States under a federal loan program.⁹²² For non-federal program loans, a suit on a promissory note evidencing the loan must be brought within five years.⁹²³ Laches does not apply to federal collection efforts on these loans.⁹²⁴

3.27.8 Tax Refund Intercepts

Tax refund interception is the major technique used to collect on defaulted student loans.⁹²⁵ Even amounts owed to the borrower as Earned Income Tax Credits may be intercepted (except to the extent, if any, that they are paid during the year earned). There is no statute of limitation applicable to this technique. A non-debtor spouse may file an injured spouse claim to get her portion of the tax refund. See *Tax Law for Legal Services and Pro Bono Attorneys*, § 9.2, *infra*.

While harsh, interception may be preferable to permitting the account to be turned over to a collection agency, where a large portion of voluntary payments go to collection fees, or to consolidating a loan, which results in 18.5% collection fees.⁹²⁶

⁹¹⁷ *Id.* at § 7.5.4.1.

⁹¹⁸ *Id.*

⁹¹⁹ See, e.g., U.S. v. Durbin 64 F.Supp. 2d 635 (S.D. Tex. 1999).

⁹²⁰ 20 U.S.C. § 1087(a); see generally, NCLC, STUDENT LOAN LAW § 9.7 (4th ed. 2010).

⁹²¹ 11 U.S.C. § 523(a)(8); see also NCLC, STUDENT LOAN LAW ch. 10 (4th ed. 2010).

⁹²² 20 U.S.C. § 1092a.

⁹²³ See, e.g., Governor’s Sp. Com’n on Educ. v. Dear, 532 So.2d 902 (La. App. 5 Cir. 1988).

⁹²⁴ U.S. v. Davis, 817 F.Supp. 926 (M.D. Ala. 1993).

⁹²⁵ Authorized by 31 U.S.C. § 3720A.

⁹²⁶ See generally NCLC, STUDENT LOAN LAW 8.1, 8.2 (4th ed. 2010).

3.27.9 Administrative Offset of Benefits

Federal agencies may recover money owed on student loans by offsetting a debtor's social security benefits.⁹²⁷ There is no statute of limitation on the offset of Social Security benefits to pay a student loan.⁹²⁸ However, the first \$9,000 of Social Security benefits per year are exempt and offset is limited to 15% of the benefit.⁹²⁹

3.27.10 Rescheduling Loan Payments

There are seven different ways for students to reschedule their payments: deferments, forbearance, loan consolidation, repayment plans, guaranty agency compromise, Department compromise, and Chapter 13 bankruptcy.⁹³⁰

3.28 LOAN CONSOLIDATION ISSUES

Loan consolidation constitutes a new extension of credit and is subject to all the possible claims and defenses applicable to original loans discussed above in this manual.⁹³¹ In some cases, the consolidation may change the nature of the debt for certain purposes.

3.29 WORTHLESS CHECKS

There are three parties to a check (negotiable instrument): the person who writes the check is the "drawer"; the bank on which the check is written is the "drawee"; and the person or entity to whom the check is written is the "payee". If the check is dishonored due to insufficient or non-sufficient funds, "NSF", then the payee becomes the creditor of the drawer for the debt owed. Creditors have a civil remedy and a criminal remedy which they may pursue.

3.29.1 Civil Remedy

The creditor must first make written demand for payment by certified or registered mail. If the drawer fails to pay within 15 working days after receipt of such demand, then the creditor may sue the drawer in a civil action for damages of twice the amount owed, but in no case less than \$100, plus attorney fees and court costs.⁹³² An example of a written demand is set forth at La. R. S. 9:2782(C).

Whenever any check is written, and the bank having the account refuses to pay the check, such refusal shall be prima facie evidence that at the time the check was presented for payment, the drawer did not have the money in the bank to pay the check.⁹³³

The payee or holder is also allowed to charge a service charge of \$25 or 5% of the face amount of the check, whichever is greater.⁹³⁴ The payee must post the amount of the service charge in a convenient and conspicuous place on its business premises where a person entering the location will see it.⁹³⁵

⁹²⁷ 31 U.S.C. § 3716(c)(1).

⁹²⁸ 31 U.S.C. § 3716(c)(1); *Lockhart v. United States*, 546 U.S. 142 (2005).

⁹²⁹ 31 U.S.C. § 3716 (c)(3)(A)(iii).

⁹³⁰ See generally NCLC, *STUDENT LOAN LAW* ch. 4 (4th ed. 2010).

⁹³¹ See generally NCLC, *Student Loan Law* ch. 6 (4th ed. 2010) for a discussion on consolidation of student loans.

⁹³² La. R. S. 9:2782; see also *TeleRecovery of La., Inc. v. Rayborn*, 814 So.2d 688 (La. App. 1 Cir. 2002) (collector prevented from double recovery for failure to send notice to address on dishonored check); *F. Christiana & Co., v. Matt's Grocery, Inc.*, 674 So.2d 419 (La. App. 4 Cir. 1996) (creditor did not strictly comply with dishonored check statute).

⁹³³ See *TeleRecovery*, 814 So.2d at 692.

⁹³⁴ La. R. S. 9:2782(B).

⁹³⁵ *Id.*

Pursuant to Louisiana's commercial laws which govern banking activity, the consumer's obligation to pay these checks may not be enforced unless the consumer is given notice of dishonor of the instrument, or notice of dishonor is excused.⁹³⁶ Notice of dishonor may be given by any person, by any commercially reasonable means, and is sufficient if it reasonably identifies the instrument and indicates that the instrument has been dishonored or has not been paid or accepted.⁹³⁷ Return of an instrument given to a bank for collection is sufficient notice of dishonor.⁹³⁸

3.29.2 Criminal Remedy

Writing worthless checks is a crime pursuant to La. R.S. 14:71, which defines issuing of worthless checks as "the issuing, in exchange for anything of value, whether the exchange is contemporaneous or not, with intent to defraud, of any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of the issuing that the offender has not sufficient credit with the bank, or other depository for the payment of such check, draft, or order in full upon its presentation."

Failure to pay the instrument within ten days after notice of its nonpayment, upon presentation by certified mail to the drawer, either at the address shown on the instrument or the last known address for such person shown on the records of the bank, or within ten days after delivery or personal tender of the written notice, shall be presumptive evidence of the intent to defraud.⁹³⁹

When the offender has issued more than one worthless check within a 180-day period, the amounts of all the worthless checks issued during that 180-day period may be added together to determine the grade of the offense.⁹⁴⁰ When the amount of the checks are \$500 or more, the offender shall be imprisoned, with or without hard labor, for not more than 10 years, or may be fined not more than \$3,000, or both.⁹⁴¹ Because the punishment for issuing worthless checks includes imprisonment at hard labor, this crime is classified as a felony.⁹⁴²

4. EXEMPTIONS

4.1 OVERVIEW

Often, an indigent's income and assets are exempt from seizure. Exemption planning and litigation, if necessary, may protect income and assets that are essential for the indigent's subsistence. Available exemptions are listed below.

4.2 EXEMPTIONS

1. **Homestead.** The homestead⁹⁴³ is exempt from seizure and sale for an amount up to \$35,000 of its net equity.⁹⁴⁴ A mobile home may qualify as a homestead even if the owner does not own the underlying land.⁹⁴⁵ The homestead exemp-

⁹³⁶ See La. R.S. 10:3-502.

⁹³⁷ See *Haik v. Rowley*, 377 So.2d 391 (La. App. 4 Cir. 1979).

⁹³⁸ *Bollich v. La. Bank & Trust Co.*, 271 So.2d 274 (La.App. 3 Cir. 1972).

⁹³⁹ La.R.S. 14:71(A)(2).

⁹⁴⁰ La.R.S. 14:71(F).

⁹⁴¹ La.R.S. 14:71(D).

⁹⁴² La.R.S.14:2(4).

⁹⁴³ La. R.S. 20:1(A)(1) (Homestead is defined as "a residence occupied by the owner and the land on which the residence is located, including any building and appurtenances located thereon, and any contiguous tracts up to a total of five acres if the residence is within a municipality, or up to a total of two hundred acres of land if the residence is not located in a municipality").

⁹⁴⁴ La. Const. art. 7, § 20(A)(2); La. R.S. 20: 1.

⁹⁴⁵ *In re Baker*, 71 B.R. 312 (Bankr. W.D. La. 1987).

tion does not apply to all debts. Examples of debts excluded from its protection are debts for the purchase price of property, labor or materials furnished to construct or repair of the homestead, taxes and restitution for certain crimes.⁹⁴⁶ Also, if the homeowner is in bankruptcy and has recently moved to Louisiana, another state's law may govern the exemption of a homestead.⁹⁴⁷

- a. If the obligations arise directly as a result of a catastrophic or terminal illness or injury, the exemption shall apply to the full value of the homestead based upon its value one year before such seizure.⁹⁴⁸ The debtor must show exactly how the funds were used to qualify for this exception.⁹⁴⁹
- b. Under current law, the homestead exemption is not available to co-owners other than spouses and their children. A surviving spouse is eligible for a homestead exemption if she has any interest in the property, including a usufruct.⁹⁵⁰ Property co-owned by siblings or unrelated persons, such as co-habiting couple, will not be protected by the homestead exemption.⁹⁵¹
- c. Absent a valid homestead waiver, junior mortgage and judgment creditors cannot judicially sell a homestead unless the net equity exceeds \$35,000.⁹⁵²
- d. A homestead waiver signed only by one spouse is not effective as to the non-signing spouse.⁹⁵³ The exception to this rule is where the homestead is the separate property of the signing spouse. Such waivers shall be recorded in the mortgage records of the parish where the homestead is situated and are effective from the time of recording.⁹⁵⁴
- e. Where spouses are separated, the owner-occupant may be able to claim the entire \$35,000.⁹⁵⁵
- f. Temporary absence does not constitute abandonment. Abandonment is a question of intent and is not to be presumed, and even a temporary absence does not create a presumption.⁹⁵⁶ The burden of proof is on party alleging abandonment, and dual residency does not constitute abandonment.⁹⁵⁷ To protect the homestead, the owner should claim the homestead exemption at the time of seizure and sale or when the sale proceeds are still with the sheriff or purchaser at sale.⁹⁵⁸

⁹⁴⁶ La. R.S. 20: 1 (C).

⁹⁴⁷ 11 U.S.C. § 522 (b)(3)(A); *see e.g.*, In re Arrol, 170 F.3d 934 (9th Cir. 1999).

⁹⁴⁸ La. R.S. 20:1(A)(2-3) ("Catastrophic or terminal illness or injury" shall mean an illness or injury which creates uninsured obligations to health care providers of more than ten thousand dollars and which are greater than fifty percent of the annual adjusted gross income of the debtor, as established by an average of federal income tax returns for the three preceding years).

⁹⁴⁹ In re Collet, 351 B.R. 395 (Bankr. W.D. La. 2006) (debtor with a qualifying medical condition unable to take advantage of La. R.S. 20:1(A)(2) because he was unable to show exactly how his credit card loans were spent).

⁹⁵⁰ La. Const. art. 7 § 20(A)(2); In re Johnson, 2009 WL 2848983 (Bankr. E.D. La. 2009). (right of homestead exemption recognized for homestead owned by surviving spouse, adult children of her marriage and step-children).

⁹⁵¹ *See e.g.*, Matter of Brocato, 30 F.3d 641 (5th Cir. 1994)(2 unrelated women); In re Mazoue, 240 B.R. 878 (E.D. La. 1999); In re Davis, 2008 WL 793520 (Bankr. W.D. La. 2008).

⁹⁵² La. R.S. 20:1(A)(2); *see also* La. C.C.P. art. 2337; Nitro Gaming Inc. v. Entercept Services Inc., 823 So.2d 1141 (La. App. 2 Cir. 2002); Barnard v. Barnard, 391 So.2d 939 (La. App. 2 Cir. 1980).

⁹⁵³ La. R.S. 20:1(D); *see also* Reymond v. Louisiana Trust & Savings Bank, 153 So. 529, 530-31 (La. 1934); Barlow v. Estate of Carr, 292 So.2d 721 (La. App. 2 Cir. 1974).

⁹⁵⁴ La. R.S. 20:1(D).

⁹⁵⁵ *See* Knight v. Parish Nat'l Bank, 457 So.2d 1219 (La. App. 1 Cir. 1984); Reymond, 153 So. 529, 530-31.

⁹⁵⁶ Lamkin v. Flanagan, 865 So.2d 916, 923 (La. App. 2 Cir. 2004).

⁹⁵⁷ In re Chalain, 21 B.R. 885 (Bankr. W.D. La. 1982); *see also* In re Hanks, 11 B.R. 706 (Bankr. W.D. La. 1977).

⁹⁵⁸ American Thrift & Finance Plan, Inc. v. Valteau, 576 So.2d 598 (La. App. 4 Cir. 1991).

- g. The homestead exemption extends to the proceeds of insurance payments⁹⁵⁹ and the proceeds of sales.⁹⁶⁰
 - h. A related law, La. R.S. 13: 3851.1, prohibits seizure of homesteads for credit card debt during the debtor's life or until he transfers his homestead.
2. Usufruct. The parental usufruct on minor child's property⁹⁶¹ is exempt.⁹⁶² Other usufructs generally are not exempt.⁹⁶³
 3. Earnings. 75% of disposable earnings⁹⁶⁴ per week, but not less than 30 times the federal minimum hourly wage (or \$217.50 per week⁹⁶⁵) is exempt.⁹⁶⁶ Termination of employment does not change the exempt character of wages.⁹⁶⁷ Self-employment income may also be exempt up to 75% of disposable earnings.⁹⁶⁸ Wages paid as damages in a personal injury suit may not be exempt.⁹⁶⁹ Also, wages deposited into a bank account may lose exemption from seizure.⁹⁷⁰
 4. Federal earned income tax credit. This tax credit is exempt except for seizure by the Department of Revenue for arrears in child support payments.⁹⁷¹ However, the child care tax credit portion of the tax refund is not exempt.⁹⁷²
 5. Motor Vehicle. One motor vehicle per household is exempt up to \$7,500 in equity value. The equity value of the motor vehicle is based on the NADA retail value of the particular year, make and model.⁹⁷³ The only additional vehicle that may be exempted is one modified to adapt its use to the physical disability of the debtor or his family and is used for transportation of the disabled person.⁹⁷⁴ An additional vehicle may not qualify for exemption as a tool of the trade.⁹⁷⁵

⁹⁵⁹Thompson-Ritchie & Co. v. Graves, 120 So. 634 (1929).

⁹⁶⁰La. R.S. 20: 1 (A)(2); La. R.S. 13: 3881 (A)(9); In re McCollum, 348 B.R. 377 (Bankr. E.D. La. 2006), *aff'd*, 363 B.R. 789 (E.D. La. 2007) (homestead exemption extended to proceeds under [statutory exemption amount] from the voluntary sale of homestead to pay creditors).

⁹⁶¹"Parents have during marriage the enjoyment of the property of their children until their majority or emancipation." La. CIV. CODE ANN. art. 223 (2010).

⁹⁶²La. R.S. 13:3881(A)(3).

⁹⁶³Keys v. Box, 476 So.2d 1141 (La. App. 3 Cir. 1985).

⁹⁶⁴"Disposable earnings" means that part of the earning of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld and which amounts are reasonable and are being deducted in the usual course of business at the time the garnishment is served upon the employer for the purpose of providing benefits for retirement, medical insurance coverage, life insurance coverage and which amounts are legally due or owed to the employer in the usual course of business at the time the garnishment is served.

⁹⁶⁵29 U.S.C. § 206(a)(1)(C) (federal hourly minimum wage is \$7.25 per hour).

⁹⁶⁶La. R.S. 13:3881(A)(1)(a); see also La. R.S. 46:236.3; 15 U.S.C. §1673(a).

⁹⁶⁷Laurencic v. Jones, 180 So.2d 803 (La. App. 4 Cir. 1965).

⁹⁶⁸In re Graham, 2010 WL 346372 (Bankr. M.D. La. 2010); FTC v. National Business Consultants, Inc., 2005 WL 2060911 (E.D. La. 2005)(dicta).

⁹⁶⁹Matter of Wischan, 77 F.3d 875 (5th Cir. 1996).

⁹⁷⁰In re Sinclair, 417 F.3d 527 (5th Cir. 2005). Many states' laws protect exempt wages from seizure when deposited in a bank account. However, current Louisiana law does not.

⁹⁷¹La. R.S. 13:3881(A)(6).

⁹⁷²In re Legier, 2004 WL 4945987 (Bankr. E.D. La. 2004).

⁹⁷³La. R.S. 13:3881(A)(7).

⁹⁷⁴La. R.S. 13:3881(A)(8).

⁹⁷⁵In re Belsome, 434 F.3d 774 (5th Cir. 2005).

6. Household Goods and Personal Items. Certain household goods are exempt without any value limitation on the amount of the exemption.⁹⁷⁶ Even some “luxury” items, such as antique furniture, may be exempt.⁹⁷⁷ Wedding or engagement rings up to \$5,000 in value are exempt.⁹⁷⁸
Note: non-possessory security interests in household goods other than a purchase money security interest are illegal under the FTC Credit Practices Rule, 16 C.F.R. § 444.2(a)(4) (2011).
7. Tools of Trade. Property used in the exercise of a profession by which one earns one’s livelihood is exempt.⁹⁷⁹
8. Educational Assistance Funds. GSL loans, Pell grants or other forms of educational assistance should be exempt from seizure even though the law does not expressly exempt such funds from garnishment. The Higher Education Act, 20 U.S.C. § 1001 et seq., imposes criminal penalties when GSL funds are used for non-educational purposes,⁹⁸⁰ and so it can be argued that these funds are exempt from seizure.⁹⁸¹
9. Unemployment Benefits. La. R.S. 23:1693(A). Railroad workers’ unemployment insurance is also exempt under 45 U.S.C. § 352(e).
10. TANF Benefits. La. R.S. 46:111.
11. Worker’s Compensation Benefits. La. R.S. 23:1205.
12. Social Security Benefits. 42 U.S.C § 407(a).
13. Firemen’s Disability and Relief Fund. La. R.S. 33:2035.
14. Health, Accident and Disability Insurance. La. R.S. 22:646.⁹⁸²
15. Life Insurance, Endowment and Annuity Proceeds. La. R.S. 22:647.
16. Retirement Plans, Individual Retirement Accounts, Annuities, and Roth IRAs. La. R.S. 20:33; La. R.S. 13:3881(D)(3).⁹⁸³
17. State Retirement Benefits. The retirement Benefits of Louisiana teachers,⁹⁸⁴ school lunch employees, firefighters,⁹⁸⁵ police state employees,⁹⁸⁶ and tax assessors other state employees⁹⁸⁷ are exempt. La. R.S. 17:1233
18. Spendthrift Trusts. La. R.S. 9:2004, 06.
19. Deposits of servicemen while on permanent duty outside the United States. 10 U.S.C. § 1035(a).
20. Armed Forces annuities based on retirement pay. 10 U.S.C. § 1440.
21. Armed services survivor benefits. 10 U.S.C. § 1450(i).

⁹⁷⁶ See La. R.S. 13:3881(A)(4).

⁹⁷⁷ In re Mmahat, 110 B.R. 236 (Bankr. E.D. La. 1990).

⁹⁷⁸ La. R.S. 13:3881(A)(5).

⁹⁷⁹ La. R.S. 13:3881(A)(2) (limited to tools, instruments, books, one utility trailer, and one firearm valued under \$500); see, e.g., Oubre v. Hinchman, 365 So.2d 17 (La. App. 4 Cir. 1978); Bank of Louisiana v. Nash, 360 So.2d 259 (La. App. 4 Cir. 1978).

⁹⁸⁰ 20 U.S.C. § 1097(a).

⁹⁸¹ See, e.g., Schaerrer v. Westman Comm’n Co., 769 P.2d 1058 (Colo. 1989).

⁹⁸² See, e.g., Mexic v. Mexic, 634 So.2d 18 (La. App. 1 Cir. 1994).

⁹⁸³ See, e.g., In re Arcement, 136 B.R. 425 (Bankr. E.D. La. 1991); Cashio v. Tollin, 712 So.2d 254 (La. App. 5 Cir. 1998); Rousey v. Jacoway, 544 U.S. 320 (2005).

⁹⁸⁴ La. R.S. 11:704.

⁹⁸⁵ La. R.S. 11:2263.

⁹⁸⁶ La. R.S. 11:2228.

⁹⁸⁷ La. R.S. 11:405.

22. Retirement,⁹⁸⁸ disability, and death funds of certain federal civil service employees.⁹⁸⁹
23. Railroad Retirement Act annuities and pensions. 45 U.S.C. § 231m(a).
24. Certain interests in ERISA pension plan. *See* 29 U.S.C. § 1056(d).
25. Medical, disability and death benefits under Longshoreman and Harbor Workers Act. 33 U.S.C. § 916.
26. Certain veterans' and servicemen's group life insurance benefits. 38 U.S.C. § 5301(a)(1).

4.3 EXEMPT FUNDS DEPOSITED IN BANK ACCOUNT

Social Security benefits and veteran's benefits deposited in bank accounts remain exempt from garnishment.⁹⁹⁰ Other exempt funds, such as retirement benefits, educational assistance funds, wages, and homestead proceeds⁹⁹¹ retain their exempt status when deposited in a bank account so long as the source of funds is traceable. Care should be taken not to commingle exempt and nonexempt funds. However, cash is not exempt in Louisiana, and this can create serious problems for debtors in protecting otherwise exempt income.⁹⁹²

31 C.F.R. § 212.1 *et seq.* (Feb. 23, 2011) requires banks to recognize exemption from seizure of any remaining portion of the past two months' electronic deposits from Social Security, SSI, veterans benefits, Railroad Retirement, Railroad Unemployment and Federal Employee Retirement. Garnishment or offset orders from the federal government (e.g., taxes, federally guaranteed loans) or state child support enforcement agencies are limited by this rule. A protected amount calculated and established by a bank pursuant to 31 C.F.R. § 212.6 is conclusively considered to be exempt from seizure.

4.4 HOW TO PROTECT THE EXEMPTION

If a debtor's exempt property is seized, a motion or summary proceeding for the release of the exempt funds should be filed.⁹⁹³ In most cases, the creditor's attorney should quickly agree to release exempt funds without litigation in order to avoid damages for wrongful seizure.⁹⁹⁴

The debtor may also enjoin the sale of exempt property or property wrongfully seized.⁹⁹⁵ The injunction petition should fully allege the facts which establish the right to the exemption.⁹⁹⁶ Property may not be sold if the price is not sufficient to cover sales costs, applicable homestead exemption and mortgages superior to that of the seizing creditor.⁹⁹⁷ The homestead exemption should always be claimed at the time of the seizure and sale or when the sale proceeds are still with the sheriff or purchaser at sale.⁹⁹⁸

⁹⁸⁸ 5 U.S.C. § 8346.

⁹⁸⁹ 5 U.S.C. § 8130.

⁹⁹⁰ *See, e.g.,* *Philpott v. Essex Cty. Welfare Board*, 409 U.S. 413 (1973); *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159 (1962).

⁹⁹¹ Welfare recipients who receive homestead proceeds from a sale should be advised of the impact of their welfare benefits and options for minimizing the same.

⁹⁹² *See e.g.,* *In re Sinclair*, 417 F.3d 527 (5th Cir. 2006).

⁹⁹³ *See Grayson v. Gray*, 207 So.2d 916 (La. App. 2 Cir. 1968); *cf. Ponder v. Relan Produce Farmers, Inc.*, 439 So.2d 498 (La. App. 1 Cir. 1983) (summary process to dissolve premature garnishment).

⁹⁹⁴ *See, e.g., Belle v. Chase*, 468 So.2d 744 (La. App. 5 Cir. 1985).

⁹⁹⁵ *Cox v. Smith*, 275 So.2d 459 (La. App. 2 Cir. 1973); *Gulf National Bank of Lake Charles v. Lognio*, 546 So.2d 644 (La. App. 3 Cir. 1989).

⁹⁹⁶ *Holmes v. Bordelon*, 40 So.2d 816 (La. App. 2 Cir. 1949).

⁹⁹⁷ La. Code Civ. Proc. art. 2337.

⁹⁹⁸ *American Thrift & Finance Plan, Inc. v. Valteau*, 576 So.2d 598 (La. App. 4 Cir. 1991).

4.5 DAMAGES FOR WRONGFUL SEIZURE

Damages and attorney's fees are generally available for wrongful seizures.⁹⁹⁹ A wrongful seizure may also be an actionable unfair trade practice.¹⁰⁰⁰ Enhanced damages, including treble damages, may be available if the wrongful seizure is an unfair trade practice.

Many seizures are wrongful. Some examples include:

- Seizures under executory process where there is a lack of authentic evidence. *Bank of New York Mellon v. Smith*, 71 So.3d 1034 (La. App. 3 Cir. 2011) *writ denied* 75 So.3d 462 (La. 2011).
- Seizure of exempt property. *Belle v. Chase*, 468 So.2d 744 (La. App. 5 Cir. 1985).
- Seizure without judicial process. *Tyler v. Rapid Cash, L.L.C.*, 930 So.2d 1135 (La. App. 2 Cir. 2006).
- Seizure of wife's income and property without prior notice or joinder. *See, e.g., Jackson v. Galan*, 631 F. Supp. 409 (E.D. La. 1986).
- Seizure of a spouse's separate property. *See, e.g., Ford Motor Credit Co. v. Corbello*, 482 So.2d 203 (La. App. 3 Cir. 1986); *Bryant v. Sears Consumer Financial*, 617 So.2d 1191 (La. App. 3 Cir. 1993).
- Seizure prior to expiration of suspensive appeal period. La. Code Civ. Proc. art 2252; *see, e.g., Penalber v. Blount*, 550 So.2d 577 (La. 1989); *Maise v. Demarest*, 483 So.2d 1193 (La. App. 4 Cir. 1986), *writ denied*, 488 So.2d 690.

5. ARBITRATION AGREEMENTS

5.1 INTRODUCTION

Arbitration may be governed by the Federal Arbitration Act or the Louisiana Binding Arbitration Act.¹⁰⁰¹ These laws are very similar. Section 2 of the Federal Arbitration Act on the enforceability of arbitration agreements preempts state law as to transactions affecting commerce.¹⁰⁰² Courts rarely find that a consumer transaction, even a local transaction, does not affect interstate commerce.¹⁰⁰³ Thus, the Federal Arbitration Act will apply to most consumer transactions.¹⁰⁰⁴ Courts must enforce the Federal Arbitration Act with respect to all arbitration agreements covered by that statute.¹⁰⁰⁵ There are some federal statutory exceptions to the Federal Arbitration Act which prohibit arbitration. For example, no residential mortgage loan and no extension of credit under an open end consumer

⁹⁹⁹ La. Code Civ. Proc. art. 2298; *see, e.g., Houma Mortg. v. Marshall*, 664 So.2d 1199 (La. App. 1 Cir. 1995); *Mihalogianakis v. Jones*, 563 So.2d 306 (La. App. 4 Cir. 1990) (damages and costs awarded for wrongful garnishment); *Ogg v. Ferguson*, 521 So.2d 525 (La. App. 4 Cir. 1988) (damages and attorney fees awarded for seizure of wrong property); *Belle v. Chase*, 468 So.2d 744 (La. App. 5 Cir. 1985) (damages and attorney fees awarded for seizure of exempt property).

¹⁰⁰⁰ *See e.g., Bryant v. Sears Consumer Financial Corp.*, 617 So.2d 1191 (La. App. 3 Cir. 1993) *writ denied* 619 So.2d 533 (La. 1993).

¹⁰⁰¹ 9 U.S.C. § 1 *et seq.*; La. R.S. 9: 4201 *et seq.* *see also* La. Civ. Code art. 3099-3132.

¹⁰⁰² *See e.g., FIA Card Services, N.A. v. Weaver*, 62 So.3d 709 (La. 2011).

¹⁰⁰³ *See e.g., Baronoff v. Kean Development Co.*, 818 N.Y.S.2d 421 (N.Y. Sup. Ct. 2006) (FAA did not apply to housing renovation contract).

¹⁰⁰⁴ *Allied Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995). Under 9 U.S.C. § 2, the Federal Arbitration Act applies to any contract involving interstate commerce.

¹⁰⁰⁵ *Marnet Health Care Center, Inc. v. Brown*, 565 U.S. ___ (2012), 132 S. Ct. 1201.

credit plan secured by a consumer's principal dwelling may include terms that require arbitration.¹⁰⁰⁶ The courts are sharply divided on whether the Magnuson-Moss Act prohibits arbitration of warranty claims. However, a Louisiana court has held that the Magnuson-Moss Act does not prohibit arbitration.¹⁰⁰⁷

5.2 AN AGREEMENT TO ARBITRATE IS REQUIRED

Arbitration is a matter of contract. Some parties may not be bound by arbitration if they did not sign the agreement or lacked capacity.¹⁰⁰⁸ A party can't be required to submit to arbitration unless he has agreed to arbitration.¹⁰⁰⁹ Debt buyers often can't prove an arbitration agreement by competent evidence.

5.3 WHEN CAN ARBITRATION BE CONTESTED?

Whether arbitration is required focuses on three questions: (1) was an arbitration agreement formed, (2) is the agreement valid and enforceable and (3) is the dispute or issue within the scope of the agreement.¹⁰¹⁰ The court must determine whether an issue is referable to arbitration under a written arbitration agreement.¹⁰¹¹ If the issue is referable or arbitrable, a court should stay the lawsuit. If an issue is not referable, the court should allow the non-referable issue(s) to proceed in the lawsuit.¹⁰¹² The parties may have to conduct separate arbitration and judicial proceedings if arbitrable and non-arbitrable claims exist.¹⁰¹³ An order compelling arbitration is an interlocutory judgment and may be reviewed in an application for supervisory writs.¹⁰¹⁴

The proponent of arbitration has the burden of proof that there is an agreement to arbitrate.¹⁰¹⁵ Whether an agreement to arbitrate was formed is always determined by the courts, if the issue is timely and properly raised.¹⁰¹⁶ The other gateway issues of "arbitrability" under the Federal Arbitration Act are the enforceability of the arbitration agreement and whether it applies to the dispute at issue. The enforceability and applicability of the arbitration agreement are determined by the court unless there is clear and unmistakable evidence that the parties intended for these arbitrability issues to be arbitrated.¹⁰¹⁷ An arbitration award is not judicially enforceable if the agreement to arbitrate is invalid or can't be proved.¹⁰¹⁸

¹⁰⁰⁶ 15 U.S.C. § 1639c(e)(1). Sarbanes-Oxley whistleblower actions are also excluded from arbitration. 18 U.S.C. § 1514A.

¹⁰⁰⁷ Howell v. Cappaert Manufacturing Housing, Inc., 819 So.2d 461 (La. App. 2 Cir. 2002) writ denied 827 So.2d 1161 (La. 2002) (5-2); see also Walton v. Rose Mobile Homes, LLC, 298 F.3d 470 (5th Cir. 2002) (2-1).

¹⁰⁰⁸ Prasad v. Bullard, 51 So.3d 35 (La. App. 5 Cir. 2010) (absent piercing of the corporate veil, non-signatory member of LLC was not bound by arbitration agreement signed by consumer and the LLC); Snyder v. Belmont Homes, Inc., 899 So.2d 57, 64 (La. App. 1 Cir. 2005), writ denied 904 So.2d 699 (La. 2005) (child's claim not bound by arbitration since child is not bound by arbitration clause signed by parents); but see Hansford v. Cappaert Manufactured Housing, 911 So.2d 901, 905 (La. App. 2 Cir. 2005) (husband's signature to arbitration agreement could bind wife to arbitration).

¹⁰⁰⁹ La. Civ. Code art. 3101; Hall Street Associates v. Mattel, 552 U.S. 576 (2008); AT & T Techs., Inc. v. Communication Workers of America, 475 U.S. 643, 648-49 (1986).

¹⁰¹⁰ Bolden v. FedEx Ground Package System, Inc., 60 So.3d 679 (La. App. 4 Cir. 2011).

¹⁰¹¹ La. R.S. 9: 4202; Bolden v. FedEx Ground Package System, Inc., 60 So.3d 679 (La. App. 4 Cir. 2011).

¹⁰¹² Bolden v. FedEx Ground Package System, Inc., 60 So.3d 679 (La. App. 4 Cir. 2011).

¹⁰¹³ See e.g., KPMG LLP v. Cocchi, 132 S. Ct. 23 (2011); Bolden v. FedEx Ground Package System, Inc., 60 So.3d 679 (La. App. 4 Cir. 2011).

¹⁰¹⁴ Collins, 752 So.2d 825, 829 (La. 2000); Bolden v. FedEx Ground Package System, Inc., 60 So.3d 679, 681-83 (La. App. 4 Cir. 2011).

¹⁰¹⁵ FIA Card Services, N.A. v. Weaver, 62 So.3d 709 (La. 2011).

¹⁰¹⁶ Granite Rock Co. International Broth. Of Teamsters, 130 S. Ct. 2847, 2857-58 (2010).

¹⁰¹⁷ Granite Rock Co. International Broth. Of Teamsters, 130 S. Ct. 2847, 2857-58 (2010); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); see also FIA Card Services, N.A. v. Weaver, 62 So.3d 709 (La. 2011).

¹⁰¹⁸ FIA Card Services, N.A. v. Weaver, 62 So.3d 709 (La. 2011).

The formation and enforceability of an arbitration agreement is determined by state law contract principles such as fraud, duress, error, unconscionability, adhesion, etc.¹⁰¹⁹ However, the state law defense is preempted by the Federal Arbitration Act if it applies only to arbitration or derives its meaning from the fact that an agreement to arbitrate is at issue.¹⁰²⁰ Also, if a party challenges the entire contract as invalid under state law for fraudulent or unlawful provisions, the Federal Arbitration Act requires that the challenge be arbitrated.¹⁰²¹

An arbitration agreement may not exist if the underlying contract was validly cancelled.¹⁰²² Arbitration provisions which restrict the arbitrator's power to award relief afforded by a federal or state statute may be unlawful.¹⁰²³ In some cases, tort and statutory claims may exceed the scope of an arbitration agreement or an arbitrator's authority.¹⁰²⁴ However, the Louisiana Supreme Court has expressed the view that unless otherwise limited by the parties' contract or the rules of the specific arbitral tribunal, arbitrators have the power to render relief to the full extent provided by law and equity.¹⁰²⁵ An arbitration agreement that shortens the statute of limitations may be unconscionable and unenforceable.¹⁰²⁶

5.4 THE COSTS OF ARBITRATION—REMEDIES FOR AN INDIGENT CONSUMER?

Arbitration can be prohibitively expensive for indigent litigants and may subject them to sanctions for failure to pay.¹⁰²⁷ Excessive arbitration filing fees may render an arbitration clause unenforceable due to unconscionability if the fees prevent the indigent from having his claims or defenses heard in the arbitral forum.¹⁰²⁸ Currently, Louisiana does not have a statute that regulates waiver of filing and arbitrator fees for indigents. So, an indigent litigant may have to seek a court ruling that the arbitration clause is unenforceable if the opposing party won't pay the arbitration fees or the arbitration agency and arbitrators won't waive their fees. Another alternative is to ask the opposing party to waive arbitration and resolve the matter by litigation or by submission of the case to a cheaper arbitration company. To present a case for unenforceability due to your client's indigency, you should immediately explore these alternatives.

¹⁰¹⁹ *Rent-A-Center, West, Inc. v. Jackson*, 130 S.C. 2772 (2010); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Aguillard v. Auction Mgmt. Corp.*, 908 So.2d 1 (La. 2005); *Hodges v. Reasonover*, ___So.3d___, 2012 WL 2529403 (La. 2012) (attorney retainer requiring arbitration of malpractice invalid for non-compliance with ethical rules); *LaFleur v. Law Offices of Anthony Buzbee*, 960 So.2d 105 (La. App. 1 Cir. 2007) (attorney retainer contract waiving right to trial of legal malpractice claim found unconscionable).

¹⁰²⁰ *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

¹⁰²¹ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

¹⁰²² *Johnson v. Blue Haven Pools of Louisiana, Inc.*, 928 So.2d 594 (La. App. 1 Cir. 2006).

¹⁰²³ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 671 (S.C. 2007), cert. denied 552 U.S. 990 (2007); *Hadnot v. Bay, Ltd.*, 344 F.3d 474 (5th Cir. 2003); NCLC, *CONSUMER ARBITRATION AGREEMENTS* (6th ed. 2011), § 4.4.

¹⁰²⁴ See e.g., *Snyder v. Belmont Homes, Inc.*, 899 So.2d 57 (La. App. 1 Cir. 2005), writ denied 904 So.2d 699 (La. 2005); cf. *Peoples Security Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993).

¹⁰²⁵ *Hodges v. Reasonover*, 103 So.3d 1069 (La. 2012) (depending on agreement, parties have same rights and remedies as if case were being heard in state court). But see concern expressed in Justice Weimer's concurring opinion if an "action" is required to prevent peremption. *Id.*

¹⁰²⁶ *Pitts v. Watkins*, 905 So.2d 553 (Miss. 2005).

¹⁰²⁷ Financial inability to pay arbitration fees is a defense to a contempt action for failure to pay these fees. See La. R.S. 13: 4206. Cf., *Turner v. Rogers*, 564 U.S. ___, 131 S.Ct. 2507 (2011) (financial inability is defense to contempt).

¹⁰²⁸ *Green Tree Fin. Corp. v. Randolph*, 513 U.S. 79, 90 (2000) (arbitration agreement unenforceable if large arbitration costs preclude party from effective vindication of rights); *Hodges v. Reasonover*, 103 So.3d 1069 (La. 2012); *Murphy v. Mid-West Natl. Life Ins. Co. of Tennessee*, 78 P.3d 766 (Idaho 2003) (\$2,500 in fees for claim under \$10,000 made arbitration agreement unenforceable).

It is a myth that arbitration is cheaper than litigation. The arbitration fees can substantially exceed the costs of a judicial lawsuit. Initial filing fees in consumer cases often range from \$375 to more than \$2,000. The hourly rates for arbitrators can be \$375 or higher.¹⁰²⁹ In some cases, the parties may have to conduct separate arbitration and judicial proceedings if arbitrable and non-arbitrable claims exist.¹⁰³⁰ If the losing party in arbitration does not pay, the prevailing party must file a lawsuit to confirm the arbitration award, thereby incurring additional court fees.

The Louisiana Attorney General has ruled that a consumer credit extender may not use an arbitration clause where the arbitration costs to the consumer exceed those allowable under the Louisiana Consumer Credit Law.¹⁰³¹

5.5 OTHER WAYS TO CONTEST ARBITRATION

A bankruptcy court may decline to compel arbitration when the proceeding derives exclusively from the Bankruptcy Code.¹⁰³² Mandatory arbitration clauses in contracts of insurance are prohibited by statute. This even applies to a federally reinsured crop insurance policy.¹⁰³³ The right to arbitrate may be waived by a party's litigation conduct.¹⁰³⁴

5.6 ENFORCEMENT OF ARBITRATION CLAUSES

If one party fails to pay its arbitration filing fees or costs, the Louisiana arbitration statute allows the other party to remove the case to a court.¹⁰³⁵ In a case of refusal or failure to arbitrate, the Federal Arbitration Act directs the court to compel arbitration.¹⁰³⁶ Federal and state law both provide a right to a jury trial on the issue of whether the arbitration agreement is enforceable.

5.7 VACATUR AND JUDICIAL REVIEW

Judicial review of arbitration awards is limited. The arbitration statutes only provide for (1) a motion to modify, correct or vacate the arbitration award on certain grounds and (2) defense of a suit to confirm an arbitration award if there is a challenge to the existence or enforceability of the award.¹⁰³⁷ Generally, the grounds for vacatur are limited to corruption, fraud, arbitrator misconduct in the hearing or cases where the arbitrator was biased or exceeded his powers.¹⁰³⁸ The arbitration statutes do not provide grounds to appeal or vacate an arbitration award on its merits.¹⁰³⁹ However, some courts allow a narrow review for manifest disregard of the law.¹⁰⁴⁰

A party dissatisfied with the arbitration award should immediately file a motion to modify, vacate or correct if statutory grounds for review exist.¹⁰⁴¹ The deadlines for these motions are 90 days under the Federal Arbitration Act and 3

¹⁰²⁹The 2012 hourly rate for Southeast Louisiana MAPS arbitrators is \$375.

¹⁰³⁰KPMG LLP v. Cocchi, 132 S. Ct. 23 (2011).

¹⁰³¹La. Atty. Gen. Op. 98-380 (Mar. 28, 1999).

¹⁰³²In re Gandy, 299 F.3d 489, 495 (5th Cir. 2002).

¹⁰³³Hobbs v. IGF Insurance Co., 834 So.2d 1069 (La. App. 3 Cir. 2002).

¹⁰³⁴NCLC, CONSUMER ARBITRATION AGREEMENTS (4th ed. 2011), § 8.3.

¹⁰³⁵La. R.S. 9: 4203 (E).

¹⁰³⁶9 U.S.C. § 4.

¹⁰³⁷9 U.S.C. §§ 9-11; La. R.S. 9: 4209-11.

¹⁰³⁸9 U.S.C. §§ 10-11; La. R.S. 9: 4210-11; *see e.g.*, Napolitano v. Gill, 88 So.3d 446 (La. 2012) (improper exclusion of witness testimony may be grounds for judicial review).

¹⁰³⁹Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001).

¹⁰⁴⁰Webb v. Massiha, 993 So.2d 345 (La. App. 5 Cir. 2008), *writ denied* 990 So.2d 780, 781 (La. 2009).

¹⁰⁴¹A denial of a claimant's claim can be the subject of a motion to vacate. *See* Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001).

months under the Louisiana Binding Arbitration Act.¹⁰⁴² Generally, the vacatur motion is filed in state court, even if the FAA applies to the consumer transaction, unless there is independent federal subject matter jurisdiction for the motion.

Statutory grounds to vacate may be raised in response to a suit for confirmation if they are raised within the statutory deadlines for motions to vacate. The statutes say that the motion must be “served” within the 90 day (federal) or 3 month (Louisiana) delay period. Many creditors wait until the expiration of the deadlines for motions to vacate before filing their suits to confirm. This strategy limits the defenses available to the consumer. The arbitration statutes create a trap for the unwary. You may think a client who just received a suit to confirm has X days to respond. However, it is possible that the 90 day period to raise a “motion to modify, correct or vacate” defenses will run before the X days to answer the suit and preclude any defenses the consumer had. Note that both federal and state law state that a “motion” may be used to seek vacatur of an arbitration award.

An arbitration award is not a final judgment unless and until confirmed by a court. Thus, an unconfirmed arbitration award does not preclude, by operation of *res judicata*, a subsequent action for contempt for violation of a court order.¹⁰⁴³

5.8 PROS AND CONS OF ARBITRATION FOR CONSUMERS

Generally, consumers will want to oppose arbitration for many reasons, e.g., the prohibitive costs, lack of discovery and appeal rights, bias of the arbitral forum, etc., if they can. However, in some cases, it may be in the consumer’s interest to compel arbitration. If the creditor files suit, rather than an arbitration claim, the consumer may except to the suit on prematurity or seek to stay the suit.

For more information on contesting arbitration agreements and also on conducting arbitrations, see generally NCLC, *CONSUMER ARBITRATION AGREEMENTS* (6th ed. 2011). This NCLC manual has many briefs for the various arguments to attack an arbitration agreement.

6. GOVERNMENT LAW ENFORCEMENT AGENCIES

6.1 OVERVIEW

There are several government law enforcement agencies that can help consumers: the Federal Trade Commission, the Consumer Financial Protection Bureau, the Louisiana Attorney General, the Louisiana Insurance Commissioner and local district attorney economic crime units. Also, there are opportunities for consumer law attorneys to collaborate with government law enforcement agencies.

6.2 FEDERAL TRADE COMMISSION (FTC)

Section 5 of the Federal Trade Commission Act authorizes the Federal Trade Commission to investigate and prosecute unfair and deceptive trade practices and to promulgate rules against such practices. The FTC’s webpage, www.ftc.gov, has a page for consumers and advocates to file complaints against businesses or individuals who engage in unfair and deceptive business practices. The FTC webpage also has a searchable index of its enforcement actions and orders by defendant, and helpful briefs. So, you can check to see what has been held to be unlawful and who has been the subject of FTC enforcement actions.

¹⁰⁴² 9 U.S.C. § 12; La. R.S. 9: 4213.

¹⁰⁴³ Interdiction of Wright, 75 So.3d 893 (La. 2011).

The FTC webpage has a wealth of consumer law information. You can order their publications for use in consumer education. There is a comprehensive guide for attorneys on how to help clients with identity theft. (See www.idtheft.gov/probono). The FTC promotes collaboration with legal services providers and has a listserv for its legal services providers collaborative, which consumer attorneys should join.

6.3 CONSUMER FINANCIAL PROTECTION BUREAU (CFPB)

In the Dodd-Frank Act of 2010, Congress established the Consumer Financial Protection Bureau. The CFPB's broad powers under the Dodd-Frank reforms include oversight, regulation and enforcement of consumer financial protection laws. The CFPB is now responsible for most federal consumer finance regulations, e.g., the Truth-in-Lending Act, Fair Credit Reporting Act, Equal Credit Opportunity, Home Mortgage disclosures, Mortgage Assistance Relief Services, etc.¹⁰⁴⁴ The CFPB's webpage is www.ConsumerFinance.gov, and it takes complaints from consumers on credit cards, mortgages, bank accounts and services and private student loans. The CFPB is also interested in collaboration with consumer advocates.

6.4 LOUISIANA ATTORNEY GENERAL

The Louisiana Attorney General has the authority to enforce the Louisiana Unfair Trade Practices Law, La. R.S. 51: 1401 *et seq.* The Attorney General may seek injunctive relief against unfair and deceptive trade practices. The Attorney General has a consumer protection hotline to take consumer complaints.

6.5 LOUISIANA INSURANCE COMMISSIONER

The Louisiana Insurance Commissioner accepts insurance complaints from consumers about insurance companies and adjusters and enforces insurance laws. The Commissioner's Office of Consumer Advocacy responds to consumers' complaints about violations of insurance law and the policyholder's Bill of Rights, La. R.S. 22: 41. The OCA may provide remedies for violations of La. R.S. 22: 1892 in the handling of an insurance claim. The Commissioner regularly publishes Consumer Alerts. Its webpage, www.lti.state.la.us, has a search function for insurance companies' agents for service of process.

6.6 DISTRICT ATTORNEYS

Many parish district attorneys prosecute violations of criminal law for consumers who have been ripped off. Larger parish district attorneys may have an economic crime unit. Conviction of an economic crime defendant may lead to an order of restitution for the victim.

¹⁰⁴⁴For discussion of the CFPB's regulations, see NCLC, FEDERAL DECEPTION LAW, ch. 3 (1st ed. 2012) *Consumer Financial Services Answer Book 2012-13* (Practising Law Institute 2012).

