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# Attorney Fees Provisions and Promissory Notes

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## ATTORNEY FEES PROVISIONS AND PROMISSORY NOTES

### *The Stipulation*

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 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<sup>1</sup> of the unpaid balance of the note, and the percentage varies with the amount of the instrument involved. In the event the debtor defaults and the note is turned over for collection, the services rendered by the attorney may include nothing more than making a phone call and threatening to sue the debtor, sending a demand letter, filing a petition, or answering a reconventional demand. For these services, the debtor may be forced to pay the entire amount of the stipulated fee, which can range from ten percent to twenty-five percent of the amount due. If the balance due is large, the fee will be sizeable. By the same token, the fee collected could be quite small.

Banks and other financial institutions usually retain attorneys who handle all of their collections. These attorneys collect all the money, withhold their fee, and remit the balance to the bank. The compensation to the attorney is seldom adequate on a small note since he may have to spend a great deal of time to collect a very small fee. On a large note, however, he may not fully earn the fee that he receives. In the long run, the problem with the fees collected by the attorney on these notes does not appear so great—the lucrative fees from the larger notes set off the inadequate compensation he receives on the smaller notes. At first blush, this may seem unfair to the larger borrowers, but it should be recognized that the large borrowers are sophisticated businessmen who should be well advised and who accept the cost of default. There is far greater reason to protect the small borrower than there is to protect the large borrower.

In addition, the attorney does not always demand the full amount of the stipulated fee. Where the fee is clearly outrageous, the attorney usually will not abuse the stipulation. He will usually "help" the debtor by not collecting the full amount, and at the same time collect a more than adequate fee. The lending institution may also try to compromise the matter with the debtor; using the attorney fees as a tool for negotiation, the creditor encourages the debtor to pay. These arrangements are not always satisfactory to the attorney. Some creditors and debtors are all too ready to negotiate the attorney fees downward.

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1. There are several advantages to the fixed percentage. In order to obtain executory process the amount must be certain. The fixed percentage eliminates any need for presenting evidence to prove attorney fees. A fixed percentage avoids the need for a court to determine the fee which the legal community prefers because, whether justified or not, the legal community generally feels that courts set "reasonable" fees far too low.

These stipulations for attorney fees have resulted in a great deal of litigation. Furthermore, this area presents serious ethical questions for attorneys and many questions for the courts in regard to their role in regulating the legal profession. It also brings into question the extent to which individuals are free to contract. The strong public policy in favor of regulation of the legal profession conflicts with the contractual freedom of parties.

Despite a recent decision of the Louisiana Supreme Court, *Leenerts Farms, Inc. v. Rogers*,<sup>2</sup> and a legislative attempt to override that decision,<sup>3</sup> there are still many unanswered questions about the attorney fees provision in a promissory note. *Leenerts Farms* addressed two questions: first, whether the stipulation for attorney fees is a liquidated damages provision;<sup>4</sup> and second, whether the courts could regulate the amount paid pursuant to the stipulation.<sup>5</sup>

In regard to the first question the court failed adequately to justify its conclusion; the court simply asserted, after little discussion, that the provision was *not* a stipulation for liquidated damages. The court did not explain why the stipulation was not a liquidated damages provision, and it refused to classify or characterize the stipulation for attorney fees. The court failed to state what the provision is, but rather stated what the provision is not. It is this failure of the courts to define clearly what they are dealing with in these stipulations that probably led to the uncertainty and confusion in this area. A clear classification of these stipulations would help to define the legal consequences associated with them and would lend guidance in answering questions such as the following: In whose favor does the stipulation run? Who "owns" the fee? Is it subject to court supervision? When, if ever, may the attorney intervene?

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2. *Leenerts Farms, Inc. v. Rogers*, 421 So. 2d 216 (La. 1982). This case resolved the split in the decisions of the courts of appeal on the question of court supervision of the amount paid under a provision for attorney fees in a promissory note. See *infra* text accompanying notes 21-25.

3. See 1983 La. Acts, No. 483, § 1, *amending* LA. CIV. CODE art. 1935. The amendment provides:

The damages due 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 where the parties, by contract in writing, have expressly agreed that the 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.

4. The court answered this question in the negative, 421 So. 2d at 218, but the lack of any analysis upon the question, together with a failure to determine what the stipulation is, left many questions unanswered.

5. In a unanimous opinion, the supreme court held that courts may inquire into the reasonableness of attorney fees which have been fixed in a note by the parties as a percentage of the amount due upon default of the debtor.

The Louisiana Legislature attempted to clarify the nature of attorney fees provisions in Act 483 of 1983.<sup>6</sup> This act made attorney fees, when fixed by a stipulation between the parties, an element of damages collectible under Louisiana Civil Code article 1935. Act 483 makes it clear that the creditor, and not the attorney, is entitled to the fee. At first glance, this seems to answer most of the questions; it is not at all clear, however, whether Act 483 settles the question of the supreme court's power to regulate the fees.

Any consistent and meaningful approach to the entire problem must begin with a proper classification of the provision for attorney fees. This note will examine a few of the avenues open to the court in classifying the stipulation for attorney fees.

### *History*

In 1934, the Louisiana Supreme Court rendered two decisions on attorney fees provisions in promissory notes.<sup>7</sup> In *W.K. Henderson Iron Works & Supply Co. v. Meriwether Supply Co.*,<sup>8</sup> the court held that the stipulation was a liquidated damages provision. This holding was significant because it indicated that the stipulation ran in favor of the creditor and because the courts do not ordinarily look behind liquidated damages provisions. If the parties have agreed on the amount of damages to be paid, the courts normally will not inquire whether the damages agreed upon equal or approximate the actual damage suffered.<sup>9</sup> Shortly thereafter, however, the supreme court, without any reference to *Henderson Iron Works*, decided *Foundation Finance Co. v. Robbins*.<sup>10</sup> In *Foundation Finance*, the court held that a stipulation for attorney fees did not constitute usurious interest. In reaching this conclusion, the court said that the fees stipulated in the note did not belong to the creditor (as would the interest) but belonged to the attorney. The court went on to say that no person could collect or receive attorney fees unless he was an attorney-at-law. Although the supreme court allowed the award of the stipulated fees in both *Henderson Iron Works* and *Foundation Finance*, the cases were in direct conflict in one very important respect: *Henderson Iron Works* said that the stipulated fees belonged to the creditor because they were liquidated damages, while *Foundation Finance* declared that the fees

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6. See *supra* note 3.

7. *Foundation Fin. Co. v. Robbins*, 179 La. 259, 153 So. 833 (1934); *W.K. Henderson Iron Works & Supply Co. v. Meriwether Supply Co.*, 178 La. 516, 152 So. 69 (1934).

8. 178 La. 516, 152 So. 69 (1934). This case was overruled by *Leenerts Farms*, 421 So. 2d at 219.

9. *Maloney v. Oak Builders, Inc.*, 256 La. 85, 235 So. 2d 386 (1970); *Lama v. Manale*, 218 La. 511, 50 So. 2d 15 (1950); *Flanders v. Motor Sales & Serv.*, 9 La. App. 616, 118 So. 387 (Orl. 1928).

10. 179 La. 259, 153 So. 833 (1934).

belonged to the attorney. This difference is a very important one: if the stipulated fees belong to the attorney, there is no question that the supreme court possesses the power to regulate them, but if they belong to the creditor the answer is not so clear.<sup>11</sup>

The courts of appeal did not follow the rationale of *Foundation Finance*, but only its holding that attorney fees provisions were not interest. Instead, the jurisprudence followed the *Henderson Iron Works* rationale (that the provision was one for liquidated damages) through the 1970's.<sup>12</sup> In 1975, however, the rationale of *Foundation Finance* was resurrected by the fourth circuit in *Jefferson Bank & Trust Co. v. Post*.<sup>13</sup> The fourth circuit, relying on *Foundation Finance*, held that once an overdue note is turned over to an attorney for collection, the attorney fees stipulated in the note belong to the attorney.<sup>14</sup> The court in *Post* did not face the question of whether the twenty-five percent fee was excessive, but in *People's National Bank v. Smith*,<sup>15</sup> the fourth circuit, again relying on *Foundation Finance*, concluded that a "fee of over \$53,000.00 to collect this note is 'in excess of a reasonable fee,'"<sup>16</sup> and remanded the case to the district court to set a proper fee. The court emphasized that the fee belonged to the attorney and that the attorney's collection of an unreasonable fee violated disciplinary rule 2-106 of the Code of Professional Responsibility.<sup>17</sup> Collection of the fee was, therefore, contrary to public policy.

While the fourth circuit was following *Foundation Finance*, continued

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11. In *Leenerts Farms* the court said that it was exercising its inherent constitutional power to regulate the legal profession. 421 So. 2d at 219. The power of the court and its limits are beyond the scope of this paper, but for an interesting discussion on this topic, see Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 LA. L. REV. 765 (1977); Hood, *Renewed Emphasis on Professional Responsibility*, 35 LA. L. REV. 719, 721 (1975); Hargrave, *Developments in the Law, 1979-1980—Louisiana Constitutional Law*, 41 LA. L. REV. 529, 543-44 (1981); Knight, *Developments in the Law, 1979-1980—Professional Responsibility*, 41 LA. L. REV. 548 (1981). See also *Saucier v. Hayes Dairy Prods., Inc.*, 373 So. 2d 102 (La. 1979); *Singer, Hunter, Levine, Seeman, & Stuart v. Louisiana State Bar Ass'n*, 378 So. 2d 423 (La. 1979). This note does not question the court's power, but by classifying the provision merely seeks to lay down a foundation for understanding when that power may be applicable and why.

12. See, e.g., *Fidelity Nat'l Bank v. Pitchford*, 374 So. 2d 149 (La. App. 1st Cir. 1979); *First Nat'l Bank v. Doni Homes, Inc.*, 338 So. 2d 1202 (La. App. 3d Cir. 1976); *Burris v. Gay*, 324 So. 2d 11 (La. App. 2d Cir. 1975), *writ denied*, 326 So. 2d 377 (La. 1976); *Snider v. Bozarth*, 180 So. 2d 800 (La. App. 4th Cir. 1965).

13. 312 So. 2d 907 (La. App. 4th Cir. 1975).

14. *Id.* at 909.

15. 360 So. 2d 560 (La. App. 4th Cir. 1978).

16. *Id.* at 563 (emphasis added) (quoting LA. CODE OF PROF. RESP. DR 2-106(B) (found in ARTICLES OF INCORP., LA. STATE BAR ASS'N, art XVI; LA. R.S. tit. 37, ch. 4, app. (1974)) [hereinafter cited as CODE OF PROF. RESP.]).

17. "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." CODE OF PROF. RESP. DR 2-106(A).

adherence to the *Henderson* rationale in the other circuits created a split in the jurisprudence.<sup>18</sup> In 1982, the supreme court granted certiorari<sup>19</sup> to review a first circuit opinion, *Leenerts Farms, Inc. v. Rogers*,<sup>20</sup> and to resolve the split in the circuits.

In *Leenerts Farms*<sup>21</sup> the supreme court expressly overruled *Henderson Iron Works*.<sup>22</sup> After determining that the stipulation was not a liquidated damages clause, the court held that it did in fact have the power to regulate the amount paid pursuant to such attorney fees provisions. Relying on *Saucier v. Hayes Dairy Products, Inc.*,<sup>23</sup> the court asserted that a stipulation in a promissory note which provided for excessive attorney fees was in derogation of laws made for the preservation of public good. The court stated:

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 fees as a percentage of the amount to be collected.<sup>24</sup>

In response to *Leenerts Farms*, the legislature passed Act 483 of 1983, amending Civil Code article 1935.<sup>25</sup> As a result of this amendment, and the court's failure in *Leenerts Farms* to clearly state what the provision for attorney fees is, the questions of what the provision is and the legal effects that flow therefrom are now as confused as ever.

### *Liquidated Damages*

The assertion in *Leenerts Farms* that the attorney fees stipulation is not a liquidated damages clause may be correct. In an attempt to classify the provision for attorney fees, however, this possibility deserves at least another look, especially in light of the amendment to Civil Code article 1935.

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18. See cases cited *supra* note 12.

19. 413 So. 2d 506 (La. 1982).

20. 411 So. 2d 576 (La. App. 1st Cir. 1982).

21. 421 So. 2d 216 (La. 1982).

22. *Id.* at 219.

23. 373 So. 2d 102 (La. 1979) (held that the Code of Professional Responsibility had the force and effect of substantive law).

24. 421 So. 2d at 219.

25. How the court will deal with this amendment is unknown. In *Saucier* the supreme court said that the "rules [of the Code of Professional Responsibility] set forth by virtue of the Court's exercise of its prevailing judicial authority override legislative acts which tend to impede or frustrate that authority; only legislative enactments in this area which aid the Court's inherent powers will be approved." 373 So. 2d at 115. If the court continues to feel that the fee is within its power to regulate, the amendment could be short lived. See *supra* note 11.

As a general rule, attorney fees may not be recovered except when authorized by statute or contract.<sup>26</sup> Attorney fees are not allowable in an action for breach of contract unless there is a specific provision for them in the contract.<sup>27</sup> A provision in a contract that stipulates an amount to be paid in case of a breach, however, may be interpreted as either a liquidated damages or a penal clause. As Professor McCormick observed in his treatise on damages:

If a party to a contract agrees to pay a certain sum of money if he commits a breach, or to forfeit a sum of money deposited with the other party, the amount agreed to be paid or forfeited may be held to be "liquidated damages" or may be considered a "penalty."

If it is determined that the amount was fixed in good faith as an estimate by the parties of the probable injury to be suffered from a breach, then it will be denominated "liquidated damages" and the agreement will be enforced; but if the court finds that it was not such a pre-estimate, but was fixed merely as a deterrent to prevent a breach, it will be termed a "penalty" and the agreement will not be enforced.<sup>28</sup>

At common law, unenforceable penalty clauses in a contract were sharply distinguished from liquidated damages.<sup>29</sup> Although the Louisiana Civil Code does not make this distinction,<sup>30</sup> Louisiana courts have departed from the Code and have adopted the common law distinction between penal clauses and liquidated damages.<sup>31</sup> The jurisprudence of Louisiana had long viewed a stipulation for attorney fees in a fixed and determinable amount as a provision for liquidated damages.<sup>32</sup> In *Leenerts Farms*, however, the supreme court abandoned this position.

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26. For an interesting discussion of the rule, its origin, and the underlying policy, see Comment, *Attorney's Fees as an Element of Damages: The General Rule and Its Exceptions*, 20 LA. L. REV. 389 (1960). See also *Nassau Realty Co. v. Brown*, 332 So. 2d 206 (La. 1976); *Maloney v. Oak Builders, Inc.*, 256 La. 85, 235 So. 2d 386 (1970); *Inzer v. Hollis*, 339 So. 2d 522 (La. App. 2d Cir. 1976), writ denied, 341 So. 2d 1124 (La. 1977).

27. *Morein v. G.J. Deville Lumber Co.*, 215 So. 2d 208 (La. App. 3d Cir. 1968).

28. C. McCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 146, at 599 (1935).

29. 5 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* §§ 770, 776 (3d ed. 1961); C. McCORMICK, *supra* note 28, § 146.

30. Unlike the common law, the Civil Code specifically recognized penal clauses and provided for their enforceability. See LA. CIV. CODE arts. 2117-2129. However, the Code has no provisions for liquidated damages in the case of an obligation to pay money. See LA. CIV. CODE arts. 1934-1935. The 1983 amendment to article 1935 changes this.

31. For a thorough discussion of this area, see Comment, *Penal Clauses and Liquidated Damages, A Comparative Survey*, 33 TUL. L. REV. 180 (1958); Note, *Damages—Penal Clause—Liquidated Damages*, 25 TUL. L. REV. 407 (1951). For leading cases in this respect, see *Pennington v. Drews*, 218 La. 258, 49 So. 2d 5 (1949); *Ekman v. Vallery*, 185 La. 488, 169 So. 521 (1936); *Heeb v. Codifer & Bonnabel, Inc.*, 162 La. 139, 110 So. 178 (1926).

32. See *W.K. Henderson Iron Works & Supply Co. v. Meriwether Supply Co.*, 178

[I]t has been held that a stipulation in a note for the payment of attorney fees upon the default of the debtor is not a stipulation for the payment of damages as contemplated by . . . article [1935]. *Foundation Finance Co. v. Robbins*, 179 La. 259, 153 So. 833 (1934); *Race & Foster v. Bruen*, 11 La. Ann. 34 (1856). Therefore, such a provision certainly cannot be a stipulation for the payment of liquidated damages.<sup>33</sup>

Both of the cases cited by the supreme court held only that attorney fees provisions were not interest.<sup>34</sup> But a holding that such stipulated fees are not interest does not necessarily mean that they are not liquidated damages. It is difficult to follow the court's truncated rationale in *Leenert's Farms*. One possible explanation is that the court left out a step in its syllogism. The missing step originates in Civil Code article 1935, as it appeared before the 1983 amendment:<sup>35</sup> "The damages due 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." A cursory reading of the last sentence may lead one to the conclusion that the only damages collectible in this situation are interest. With this missing step, the court's syllogism may be completed: The jurisprudence has held that the attorney fees provisions are not interest; the only damages collectible for delay in an obligation to pay money are interest; therefore a stipulation for attorney fees cannot be liquidated damages because this is not a damage collectible under article 1935. The court may have concluded that the stipulation was not a liquidated damage by concluding that article 1935 damages are the only damages collectible.

If this is the court's reasoning in *Leenerts Farms*, it is subject to two criticisms. First, the court's disposition of the case is inconsistent with the above reasoning. If the stipulated fees were not interest and therefore not collectible, the court should not have reduced the amount; it should have entirely disallowed any collection. The stipulated fees are not interest whether in small amount or large. Second, the court failed to

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La. 516, 152 So. 69 (1934); *Fidelity Nat'l Bank v. Pitchford*, 374 So. 2d 149 (La. App. 1st Cir. 1979); *First Nat'l Bank v. Doni Homes, Inc.*, 338 So. 2d 1202 (La. App. 3d Cir. 1976); *International Harvester Credit Corp. v. McGill*, 297 So. 2d 272 (La. App. 3d Cir. 1974). All of the foregoing cases held that a stipulation in a promissory note was liquidated damages. See also *Maloney v. Oak Builders, Inc.*, 256 La. 85, 235 So. 2d 386 (1970) (held as liquidated damages a provision for attorney fees in a building contract); *Schramm v. Toye Bros. Yellow Cab Co.*, 169 So. 116, *amended on reh'g*, 170 So. 44 (La. App. Orl. 1936) (held as liquidated damages a provision for attorney fees in a lease).

33. 421 So. 2d at 219.

34. In both cases the defendant-debtors were contending that the provision for attorney fees represented hidden usurious interest. The court in both cases rejected this notion. *Foundation Finance*, 179 La. at 263, 153 So. at 834; *Race & Foster*, 11 La. Ann. at 35.

35. For the amended version of article 1935, see *supra* note 3.



recognize a distinction between the damages due for delay under article 1935 and the damages incurred upon the default of the debtor. This distinction was drawn by both of the cases which *Leenerts Farms* relied upon to preclude classification of the stipulation as liquidated damages. In *Foundation Finance* the court stated:

It is true that the Civil Code, in article 1935, declares that the damages due for delay in the performance of an obligation to pay money are called interest . . . . But that definition of interest, as being "the damages due for delay in the performance of an obligation to pay money," is not at all applicable to a stipulation for the payment of attorneys' fees incurred for the collection of the debt; because a stipulation to pay an attorney's fee for the collection of a debt . . . is not a stipulation to pay damages for delaying the payment of the debt . . . . For a debtor to compel his creditor to employ an attorney to collect the debt, at the debtor's expense, is not an assumption of liability for damages "for delay" in the payment of the debt. The employment . . . is to hasten—not to delay—the collection of the debt.<sup>36</sup>

Similarly, in *Race & Foster v. Bruen*,<sup>37</sup> the court stated that the money was not interest, "but the means only of securing that compensation."<sup>38</sup> In both cases, the fee was held to be collectible.

After the legislature's amendment of article 1935, this distinction is unimportant.<sup>39</sup> The new terms of article 1935 clearly state that two kinds of damages are collectible: interest *and* attorney fees (if stipulated in the note). The new article clearly states, however, that these fees belong to the creditor, and this would render inapplicable the strong policy reasons the court has asserted for regulating attorney fees. It is not clear that the supreme court would be able to regulate the fees if they belonged to the the creditor. The decision in *Leenerts Farms* that the supreme court could regulate the fees collected pursuant to such stipulations turned on the holding that the provision was not one for liquidated damages and that it therefore did not belong to the creditor but to the attorney. The rationale for this holding has been undermined by the new article.

### *Penal Clause*

"A penal clause is a secondary obligation, entered into for the purpose of enforcing the performance of a primary obligation."<sup>40</sup> "The penal clause is the compensation for the damages which the creditor sustains

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36. 179 La. at 270-71; 153 So. at 837 (emphasis added).

37. 11 La. Ann. 34 (1856).

38. *Id.* at 35.

39. See *supra* note 3.

40. LA. CIV. CODE art. 2117.

by the non-execution of the principal obligation. The creditor can not demand the principal and the penalty together, unless the latter be stipulated for the mere delay."<sup>41</sup> However, "[t]he penalty may be modified by the judge, when the principal obligation has been partly executed, except in case of a contrary agreement."<sup>42</sup> It is possible to rationalize the stipulation for attorney fees as a penal clause, *i.e.*, as an alternative obligation stipulated for delay in performance of the principal obligation, so that both the penalty and performance of the principal obligation may be demanded. If the stipulation were classified as a penal clause, this would be a very neat solution for the court. The payment of money after suit is performance, but only a partial performance. It is partial because the payment was not made on time. Since it is a partial payment, the court could reduce the penalty under Civil Code article 2127. The classification as a penalty clause would thus achieve the policies the court seeks to further in reducing attorney fees.

It is doubtful that the provision for attorney fees fits into the penal clause classification. The purpose for the inclusion of the stipulation is not that the obligation to pay the fees will enforce the performance of the main obligation. It reflects a desire on the part of the lender to avoid the loss of the cost of the attorney's services, if he must employ an attorney to obtain repayment. The underlying motive for the stipulation is not punishment of the borrower, but repayment to the lender of the expenses he incurs. The stipulation seems to be a provision for indemnity—not punishment. The word "penalty" contemplates a punishment; it is designed to force performance of the obligation by the threat of its imposition. The provision for attorney fees is not prompted by this motivation.

#### *Stipulation Pour Autrui*

In *American General Investment Corp. v. St. Elmo Lands*,<sup>43</sup> the fourth circuit addressed the question of whether the stipulation for attorney fees was a stipulation *pour autrui*. The plaintiff sold property to the defendants and took two notes in payment. The notes contained a stipulation for attorney fees in the amount of ten percent of the unpaid balance. The maker defaulted, and the plaintiff instituted foreclosure proceedings, seeking the balance of \$2,272,000 plus costs and attorney fees. A writ of seizure was recorded. Before any further legal action was taken, however, the defendant found a purchaser willing to pay a sum sufficient to satisfy the plaintiff's claim. At this point, the plaintiff notified his attorneys to suspend legal action.

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41. LA. CIV. CODE art. 2125.

42. LA. CIV. CODE art. 2127.

43. 391 So. 2d 570 (La. App. 4th Cir. 1980), *writ denied*, 395 So. 2d 682 (La. 1981).

The attorneys became concerned that the plaintiff would not pay the legal fees stipulated in the note. To protect their interests, the attorneys executed and recorded an affidavit asserting a privilege on the property. The plaintiff then fired the attorneys and instructed them to withdraw as counsel of record. At this point, the attorneys filed a plea of estoppel asserting that the plaintiff should be estopped from dismissing the lawsuits because the litigation created a stipulation *pour autrui* in their favor.

The fourth circuit held that the provision for attorney fees in a mortgage note is a valid and enforceable obligation in favor of the payee of the note.<sup>44</sup> In so holding, the court stated that the stipulation could not be for a third party because it benefited one of the contracting parties. The mere fact that the stipulator himself realizes some benefit from the provision, however, does not exclude the possibility of a stipulation *pour autrui*. Professor J. Denson Smith pointed this out clearly in an extensive article on the subject.

To begin with, it should be recognized that there is nothing conflicting in the finding of an intention . . . to stipulate on one's own behalf; that there is nothing conflicting in the presence of a contemplated advantage for a third person in a contract which will enure also to the benefit of the promisee.<sup>45</sup>

Roman Law recognized that where the stipulation provided for payments to a third party in discharge of the creditor's own debt, such third party was more than a mere appointee to receive.<sup>46</sup> Furthermore, the Civil Code articles dealing with the stipulation *pour autrui* do not inquire into the underlying motive of the stipulator, nor require that the benefit inure only to the third party beneficiary.<sup>47</sup>

The factors to be considered in deciding whether an advantage in a contract has been provided for a third person are:

- (1) the existence of a legal relationship between the promisee and the third person involving an obligation owed by the promisee to the beneficiary which performance of the promise will discharge;
- (2) the existence of a factual relationship between the promisee and the third person, where, (a) *there is a possibility of future*

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44. *Id.* at 573.

45. Smith, *Third Party Beneficiaries in Louisiana: The Stipulation Pour Autrui*, 11 TUL. L. REV. 18, 24 (1936).

46. *Id.* at 26.

47. Civil Code article 1890 provides: "A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked." Civil Code article 1902 provides: "But a contract, in which anything is stipulated for the benefit of a third person, who has signified his assent to accept it, can not be revoked as to the advantage stipulated in his favor without his consent."

*liability either personal or real on the part of the promisee to the beneficiary against which performance of the promisee [sic] will protect the former;* (b) securing an advantage for the third person may beneficially affect the promisee in a material way; (c) there are ties of kinship or other circumstances indicating that a benefit by way of gratuity was intended.<sup>48</sup>

Several of these factors are present in the standard fixed-percentage attorney fee provision. There is a factual relationship wherein the promisee may become liable to the attorney at a future time. If the debtor defaults, the promisee will certainly have to incur attorney fees to collect the note. The performance of the promise will relieve the creditor of the burden of paying the debt to the attorney, and the attorney has legal recourse against the promisee to collect a fee whether the debtor pays or not.

It is not necessary that the particular identity of the attorney be known at the time of contracting. In *Andrepoint v. Acadia Drilling Co.*,<sup>49</sup> the supreme court disposed of an argument that the identity of the beneficiary must be certain.

The contention that the third party was not named is without merit. Planiol gives the answer to this contention in this treatise "Traité Élémentaire De Droit Civil" . . . :

Can one stipulate for undetermined persons? Yes, on the condition that the beneficiaries of the stipulation, at present undetermined, are determinable on the day on which the agreement is to have effect for their benefit. The obstacle to the effectiveness of a stipulation for another, is not therefore strictly speaking the simple present undetermined character of its beneficiaries, provided there are means to ascertain who they are when it becomes necessary to do so, but their future undetermined character, which must remain undefined, in other words, their undeterminability.<sup>50</sup>

There are instances in the jurisprudence where after a class of beneficiaries were named, a member of the class, undetermined at the time of the stipulation, stepped forward to take advantage of the stipulation in his favor. For example, in *Pelican Well & Tool Supply Co. v. Johnson*,<sup>51</sup> an assignee of a leasehold agreed to pay the bills of his assignor relating to prior operation of the leasehold. The plaintiff, a creditor of

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48. Smith, *supra* note 45, at 58 (emphasis added).

49. 255 La. 347, 231 So. 2d 347 (1969).

50. 255 La. at 361-62, 231 So. 2d at 352 (quoting 2 M. PLANIOL, TREATISE ON THE CIVIL LAW, pt. 1, no. 1236, at 704 (11th ed. La. St. L. Inst. trans. 1959)).

51. 194 La. 987, 195 So. 514 (1940).

the assignor, sued the assignee on the obligation alleging that he was a third-party beneficiary. The defendant contended that the plaintiff had not been named, and so he could not be a beneficiary. The court dismissed this argument, reaffirming the principle that the third party does not have to be named.<sup>52</sup>

There is jurisprudence supporting the view that the attorney fee provisions are stipulations *pour autrui*, although there are no specific holdings to this effect. For instance, in 1973 the fourth circuit held in *Jefferson Bank & Trust Co. v. Post*<sup>53</sup> that, as a matter of law, the attorney fees were due once the note was put in the attorney's hands for collection, and that the attorney fees so stipulated belong to the attorney employed.<sup>54</sup> In reaching this conclusion, the court relied on *Foundation Finance*,<sup>55</sup> the same case that the supreme court relied on in *Leenerts Farms*. Thus, the *Post* holding may still be sound.

Finding that the provisions are stipulations *pour autrui* would help the court rationalize its asserted power to regulate the amounts collected pursuant to the provisions. If the lawyer owns the stipulated fees, there is no question that the court has power to regulate the amounts received pursuant to such stipulations as attorney fees. However, if the attorney fees provision were considered a liquidated damage or a penal clause,<sup>56</sup> *i.e.*, if the creditor owned the stipulated fees, then the supreme court would be able to regulate the provisions only to the extent that it could regulate other liquidated damages or penal clauses.

### Conclusion

The 1983 amendment to article 1935 raises to a higher profile the questions posed by the stipulation for attorney fees in a promissory note. Any further judicial interpretation of this provision should begin by classifying the stipulation. The three classifications discussed here—liquidated damages, the penal clause, and the stipulation *pour autrui*—by no means exhaust the possible categories into which the attorney fees provision could fall. Once the provision has been classified, legal consequences would flow therefrom. For example, a classification as liquidated damages would mean that the damages belong to the creditor, and that the courts should not normally look behind the amount. A classification as a stipulation *pour autrui*, however, would mean that the third party, the attorney, would own the fee and the amount would clearly fall within the court's

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52. See also 1 S. LITVINOFF, OBLIGATIONS § 24 in 6 LOUISIANA CIVIL LAW TREATISE 42 (1969).

53. 312 So. 2d 907 (La. App. 4th Cir. 1975).

54. *Id.* at 909.

55. See *supra* text accompanying notes 10-11.

56. This is what the 1983 amendment to article 1935 suggests.

regulatory powers. A legal classification would not simply answer the academic question of what legal category the provision fits into, but also the more practical questions of to whom the fee belongs, whether an attorney may ever intervene in a suit for collection, and, more significantly, whether the amount of the fee is subject to court supervision.

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