Louisiana Law Review

Volume 37 | Number 2
The Work of the Louisiana Appellate Courts for the 1975-1976 Term: A Symposium
Winter 1977

Public Law: Consumer Law

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Repository Citation
Ronald L. Hersbergen, *Public Law: Consumer Law*, 37 La. L. Rev. (1977)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol37/iss2/17

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CONSUMER LAW

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TRUTH IN LENDING

Most disclosure statements given to customers or prospective customers pursuant to Title I of the Federal Consumer Credit Protection Act of 1968[1] contain an acknowledgment of receipt thereof to be signed by the consumer. Where liability for an alleged failure by the creditor to disclose is asserted against an assignee of the underlying obligation, acknowledgment of receipt can be conclusive proof that the required disclosure statement was delivered to the person entitled under the law to receive it.[2] In failure to disclose actions involving the original creditor in a transaction secured by an interest in real property, the acknowledgment creates no more than a rebuttable presumption that the disclosure statement was delivered.[3] In other cases involving the original creditor, the act does not expressly provide any presumptions or burden of proof revolving around a signed acknowledgment, and in such cases the First Circuit has said in *College Park Credit Corporation v. Aitkens*[4] that the burden of proof is as in any other case.[5] One of the defendant borrowers in *Aitkens* testified that he had no recollection of the loan transaction; the other testified that she had kept all the papers relative to the transaction in a folder, but that no copy of the disclosure statement resided therein. Neither denied that a copy of the disclosure statement was received. The First Circuit, treating the acknowledgment as prima facie proof of delivery of the required disclosures, affirmed the ruling of the trial judge that the defendants' testimony was not sufficient to rebut the plaintiff's evidence of delivery.

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1. 15 U.S.C. §§ 1601 *et seq.* (1970).

2. *Id.* § 1641. The acknowledgment may also, under § 1641, be conclusive proof that the statement complies with the statute, insofar as liability of the assignee is concerned. Summary judgment for an assignee may be appropriate. *See* Chrysler Credit Corp. v. Barnes, 126 Ga. 444, 191 S.E.2d 121 (Ga. App. 1972). Assignees may lose the presumption as to compliance if there is a violation of the disclosure requirements "apparent on the face" of the disclosure statement. 15 U.S.C. § 1641 (1970); Austin v. Ohio Furniture Co., CONS. CRED. GUIDE (CCH) ¶ 99,610 (N.D. Ohio 1970) (Transfer Binder).

3. 15 U.S.C. § 1635(c) (1970). *Cf.* Gillard v. Aetna Fin. Co., 414 F. Supp. 737 (E.D. La. 1976).

4. 317 So. 2d 238 (La. App. 1st Cir. 1975).

5. As a general matter, the federal act does not disturb local law—substantive or procedural. *Cf.* 15 U.S.C. § 1610(a)-(b) (1970).

In another Fourth Circuit case, the defendant-borrower who equivocated about his signature on an acknowledgment of receipt clause not only lost on that issue but also lost on his substantive charge that no disclosure had been made to him, as required by 15 U.S.C. § 1605(c).[6] But the court, in *Bud Finance Co. v. Gilardi*,[7] ruled that defendant did sign the acknowledgment of receipt, held that defendant was presumed to know the contents of the disclosure statement, the court stating "[o]ne cannot avoid an obligation merely by contending that he had not read it, or that it was not read and explained to him, or that he did not understand its provisions."[8]

While the rule that the signer of a written instrument is presumed to know its contents is said by the Fourth Circuit to be well-established,[9] reliance on that principle in the Truth in Lending context is ill-advised in the absence of consideration of other provisions of the law and of its regulatory partner, Regulation Z. The act requires that disclosures be made "clearly and conspicuously, [and] in accordance with the regulations of the [Federal Reserve] Board";[10] and provides that the Board *may* permit use of *terminology* different from that used in the Act itself.[11] The Board, in Regulation Z, adds the requirements that the disclosure must be made "in meaningful sequence . . ., and at the time and in the terminology prescribed in applicable sections";[12] that where the terms "finance charge" and "annual percentage rate" are required to be used, they are to be printed "more conspicuously than other terminology required";[13] that while a creditor may supply additional (*i.e.*, non-required) information or explanations with the required disclosures, "none shall be stated, utilized, or placed *so as* to mislead or confuse the customer or contradict, obscure, or detract

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6. 15 U.S.C. § 1605(c) (Supp. 1968) in relevant part states:

> Charges or premiums for [credit] insurance . . ., shall be included in the finance charge unless a clear . . . statement . . . is furnished . . . stating that the [consumer] . . . may choose the person through which the insurance is to be obtained.

7. 330 So. 2d 622 (La. App. 4th Cir. 1976).

8. *Id.* at 624.

9. The court cites *Jayco Sales and Serv., Inc. v. Smith*, 303 So. 2d 554 (La. App. 1st Cir. 1974), and *Ideal Loan of New Orleans, Inc. v. Johnson*, 218 So. 2d 6 (La. App. 4th Cir. 1969).

10. 15 U.S.C. § 1631(a) (Supp. 1974).

11. *Id.* § 1632(a) (Supp. 1974).

12. 12 C.F.R. § 226.6(a) (1976). *See* Allen v. Beneficial Fin. Co., 531 F.2d 797 (7th Cir. 1976).

13. *Id.* The section also states that all numerical amounts and percentages "shall be stated in figures and shall be printed in not less than the equivalent of 10 point type, .075 inch computer type, or elite size typewritten numerals, or shall be legibly handwritten."

attention from the information required . . . to be disclosed";[14] and that any creditor electing to combine inconsistent disclosures required under state law[15] with the federally required disclosures may do so *only* in accordance with the format set forth in Reg. Z, § 226.6(c).[16] In short, the requirements of *form* are as important as those of substance in the Truth in Lending context,[17] so that the statute and Regulation Z must have been complied with in order to say, as in *Gilardi*, that the signer is presumed to have read and understood the instrument signed. If those requirements have not been met, it is no defense to liability under the act to show that the document in fact contains the *information* required to be disclosed, or that the signer in any event understood the contents of the document perfectly and was not misled.

Three important issues of Truth in Lending law were also before the Fourth Circuit in *Termplan Mid-City, Inc. v. Laughlin*:[18] first, whether a defendant borrower may raise as a set-off the alleged failure of the creditor to meet the requirements of Truth in Lending, where the alleged violations would be prescribed under § 1640(e)[19] of the act; second, whether a creditor, to be in compliance with Reg. Z, § 226.8(d)(3),[20] must disclose that the finance charge includes only interest; and third, whether a statutorily required rebate of unearned (precomputed) interest upon acceleration of payment (or prepayment) is tantamount to an "additional charge upon default" and required to be disclosed as such.

The Fourth Circuit found the first issue to be a relatively uncomplicated application of Article 424 of the Code of Civil Procedure, which would clearly permit a defendant to raise various prescribed claims as a set-off to the amount due on a defaulted loan.[21] Whether Art. 424 would permit a

14. *Id.* § 226.6(c) (1976) (Emphasis added).

15. *Id.* § 226.6(b) (1976).

16. *Id.* § 226.6(c) (1976). The regulation also requires that all "inconsistent" disclosures appear separately and below a conspicuous "demarcation line" and be identified as such by a clear and conspicuous heading. *Id.* § 226.6(c)(2)(iii) (1976).

17. *See, e.g.*, Pennino v. Morris Kirschman & Co., 526 F.2d 367 (5th Cir. 1976); Powers v. Sims & Levin Realtors, 396 F. Supp. 12, 20 (E.D. Va. 1975); Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270 (S.D. N.Y. 1971).

18. 333 So. 2d 738 (La. App. 4th Cir. 1976).

19. 15 U.S.C. § 1640(e) (1970).

20. The section required, where "applicable," the disclosure of "the total amount of the finance charge, with [a] description of each amount included." By amendment effective August 6, 1976, the section now requires disclosure of the total amount of the finance charge "and where the total charge consists of two or more types of charges, a description of the amount of each type." *See* 41 Fed. Reg. 28,945-46 (1976).

21. The court cites article 424, and *Young v. Fremin-Smith, Inc.*, 265 So. 2d 341

prescribed civil penalty for violations of Truth in Lending to be raised as a set-off in a federal court, however, may not be as uncomplicated as it appears. One decision suggests that in a federal court § 1640(e) is *jurisdictional*;[22] if that decision is correct, this part of the *Termplan* case bears re-evaluation.

With regard to the second problem of disclosures of a single-component finance charge, the Fourth Circuit held, in reliance upon *Gibson v. Family Finance Corp. of Gentilly, Inc.*,[23] and interpretations and staff opinion letters of the Federal Reserve Board,[24] that a description of each

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(La. App. 4th Cir. 1972). The *Fenton* decision did not discuss § 1640(h), which section, as amended, states: "A person may not take any action to offset any amount for which a creditor is potentially liable to such person under subsection (a)(2) of this section against any amount owing to such creditor by such person, unless the amount of the creditor's liability to such person *has been determined* by judgment of a court of competent jurisdiction in an action to which such person was a party." [Emphasis added].

The Fourth Circuit subsequently has interpreted the section to mean that a § 1640 civil penalty claim could be determined by a Louisiana state court, as a court of competent and concurrent jurisdiction, and set off by the consumer against the creditor. *See* Reliable Credit Serv., Inc. v. Bernard, 339 So. 2d 952 (La. App. 4th Cir. 1976).

22. Fenton v. Citizens Sav. Ass'n, 400 F. Supp. 874 (C.D. Mo. 1975). The Fourth Circuit Court of Appeal had the opportunity in *Reliable Credit Serv., Inc. v. Bernard*, 339 So. 2d 952 (La. App. 4th Cir. 1976), to both reaffirm the set off portion of the *Termplan* opinion, and to distinguish the *Fenton* decision on the basis that the federal court was "simply passing on its own lack of jurisdiction," *id.* at 954, and that the *Fenton* limitation emphasized initiation of a § 1640 claim.

23. 404 F. Supp. 896 (E.D. La. 1975).

24. The Board has taken the position that "opinion" or "advisory" letters written by FRB staff members in response to inquiries from creditors, lawyers, or the general public represent only "the informed view of the particular official responding to the inquiry, who is authorized by the Board to express opinions on the particular subject," and does not necessarily represent "the position the Board members themselves would take if they formally considered the issue." FRB Letter of March 1, 1971, by Kenneth A. Kenyon, Deputy Secretary, in 5 CONS. CRED. GUIDE (CCH) ¶ 30,640; FRB Letter of December 2, 1969, by J.L. Robertson, 5 CONS. CRED. GUIDE (CCH) ¶ 30,505. The Kenyon letter states, however, that the Board believes the public "is entitled to rely on [an informal] staff opinion unless and until it is altered by the Board after formal consideration." *See also* Philbeck v. Timmers Chevrolet, Inc., 499 F.2d 971, 978 (5th Cir. 1974); Bone v. Hibernia Bank, 493 F.2d 135, 139 (9th Cir. 1974) (FRB construction of Regulation Z entitled to "deference"); Stefanski v. Mainway Budget Plan, Inc., 326 F. Supp. 138 (S.D. Fla. 1971), *rev'd on other grounds*, 456 F.2d 211 (5th Cir. 1972) (characterizing such correspondence as "persuasive . . . [but] not binding authority as to questions of interpretations of federal law"); Barksdale v. People's Fin'l Corp., 393 F. Supp. 112 (N.D. Ga. 1975) (FRB Interpretation of Regulation Z in opinion letter entitled to "great deference"); Bloomer v. McKnight Road Dodge, Inc., 397 F. Supp. 403 (W.D. Pa. 1975) (FRB letters entitled to "great weight" as constituting part of the body of "informed

amount included in the finance charge is necessary under Reg. Z, § 226.8(d)(3)[25] *only* when the total charge includes more than one element.[26] So, if the finance charge consists of only one element, *e.g.* interest, or "time-price differential," a disclosure of the total dollar amount of that charge, using the term "finance charge" would comply with § 226.8(d)(3)—there would be no requirement that the creditor disclose that the single component comprising the finance charge is the only component thereof. The opinion observes in a note to the text that the issue is not one on which the various federal courts are in agreement, though one is inclined to wonder why there should be a dispute on the issue when Reg. Z, § 226.8(d)(3) expressly states that a description of each amount included in the finance charge is only required to be given where such an item of information is "applicable" to the transaction.[27]

The third issue, arising by virtue of the requirements of the Louisiana Consumer Credit Law, R.S. 9:3529, that unearned interest be rebated to the borrower upon prepayment or acceleration of the debt, was also resolved by the Fourth Circuit in favor of the creditor. Regulation Z, § 226.8(b)(4),

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experience and judgment of the agency to whom Congress delegated appropriate authority"). The United States Supreme Court has ruled, in reference, however, to the FRB's Regulation Z itself, that "courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority," *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 372 (1973), but the status of the informal staff opinion letter has grown in light of the Court's statement.

25. *Compare* 12 C.F.R. § 226.8(d)(3) (1976) *with* 15 U.S.C. § 1638(a)(6) (1970).

26. Four federal court decisions seemingly disagree with the conclusion reached in *Gibson*; see Ives v. W. T. Grant Co., 522 F.2d 749 (2d Cir. 1975); Lewis v. Walker-Thomas Furniture Co., 416 F. Supp. 514 (D.C. Cir. 1976); Johnson v. Associates Fin., Inc., 369 F. Supp. 1121 (S.D. Ill. 1974); Meyers v. Clearview Dodge Sales, Inc., 384 F. Supp. 722, 726 (E.D. La. 1974). *Adams v. New Haven U.I. Fed. Credit Union*, 5 CONS. CRED. GUIDE (CCH) ¶ 98,619 (D. Conn. 1975), *St. Germain v. Bank of Hawaii*, 413 F. Supp. 587 (D. Hawaii 1976), and *Bloomer v. McKnight Road Dodge*, 397 F. Supp. 403 (W.D. Pa. 1975), are in accord with *Gibson*. As amended, § 226.8(d)(3) would appear to adopt the *Gibson* consruction. See note 20, *supra*. *Compare* Simmons v. American Budget Plan, Inc., 386 F. Supp. 194 (E.D. La. 1974) *with* Gillard v. Aetna Fin. Co., 414 F. Supp. 737 (E.D. La. 1976).

27. *Cf.* Philbeck v. Timmers Chevrolet, Inc., 499 F. 2d 971 (5th Cir. 1974). *Johnson v. Associates Fin., Inc.*, 369 F. Supp. 1121, 1122 (S.D. Ill. 1974), adopts the view that the failure to disclose interest as the only component of the finance charge is a violation of the general "meaningfulness" standard of the law (15 U.S.C. § 1601). The opinion does not mention the contrary position of the FRB Letters. The court is probably wrong, since § 1601's "meaningful disclosure" language is a statement of Congress's purpose in regard to the various required disclosures, which the act itself says are required "to the extent applicable." *See* 15 U.S.C. § 1639(a) (1970). *But see* Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270, 275 ("applicable" equated with "relevant").

requires that in any extension of credit other than open-end credit, the creditor disclose "the amount, or method of computing the amount, of any default, delinquency or similar charges payable in the event of late payments." Of course, where there exists the right of the creditor to accelerate future installment payments, application of § 3529 of the Louisiana Consumer Credit Law produces the following equation: late payments equals default, which equals right to accelerate, which equals unearned interest, which equals consumer's right to a rebate, all of which leads to the "Rule of 78's" or the "Sum of the Digits" method of computing that rebate. *Identification* of the "method of computing any unearned portion of the finance in the event of prepayment" is a required disclosure under Reg. Z, § 226.8(b)(7), and the battle over merely identifying that method as "The Rule of 78's" versus an explanation of the rule is long concluded.[28] Those who represent consumers also tried unsuccessfully to characterize the method of computing the rebate, *i.e.*, the Rule of 78's, as itself constituting a "default, delinquency, or similar [charge] payable in the event of late payments" under Reg. Z, § 226.8(b)(4)[29]—presumably because the rebate as calculated under the Rule of 78's can result in an amount rebated considerably less than would result from, for example, a pro rata or actuarial method of computation.[30] The argument in *Termplan*, whereby the creditor's right to accelerate payment becomes a required disclosure under

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28. *See* Reg. Z, 12 C.F.R. § 226.818 (1976) (FRB interpretation of § 226.8(b)(7)); Bone v. Hibernia Bank, 493 F.2d 135 (9th Cir. 1974); McDaniel v. Fulton Nat'l Bank, 395 F. Supp. 422 (N.D. Ga. 1975); Powers v. Sims & Levin Realtors, 396 F. Supp. 12 (E.D. Va. 1975). A decision from the Southern District of Illinois, *Johnson v. Associates Fin. Inc.*, 369 F. Supp. 1121 (S.D. Ill. 1974), reverted to the contrary view that a mere identification of the Rule of 78's has no meaning for consumers—a position of some merit—but the court itself attempts unsuccessfully to succinctly explain the Rule in its own opinion, and the FRB Interpretation to the contrary was ignored in the opinion.

29. *See* Reg. Z, 12 C.F.R. § 226.818 (1976) (FRB interpretation of § 226.8(b)(7) (1976); Bone v. Hibernia Bank, 493 F.2d 135 (9th Cir. 1974). *Cf.* Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257 (3d Cir. 1975). The Fifth Circuit takes the view that the right to accelerate is not a "default" charge under § 226.8(b)(4). *See, e.g.*, McDaniel v. Fulton Nat. Bank, 4 CONS. CRED. GUIDE (CCH) ¶ 98,562 (N.D. Ga. 1975); Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511 (5th Cir. 1976); Grant v. Imperial Motors, 539 F.2d 506 (5th Cir. 1976); Martin v. Commercial Securities, 539 F.2d 521 (5th Cir. 1976). *See generally* Hewson, *Acceleration Clauses in Georgia: Consumer Installment Contracts and the Federal Truth-in-Lending Act*, 27 MERCER L. REV. 969 (1976).

30. The rule of 78's also has been theorized as a "penalty charge" under Reg. Z, 12 C.F.R. § 226.8(b)(6) (1976). *See* Kenney v. Landis Fin's Group, Inc. 349 F. Supp. 939 (N.D. Iowa 1972). But the FRB and the Ninth Circuit disagree, see Reg. Z, 12 C.F.R. § 226.818 (1976), and Bone v. Hibernia Bank, 493 F.2d 135 (9th Cir. 1974).

Reg. Z, § 226.8(b)(4), is perhaps another extension of the same reasoning.[31] In ruling against such a construction of Regulation Z, the Fourth Circuit again relied upon a federal court decision[32] and an FRB Staff opinion letter.[33] As the court observes, however, there is considerable disagreement on the issue;[34] but a failure to make the required rebate would in any event be both a violation of the Louisiana Consumer Credit Law and a disclosable "charge" for late payment under Reg. Z, § 226.8(b)(4).

THE LOUISIANA CONSUMER CREDIT LAW

The Louisiana Consumer Credit Law is a definition-oriented enactment, section 3516 containing thirty-one key definitions. Even so, some terms are not defined by the act, including "delinquency charge," "deferral charge," "emergency" home solicitation sales, and "amicable" demand by a creditor. The decision of the Second Circuit in *Southern Equipment & Tractor Co. v. McCullen*,[35] permits the inference that such words and terms are not fatally vague, but rather will be viewed by the courts as words of common usage, needing no interpretation beyond their plain meaning.[36]

31. Yet another extension of the reasoning would say that a failure to disclose the right to accelerate is a violation of the "meaningful disclosure" standard. *See* Woods v. Beneficial Fin. Co., 395 F. Supp. 9, 16 (D. Ore. 1975); Meyers v. Clearview Dodge Sales, Inc., 384 F. Supp. 722, 726 (E.D. La. 1974). *Cf.* Johnson v. Associates Fin., Inc., 369 F. Supp 1121 (S.D. Ill. 1974).

32. Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257 (3d Cir. 1975). *See also* Frank v. Reserve Consumer Discount Co., 398 F. Supp. 703 (W.D. Pa. 1975); Jones v. East Hill Ford Sales, Inc., 398 F. Supp. 402 (W.D. Pa. 1975), *aff'd* 532 F.2d 746 (3d Cir. 1976).

33. 12 C.F.R. § 226.8(b)(4) (1976); FRB Letter of October 22, 1974, by Frederick Solomon, in 5 CONS. CRED. GUIDE (CCH) ¶ 31,173. *See also* Jones v. East Hills Ford Sales, Inc., 389 F. Supp. 402 (W.D. Pa. 1975), *aff'd* 532 F.2d 746 (3d Cir. 1976).

34. Some decisions are in accord with the no disclosure ruling of *Termplan* and *McCrackin-Sturman Ford*. *See* St. Germain v. Bank of Hawaii, 413 F. Supp. 587 (D. Hawaii 1976); Barrett v. Vernie Jones Ford, Inc., 395 F. Supp. 904 (N.D. Ga. 1975); Washington Motor Sales v. Ferreira, 131 N.J. Super. 328, 329 A. 2d 599 (1974), *aff'd* 357 A.2d 17 (1976). Others appear to require a disclosure of the acceleration right, apparently on the basis that without it, the consumer does not receive a "meaningful" disclosure, see Kessler v. Associates Fin'l. Serv. Co., 405 F. Supp. 122 (D. Hawaii 1975); Meyers v. Clearview Dodge Sales, Inc., 384 F. Supp. 722 (E.D. La. 1974); Garza v. Chicago Health Clubs, Inc., 347 F. Supp. 955 (N.D. Ill. 1972). For an excellent discussion of the evolution of the issue, see Judge Pence's opinion in the *St. Germain* case, 413 F. Supp. 587, 594-604 (D. Hawaii 1976); and Galie, *The Acceleration Clause as a Truth in Lending Disclosure: The End of the Dilemma?*, 93 BANK. L.J. 317 (1976). See also note 20, *supra*.

35. 319 So. 2d 511 (La. App. 2d Cir. 1975).

36. *Id.* at 515. *Cf.* Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257, 265-66 (3d Cir. 1975).

Before the court in *McCullen* were the terms "extension of consumer credit," "consumer purchaser" and "open-end credit or similar account" from former R.S. 9:3509, repealed by the Louisiana Consumer Credit Law of 1972. All three of the terms disputed in *McCullen* are now defined, directly or indirectly, under the new law.[37]

UNFAIR AND DECEPTIVE PRACTICES

The Louisiana Unfair Trade Practices and Consumer Protection Law[38] declares that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[39] The quoted language is unmistakably patterned upon Section 5 of the Federal Trade Commission Act. By adopting the broad and non-specific approach of the federal law the Louisiana legislature intended that Louisiana courts should consider interpretations of the FTC Act by the Federal Trade Commission and by the federal courts in determining the scope and application of the Louisiana law, and the First Circuit Court of Appeal of Louisiana has so held in *Guste v. Demars*.[40] Whether, pursuant to the well-established rule of statutory construction[41] recognized in *Demars*, such federal interpretations are held to be "compelling," "persuasive," or merely "relevant,"[42] the *Demars* case clearly shows that the federal case law brought to bear on the case under the Louisiana act is a two-way street.

Pursuant to the Louisiana act, the Attorney General sought in *Demars* to enjoin a roofing contractor from representing to prospective customers that its roofing work would be done in a "workmanlike manner" and from guaranteeing the work. The action was premised upon complaints made by three of defendant's customers to the Governor's Office of Consumer Protection, the complaint in each instance relating to a defective roof installed by defendant. The Attorney General cited the court to several favorable FTC decisions involving misrepresentations and false guarantees, but the First Circuit, in affirming the decision, was able to distinguish all

37. *See* LA. R.S. 9:3516(8), (10), (11), (13), (16), (18), (22), (23), (24), (25) (Supp. 1972).

38. LA. R.S. 51:1401 *et seq.* (Supp. 1972).

39. *Id.* § 1405(A) (Supp. 1972).

40. 330 So. 2d 123 (La. App. 1st Cir. 1976).

41. *See* State v. Macaluso, 235 La. 1019, 106 So. 2d 455 (1958); Standard Oil Co. v. Collector of Revenue, 210 La. 428, 27 So. 2d 268 (1946); Broussard v. State Farm Mut. Auto. Ins. Co., 188 So. 2d 111, 119-20 (La. App. 3d Cir. 1966); State v. Baddock, 170 So. 2d 5, 12 (La. App. 1st Cir. 1964).

42. In the *Demars* opinion the First Circuit cites the *Baddock* case, 170 So. 2d 5 (La. App. 1st Cir. 1964), and seemingly treats the federal interpretations as relevant and intended by the legislature as worthy of consideration.

such cases, either on the basis that the defendant contractor had demonstrated on numerous occasions the ability to perform roofing jobs in a workmanlike manner, or on the basis that the alleged refusal to repair defects was not indicative of a concerted effort to systematically defraud consumers.[43]

THE LESSEE DEPOSIT LAW

In a prior symposium article this author noted that the lessee deposit statute[44] was unclear as to the requisite specificity of the lessor's reasons for retention of all or any portion of a lessee's deposit.[45] The opinions of the Fourth Circuit Court of Appeal in *O'Brien v. Becker*[46] and *Lugo v. Vest*[47] have shed some light on that issue. Lessor in *O'Brien* responded in a timely fashion to the written demand of former lessees for the return of a security deposit of $50.00, but lessor refused the demand upon the basis that the former lessees "did leave considerable damage." The court held that the lessor failed to comply with the dual requirements of R.S. 9:3251 of an itemized statement accounting for the retained proceeds[48] and a statement of the reasons therefor. Accordingly, since the lessor had neither returned the deposit nor furnished an itemized statement with reasons for retention in a timely fashion, the court held that the failure to comply with R.S. 9:3251 was "willful" within the meaning of R.S. 9:3252. The decision may place the Fourth Circuit at variance with the First Circuit's recent decision in *Garb v. Clayton-Kent Builders, Inc.*,[49] in which it was held that a lessor's retention of deposit as necessary to "clean and vacuum the apartment" was

43. On the facts, the Attorney General's case was less than solid—defendant either offered to repair the leaking roof in each of the three complaint instances, or (as the testimony revealed) stood willing to do so, but was not permitted to do so by the homeowners in two of the cases, and apparently this was also true in the third. It appeared then, that the court's refusal to enjoin the defendant could have been based on either the inapplicability of the federal cases cited, or on the lack of evidence of falsity of the representations. The reason for the Attorney General's action against the defendant, however, may have had something to do with the fact that all three complainants were women—presumably widows.

44. LA. R.S. 9:3251-54 (Supp. 1974).

45. See *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Consumer Law*, 35 LA. L. REV. 384 & n.66 (1975).

46. 332 So. 2d 563 (La. App. 4th Cir. 1976).

47. 336 So. 2d 972 (La. App. 4th Cir. 1976).

48. Receipts for $173.15 for the expense of "general cleaning, painting and repairing" the premises were attached to the lessor's letter in response to the tenants' written demand, but the court dismissed the receipts as relating to normal wear incident to over four years of occupancy of the subject premises.

49. 307 So. 2d 813 (La. App. 1st Cir. 1975).

sufficient under R.S. 9:3251 without a stated reason why the work was necessary vis-à-vis "unreasonable wear."[50] The Fourth Circuit might find such a response lacking in specificity, as in *O'Brien*. In addition, the Fourth Circuit gave notice in the 1974 term in *Calix v. Whitson*[51] that it would not permit a "specious, arbitrary and capricious" reason for retention, regardless of specificity.

The answers of the lessor to interrogatories in *O'Brien* revealed that the premises had been "damaged" by cigarette burns in the living room carpet, mercurochrome stains on drapes and marks on the floor tiles in the kitchen where a refrigerator had been located. As to the latter item of damage the court concluded that the damage was not shown to have been the result of unreasonable wear, but the former two items were apparently resolved as a matter of the weight of the evidence without resort to the legal issue of unreasonable wear. Given the apparent willingness of lessors to contest the issue in the Louisiana courts of appeal even over relatively trivial amounts of money,[52] the issue of unreasonable wear seems certain to be raised often in the future. Stained drapes and cigarette burns in carpeting will be typical, perhaps, of the kind of lessor-lessee deposit squabble that will send each party to the nearest Yellow Pages section of the telephone directory.

The question becomes: What evidence that he has actually *lived* on the premises may a lessee leave behind, without running afoul of the "un-

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50. The *Garb* case is susceptible to criticism on two bases: first, the specified "damage" appeared to be short of "unreasonable wear" and, second, permitting the lessor to use the general language "clean and vacuum" would allow the very thing the statute seeks to prevent—the arbitrary withholding of deposits, a purpose recognized by the court itself. *See id.* at 815. The opinion in *Garb* does state that the "itemized statement" language of the statute requires "categorical specification which reasonably apprises Lessee of the nature of the elements of wear and tear involved," *id.* at 815, and that what the law envisions is a separate listing of each aspect of wear and tear such as painting, repair of wallpaper or plastered walls, repair to plumbing, lighting fixtures or repair or replacement of broken or damaged items. The problem is that some listings are descriptive in terms of "unreasonable wear" while others are not. For example, "repair hole in wall," "replace broken window pane," and the like, are descriptive in terms of unreasonable wear, but "clean and vacuum the apartment," or "paint walls" are not so descriptive.

51. 306 So. 2d 62, 64 (La. App. 4th Cir. 1974).

52. *See* O'Brien v. Becker, 332 So. 2d 563 (La. App. 4th Cir. 1976) ($50 deposit; lessee awarded $200 penalty plus $400 attorney's fees); Garb v. Clayton-Kent Builders, Inc., 307 So. 2d 813 (La. App. 1st Cir. 1975) ($50 deposit; lessee not prevailing); Calix v. Whitson, 306 So. 2d 62 (La. App. 4th Cir. 1974) ($150 deposit; lessee awarded $200 penalty plus $200 attorney's fee); Bradwell v. Carter, 299 So. 2d 853 (La. App. 1st Cir. 1974) ($50 deposit; lessee awarded $200 penalty).

reasonable wear'' hurdle? Existing case law in Louisiana is of little aid on the issue.[53] The Fourth Circuit in *Lugo* observed, in a case involving a ''damage'' or unreasonable wear claim for three small holes in a rear screen door, that the standard is flexible:

> In each of these kinds of cases, the trial court, hearing the testimony and observing the demeanor of the witnesses, has the difficult job of drawing a fine line between the landlord's comprehensible overzealousness in his own behalf and a calculated intention to disadvantage an unsuspecting or unenlightened tenant. In such instances, small differences in factual conclusions can, of course, precipitate large differences in judicial result. Whether or not substantial charges for the replacement of a few light bulbs and the patching of a couple of small holes in screens falls into the first or the second category is a determination properly left to the trier of the facts who saw and heard the witnesses. We can conceive of situations where, depending on the amount of rent charged and the kind of premises rented, such charges might fall into the first category described instead of the second. In this case at any rate, the able trial court has made a determination that such ''charges'' triggered the application of the protective provisions of the applicable statutes, and our review of the record signals no compelling reason for us to substitute our judgment for his. Quite the contrary, we are in agreement with him, for, in our view, the record discloses a landlord who might, at best, be described as arbitrarily overzealous and who might be more even handedly described as clearly embarked upon the very conduct which LSA-R.S. 9:3251, *et seq.*, seeks to proscribe.[54]

The Fourth Circuit may be developing the laudable theory that the listing of normal items of maintenance such as holes in screen doors and replacement of light bulbs are merely ploys by overreaching lessors, to be scrutinized closely in the courts.

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53. *See* Urban Management Corp. v. Ford Motor Credit Co., 263 So. 2d 404 (La. App. 2d Cir. 1972) (commercial lease). *See also* LA. CIV. CODE arts. 2719-23; 1974-1975 LA. OP. ATT'Y GEN. 92 (1975).

54. Lugo v. Vest, 336 So. 2d 972, 973 (La. App. 4th Cir. 1976).