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Louisiana Lender Liability

Edward B. Kramer

LOUISIANA LENDER LIABILITY

I. INTRODUCTION

The concept of lender liability has caused considerable interest in the legal community.[1] In these cases, borrowers sue lenders based on unreasonable conduct in negotiating and enforcing loan agreements. Borrowers seek not only to avoid repayment of loans, but also monetary damages from the lender in claims founded upon tort and contract principles.[2]

Suits involving claims of lender liability usually arise where a bank or other lender sues a borrower to collect a delinquent loan. The borrower countersues, claiming that the lender is liable to the borrower because of some unfair conduct on the part of the lender. These suits are common in the wake of aggressive lending policies adopted during the agricultural and energy boom of the early 1980s.

The primary objective of this comment is to examine theories of lender liability in light of the civil law. The discussion first briefly examines current common law theories of lender liability. Next, Louisiana's application of these concepts is discussed. Finally, the paper focuses on those theories of lender liability afforded by Louisiana's system of civil law.

II. THEORIES OF LENDER LIABILITY: A CORNERSTONE

The body of lender liability case law forms the basic starting point for identifying current theories of lender liability.[3] These common law theories of lender liability are very diverse. They include fraud,[4] breach

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1. "Lender liability" claims have become more frequent in response to lenders seeking to collect loans. Although societal perspectives have often prevented this type of suit, borrowers are suing lenders with more vigor. For a good primer on the subject, see Ebke and Griffin, Lender Liability to Debtors: Toward a Conceptual Framework, 40 S.W. L.J. 775 (1986). See also Comment, Good Faith Theories of Lender Liability, 48 La. L. Rev. 1181 (1988).

2. Claims of lender liability are a hybrid of tort and contract principles. Although many areas are based in tort, the most controversial is the allegation of a breach of good faith and fair dealing. See Commercial Cotton Co. v. United Cal. Bank, 163 Cal. App. 3d 511, 209 Cal. Rptr. 551 (1985).

3. Some of the best known cases involving lender liability include State Nat'l Bank of El Paso v. Farah Mfg. Co., 678 S.W.2d 661 (Tex. Civ. App. 1984) and KMC Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985).

4. *Farah*, 678 S.W.2d at 661.

of fiduciary duty,[5] duress,[6] tortious interference,[7] breach of implied covenant of good faith and fair dealing,[8] prima facie tort,[9] negligence,[10] and statutory bases including the Internal Revenue Code,[11] RICO,[12] and Federal Securities Laws.[13]

Many common law theories of lender liability differ slightly from jurisdiction to jurisdiction, but the underlying principles of liability stem from basic tort and contract law.[14] Historically, the civilian view of contracts, consumer law,[15] and to some extent torts differs from the common law.[16] The relevant difference in Louisiana is primarily in the consumer protection sector. Basically, the civil law protects consumers

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5. Henkin, Inc. v. Berea Bank & Trust Co., 566 S.W.2d 420 (Ky. Ct. App. 1978).

6. *Farah*, 678 S.W.2d at 661.

7. In re American Lumber Co., 7 Bankr. 519 (D. Minn. 1979), aff'd, 5 Bankr. 470 (D. Minn. 1980).

8. First Nat'l Bank v. Twombly, 689 P.2d 1226 (Mont. 1984).

9. Centerre Bank v. Distributors, Inc., 705 S.W.2d 42 (Mo. Ct. App. 1985).

10. Berkline Corp. v. Bank of Miss., 453 So. 2d 699 (Miss. 1984).

11. This cause of action involves a lender becoming involved with the payroll of a borrower. If the lender fails to remit certain withholding taxes, it may be liable. See I.R.C. §§ 3505(a) and (b) (1982), which state:

> [I]f a lender . . . who is not an employer . . . pays wages directly to such an employee . . . such lender . . . shall be liable in his own person . . . to the United States in a sum equal to the taxes (together with interest) required to be deducted and withheld from such wages by such employer.

12. See the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986), which provides in § 1962:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly, or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

13. See the Securities Act of 1933, § 15, 15 U.S.C. § 77o (1982) which provides:

> Every person who, by or through stock ownership, agency, or otherwise, pursuant to or in connection with an agreement or understanding with one or more other persons by or otherwise, controls any person . . . shall also be liable jointly and severally with and to the same extent as such controlled person . . . .

See also Securities Exchange Act of 1934, § 20(a), 15 U.S.C. § 78t(a) (1982 & Supp. IV 1986).

14. See supra note 3.

15. See Hersbergen, Consumer Protection, Developments in the Law, 1982-1983, 44 La. L. Rev. 267 (1983).

16. Although Louisiana Civil Code article 2315 allows for the importation of common law tort theory, the civilian view still differs. For example, Louisiana has only recently adopted the old common law theory of tortious interference with contractual rights. See 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989).

more than the common law. This difference allows theories of lender liability that are not available elsewhere to emerge in Louisiana.[17]

A. *Breach of Fiduciary Duty*

A common allegation of lender liability involves the breach of a fiduciary duty—a fiduciary relationship must develop between the parties before liability can be imposed.[18] The imposition of liability depends largely upon the relative sophistication of the parties.[19] The lender usually becomes a fiduciary when it has elicited or coerced the borrower's trust and assumed a controlling position with regard to the debtor. Once accorded fiduciary status, the lender is held to a standard whereby his actions must not misuse this control. Misuse of this position may subject the lender to a claim of lender liability.[20]

In the leading Louisiana case, *Busby v. Parish National Bank*,[21] the first circuit held that no fiduciary relationship arose between a borrower and a lender even though the lender, knowledgeable in the area of Small Business Administration loans, offered to "help" the debtors if the S.B.A. denied the loan.[22] The first circuit reversed the jury's verdict of $75,000 for the plaintiff.

The court looked at two considerations. First, the plaintiffs did not fully indicate their expectancies as to what the bank's alleged "help" meant.[23] Secondly, the court placed weight on the fact that the borrowers were accompanied by counsel at meetings with bank officials.[24] The court determined that the plaintiffs "could not justifiably rely on these

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17. The abuse of rights doctrine and the special responsibilities under Louisiana Civil Code article 2474 are two examples.

18. This duty encompasses more than a lender's ordinary duties of care, such as crediting accounts and advising of the correct amount of money due. It develops when a lender takes an active role in the business affairs of its customer.

19. Some bank/customer relationships are inherently fiduciary in nature. A dealer floor-plan loan for a borrower involved in selling automobiles and mobile homes is an example.

20. If a lender is accorded the status of a fiduciary and this duty is breached, the claims of the debtor may be equitably subordinated to other creditors. See Note, Equitable Subordination and Analogous Theories of Lender Liability: Toward a New Model of "Control," 65 Tex. L. Rev. 801 (1987).

21. 464 So. 2d 374 (La. App. 1st Cir. 1985).

22. In addition to the offer of "help," the borrower also alleged that 1) the bank led plaintiffs to believe the guaranty ratio it would propose to the Small Business Association (S.B.A.) would be 50/50 and 2) the bank represented that it would complete an I-4 form in connection with plaintiff's S.B.A. application, 464 So. 2d at 377.

23. The bank agent denied making this statement. Id. at 376.

24. The court may have been of the opinion that the presence of plaintiff's counsel at the meeting with the bank was an indication that the parties were dealing at arm's length.

statements as a commitment to provide a loan"[25] and concluded that "no fiduciary relationship existed between plaintiffs and the bank."[26]

Strikingly, the court in *Busby* found "no basis in our law for the imposition of a fiduciary duty upon the bank."[27] This contradicts the supreme court in *Scott v. Bank of Coushatta*, which declared that "article 2315 has been utilized by Louisiana courts to impose tort liability against banks that have violated clear fiduciary duties to their customers."[28] The fact that other Louisiana decisions recognize fiduciary relationships may limit *Busby*. However, the language of *Busby* still exists as an avenue to stifle potential fiduciary duty claims.

The large number of fiduciary duty cases across the country[29] indicates that litigation over fiduciary duties will surely be seen again, at least at common law. As Louisiana courts become accustomed to this cause of action in the lender liability arena, it may become a primary basis for the imposition of a lender's liability in Louisiana.

B. *Negligent Misrepresentation*

Louisiana has recognized a cause of action for negligent misrepresentation in suits involving lender liability.[30] This cause of action is based on Civil Code articles 2315 and 2316. In *White v. Lamar Realty*[31] the court stated that the code "affords a broad ambit of protection for persons damaged by intentional and negligent acts of others" sufficient to create a cause of action for negligent misrepresentation.[32] Further, *Josephs v. Austin*[33] noted that negligent misrepresentation "is in its infancy in Louisiana."[34] But, "it is a concept consistent with the policies

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25. 464 So. 2d at 378.

26. Id. at 379.

27. Id.

28. 512 So. 2d 356, 364 (La. 1987) (Calogero, J. on rehearing). The court cited Coburn v. Commercial Nat'l Bank, 453 So. 2d 597 (La. App. 2d Cir. 1984) and State Bank of Commerce v. Demco of La., Inc., 483 So. 2d 1119 (La. App. 5th Cir. 1986), as authority.

29. See Stewart v. Phoenix Nat'l Bank, 49 Ariz. 34, 64 P.2d 101 (1937) (very early case finding a relationship of "trust and confidence"); Barnett Bank v. Hooper, 498 So. 2d 923 (Fla. 1986) (finding a relationship of fiduciary duty on the part of a bank); and Barrett v. Bank of America, 183 Cal. App. 3d 1362, 229 Cal. Rptr. 16 (1986) (finding a "quasi-fiduciary" relationship).

30. This was another cause of action recognized by the court in Busby v. Parish Nat'l Bank, 464 So. 2d 374 (La. App. 1st Cir. 1985).

31. 303 So. 2d 598 (La. App. 2d Cir. 1974).

32. Id. at 601. See also Devore v. Hobart Mfg. Co., 367 So. 2d 836 (La. 1979) and Josephs v. Austin, 420 So. 2d 1181 (La. App. 5th Cir.), writ denied, 427 So. 2d 870 (1983).

33. 420 So. 2d 1181 (La. App. 5th Cir.), writ denied, 427 So. 2d 870 (1983).

34. Id. at 1185.

of the civil code."[35] This language indicates that the courts are more sympathetic to this cause of action than to breach of fiduciary duty, possibly because proving a fiduciary duty is a highly subjective undertaking, while negligent misrepresentation is more concrete.

Basically, to succeed in a cause of action under negligent misrepresentation, the borrower must show that the lender has represented some aspect of their relationship in a false and negligent manner. In order to recover, a plaintiff must establish: (1) a legal duty on the part of the defendant to supply correct information to the plaintiff; (2) a breach of this duty; and (3) damages to plaintiff as a result of his justifiable reliance upon the misrepresentation.[36]

There is a split in Louisiana circuit courts as to whether the tortfeasor (lender) must possess a pecuniary interest in the misrepresentation. Some circuits require this element. For example, in *Dousson v. South Central Bell*[37] the fourth circuit required a showing of the defendant's pecuniary interest in the misrepresentation.[38] Yet, in *Cypress Oilfield Contractors v. McGoldrick Oil*[39] the third circuit made no mention of a pecuniary interest requirement.[40]

Theoretically speaking, the phrase "pecuniary interest" may mean either a conscious effort to obtain some financial gain or a circumstance that exists independent of the will of either party. If the cause of action is based on negligence, then requiring a pecuniary interest would seem illogical,[41] because by definition a negligent tortfeasor does not plan his actions. Furthermore, if this circumstance existed without the bank's effort, then the bank will be sheltered by sheer luck: namely, the lack of a pecuniary interest.

In *Busby*,[42] the plaintiffs alleged that the bank's assurances of "help" misled them into a feeling of security. The court, denying the plaintiff's

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35. Id.

36. Busby v. Parish Nat'l Bank, 464 So. 2d 374, 377 (La. App. 1st Cir. 1985).

37. 429 So. 2d 466, (La. App. 4th Cir. 1983).

38. The court relied on Restatement (Second) of Torts, § 552, which states:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

39. 525 So. 2d 1157 (La. App. 3d Cir. 1988).

40. "In order for the doctrine to apply, three cumstances [sic] must occur: (1) there must be a legal duty on the part of the defendant to supply correct information; (2) there must be a breach of that duty; and (3) the breach must have caused damages to the plaintiff." 525 So. 2d at 1162.

41. Because negligence is a lack of care, the concept envisions no intent either to do or not to do an act.

42. 464 So. 2d 374 (La. App. 1st Cir. 1985).

claim for negligent misrepresentation, noted that the plaintiffs "could not have reasonably construed the allegations as an unqualified loan commitment from the bank."[43] Furthermore, the court found that the defendant did not rely on the plaintiff's assertion of this alleged "help."[44] The court did note, however, that the cause of action for negligent misrepresentation did exist in Louisiana.

C. *Fraud*

Fraud is almost always included in the gumbo of allegations made by the borrower. This is because fraud is "as versable as human ingenuity."[45] Fraud is defined as a "misrepresentation or suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other."[46] Allegations of fraud can also be used to obtain a trial by jury[47] and a finding of fraud entitles plaintiff to attorney's fees and damages.[48]

Because of the remedies afforded successful claims of fraud, it is not surprising that the courts are reluctant to find fraud on the part of a lender.[49] A simple, but classic example, *Motors Insurance Company v. Isadore*,[50] provides a foundation. In this case, the lender's agent fraudulently represented to the illiterate defendant that it was necessary for him to sign a note, or lose his driver's license, as he was recently involved in an auto accident.[51] The court had little difficulty in finding fraud on the part of the lender.[52]

A logical expansion of *Isadore* is to apply it to lenders who require guarantees or additional mortgage agreements from the borrower. For example, if a lender were to require a borrower to sign a larger guaranty, mortgage, or loan commitment under some false pretense, fraud might result. Often a false pretense develops when a lender threatens action

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43. Id. at 378.

44. See text accompanying note 25.

45. Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967).

46. La. Civ. Code art. 1953.

47. See La. Code Civ. P. art. 1732(2).

48. La. Civ. Code art. 1958.

49. "One who alleges fraud has the burden of establishing it by legal and convincing evidence, since fraud is never presumed. To establish fraud, exceptionally strong proof must be adduced." Sanders v. Sanders, 222 La. 233, 62 So. 2d 284 (1952); Fitch v. Broussard, 156 So. 2d 127 (La. App. 3d Cir. 1963). See also Motors Ins. Co. v. Isadore, 227 So. 2d 651, 653 (La. App. 3d Cir. 1969).

50. 227 So. 2d 651 (La. App. 3d Cir. 1969).

51. No mention was made as to why the bank required the note. Presumably, the bank had financed the initial purchase of the auto and was left without collateral to secure the debt to the uninsured Isadore.

52. "Our conclusion is that the note is void because of fraud and misrepresentation . . . ." 227 So. 2d at 653.

that it has no right or intention to perform or when some other "trickery, artifice, or device" is employed to induce the signature.[53]

An examination of the recent Texas case *State National Bank of El Paso v. Farah Manufacturing Company*[54] provides insight as to how a lender liability case of fraud may arise. The borrower was a family-owned apparel manufacturer. Because of the losses, Mr. Farah was replaced as chief executive officer. The banks amended their loan agreements to include that any change in the executive management will be an event of default on the outstanding loans. When Mr. Farah attempted to be re-elected to the board, the banks threatened to call their loans.[55] The court found the lenders liable for fraud, duress, and interference with corporate governance. As to the issue of fraud, the court held that acceleration clauses cannot be used offensively, such as for commercial advantage of the creditor, and do not permit acceleration where the facts make it unjust or oppressive.[56]

III. Louisiana Lender Liability

There are several areas of Louisiana law that offer potential basis for liability on the part of a lender. These areas include classifying the borrower as a consumer, abuse of rights, tortious interference with business, and tortious interference with contract. Each will be discussed in turn.

A. *The Borrower As A Consumer*

Louisiana, following the civilian tradition, has a policy of protecting the consumer.[57] The supplier in Louisiana, to maintain good faith, has an affirmative obligation to properly advise the consumer.[58] This rule recognizes that a seller usually has greater knowledge and sophistication regarding a transaction than a buyer. Louisiana Civil Code article 2474 acknowledges this by requiring the seller to "explain himself clearly"

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53. See Helmcamp v. InterFirst Bank, 685 S.W.2d 794, (Tex. Civ. App. 1985) (representations by an officer of a bank that "you will not lose a penny" created a basis for fraud).

54. 678 S.W.2d 661 (Tex. Civ. App. 1984).

55. In fact, the lenders had no such intention. Id. at 664.

56. 678 S.W.2d at 667.

57. See 2 S. Litvinoff, Obligations § 54, at 71-74, in 7 Louisiana Civil Law Treatise (1975).

58. See Mixon v. Brechtel, 174 So. 283 (La. App. Orl. 1937) (finding that a "person holding himself out . . . as skilled in any . . . trade is liable to [those] putting themselves in his charge") and Hersbergen, Unconscionability: The Approach of the Louisiana Civil Code, 43 La. L. Rev. 1315 (1983).

regarding "the extent of his obligations."[59] Furthermore, this article provides that "any obscure or ambiguous clause is construed against him."[60]

In practice, the courts have interpreted this statute to mean the more sophisticated supplier often must "affirmatively act as an advisor to the consumer."[61] Louisiana has applied these rules, by analogy, to a broad range of suppliers including a contractor,[62] a lessor,[63] and even a loan company.[64] In these cases, the courts have acknowledged that the more sophisticated party has an obligation to advise the less sophisticated party regarding the transaction.

Theoretically speaking, it is much easier to prove a lender's liability under these articles because the lender, if more sophisticated, has an affirmative duty to advise.[65] In practice, if the more sophisticated lender does not advise, liability may be imposed upon it. On the other hand, if the lender does advise, it may be developing an unwanted fiduciary relationship. In fact, this area is fertile ground for developments in lender liability because the civil law, unlike the common law, maintains a strict adherence to the principle that the sophisticated party who does not advise of potential defects should be responsible.[66] The extent of the "defects" is, of course, unknown, but it may even encompass the duty to inform the commercial borrower that the borrower's venture is unsound.

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59. La. Civ. Code art. 2774 reads:

> The seller is bound to explain himself clearly respecting the extent of his obligations: any obscure or ambiguous clause is construed against him.

60. La. Civ. Code art. 2056 and 2057 are also relevant. They state:

> In case of doubt that cannot be otherwise resolved, a provision in a contact must be interpreted against the party who furnished its text.
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> A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party.
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> In case of doubt that cannot be resolved, a contract must be interpreted against the obligee and in favor of the obligor of a particular obligation.
>
> Yet, if the doubt arises from a lack of necessary explanation that one party should have given, or from the negligence or fault of one party, the contract must be interpreted in a manner favorable to the other party, whether obligee or obligor.

61. 43 La. L. Rev. at 1347, quoting Mixon v. Brechtel, 174 So. at 283.

62. Governor Claiborne Apts. v. Attaldo, 231 La. 85, 90 So. 2d 787 (1956).

63. Equilease Corp. v. Hill, 290 So. 2d 423 (La. App. 4th Cir. 1974).

64. United Cos. Mtg. & Inv. v. Estate of McGee, 372 So. 2d 622 (La. App. 1st Cir. 1977).

65. For purposes of prescription, it is interesting to speculate whether an action under this article is a tort or is a breach of a contract. See supra note 2.

66. The common law follows the maxim of caveat emptor.

An interesting case in this area is *Kunnes v. Bryant*,[67] in which a homeowner sued a painter who had contracted to paint over a surface that was previously painted with creosote. The painter did not inform the homeowner that the result would not be satisfactory. The court stated that "an expert painter should advise an owner as to the possibility that an unsatisfactory result will be obtained."[68] However, the court found that the homeowner knew from previous experience that the paint probably would not seal. Consequently, it found the painter not liable.

In a lender liability context, this effect is best illustrated by the discrepancy in the level of sophistication between a rural farmer (borrower) and a banker (lender). The banker may be under an affirmative duty to advise the borrower of, inter alia, what type of crop to plant. But this places the lender in a precarious position. As noted before, if the lender advises, it may be developing an unwanted fiduciary relationship. But if the lender fails to advise it may be liable under the stated provisions of the civil code.[69]

While this basis of liability has yet to be litigated in the context of a lender liability action, it has a sound basis in both legislation and jurisprudence. Further, it provides a basis of a unique lender liability action that is not found at common law.

B. *Abuse Of Rights*

The doctrine of abuse of rights affords another basis for a lender's liability in Louisiana.[70] Closely akin to the common law theory of prima facie tort, this action applies when a legal right is exercised without benefit to the owner or with a purpose other than that for which it was granted.[71] At common law, prima facie tort is a "lawful act unjustifiably performed with an intent to harm another."[72]

One of the most striking examples of this cause of action in a lender liability context is the case of *Centerre Bank v. Distributors,*

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67. 49 So. 2d 872 (La. App. Orl. 1951).

68. Id. at 874.

69. It would be interesting to see if a cause of action could be maintained against a lender who knows that the borrower is unable to repay the sums loaned. Under this theory, the lender, skilled in financial matters should advise the customer of his inability to pay.

70. For a discussion of the common law counterpart, prima facie tort, see Maitland, The Forms of Actions at Common Law 4-5 (1941); G. Alexander, Commercial Torts § 6.1 (1973); and Aikens v. Wisconsin, 195 U.S. 194, 25 S. Ct. 3 (1904) (defining prima facie tort as the intentional infliction of temporal damages.)

71. See Morse v. J. Ray McDermott & Co., 344 So. 2d 1353 (La. 1977).

72. Porter v. Crawford & Co., 611 S.W.2d 265, 268 (Mo. Ct. App. 1980) (finding plaintiff had a cause of action in prima facie tort against an insurer which intentionally stopped payment on a check).

Inc.[73] Although this case arises in Montana, it illustrates how this cause of action is employed. The lender in *Centerre* was sued by the borrower for wrongfully calling a $900,000 secured demand note. The lender, apparently concerned with the decreasing value of the security and under pressure from bank examiners, took possession of the security and the accounts receivable of the borrower. The trial court ruled for the borrower and awarded $3 million in damages.[74] The court of appeals reversed, citing a justifiable legitimate business interest to reduce losses resulting from high risk loans.[75]

Abuse of rights is an equitable doctrine. It provides a remedy where another has exercised a "right" but has committed a "wrong" in so doing. What is peculiar in a case of lender liability is that the lender can actually exercise a right that it has, but still be liable if it is unjustifiable and adverse to the borrower.

The factors that the court will apply in finding an abuse of rights have been established as follows:

> (1) The lender is exercising the right exclusively for the purpose of harming the borrower, or the lender's predominate motive is to cause harm;
> (2) The lender has no serious and legitimate interest that is worthy of judicial protection;
> (3) The lender exercises the right in violation of moral rules, good faith or elementary fairness; or,
> (4) The lender exercises the right for a purpose other than that for which the right was granted.[76]

It should be noted that there need be no showing of an intent to harm. The doctrine of abuse of rights has been applied when there was no serious and legitimate interest in the exercise of the right worthy of judicial protection.[77]

In *State Bank of Commerce v. Demco of Louisiana*,[78] the court examined the abuse of rights doctrine as applied to actions regarding third parties by the lender. In that case, the debtor sought damages for injury to its business and trade reputation allegedly brought on by a

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73. 705 S.W.2d 42 (Mo. Ct. App. 1985).
74. Id.
75. Id. at 55.
76. Illinois Cent. Gulf R.R. Co. v. International Harvester Co., 368 So. 2d 1009 (La. 1979); Mascro v. Wokocha, 489 So. 2d 274 (La. App. 4th Cir. 1986).
77. Illinois Cent. R.R. Co. v. International Harvester Co., 368 So. 2d 1009 (La. 1979).
78. 483 So. 2d 1119 (La. App. 5th Cir. 1985).

letter written by an officer of State Bank to one of Demco's debtors.[79] The court dismissed the demand based on abuse of rights pointing out that the plaintiff admitted in his petition that the Bank had no right to write the letter. The court reasoned that if the Bank had no such right, "then by definition the theory of abuse of that right cannot prevail."[80] It should be noted that the court did not dispute the existence of the doctrine as applied to lenders, it simply found that it did not apply in this case.

The courts appear to focus on the existence of a serious and legitimate interest by the party exercising the right. Often, a lender has a legitimate interest in protecting its stake in the loans advanced, or to be advanced. This standard may be too difficult a burden for plaintiffs to overcome.

C. *Tortious Interference With Business*

Louisiana courts have long recognized a cause of action for interference with another's business relations.[81] In the area of lender liability, this basis may be utilized where a lender has influenced others not to deal with the borrower. For example, if a lender has indicated to other bank customers that a particular borrower is late in his loan payments, this may be construed as being improper influence on the part of the lender.[82]

Under the doctrine of tortious interference with business, "a party must show that a defendant improperly and maliciously influenced others not to deal with him."[83] The court in *Sandolph v. P & L Hauling Contractors*[84] recognized the rule that an entity "has an absolute right

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79. The letter provided in pertinent part:

> Please let this letter constitute a formal notice that your payment to Demco La., Inc. for services rendered should be addressed, as you have done in the past, to Demco, Inc. c/o State Bank of Commerce, P. O. Box 1527, Slidell, Louisiana, 70459.
>
> It is our understanding that we have an assignment of their accounts receivable and will look to you for damages for any losses suffered via failure to remit your accounts payable as mentioned within the body of this letter.

80. 483 So. 2d at 1122.

81. Graham v. St. Charles St. R.R. Co., 47 La. Ann. 1656, 18 So. 707 (1895) (a railroad foreman was held liable for instructing employees not to shop at corner grocery store). See also McCoin v. McGehee, 498 So. 2d 272 (La. App. 1st Cir. 1986); Ustica Enterprises v. Costello, 434 So. 2d 137 (La. App. 5th Cir. 1983).

82. A "malicious and wanton" motive was required in *Ustica Enterprises*, 434 So. 2d at 140.

83. Muslow v. A.G. Edwards & Sons, Inc., 509 So. 2d 1012, 1021, (La. App. 2d Cir.), writ denied, 512 So. 2d 1183 (1987).

84. 430 So. 2d 102 (La. App. 5th Cir. 1983).

to refuse to deal with another" but the right to influence others not to deal is "not as broad."[85]

Tortious interference with business is based on Louisiana Civil Code article 2315. The policy behind this cause of action is protection of business relations from the undue influence of third parties. It is difficult to prevail in this cause of action because one must show not only intent, but also actual interference.[86] Under this doctrine, it has been held that a businessman is protected from malicious and wanton interference, however, interference by actors with legitimate interests is permitted.[87]

In a lender liability case, the application of this doctrine is easily envisioned.[88] Borrowers A and B are customers of Bank and of each other. Bank has difficulty collecting from A, but collects promptly from B. Bank advises B that A may be "having trouble." B stops dealing with A. The dispositive question is whether B stopped dealing with A because of Bank's communication. Bank may have an obligation, however, to advise B of its knowledge of A under the theory that a borrower is a customer.[89] If Bank so advises, it absolves itself of liability to B but becomes liable to A for a breach of its fiduciary duty,[90] and under the doctrine of tortious interference with business.

Although the doctrine of tortious interference has not arisen in a lender liability action in Louisiana, its broad applicability affords a potential basis of liability in a broad range of facts.

D. *Tortious Interference With Contract*

Until now, no cause of action existed in this state for intentional interference with contractual rights.[91] In fact, Louisiana has been the only "American state that does not recognize the action for tortious interference with contractual relations."[92] An action for intentional in-

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85. Id. at 103.

86. Actual interference may result in a loss. Although intent may be present, if no actual interference resulting in loss occurred, then the plaintiff will not prevail.

87. McCoin v. McGehee, 498 So. 2d 272 (La. App. 1st Cir. 1986).

88. See State Nat'l Bank v. Farah Mfg. Co., 678 S.W.2d 661 (Tex. Civ. App. 1984).

89. See supra text accompanying notes 60 and 61.

90. See supra text accompanying notes 23-29.

91. Kline v. Eubanks, 109 La. 241, 33 So. 211 (1902), overruled by 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989) (cause of action for tortious interference with contract does not exist in Louisiana). Louisiana courts have hinted that they may be willing to accept this cause of action for some time. See State Bank of Commerce v. Demco of La., Inc., 483 So. 2d 1119 (La. App. 5th Cir. 1986); Sanborn v. Oceanic Contractors, Inc. 448 So. 2d 91 (La. 1984); and PPG Industries v. Bean Dredging, 447 So. 2d 1058, (La. 1984).

92. 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989).

terference with performance of contract by a third person, however, has been recognized in the Second Restatement of Torts for years.[93]

Overruling eighty-seven years of jurisprudence, the supreme court recognized this cause of action in the recent case of *9 to 5 Fashions, Inc. v. Spurney*.[94] A supplier of uniforms to the Louisiana World Exposition sued an officer of the exposition after it went bankrupt. The supplier alleged that the officer was personally liable for failing to appoint a coordinator between the fabric manufacturer and the fair. The plaintiff claimed that these actions resulted in too much fabric being ordered. The trial court awarded damages to the fabric company.[95] The appellate court reduced damages, but otherwise affirmed.[96] The supreme court reversed the decision, but explicitly recognized a cause of action for intentional interference with contractual rights.

In the arena of lender liability, a typical case arising under this theory of liability would be as follows.[97] A is a borrower. Bank, in an effort to protect its loan to A, states that unless A obtains permission from Bank before paying other creditors, Bank will call its outstanding loan. Not only may the borrower have a cause of action, but the creditors who were not paid may have an action because their contractual relations were impaired as well.[98]

Although a lender may act to protect its legitimate financial interest, this does not confer an absolute privilege to interfere with the debtor's

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93. Restatement (Second) of Torts § 766 (1977) reads:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

94. 538 So. 2d 228 (La. 1989). Tortious interference has significant ramifications in the lender liability arena. Many cases have been litigated in other jurisdictions based on this cause of action. See State Nat'l Bank v. Farah Mfg. Co., 678 S.W.2d 661, (Tex. Civ. App. 1984); Davis v. Lewis, 487 S.W.2d 411 (Tex. Civ. App. 1972), and Leonard Duckworth, Inc. v. Michael Field & Co., 516 F.2d 952 (5th Cir. 1975). But see Sterner v. Marathon Oil Co., 767 S.W.2d 686 (Tex. 1989), overruling Black Lake Pipe Line Co. v. Union Constr. Co., 538 S.W.2d 80 (Tex. 1976).

95. $101,438 in damages were awarded.

96. 9 to 5 Fashions, Inc. v. Spurney, 520 So. 2d 1276 (La. App. 5th Cir. 1988). The court reduced damages to $45,308.

97. The facts of this hypothetical are taken largely from the case of Melmed v. Lake County Nat'l Bank, 727 F.2d 1399 (6th Cir. 1984).

98. Usually, if the borrower goes bankrupt and the creditor is left unpaid, the creditor may pursue his claim against the solvent party, the bank. See Note, Equitable Subordination and Analogous Theories of Lender Liability: Toward a New Model of "Control," 65 Tex. L. Rev. 801 (1987).

affairs.[99] Furthermore, at common law, an action based on interference need not show that the interfering party acted with an intent to harm. The plaintiff need only show that the acts were willful and intentional.[100]

As the newest cause of action in Louisiana, tortious interference with contractual relations will surely be an area of much litigation. Well-suited for claims of lender liability and backed by a tremendous number of cases at common law, this cause of action promises to be at the forefront of lender liability litigation in Louisiana.

IV. CONCLUSION

There is an abundance of theories at common law under which claims of lender liability may be pursued. However, Louisiana law recognizes some causes of action that the common law does not.

First, consumer protection laws provide a potent weapon with which to pursue claims for borrowers who were not apprised of the risks associated with the venture. Second, recognition of the doctrine of abuse of rights allows borrowers to pursue actions for a lender's unjustified actions. Third, the doctrine of tortious interference with business provides an action to borrowers who were forced out of business. Finally, the recent recognition of the doctrine of tortious interference with contract illustrates the greater protection afforded borrowers.

Compared with other states, Louisiana has produced few decisions involving lender liability. However, the principles and theories underlying the civil law may provide protection equal to, if not greater than, that found elsewhere. The future of lender liability in Louisiana, then, depends largely upon the imagination and aggressiveness of the attorneys who pursue or defend these claims.

Edward B. Kramer

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99. See State Nat'l Bank v. Farah Mfg. Co., 678 S.W.2d 661, 690, (Tex. Civ. App. 1984).

100. Id. at 690.