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COMMENTS

STIPULATED ATTORNEY'S FEES: A COMPROMISING POSITION

Suppose an attorney performs the collection work for a financial institution. The fee for his collection services is fixed at a percentage of the amount to be collected in the note.¹ Over a period of one year the attorney has been unable to collect any fee from the dozen or so collection cases he has had, primarily because of the insolvency of the various debtors.

When the attorney is about to become insolvent himself, he is handed a collection case which involves an outstanding debt of \$100,000. To the delight of the attorney, the debtor is completely solvent. The note has a twenty-five percent attorney's fees provision, and the attorney eagerly looks forward to collecting his \$25,000 fee. Unfortunately, the solvent debtor objects to such an "excessive" fee in comparison to the actual work performed by the attorney on this one collection case.

Is anyone entitled to the attorney's fees stipulated in the note? May a court inquire into the reasonableness of these attorney's fees? And finally, does the fee belong to the creditor or his attorney?

In 1982, the Louisiana Supreme Court answered these questions in *Leeneris Farms, Inc. v. Rogers*,² holding that courts may inquire into the reasonableness of attorney's fees that are fixed in a note as a percentage of the amount due upon default. Since this decision, the legislature has introduced language into the Civil Code which purported to overrule the holding in *Leeneris Farms*, only to have that very language deleted by the revision of the articles on the law of obligations. Although the legislature placed the language back into the Civil Code in the following session, and in doing so specifically provided for retroactive application, all of the circuit courts of appeal who have addressed the issue, with one exception, have followed the ruling in *Leeneris*

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1. When a borrower goes to a lending institution to borrow money, he typically executes a promissory note for his debt. This note usually will contain a provision in which the maker agrees to pay the creditor's attorney's fees. These fees become payable whenever there is a default and the note is turned over to an attorney for collection. The amount of the fee will be a fixed percentage of the unpaid balance of the note. Note, Attorney's Fees Provisions and Promissory Notes, 44 La. L. Rev. 831 (1984).

2. 421 So. 2d 216 (La. 1982).

Farms rather than apply the amended Civil Code article. This battle between the legislative and judicial branches, as well as the conflict between the circuits, has only made this area of law more uncertain.

This comment will examine in detail the judicial and legislative responses to *Leenerts Farms*, evaluate the alternatives available for the resolution of the issue of stipulated attorney's fees, and, finally, suggest a possible solution.

The Present State of the Law

In 1982, the Louisiana Supreme Court granted certiorari³ to review the first circuit decision in *Leenerts Farms, Inc. v. Rogers*⁴ to resolve a direct conflict between the first and the fourth circuits over whether courts may inquire into the reasonableness of attorney's fees which have been stipulated in a note.

In *Leenerts Farms*, the plaintiff agreed in a note to pay the attorney's fees incurred in the collection of the note, including interest, fixed at twenty percent of the amount collected. When the plaintiff became delinquent in the payments on the note, the defendant instituted an executory process proceeding to enforce the mortgage on the property. The court issued a writ commanding the sheriff to seize and sell the property affected by the mortgage. Prior to the sale, the plaintiff paid the sheriff the entire requested amount, including \$72,755.26 in attorney's fees which represented twenty percent of the outstanding amount collected. The plaintiff subsequently filed suit to recover the attorney's fees from the defendant.

At the trial level, the creditors filed an exception of no cause of action which was sustained. The first circuit court of appeal affirmed, relying on *Fidelity National Bank v. Pitchford*,⁵ wherein the first circuit upheld as reasonable a twenty-five percent attorney's fees stipulation. The court in *Fidelity National Bank* followed the 1934 Louisiana Supreme Court case of *W.K. Henderson Iron Works & Supply Co. v. Merriwether Supply Co.*,⁶ in which the supreme court stated:

A stipulation for attorneys' fees in case an obligation should not be paid at maturity, and the services of an attorney are necessary for the collection thereof, is a stipulation for liquidated damages and becomes due in full when the obligation is not paid at maturity and the services of an attorney become necessary

3. 413 So. 2d 506 (La. 1982).

4. 411 So. 2d 576 (La. App. 1st Cir. 1982).

5. 374 So. 2d 149 (La. App. 1st Cir. 1979).

6. 178 La. 516, 152 So. 69 (1934).

to enforce the same, regardless of the extent or value of said services.⁷

The fourth circuit, however, in *People's National Bank v. Smith*,⁸ another case involving a twenty-five percent stipulation for attorney's fees, abandoned what they recognized as "[w]ell settled jurisprudence that the payee of a note is entitled to recover attorney fees as stipulated in the note,"⁹ and found that a fee of over \$53,000 to collect the note was unreasonable. The court reasoned that the fee violated specific provisions of the Code of Professional Responsibility¹⁰ and was therefore against public policy.

In *Leenerts Farms*, the supreme court resolved the conflict between the circuits by agreeing with the rationale of the fourth circuit. The court expressly overruled *Henderson Iron Works*, basing its holding on the constitutional authority which vests in it the power to regulate the practice of law.

The Court reasoned that:

This court's prevailing judicial authority resulted in the adoption and promulgation of the Articles of Incorporation of the Louisiana State Bar Association, which Articles came to incorporate the Code of Professional Responsibility. The Code of Profes-

7. *Id.* at 581, 152 So. at 70.

8. 360 So. 2d 560 (La. App. 4th Cir. 1978).

9. *Id.* at 563.

10. The Code of Professional Responsibility, La. R.S. 37, ch. 4, art. 16, DR 2-106 (1974), provides in pertinent part:

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

sional Responsibility which regulates attorneys' practices has been recognized as having the force and effect of substantive law. . . . Individuals cannot by their conventions, derogate from the force of laws made for the preservation of public good or good morals. La. Civil Code Art. 11. We view the Code of Professional Responsibility as being the most exacting of laws established for the public good. Hence, the prohibition against a lawyer collecting a "clearly excessive fee" cannot be abrogated by a provision in a note fixing the amount of attorney's fees as a percentage of the amount to be collected.¹¹

Thus, the court established the rule that permits judicial evaluation of the reasonableness of attorney's fees that are fixed in a note.

The Legislature responded to *Leenerts Farms* by amending former Civil Code article 1935 to read:

The damages for delay in the performance of an obligation to pay money are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more. *But when the parties, by contract in writing, have expressly agreed that a debtor shall also be liable for the creditor's attorney fees in a fixed or determinable amount, the creditor is entitled to that amount as well.*¹²

Subsequent to the amending of article 1935, the Louisiana courts of appeal were faced with a number of cases addressing the issue of stipulated attorney's fees.

In *Knighen v. Knighen*,¹³ the second circuit found that *Leenerts Farms* was "authority for the trial court to inquire into the reasonableness of an attorney's fees provision in a note, whether or not the issue is raised by the opposing party, as a matter of public policy."¹⁴ The case involved a note containing a twenty-five percent stipulation for attorney's fees, and the second circuit affirmed the trial court's judgment awarding only \$1,000 in attorney's fees despite an unpaid balance of \$48,000 on the note. The court then added an additional \$1,500 to the judgment as a reasonable fee for the attorney's appellate work.

Taking the rationale of *Knighen* one step further, the second circuit concluded in *City Bank and Trust Co. v. Hardage Corp.*,¹⁵ "that the

11. 421 So. 2d at 219.

12. La. Civ. Code art. 1935² (1983) (emphasis added). This amendment became effective August 30, 1983.

13. 447 So. 2d 534 (La. App. 2d Cir. 1984).

14. *Id.* at 543.

15. 449 So. 2d 1181 (La. App. 2d Cir. 1984).

policy inherent in the *Leenerts Farms* decision makes a judgment obtained by default in which a fee is awarded in accordance with an attorney's fee provision in a note reviewable by this court to determine if it is excessive."¹⁶ The court of appeal amended the judgment of the trial court by reducing the attorney's fees awarded from \$12,500 to \$1,500.

In *Alliance Federal Savings and Loan Association v. Eskan*,¹⁷ the fifth circuit held a twenty-five percent stipulation which resulted in an award of \$423,000 in attorney's fees to be "excessive in view of the routine nature of the proceedings."¹⁸ The case was remanded for a determination of what a reasonable fee would be.

In the fourth circuit case of *Brumfield v. Bordenove Acceptance Corp.*,¹⁹ the plaintiff brought a class action challenging the practice of stipulating fixed percentage attorney's fees in notes. Although the court recognized *Leenerts Farms*, it affirmed the trial court's dismissal on the exception of no right of action, finding that the challenged fee of \$246.08 could not be said to be unreasonably high.

The fifth circuit addressed the issue again in *Chin v. Rousset*²⁰ and again followed the rationale of *Leenerts Farms* by remanding the case to the trial court for a determination of whether twenty-five percent is a reasonable fee based on the "counsel's legal skills, experience, the complexity of the litigation, time expended, and results achieved."²¹ The court, however, noted the 1983 amendment to Civil Code article 1935, stating: "It appears the legislature has exercised its power in response to *Leenerts Farms* and would challenge the courts' exercising of the inherent constitutional power to regulate the legal profession. As the instant case was decided well before the enactment of the amendment, we need not address these questions here"²² The supreme court denied writs to review the decision.²³

The 1984 regular session of the Louisiana Legislature completely revised the obligations section (Titles III and IV of Book III) of the Civil Code.²⁴ This revision removed that part of article 1935 which was amended by Act 483 of 1983, and renumbered the remainder of article 1935 as article 2000 of the Civil Code.²⁵ It should be noted that the

16. *Id.* at 1182.

17. 450 So. 2d 767 (La. App. 5th Cir. 1984).

18. *Id.* at 769.

19. 454 So. 2d 841 (La. App. 4th Cir. 1984).

20. 456 So. 2d 673 (La. App. 5th Cir. 1984).

21. *Id.* at 679.

22. *Id.* at 678-79, n.3.

23. 459 So. 2d 540 (La. 1984).

24. 1984 La. Acts No. 331.

25. As noted by Judge Sexton in *Brass v. Minnieweather*: "The new Art. 2000 makes no provision as to attorney's fees, and the comments to this article do not reflect the reason for omission of this portion of the Article." 468 So. 2d at 614, n.1.

removal of this provision was part of an entire revision, suggesting that it may not have been a conscious effort on the part of the legislature to delete the particular language in question.²⁶ The revision became effective January 1, 1985.

After the passage of the revision of 1984, but prior to its effective date, the Louisiana Fifth Circuit Court of Appeal addressed the issue of attorney's fees in *Caplan v. Latter & Blum, Inc.*²⁷ Appellant cited *Leenerts Farms* for the proposition that attorney's fees must be reasonable, while appellee suggested that Act 483 of 1983 had legislatively overruled *Leenerts Farms*. The court of appeals agreed with the appellee, saying: "There is no question that the *Leenerts Farms* decision has been legislatively overruled."²⁸ Nevertheless, the court found that neither *Leenerts Farms* nor Civil Code article 1935 applied, because the breach of the lease predated the *Leenerts Farms* decision. The fifth circuit found the lease provision calling for attorney's fees to be controlling. The supreme court granted writs²⁹ to review the decision, but reversed on other grounds and never reached the issue of attorney's fees.³⁰

In 1985, the fourth circuit, in *Easterling v. Halter Marine, Inc.*,³¹ simply followed *Leenerts Farms* and affirmed the trial court's judgment fixing attorney's fees at less than the ten percent stipulated in the lease.

In the 1985 regular session, the legislature enacted Act 137 to amend Civil Code article 2000, reinserting the language of Act 483 of 1983 into the Civil Code. In addition, the legislature provided in section two of the Act: "The provisions of this Act are remedial and shall be applied retroactively and prospectively to any delay in performance of an obligation which has as its object a sum of money, arising prior to, on, or after the effective date of this Act."³²

This language was added presumably in response to the second circuit decisions of *City Bank and Trust*³³ and *Brass v. Minnieweather*.³⁴ In these cases, the second circuit found Act 483 of 1983 to be substantive in nature and therefore not retroactive.³⁵ The court added in *Brass*: "Because of this determination we do not reach the broad issue of

26. The passage of Act 137 of 1985, discussed *infra*, supports this conclusion.

27. 462 So. 2d 229 (La. App. 5th Cir. 1984), *rev'd*, 468 So. 2d 1188 (La. 1985).

28. *Id.* at 233.

29. 462 So. 2d 1255 (La. 1985).

30. 468 So. 2d 1188 (La. 1985).

31. 470 So. 2d 221 (La. App. 4th Cir. 1985).

32. La. Civ. Code art. 2000 (West 1986).

33. 449 So. 2d 1181 (La. App. 2d Cir. 1984).

34. 468 So. 2d 611 (La. App. 2d Cir. 1985).

35. For an interesting discussion of the effects of Section 2 of Act 137 of 1985, see Mengis, *Developments in the Law, 1984-1985—Professional Responsibility*, 46 La. L. Rev. 637, 646-48 (1986).

whether the Legislature had the authority to overrule the public policy statement of *Leenerts*.³⁶

Recently, in *Graham v. Sequoya Corp.*,³⁷ the first circuit deviated from recent jurisprudence by finding Act 483 of 1983 to be controlling, and awarded a mortgage creditor the full amount of attorney's fees stipulated in the note. The court reasoned that Act 483 undermined the *Leenerts Farms* decision, since the Act states that the creditor, and not the attorney, is entitled to the fee, thus making the provision one for liquidated damages. Since Act 483 went into effect while the suit was pending, the court had to find the Act to be retroactive in order to apply it. The supreme court reversed the first circuit³⁸ by finding Act 483 of 1983 to be substantive in nature and therefore inapplicable. The court stated: "Without questioning the purpose of this act or whether the legislature infringed upon this court's constitutional authority to regulate the practice of law, we determine that Act 483 is not applicable to this case."³⁹ Thus, the court did not address the constitutionality of the statute, nor did it address the effect of the amendment on the *Leenerts* decision.

Justice Blanche, the sole dissenter in *Graham*, echoed the first circuit, stating:

[A]rticle 1935 was amended in just such a way as to undermine the holding of *Leenerts*. The legislative history of the amendment undeniably points to the conclusion that it was passed for the very purpose of returning the law to the state in which it was before *Leenerts*. . . . The definition of curative legislation fits this amendment "like a glove."⁴⁰

Finally, and most recently, in *Central Progressive Bank v. Wyatt*,⁴¹ the first circuit again faced the issue of whether stipulated attorney's fees were subject to a reasonableness review. In *Wyatt*, holders of a second mortgage intervened in a foreclosure suit brought by the first mortgage holder, Central Progressive Bank, alleging that the attorney's fees prayed for (which amounted to only 10% of the balance due, although the notes contained a 25% stipulation) were unreasonable under DR-2-106 and thus adversely affected their rights as second mortgage holders.

The court held that the second mortgage holders had no cause of action to intervene, reasoning that any attorney's fees stipulated in the

36. 468 So. 2d at 614, n.2.

37. 468 So. 2d 849 (La. App. 1st Cir. 1985), rev'd, 478 So. 2d 1223 (La. 1985).

38. 478 So. 2d 1223 (La. 1985).

39. *Id.* at 1225.

40. *Id.* at 1226.

41. *Central Progressive Bank v. Wyatt*, No. 85-0834 (La. App. 1st Cir. Oct. 15, 1986).

collateral mortgage package belonged to Central Progressive Bank (the creditor-obligee-payee) and not Central's attorneys, since article 2000, as amended, provides that the obligee is entitled to that amount, and since DR 5-103 prohibited Central's attorneys from acquiring a proprietary interest in the obligation sued upon. Therefore, the court found DR 2-106 inapplicable because the disciplinary rule only prohibits *attorneys* from entering into contracts with clients which provide for an excessive fee, but does not prohibit non-attorney parties from entering into such an agreement between themselves.

Reviewing the recent developments in the law of stipulated attorney's fees, with conflicts not only between the circuits but between the legislature and the judiciary, it becomes apparent that answers to the posed problems are less than certain. There are, in fact, three possible resolutions of this issue, each having some merit, but each with inherent problems. A court deciding the issue of attorney's fees stipulated at a fixed or determinable amount in a written contract has the option of either finding Civil Code article 2000⁴² controlling, finding it unconstitutional, or, despite the language of that article, conducting a reasonableness review.

Before addressing each of the alternatives, it is necessary to focus on the relationship which is to be regulated. Essential to a proper analysis of this issue is understanding that there are two separate and distinct relationships: the debtor-creditor relationship and the attorney-client relationship. Making this distinction is necessary not only as the underlying basis for criticism of the *Leenerts Farms* decision,⁴³ but also for compliance with Canon 5, which requires a lawyer to "exercise *independent* professional judgment on behalf of a client."⁴⁴

Alternative 1: The Article Controls

The first alternative is to adhere to the Civil Code. While this approach may be the one that the supreme court is least likely to take, it may be the most correct. The argument supporting this approach is predicated upon a reading of article 2000 which finds an attorney's fee provision in a note actually to be one for liquidated damages.⁴⁵ Judge

42. Since Section 2 of Act 137 of 1985 declares the Act retroactive, there should no longer be a need to address Act 483 of 1983.

43. The court made no such distinction in *Leenerts Farms*, which in this writer's opinion produced unsound reasoning by the court. See Alternative 3 discussed infra.

44. Code of Professional Responsibility, La. R.S. 37, ch. 4, art. 16, Canon 5 (1974) (emphasis added). To mistakenly conclude that the fee is owed directly to the attorney would mean that the attorney functioned as a party to the suit, in violation of Canon 5.

45. For a more intensive discussion of this topic, see Note, *supra* note 1.

Watkins of the first circuit made this argument in *Graham v. Sequoya Corp.*,⁴⁶ when he observed:

The Supreme Court's decision in *Leenerts Farms* that it could regulate the fees stipulated in the mortgage note turned on its holding that the provision for attorney's fees in a note was not one for liquidated damages. Therefore, the fees did not belong to the creditor but to the attorney and were subject to the Supreme Court's power to regulate the practice of law. This rationale was undermined by Act 483 which states that the creditor, and not the attorney, is entitled to the fee.⁴⁷

The appellate court in *Graham* found that since, under the article, the creditor is actually the one entitled to the fee (as opposed to the attorney), the fee is simply part of the creditor's liquidated damages, and the court, therefore, may not regulate the fee to a greater extent than it may regulate the award of damages in general. The court simply found the attorney's fees provision to be outside the realm of "the practice of law."

The first circuit's interpretation in *Graham* and *Wyatt* is fundamentally sound. While failing to fully articulate its reasoning, the court recognized that amended article 2000 applies solely to the creditor in his relationship to the debtor. Although the supreme court admittedly has the power to regulate the practice of law,⁴⁸ and therefore the attorney-client relationship, it does not have power to regulate contractual relationships between a debtor and his creditor. That power is reserved for the legislature and has been exercised in the form of article 2000.

This notion that stipulated attorney's fees are actually liquidated damages belonging to the creditor is not new. In fact, until *Leenerts Farms*, the Louisiana jurisprudence consistently viewed attorney's fees stipulated in a note as liquidated damages.⁴⁹ It is perhaps a little baffling why (with the exception of the first circuit) Louisiana courts recently have refused to reach the same conclusion. After all, prior to *Leenerts Farms*, Louisiana courts had no trouble finding that stipulated attorney's fees belonged to the creditor, even without benefit of an applicable civil code article.

Even if an attorney's fees provision is considered one for liquidated damages rather than for actual attorney's fees, the "fee" is not com-

46. 468 So. 2d 849.

47. *Id.* at 850.

48. See generally, *Singer Hunter Levine Seemen & Stuart v. Louisiana State Bar Ass'n*, 378 So. 2d 423 (La. 1979); *Scott v. Kemper*, 377 So. 2d 66 (La. 1979); and *Louisiana State Bar Ass'n v. Edwins*, 329 So. 2d 437 (La. 1976).

49. See Note, *supra* note 1, at 834. See also *Graham v. Sequoya Corp.*, 478 So. 2d at 1226 (Blanche, J., dissenting).

pletely free from review. Civil Code article 2012 now allows a court to modify the award for stipulated damages when it is manifestly unreasonable.⁵⁰ Article 2012 is actually phrased in the negative, stating that courts *may not* modify stipulated damages unless they are so manifestly unreasonable as to be contrary to public policy. Clearly, the standard of review provided under article 2012 is much more limited than a court's review of attorney's fees under Disciplinary Rule 2-106. The Disciplinary Rule provides eight factors for the court to consider in determining whether an attorney's fee is excessive. Civil Code article 2012, on the other hand, reflects the general rule that parties are allowed freedom to contract as to anything which does not violate public policy.⁵¹

In spite of the merits of treating attorney's fees as stipulated damages, such an approach requires a finding that attorney's fees are not in fact attorney's fees. The legislature, in order to change the status of an attorney's fee provision in a contract, must do more than merely declare the recipient of the fee to be someone other than an attorney; it must explicitly characterize the fee as something other than an attorney's fee. For example, to achieve Judge Watkins's desired result, the legislature could replace the words "attorney's fees" with "collection fees" in article 2000. However, with an attorney-filled legislature,⁵² one might surmise that such language would not reflect the true intent of our lawmakers.

Unfortunately, while the first circuit has presented an interesting and theoretically correct argument, the bottom line remains that the supreme court will simply not allow any legislative act to undermine the rationale of *Leenerts Farms* and infringe on the court's inherent authority to regulate the practice of law.

Alternative 2: Declare the Article Unconstitutional

The second and most radical alternative is to declare unconstitutional the following language of Civil Code article 2000: "If the parties, by written contract, have expressly agreed that the obligor shall also be liable for the obligee's attorney fees in a fixed or determinable amount, the obligee is entitled to that amount as well." Although a court has yet to address the constitutionality of either current article 2000 or article 1935 of the Code of 1870, appellants in *Graham v. Sequoya Corp.*

50. La. Civ. Code art. 2012.

51. "Parties are free to contract for anything that is lawful, possible, and determined or determinable." La. Civ. Code art. 1971.

52. Nineteen members or 49% of the Louisiana Senate, and 26 members or 25% of the Louisiana House of Representatives, are attorneys. This represents the largest group of any single profession. Grass Roots Guide to Louisiana Politics.

raised the issue on appeal. Nevertheless, the first circuit refused to address the issue since it had not been raised at the trial level.⁵³

The argument for finding article 2000 unconstitutional is grounded in the principle of separation of powers⁵⁴ and in article 5 section 5(B) of the Louisiana Constitution which states: "The supreme court has exclusive jurisdiction of disciplinary proceedings against a member of the bar."⁵⁵ In *Louisiana State Bar Association v. Connelly*,⁵⁶ the supreme court, when speaking of its implied or inherent power over attorneys, said: "The court, while it will approve legislative acts passed in aid of its inherent power, will strike down statutes which tend to impede or frustrate its authority."⁵⁷ More recently, in *Leenerts Farms*, the supreme court emphasized that the adoption of the Code of Professional Responsibility evolved from the court's duty to assert the authority conferred upon it by the state constitution.⁵⁸

Recently, in *Singer Hunter Levine Seeman & Stuart v. Louisiana State Bar Association*,⁵⁹ the supreme court struck down a statute that conflicted with a provision of the Code of Professional Responsibility. This case involved a law partnership organized under the laws of New York which included two individuals who had been admitted to practice law in Louisiana and who were the only members of the firm physically present and practicing law in Louisiana. In the opinion of the Louisiana Bar Association Committee on Professional Responsibility, the practice by the Louisiana lawyers under the heading of an out-of-state firm was in violation of Louisiana Revised Statutes (La. R.S.) 37:213,⁶⁰ which purported to define and regulate the practice of law.⁶¹ The partnership

53. 468 So. 2d at 851.

54. For an interesting discussion of this principle, see Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 La. L. Rev. 765 (1977).

55. La. Const. art. V § 5 (B).

56. 201 La. 342, 9 So. 2d 582 (1942).

57. 9 So. 2d at 586.

58. 421 So. 2d at 219.

59. 378 So. 2d 423 (La. 1979); see also Knight, *Developments in the Law, 1979-1980—Professional Responsibility* 41 La. L. Rev. 548, 550 (1981).

60. La. R.S. 37:213 (1979).

61. La. R.S. 37:213 provided in pertinent part:

No natural person, who has not first been duly and regularly licensed and admitted to practice law by the Supreme Court of this state, no partnership except one formed in the practice of law and composed of such duly licensed natural persons, and no corporation or voluntary association except a professional law corporation organized pursuant to Chapter 11 of Title 12 of the Revised Statutes shall:

- (1) Practice law;
- (2) Furnish attorneys or an attorney and counsel to render legal services;
- (3) Hold himself or itself out to the public as being entitled to practice

brought suit to obtain injunctive and declaratory relief to prevent the Bar Association from interfering with what it asserted were essentially lawful activities.

The court found La. R.S. 37:213 to be in direct conflict with Disciplinary Rule 2-102(D) of the Code of Professional Responsibility⁶² and declared La. R.S. 37:213 unconstitutional insofar as it conflicted with DR 2-102(D). In so ruling, the court focused on the principle of separation of powers:

The power to regulate the practice of law arises from the division of our state government by our constitution into three separate branches The Constitution provides that no one branch of government shall exercise the powers belonging to the others. . . . This division creates in the judicial branch an indirect power which the executive and legislative branches cannot abridge.⁶³

The court then discussed its authority to regulate the profession within the context of the Code of Professional Responsibility:

This court's authority to regulate the practice of law has resulted in the promulgation and adoption as rules of this court the Articles of Incorporation of the Louisiana State Bar Association . . . [which] were subsequently amended by this court to incorporate the Code of Professional Responsibility The plaintiffs are in compliance with DR 2-102(D). Under the authority of this court, they are entitled to engage in the activities which the bar association claims to be in violation of the statute. Assuming that . . . the out-of-state lawyers . . . are engaged in

law;

- (4) Render or furnish legal services or advice;
- (5) Assume to be an attorney at law or counsel at law;
- (6) Assume, use or advertise the title of lawyer, attorney, counselor, advocate or equivalent terms in any phrase containing any of these titles, in such a manner as to convey the impression that he is a practitioner of law; or
- (7) In any manner advertise that he, either alone or together with any other person, has, owns, conducts or maintains an office of any kind for the practice of law.

62. The Model Code of Professional Responsibility, La. R.S. 37, ch. 4, art. 16, DR 2-102(D) provides:

A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction."

63. 378 So. 2d at 426.

acts proscribed by R.S. 37:213, the statute is constitutionally infirm because it is an impermissible infringement on the judicial authority. The statute cannot frustrate this court's inherent authority to regulate the practice of law.⁶⁴

Extending the reasoning of *Singer*, one can argue that Civil Code article 2000 in its present form is unconstitutional, as it conflicts with DR 2-106 of the Code of Professional Responsibility, and the legislature has therefore infringed on the supreme court's inherent authority to regulate the practice of law. At first blush, this would seem to be the case, since article 2000 contemplates the recovery of *any* attorney's fees stipulated in a written contract, while DR 2-106 specifically prohibits excessive attorney's fees.

Nevertheless, an important fact distinguishes *Singer*: if article 2000 and the Disciplinary Rule conflict, they conflict *only when the fee turns out to be excessive or unreasonable*. Certainly, in small collection cases for example, the stipulated fee will not be excessive, and the article could be applied without conflicting with DR 2-106.

This writer, however, submits that article 2000 and DR 2-106 *never* conflict. Since article 2000 specifically states that the *obligee* is entitled to the fee, and DR 2-106 only prohibits a *lawyer* from collecting a clearly excessive fee, the article and the disciplinary rule govern two different relationships. In other words, article 2000 does not purport to regulate attorneys, and DR 2-106 does not purport to regulate creditors.

Other problems with declaring the article unconstitutional are the implications of its effect with regard to other statutory directives. A number of statutes provide for attorney's fees fixed at a percentage of the amount due upon default for collection services.⁶⁵ While the percentage is usually fixed at only ten percent, there is the possibility that with a sufficiently large debt, ten percent could easily be deemed as excessive as the typical twenty-five percent stipulation in a promissory note. Striking down the attorney's fees provision of Article 2000 would in all probability lead to numerous challenges of the statutes which fix the attorney's fees at a percentage of the outstanding debt. Therefore, the supreme court, faced with other options, would be wise to avoid this alternative.

Alternative 3: A Reasonableness Review

The final alternative is the one the supreme court is most likely to take. Without bowing to the legislature, or taking the extreme measure of declaring the article unconstitutional, the supreme court could simply

64. *Id.* at 426-27.

65. See, e.g., La. R.S. 9:2782, 9:3530, 31:212.23, 40:2010.9 and 51:831.

conduct a reasonableness review regardless of the express language of article 2000.⁶⁶

The basic flaw in this alternative is that it requires the supreme court to follow its precedent in *Leenerts Farms*, despite the shaky ground upon which that decision rests. The *Leenerts Farms* decision has not gone without criticism. The court has been accused of failing to explain why the stipulation was not one for liquidated damages, and criticized for failing to classify exactly when such a stipulation exists.⁶⁷

Another problem is the actual holding of *Leenerts Farms*. The authority for the supreme court to regulate the practice of law, article 5 section 5(B) of the Louisiana Constitution, gives the court original jurisdiction in bar matters.⁶⁸ In *Leenerts Farms*, however, the supreme court held that *courts* may inquire into the reasonableness of attorney's fees, allowing, in effect, the lower courts to regulate the practice of law as well. It is not clear that district and appellate courts may constitutionally be delegated this authority over bar matters.⁶⁹

Given the problems with the leading case in the area of stipulated attorney's fees, it is easy to see that this alternative is a poor one.

Conclusion

It has been suggested that in order to resolve the issue of whether courts may inquire into the reasonableness of attorney's fees, it is necessary to classify the stipulation. Attempts have been made to classify such a provision as a penal clause, as liquidated damages, and as a stipulation pour autrui, as well as fees belonging to the attorney.⁷⁰ Another such classification might be to analogize stipulated attorney's fees to court costs. Court costs are assessed as an out-of-pocket expense that the litigant incurs in "collecting" his judgment, much the same as the expense a creditor incurs in collecting his note.

Although such classifications may be useful, there is still some question as to whether courts can then regulate the "classified" stipulation. It is more sensible to focus on the relationship which the court is attempting to regulate. Courts can regulate that which is contracted between the parties only to the extent that the agreement is against

66. This approach was recently taken by a Louisiana district court in *Gibson v. Burns*, CDC, No. 85-09533 (July 7, 1986).

67. See Note, *supra* note 1, at 832.

68. La. Const. art. V, § 5(B).

69. On the contrary, La. Const. art. V, § 5(B) expressly provides: "The supreme court has *exclusive* original jurisdiction of disciplinary proceedings against a member of the bar" (emphasis added). But cf. *Fowler v. Jordan*, 430 So. 2d 711 (La. App. 2d Cir. 1983), where the court stated: "It is expressly within the province of the appellate courts of this state . . . to scrutinize and regulate attorney-client relations." *Id.* at 716.

70. See Note, *supra* note 1, at 839-42.

public policy, while they may regulate the fee an attorney charges his client to the extent that the fee is inconsistent with DR 2-106.

This, of course, is not the solution to the problem, because the supreme court is not likely to recognize *Leenerts Farms* for the *faux pas* that it may well be, nor are the circuit courts likely to follow any first circuit decisions which have not been upheld by the supreme court. The best and the most practical solution to the problem may require that contracting parties take matters into their own hands. If the creditor would include a provision stipulating "collection fees" rather than "attorney's fees," a court would have more difficulty concluding that the stipulated fee belongs to the attorney.

Finally, article 2000 should also be amended to read "collection fees" rather than "attorney's fees." This would eliminate one final problem that might arise. Since article 2000 now reads that damages for delay of an obligation to pay money are called interest, "*and whatever loss the obligee incurs he can recover no more,*"⁷¹ there is the danger that a court might erroneously interpret the provision to preclude the award of any "other" damages, such as a collection fee. Such an erroneous interpretation could be made since, at a glance, the article seems to authorize *only* interest as damages with the one qualification that the obligee is entitled to attorney's fees as well. The error would be that the article only precludes collecting anything other than interest for *delay* damages, while a collection fee would be damages occasioned by a debtor's non-performance. By changing "attorney's fees" to "collection fees," the collection fees would be specifically provided for in the code as well as the contract, thereby avoiding any confusion.

There is of course no perfect solution to the problems in this area of the law. What is offered instead is simply a realistic approach that would have, at the very least, a positive impact on a confusing area of the law.

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71. La. Civ. Code art. 2000 (emphasis added).

