First Guaranty Bank v. Baton Rouge Petroleum Center: The Louisiana Supreme Court Re-Examines Executory Process and Deficiency Judgment

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The Louisiana Supreme Court Re-Examines Executory Process and Deficiency Judgment

A creditor enforced its mortgage on debtor's property through executory process. After proper appraisal, the mortgaged property was sold at a judicial sale for the required minimum price of two-thirds of the appraised value. The creditor then brought an action for a deficiency judgment to recover the balance of the debt.

The debtor opposed the deficiency judgment on the grounds that the creditor had not attached an authentic copy of the corporate resolution that authorized execution of the mortgage. Authentic evidence of such a resolution is an essential link of proof for executory process against property mortgaged by a corporation.

On original hearing, the supreme court followed a long line of cases that began with League Central Credit Union v. Montgomery and held that a creditor who causes property to be sold by executory process without submitting the proper authentic evidence may not obtain a deficiency judgment in a subsequent action against the mortgagor corporation. On rehearing, the creditor argued that League Central, upon which the court's original opinion relied, was an "unwarranted departure from the Code of Civil Procedure and statutes." Persuaded by the creditor's argument, the supreme court unanimously overruled League Central, reasoning that the defense to a deficiency judgment action created by that case had no statutory basis. Accordingly, the court found that the creditor was entitled to a deficiency judgment against the debtor.

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1. 529 So. 2d 834 (La. 1988).
3. The resolution had been passed and filed in the public records when the mortgage was executed. The agent named in the resolution had authority to execute the mortgage in question. However, Louisiana Code of Civil Procedure article 2635 requires that authentic evidence of this resolution be submitted with the plaintiff's petition for executory process. See infra text accompanying note 14.
4. 251 La. 971, 207 So. 2d 762 (1968).
5. The original opinion was written by Justice Cole. Justice Dennis concurred and Chief Justice Dixon and Justices Lemmon and Marcus dissented.
7. The court awarded $264,620, the amount of the note sued on, less $190,915.78, the proceeds of the judicial sale, plus attorney's fees, interest and costs. On Sept. 9, 1988 the supreme court issued a per curium opinion which amended the decree of May 23 so
First Guaranty Bank v. Baton Rouge Petroleum Center, Inc. is an important decision because it rejected the rationale of League Central and abolished the affirmative defense to deficiency judgment created by that case. Under League Central, debtors could allow their mortgaged property to be sold under a defective executory process and then assert the defect in that proceeding to defeat a subsequent action against them for deficiency judgment. Debtors were thus able to limit their creditor's recovery to the proceeds of the judicial sale of the mortgaged property, which was often substantially less than the amount of the principal debt. First Guaranty prevents debtors from employing this strategy to deny their creditors full recovery.

This note will examine the changes in the law that result from the court's decision in First Guaranty. The legal background of this decision will be presented in a discussion of the relevant statutory law and prior jurisprudence. Then there will be an examination of the First Guaranty opinion, followed by an analysis of the decision's effects upon executory process and parties involved in executory proceedings. Finally, there will be an evaluation of the First Guaranty decision and its implications and a recommendation designed to minimize the harshness inherent in executory proceedings.

STATUTORY BACKGROUND

The court in First Guaranty based its decision on a finding that League Central was not in accord with Louisiana's positive law regarding executory process and deficiency judgment. A complete review of the law encompassing executory process and deficiency judgment is beyond the scope of this note, but the court's decision is best read with the relevant statutory background in mind.

Executory process is an in rem action that provides a simple, expeditious, and inexpensive ex parte procedure by which creditors may initiate "the seizure and sale of property, without previous citation and as to delete attorney's fees from the award:

A limited rehearing is granted. In order to avoid the possibility of judicial approval of an excessive attorney's fee, and to permit a court to consider all of the relevant circumstances, the provision relating to attorney's fees is deleted from our decree, and the case is remanded to the trial court which is directed to fix the attorney's fee. Otherwise, the decree of this court is reaffirmed.

529 So. 2d at 845.


9. Id. at 571-72.
judgment, to enforce a mortgage or privilege thereon evidenced by an authentic act importing a confession of judgment."

The creditor begins the proceeding by filing a petition praying for seizure and sale of the property encumbered by the mortgage. The creditor must attach to his petition certain types of evidence that prove the right to use executory process. The evidence required to be in authentic form includes:

- The note, bond, or other instrument evidencing the obligation secured by the mortgage or privilege.
- The authentic act of mortgage or privilege importing a confession of judgment.
- If the secured property is movable, the act of mortgage or privilege importing a confession of judgment, whether by authentic act or by private signature duly acknowledged.
- Any judgment, judicial letters, order of court, or authentic act necessary to complete the proof of plaintiff's right to use executory process.

When the creditor seeks to enforce a mortgage on movable property through executory process, the creditor may prove the mortgage by an act of mortgage under private signature duly acknowledged. In addition, certain documents are deemed authentic for purposes of executory process. These include the note evidencing the obligation when it is paraphed for identification with the mortgage, certified copies of judgments or authentic acts, certified copies of partnership contracts that authorize a mortgage, and copies of corporate resolutions authorizing a mortgage. Other evidence need not be authentic but may be proved by a verified petition, supplemental petition, or affidavit.

10. La. Code Civ. P. art. 2631. This article provides: "Executory proceedings are those which are used to effect the seizure and sale of property, without previous citation and judgment, to enforce a mortgage or privilege thereon evidenced by an authentic act importing a confession of judgment, and in other cases allowed by law."

Code of Civil Procedure article 2632 defines an "act importing a confession of judgment" as an act in which "the obligor therein acknowledges the obligation secured thereby, whether then existing or to arise thereafter, and confesses judgment thereon if the obligation is not paid at maturity."


12. Id. art. 2635.

13. Id.

14. Id. art. 2636.

15. Id. Hence, if the creditor in First Guaranty had attached a corporate resolution that was not in authentic form, the proceeding would not have been defective, for the resolution would be deemed to be in authentic form under article 2636.

16. See La. Code Civ. P. art. 2637, specifying the evidence which need not be authentic although it is often essential in confirming the creditor's right to use executory process.
Upon finding that the plaintiff has submitted the required evidence, the court will order the issuance of a writ commanding the sheriff to seize and sell the mortgaged property. Before this writ is executed, however, the sheriff must serve the debtor with a demand for payment, which notifies the debtor that if payment is not made within three days, the writ of seizure and sale will be executed on the mortgaged property. If payment is not made within three days, the sheriff will seize the mortgaged property and serve the debtor with a written notice of that seizure. The sheriff must then advertise the impending judicial sale of the property, at least once for movable property and at least twice for immovable property in the manner provided by law.

The Code of Civil Procedure requires that prior to judicial sale the seized property be appraised in accordance with law. The sheriff will not sell the property at the initial judicial sale if the price offered by the highest bidder is less than two-thirds the appraised value of the property. At the second sale, however, the property may be sold for whatever price it will bring. If the debtor has waived appraisal in the act of mortgage, the creditor may direct that the property be sold without appraisal. The sale without appraisal will proceed more quickly and less expensively. The creditor, however, does forfeit rights by selling without appraisal. The Deficiency Judgment Act provides that where

17. Under La. Code Civ. P. art. 283, clerks of court have the power to order seizure and sale under executory process; however, these orders are customarily issued upon order of the court.
19. Id. art. 2639.
20. The right to receive a demand for payment before issuance of the writ of seizure and sale may be waived by the debtor in the act or mortgage or privilege. See La. Code Civ. P. art. 2639. Since the right usually is waived, it is of little practical consequence.
21. Id. art. 2721.
22. Id. art. 2722 provides: "After seizure of the property, the sheriff shall proceed to advertise the sale of the property, in accordance with the provisions of the first paragraph of Article 2331."
25. This requirement is found in La. Code Civ. P. art. 2336 dealing with judicial sale under writ of fieri facias. La. Code Civ. P. art. 2724 enumerates the provisions relating to a sale of property under a writ of fieri facias that shall also be applied to a sale of property under a writ of seizure and sale.
27. Id. art. 2723.
If a mortgagor or other creditor takes advantage of a waiver of appraisement of his property, movable, immovable, or both, by a debtor, and the proceeds
a creditor causes the debtor's property to be sold without appraisal, the
debt will be considered fully satisfied and deficiency judgment will be
unavailable.29

The debtor may prevent the sale in one of several ways. Most
obviously, the debtor can simply pay the debt, interest, and costs to
the sheriff before adjudication.30 The debtor may also use an injunction
to arrest the seizure and sale.31 The seizure and sale may be arrested
by injunction when the debt secured by the mortgage has been extin-
guished, is legally unenforceable, or, more importantly for purposes of
this paper, when the proper procedure has not been followed in the
executory process. If an injunction is granted, the court may allow the
debtor damages for wrongful seizure, including attorneys' fees.32 Finally,
the debtor may halt the sale by taking a suspensive appeal from the judicial order of sale. 33 The debtor must appeal the order within fifteen days of its signing. 34 The debtor must also furnish security for the appeal in "an amount exceeding by one-half the balance due on the debt secured by the mortgage or privilege sought to be enforced, including principal, interest to date of the order of appeal, and attorney's fees, but exclusive of court costs." 35

The victory obtained by a debtor who has the sale enjoined or successfully takes a suspensive appeal will likely be short lived. Neither an injunction of a sale based on defective proceedings or the appeal of that defective proceeding will prevent collection of the debt, and will not prevent a later sale made through proper proceedings. In fact, the creditor whose sale has been halted because of defective proceedings may simply convert the executory process into an ordinary proceeding by amending his petition and enforce the mortgage by ordinary process, a slower and more cumbersome method. 36

If a balance remains on the debt after the distribution of the proceeds of the judicial sale with appraisal, the creditor may seek a personal judgment against the debtor for the deficiency. 37 The creditor may obtain this deficiency judgment either by converting the executory process into an ordinary proceeding after the sale or by bringing a new suit against the debtor by ordinary process. The deficiency judgment action, unlike executory process, requires both citation of the debtor and in personam jurisdiction over him. 38 The creditor may not rely on a confession of judgment 39 but instead must plead and prove both the obligation creating the debt 40 and the debtor's nonperformance. 41 The creditor must also

33. Id. art. 2642.
34. Id.
35. Id. Because it requires a bond exceeding by more than one-half the total mortgage indebtedness, a security that the debtor probably cannot furnish, Professor McMahon called suspensive appeal a "particularly hollow remedy." McMahon, supra note 8, at 658.
36. La. Code Civ. P. art. 2644 provides: "The plaintiff in an executory proceeding may convert it into an ordinary proceeding by amending his petition so as to pray that the defendant be cited and for judgment against him on the obligation secured by the mortgage or privilege." The article further provides that "[t]he plaintiff in an ordinary proceeding may not convert it into an executory proceeding." See also Richard v. Bird, 4 La. 305, 307-08 (1832).
38. Id. art. 2772.
39. "The confession of judgment, having served its purpose in the executory proceeding, has become functus officio, and the mortgage must prove the indebtedness asserted by the usual modes of proof." McMahon, supra note 8, at 571.
41. Id. art. 1994 provides: "An obligor is liable for the damages caused by his failure to perform a conventional obligation. A failure to perform results from nonperformance, defective performance or delay in performance."
show that the property was sold after appraisal in accordance with law. The debtor can defend by showing that the creditor has failed to make his case or by rebutting an element of that case, such as the validity of the appraisal. The debtor may also assert that the obligation is null, has been modified or has been extinguished. The debtor carries the burden of proving nullity, modification, or extinction.

**Prior Jurisprudence**

In addition to those listed above, the courts developed another defense to a deficiency judgment following seizure and sale under executory process. Under the supreme court's decision in *League Central*, a debtor could assert the existence of a defect in the executory proceedings as an affirmative defense to a creditor's suit for deficiency judgment.

This defense originated in *Tapp v. Guaranty Finance Co.*, a 1963 decision of the first circuit court of appeal. The *Tapp* case involved an action to annul a deficiency judgment. The plaintiff had given a promissory note as part of the price of an automobile and had executed a chattel mortgage on the car as security for that note. The seller transferred the note to the defendant finance company. The debtor defaulted on the note, and the defendant obtained an order for executory process. The car was seized and sold with appraisal, and the defendant proceeded against the plaintiff for the deficiency, which was granted. The debtor met attempts to enforce that deficiency judgment with an action for nullity, claiming that the executory proceeding was defective because the note sued on was not in authentic form.

The first circuit agreed that the executory proceedings were null for want of proper authentic evidence. The question became whether the debtor could prevent a deficiency judgment because of a defect in the executory proceedings. The first circuit held that the debtor could assert the earlier defect against the action for a deficiency. The court reasoned that if the order for executory process was null, it could not serve as the basis for a legal appraisal and sale. Since the Deficiency Judgment

42. See supra notes 27-28.
43. If the sale is made without benefit of appraisal, then the creditor will be denied a deficiency judgment. See supra notes 28 and 37. However, where there is substantial compliance with the statutory appraisal requirements the court should not find that the sale has been made without valid appraisal. See, e.g., G.M.A.C. v. Mergist, 520 So. 2d 1109 (La. App. 3rd Cir. 1987), writ denied, 522 So. 2d 566 (1988).
44. La. Civ. Code art. 1831 provides in part: "A party who asserts that an obligation is null, or that it has been modified or extinguished, must prove the facts or acts giving rise to the nullity, modification, or extinction."
45. 158 So. 2d 228 (La. App. 1st Cir. 1963), writ denied, 245 La. 641, 160 So. 2d 228 (1964).
Act\textsuperscript{46} prohibits deficiency judgments except where the judicial sale occurs after a legal appraisal, the court concluded, the deficiency judgment against the debtor was void because it was based on a null order for executory process.

Critics of the \textit{Tapp} decision were concerned that allowing such attacks on the validity of an executory proceeding would adversely affect the stability of titles acquired through judicial sales.\textsuperscript{47} This concern for the stability of titles formed the basis for the fourth circuit's opinion in \textit{White Motor Co. v. Piggy Bak Cartage Co.}\textsuperscript{48} In that case, the creditor had caused three trucks mortgaged by the defendant to be sold under executory process. The creditor's petition for executory process was defective because it did not contain authentic evidence authorizing the execution of the chattel mortgages for the defendant corporation. The debtor did not assert this defect to prevent the seizure and sale of the trucks, but raised the defect for the first time as a defense against the subsequent suit for deficiency judgment. The debtor's argument followed the reasoning of \textit{Tapp}: the lack of authentic evidence made the order of seizure and sale null; a null order could not support a legal appraisal, and hence there was none; and, because there was no legal appraisal, the Deficiency Judgment Act barred the creditor's suit.

The fourth circuit holding rejected the debtor's argument that once the property was adjudicated to an innocent third party, the mortgagor was estopped from complaining that the order for executory process was signed without sufficient authentic evidence. It did not matter, in the view of this court, that the debtor did not assert the defect in an attempt to annul the sale, but only as a defense to an action for deficiency judgment brought by the seizing creditor.\textsuperscript{49} The court reasoned that holding proceedings null because of minor formal irregularities would inevitably have an adverse effect on titles obtained through judicial sales. In short, the fourth circuit limited the \textit{Tapp} rationale to cases in which the property was not in the hands of an innocent third party.\textsuperscript{50}

The Louisiana Supreme Court reconciled this apparent conflict in \textit{League Central Credit Union v. Montgomery}.\textsuperscript{51} After an automobile was sold through executory process, the credit union sought and obtained a deficiency judgment. The debtor appealed the deficiency judgment,
contending that the act of mortgage had been improperly acknowledged and thus the executory proceeding was null. The debtor argued that the defect in the executory proceeding precluded a deficiency judgment.

The fourth circuit avoided the issue because it found that no defect appeared in the executory proceedings. The supreme court found that the acknowledgment of the act of mortgage was in fact defective and hence was forced to resolve the conflict between the *Tapp* and *White Motor* cases. The court, adopting the reasoning of *Tapp*, held that a defect in the prior executory process constituted an affirmative defense to a later action for deficiency judgment.

The court found that the Code of Civil Procedure provisions setting out the authentic evidence required to institute executory process were prohibitory laws. Under then article 12 of the Civil Code encroachments on prohibitory laws are nullities. Executory proceedings based on improper authentic evidence are null. Further, the court reasoned, any action based on the null executory proceedings is also null. Hence, a deficiency judgment action could not be based on defective executory proceedings.

The identical line of reasoning, when put forth by the *Tapp* court, had been criticized for its adverse effect on titles to property. The *League Central* court responded to these criticisms by pointing out that in an action for deficiency judgment, the seizure and sale are not implicated. In such an action, the debtor is seeking not to annul the executory proceedings, but to defeat a deficiency judgment. To protect the stability of property rights acquired by innocent third parties through such sales, the court specified that in such instances the debtor could not annul the executory process and regain the property. Rather, the declaration of nullity only prevented a deficiency judgment based on the null executory process.

**The First Guaranty Opinion**

On the rehearing of the case, the Louisiana Supreme Court examined only one issue: Does the creditor's failure to submit authentic evidence

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52. League Central Credit Union v. Montgomery, 198 So. 2d 914 (La. App. 4th Cir. 1967).
53. *League Central*, 251 La. at 978, 207 So. 2d at 764.
55. Civil Code articles 11 and 12 (1870) have been incorporated into article 7. The official comments to article 7 indicate that this revision was not intended to change the law. See *La. Civ. Code art. 7 comment (a).*
56. See supra note 28.
57. *League Central*, 251 La. at 980, 207 So. 2d at 765.
58. On original hearing the court had found that authentic evidence of a corporate resolution authorizing the corporation to give a mortgage is an essential link of proof in an executory proceeding. This finding is not questioned on rehearing.
59. See supra text accompanying note 12.
in the executory proceeding constitute a defense to the creditor's subsequent ordinary action for a deficiency judgment? This question had been answered by *League Central*, but the court decided that a "careful re-examination" of *League Central* was called for.

The opinion began with a synopsis of *League Central* and its holding. This introduction ended with a statement foreshadowing the demise of the *League Central* rule:

*League Central* and its progeny have created an affirmative defense to a deficiency judgment action which has nothing to do with whether the property was sold after valid appraisal or whether a just deficiency is due, but rather with whether the mortgagee complied with every jot and title as to the form of authentic evidence required in the executory proceeding.61

Before beginning its re-examination of *League Central* the court presented an overview of the law in the areas of executory proceedings, annulment of judicial sales, and deficiency judgment.62 The court concluded its discussion of direct action to annul sale under executory process by explaining that Louisiana Revised Statutes 13:4112 provides that lack of authentic evidence or formal defects in the executory process may not serve as grounds to annul a completed sheriff's sale of immovable property.63 Although this section of the opinion purported only to "describe the legal context in which [League Central] arises,"64 in a footnote the court rejected the defendant's argument that the last sentence of Louisiana Revised Statutes 13:4112—"[n]othing herein shall be construed to affect legal defenses otherwise available to any person against whom a deficiency judgment is sought after public sale of immovable property through executory proceedings"65—incorporated the

61. Id. at 839.
62. Much of the court's discussion of these areas of law was taken verbatim, but without acknowledgment, from Justice Tate's original opinion in Reed v. Meaux, 292 So. 2d 557 (La. 1973). Justice Tate's opinion was reversed in a rehearing of the case.63. *First Guaranty*, 529 So. 2d at 841 n.2.
64. Id. at 839.
65. La. R.S. 13:4112 (Supp. 1989) provides:
No action may be instituted to set aside or annul the judicial sale of immovable property by executory process by reason of any objection to form or procedure in the executory proceedings, or by reason of the lack of authentic evidence to support the order and seizure, where the sheriff executing the foreclosure has either filed the process verbal of the sale or filed the sale for recordation in the conveyance records of the parish. Any party seeking to annul or set aside a judicial sale of immovable property through executory proceedings filed for record before the adoption of this Section must do so within six months of
rule of *League Central* into the statutory law. The court found that the language in question expressed a legislative intent that the statute should not alter any statutory or jurisprudential defenses available against a deficiency judgment. Justice Dennis characterized the last sentence of section 13:4112 as being "carefully worded so as to permit jurisprudentially created defenses to be overruled or modified by the courts and to be affected by other statutes."66

Having reviewed the statutory framework, the court began its assault on *League Central*. The court identified two premises upon which the *League Central* case rested:

1. The requirement of proper authentic evidence in executory proceedings is a prohibitory law; and whatever is done in contravention of a prohibitory law is void, though the nullity be not formally directed; and
2. If improper authentic evidence was filed so as to render the executory proceedings null, any action based upon the executory proceedings is likewise null.67

Examining the first of these premises, the court found that the term "prohibitory law," as used in the Louisiana Civil Code of 1870,68 means "rules of public order." Since rules of public order serve to protect the public interest, an individual may not renounce them.69 The court then explained that the Code of Civil Procedure provisions requiring authentic evidence in executory proceedings are not prohibitory laws within this meaning for they neither expressly nor impliedly prohibit the debtor from renouncing them. Instead, the Code provides that the debtor may assert the creditor's failure to comply with those provisions as a defense to the executory proceeding through an action for injunction or a suspensive appeal. In the court's view, the Code of Civil Procedure provisions leave it within the debtor's discretion whether the defense of improper procedure is raised. From this, the court concluded that a defect that the debtor did not object to did not make the entire proceeding absolutely null.70

With the first of *League Central*'s premises decisively refuted, the court then examined the second premise. This second premise—that if the executory proceeding is null then any action based on the executory proceeding is null—was seen to have two possible interpretations. The

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66. *First Guaranty*, 529 So. 2d at 841 n.2.
67. Id. at 842.
68. See supra note 55.
69. See La. Civ. Code art. 7 comment (d).
70. *First Guaranty*, 529 So. 2d at 843.
first interpretation was that the failure to submit proper authentic evidence nullified the executory process and thereby nullified the subsequent deficiency judgment. Based on its conclusion that the laws requiring authentic evidence are not prohibitory laws, and that failure to comply with them did not annul the executory process, the court found this reasoning erroneous.

The court then turned to the second possible interpretation, that any defense available to the debtor in the executory proceeding may be raised in the action for deficiency judgment because the deficiency judgment action “is based upon, a part of, or a continuation of the executory proceeding.’’ The court rejected this reasoning as well. While acknowledging that the deficiency judgment action is related to the executory proceeding, the court pointed out that the deficiency judgment action “is established by the legislated law as a separate and independent proceeding [from executory process], different in concept and purpose, involving different kinds of procedure, evidence, and defenses.”

To further illustrate that the deficiency judgment and executory process are separate actions, the court enumerated the Code of Civil Procedure’s requirements for a deficiency judgment and noted that “[t]he legislated law does not require a creditor to prove that he presented flawless authentic evidence in the executory proceeding in order to obtain a deficiency judgment or grant the debtor a defense to a deficiency judgment based upon the creditor’s failure to do so.”

Because it found that League Central was not in accord with Louisiana’s positive law, the court characterized the affirmative defense created by that case as an “anomaly,” which “further indicates that the jurisprudence has developed contrary to the legislative intent.”

The anomaly arose from the fact that a debtor who asserted his defenses to the fullest extent allowed by the Code of Civil Procedure was left in an inferior position to the debtor who failed to raise the defenses until the action for deficiency judgment. If the debtor raised the procedural irregularities in the executory proceeding, the procedure the Code of Civil Procedure seems to contemplate, the creditor could cure the defect and still get a deficiency judgment. But if an indiligent or shrewd debtor waited

71. Id.
72. Id.
74. First Guaranty, 529 So. 2d at 843.
75. Id.
76. See supra text accompanying notes 31-35.
77. Where the debtor asserts a defense against the executory proceeding, the creditor is authorized to convert the action into an ordinary proceeding through which he may obtain a judgment for the full amount of the debt. See supra note 36.
until the deficiency judgment action to raise the irregularity, the *League Central* rule rewarded the debtor by abolishing the right to a deficiency. In short, a debtor who waived his rights to stop the executory proceeding was in a better position than one who diligently followed the procedure set forth in the Code. Following the reasoning of a scholarly criticism of the *Tapp* case,\(^7\) the court said of this situation: "There does not appear to be any reason in law or logic that the diligent debtor should be penalized [as discussed above] for exercising the defenses in the manner specifically provided by law, i.e., by appeal or injunction."\(^79\)

The opinion concluded its reexamination by rejecting an argument that the Deficiency Judgment Act justified the *League Central* defense.\(^80\) The court pointed out that the Deficiency Judgment Act was adopted to prevent creditors from recovering windfalls by purchasing valuable property from the sheriff at a small price and then pursuing the debtor for a large "deficiency."\(^81\) The appraisal provisions of the Act, said the court, offered some protection to the debtor against this clause. Under the Act, if the creditor denies the debtor the protection by selling without proper appraisal, the creditor may not be granted a deficiency judgment for any balance due on the debt. As a matter of public policy the debt in such situations is seen as fully discharged. But this public policy is not limitless. In the court's words:

> Although this policy is broad and strong, there is nothing in its history or expressions that indicates an intention to bar a creditor who fully complies with appraisal requirements from obtaining a deficiency judgment simply because of a lack of authentic evidence in the executory proceeding.\(^82\)

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78. See Note, supra note 47, at 900-01.
79. *First Guaranty*, 529 So. 2d at 843.
80. The courts in both *Tapp* and *League Central* reasoned that the lack of authentic evidence made the executory process invalid and that an invalid executory process could not serve as the basis for a valid appraisal. By finding the appraisal invalid through this reasoning the court could deny deficiency judgment by applying La. R. S. 13:4106 (1968). In Note, Civil Procedure—Deficiency Judgment After Invalid Executory Process, 29 La. L. Rev. 405, 407 (1969), the author stated:

> [T]his reasoning seems to be more makeweight than the actual basis for the decision [in *Tapp*]. The real basis seems to be that only the executory process was invalid. However, by this artificial invalidation of the appraisement, the court bolstered its decision because the legislation explicitly provides [in the Deficiency Judgment Act] that a failure to appraise the property precludes recovery of a deficiency judgment.

81. See McMahon, supra note 8, at 567 for a discussion of the abuses of waivers of appraisal that led to the enactment of the Deficiency Judgment Act.
82. *First Guaranty*, 529 So. 2d at 844.
Effects of the First Guaranty Decision

With its decision in First Guaranty, the Louisiana Supreme Court overruled 20 years of jurisprudence that had required creditors to strictly follow the proper procedure when foreclosing on a mortgage through executory process or face the possible loss of the right to recover a deficiency judgment. Although it had for all practical purposes enjoyed the status of law for two decades, League Central was rejected as an improper interpretation of the codal and statutory laws of Louisiana.

First Guaranty should not be seen to signal the demise of the strong public policy of protecting debtors, but rather as a return to enforcing that policy in the manner contemplated by the Code of Civil Procedure. Executory process is indeed a harsh remedy that should not be afforded a creditor who has not strictly complied with the formal requirements imposed by law to protect the debtor. League Central induced creditors to exercise great care in executory proceedings so as to avoid being denied a deficiency judgment because of some defect in the executory process. Even without the judicially created rule of League Central, however, the Code of Civil Procedure contains adequate incentives to insure that creditors will not blithely disregard the requirements of law when seeking executory process. The debtor can defeat executory process instituted without the required showing of authentic evidence by asserting that defect through a suspensive appeal, an injunction, or both. The Code also subjects a creditor to liability for damages for wrongful seizure and attorney's fees. Thus, even without the threat of losing the right to a deficiency judgment, the risk of delay and higher costs should suffice to prevent creditors from intentionally seeking executory process without meeting the authentic evidence requirements of the Code of Civil Procedure.

First Guaranty and the many other cases since 1968 involving the lack of sufficient authentic evidence in support of a creditor's petition for executory process indicate that even under League Central, creditors occasionally failed to meet the Code's requirements. In such instances, League Central not only provided the debtor with a defense to deficiency

84. See Myrtle Grove Packing Co. v. Mones, 226 La. 287, 76 So. 2d 305 (1954) and cases cited therein.
85. See Tate, supra note 83, at 307.
86. See supra note 32.
judgment not contemplated by the Code of Civil Procedure, but it also discouraged the debtor from asserting the defenses to the executory proceeding in the manner provided in the Code. League Central encouraged defendants to allow their property to be sold under defective executory process. If the debtor sought an injunction or appeal as provided by the Code, the creditor would either convert the action into an ordinary proceeding seeking a judgment for the full amount of the debt or cure the defect, petition the court a second time for executory process, and recover the full amount of the debt through judicial sale and a subsequent deficiency judgment action. By not objecting to the defect, the debtor reserved a defense to the deficiency judgment action and thus limited the creditor’s recovery to the net proceeds of the judicial sale, often an amount much less than the outstanding debt. That League Central encouraged debtors to knowingly disregard defects in the executory process against them and to purposefully fail to object to such defects in the manner provided by the Code shows that the rule of that case was not in accord with the intent of the Code.

The court's holding will have a dramatic effect on those debtors who have allowed their property to be sold under an executory process that was not supported by the required authentic evidence, but who have not yet faced an action for deficiency judgment. Like the Baton Rouge Petroleum Center these debtors, in reliance on League Central, may have chosen not to assert the defect in the executory proceedings in order to preserve an affirmative defense to any subsequent action for deficiency judgment. Under League Central this was a prudent course of action. The affirmative defense to deficiency judgment would have enabled the debtor to limit his liability on the obligation to the proceeds of the sale of the collateral.

What was an artful strategy has, because of the court’s decision in First Guaranty, become a waiver of the right to defeat executory process. Under First Guaranty, the existence of this defect in the completed executory process will be of no consequence in the deficiency judgment action. Despite the fact that the debtors may have relied on a jurisprudential rule repeated over twenty years, they will be unable to assert their claims in the deficiency judgment action. Thus, First Guaranty operates after the fact to change the effect of these debtors’ failure to raise the lack of authentic evidence through appeal or injunction.

First Guaranty will also effect a change in the strategy of defendants when executory proceedings that are not supported by the required authentic evidence are brought against them. In cases in which the property would have been sold without objection under League Central, debtors will now seek to stop the sale of mortgaged property under executory process. Debtors will no longer elect to withhold their objections to the lack of authentic evidence but will instead employ the suspensive appeal and injunction provided by the Code to prevent the
seizure and sale of their property under the defective executory process.

The amount of security that must be posted in order to take a suspensive appeal makes it fairly likely that most of the actions to stop executory proceedings will come in the form of applications for an injunction to arrest the seizure and sale of the property. Possibly anticipating this, the legislature amended the Code of Civil Procedure provisions governing such injunctions. This amendment changes Code of Civil Procedure article 2752(A) to provide that "a temporary restraining order shall not issue to arrest the seizure and sale of immovable property." By eliminating the availability of temporary restraining orders in these cases, the legislature has acted to preserve the expeditious nature of executory process by preventing the delay of the judicial sale in instances where the debtor's attack on the executory process is without merit.

The debtor will still be able to prevent the sale of his property before the trial of his action for injunction, but he must do so through the more onerous preliminary injunction. Unlike a temporary restraining order, a preliminary injunction will issue only if notice and an opportunity had for a hearing has been given to the adverse party. The application for preliminary injunction will be denied if the applicant fails to make at least a prima facia showing that he will prevail at the trial on the merits of the case for injunction. This standard insures that the debtor's interest in the mortgaged property will be protected until the action for injunction can be tried on its merits so long as the debtor's claim for injunction is not groundless. On the other hand, it protects the integrity of the process by allowing the creditor who has fully complied with the strict requirements governing executory process to recover the debt owed to him without needless delay.

More uncertain is the effect, if any, that First Guaranty will have on the constitutionality of Louisiana's executory process provisions. These provisions were held constitutional in Buckner v. Carmac. In that case, the Louisiana Supreme Court found that Louisiana's executory process did not violate due process in light of the following factors:

87. See supra text accompanying note 35.
88. La. Code Civ. P. art. 2753 enumerates several situations in which a debtor seeking an injunction to arrest the seizure and sale of property under executory process is not required to post any security. One of the cases in which no security is required is where the injunction is sought on grounds that "[t]he order directing the issuance of the writ of seizure and sale was rendered without sufficient authentic evidence having been submitted to the court, or the evidence submitted was not actually authentic." La. Code Civ. P. art. 2753.
that the debtor has executed a confession of judgment waiving the right to adversarial hearing; that a writ of seizure must be served on the debtor; that the debtor has a right to a suspensive appeal from the order of seizure and sale; and, that the debtor may enjoin the judicial sale, in many instances without the posting of a bond. It has been suggested that since Buckner was handed down only five years after League Central, the court’s affirming of executory process might have been influenced by the fact that any discrepancy in the executory proceeding would, under League Central, allow the debtor to avoid any subsequent deficiency judgment. This argument is not without merit, but it seems that since Buckner based the constitutionality of executory process on the debtor protections provided by the Code of Civil Procedure and not the affirmative defense created by League Central, the First Guaranty decision, which embraces the Code’s debtor protections and encourages debtors to assert them, should not bring Buckner’s finding that executory process is constitutional into question.

Recommendation

First Guaranty does highlight one problem with executory process: The debtor protections found in the Code of Civil Procedure are of no use to the debtor who is not aware of them. It is reasonable to assume that many consumer debtors are not aware of their right to challenge an executory proceeding through injunction or suspensive appeal. Because they are faced with seizure of their property, it is also reasonable to assume that some of these debtors will find it difficult to obtain legal assistance when served with the demand for payment or the notice of seizure. Many of these debtors likely resign themselves to losing the mortgaged property without realizing that they might also be found personally liable for any balance remaining on the debt after the sheriff’s sale.

Executory process is an inherently harsh remedy as it stands. The proceedings need not be made more trying by subjecting the debtor to personal liability when he expects to lose only the mortgaged property, and is not expecting to face the additional personal liability. This is not to suggest that the creditor should be denied the obligation owed him, but the debtor should know that he faces personal liability and the possible seizure of other property if the proceeds of the judicial sale are insufficient to extinguish the mortgage debt. Such knowledge would allow the debtor to make an informed decision about the possibility of legal aid. Moreover, the debtor will be unable to police the actions of

92. Id. at 329-32.
the creditor if he does not know that he has the power to stop the sale. Hence, although an injunction or appeal against the executory process will not absolutely defeat the creditor's right to recover, the debtor should at least be made aware that these protections are available.

Conveying the information regarding the possibility of deficiency judgment and the right of injunction and appeal would be relatively easy. The Code of Civil Procedure provides that the sheriff shall serve the defendant with written notice upon seizure of the defendant's property. Unlike the demand for payment, this notice of seizure may not be waived. An amendment could be added to this article requiring that the notice of seizure contain a statement notifying the debtor in layman's terms that the creditor may obtain a deficiency judgment and that the debtor has the right to stop the sale of the mortgaged property if the creditor does not strictly adhere to the requirements of law. Such an amendment would involve little more than the printing of new forms by Louisiana's sixty-four sheriff's offices, and it would not impair the creditor's right to recover the full amount of the debt owed him. It would, however, alleviate some of the inherent harshness of executory process by at least allowing the debtor to know what to expect and informing him of his possible protections. By increasing the effectiveness of the debtor protections found in the Code of Civil Procedure this amendment would also help to shield the executory process provisions against a constitutional attack arising out of the rejection of League Central.

CONCLUSION

The public policy of protecting debtors should not be served by denying creditors a deficiency judgment to recover a debt lawfully owed to them solely on procedural grounds. The law should protect the debtor by insuring that the harsh remedy of executory process is not granted unless the creditor has proven his right to that action by complying with the letter of the law. League Central encouraged debtors to allow defective executory proceedings to become final; First Guaranty will help insure that defective executory proceedings do not become final by encouraging the debtor to assert any defects in the proceeding as a defense in the manner contemplated in the Code.

The decision in First Guaranty is, at least in part, a product of the existing economic climate of the state. Although the proper forum for addressing social and economic conditions is the legislature, the Louisiana Supreme Court cannot be expected to operate in a vacuum. A civilian

94. See supra note 36.
95. La. Code Civ. P. art. 2721 comment (b).
court should not engage in judicial lawmaking, but its decisions must
to some degree be responsive to changes in social and economic con-
ditions, especially where that response entails turning away from a
jurisprudential rule, even one in which the legislature acquiesced for
twenty years.

If the jurisprudential rule better served the public interest, then the
legislature should respond to the court’s rejection of that rule by enacting
it into the positive law. That the legislature did not enact the rule of
League Central into the positive law in the session following the supreme
court’s decision in First Guaranty is some indication that the interpre-
tation of the law in First Guaranty is in accord with the legislative will.

First Guaranty is a timely decision and logical interpretation of the
Code of Civil Procedure articles. This interpretation relieves lenders of
the threat of loss created by the jurisprudential rule of League Central
while providing the debtor in default with every right contemplated by
the Code. League Central had extended the laudable public policy of
protecting debtors faced with the harsh remedy of executory process by
creating a defense to deficiency judgment not provided by the Code of
Civil Procedure. First Guaranty acknowledges that the lenders of Louis-
iana can no longer afford that extension.96

Jay B. Mitchell

96. In 1987 a record 184 F.D.I.C. insured banks failed. Sixty-three percent of the