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November 5, 2020

Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

Senator Patrick Page Cortez
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

RE: HOUSE CONCURRENT RESOLUTION NO. 88 OF THE 2018 REGULAR SESSION

Dear Mr. Speaker and Mr. President:

The Louisiana State Law Institute respectfully submits its report to the legislature relative to raising prescription sua sponte.

Sincerely,

Guy Holdridge
Director

cc: Representative Edward C. "Ted" James

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.gov
Secretary of State, Mr. R. Kyle Ardoin
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LOUISIANA STATE LAW INSTITUTE
CODE OF CIVIL PROCEDURE COMMITTEE

REPORT TO THE LEGISLATURE IN RESPONSE TO HCR NO. 88 OF THE 2018 REGULAR SESSION

Relative to allowing courts to raise the exception of prescription sua sponte

Prepared for the
Louisiana Legislature on

November 5, 2020

Baton Rouge, Louisiana

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William R. Forrester, Jr., Reporter
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ENROLLED

2018 Regular Session

HOUSE CONCURRENT RESOLUTION NO. 88

BY REPRESENTATIVE JAMES

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute to study the effects of enacting a law that would amend Code of Civil Procedure Article 927 and Civil Code Article 3452 to allow courts to raise prescription *sua sponte* in lawsuits and to report its findings of the study to the legislature no later than February 1, 2019.

WHEREAS, Louisiana Civil Code Article 3494 states that the prescriptive period for an action on an open account is subject to a liberative prescription period of three years; and

WHEREAS, Civil Code Article 3452 and Code of Civil Procedure Article 927(B) state that prescription must be pleaded and the court is not permitted to supply a plea of prescription; and

WHEREAS, prescription is the only peremptory exception that may not be raised by the court; and

WHEREAS, a default judgment can be rendered on a prescribed debt and result in wage garnishments for unrepresented defendants; and

WHEREAS, filing suit on a prescribed debt can result in legally unenforceable obligations becoming enforceable against unrepresented consumers; and

WHEREAS, filing suit after the prescriptive period is a violation of the Fair Debt Collection Practices Act.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to commission a study regarding a law that would allow the courts to raise prescription *sua sponte* in lawsuits and to report its findings of the study to the Louisiana Legislature no later than February 1, 2019.

BE IT FURTHER RESOLVED that a suitable copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

November 5, 2020

To: Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

Senator Patrick Page Cortez
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

REPORT TO THE LEGISLATURE IN RESPONSE TO HCR NO. 88 OF THE 2018 REGULAR SESSION

House Concurrent Resolution No. 88 of the 2018 Regular Session urged and requested the Louisiana State Law Institute to study the effects of enacting a law that would amend Code of Civil Procedure Article 927 and Civil Code Article 3452 to allow courts to raise prescription *sua sponte* in lawsuits. In fulfillment of this request, the Law Institute assigned this project to the Code of Civil Procedure Committee, which, in turn, sought guidance from the Prescription Committee.

The Law Institute considered the history of Louisiana's longstanding rule that prescription must be pleaded by the parties and cannot be supplied by a court on its own motion, a rule that has been part of Louisiana law since at least 1825.[1] A prohibition against allowing courts to supply pleas of prescription is the general rule throughout other civil law jurisdictions as well, appearing, for example, in French, German, Greek, and Dutch law.[2] The rule requiring parties to plead prescription in order for it to have effect can also be found in international conventions and model laws to which both civil and common law countries are parties.[3] In addition, common law authorities provide that courts in the United States are allowed to raise issues pertaining to statutes of limitations only in certain limited cases.[4]

[1] *See, e.g*. La. Civ. Code art. 3463 (1870); La. Civ. Code art. 3426 (1825). In fact, the predecessor of Louisiana's current law dates to the French Code Napoléon of 1804. See Code Nap. art. 2223 ("*Les juges ne peuvent pas suppléer d'office le moyen résultant de la prescription*.").

[2] *See* Fr. Civ. Code art. 2247; *see also* REINHARD ZIMMERMANN, COMPARATIVE FOUNDATIONS OF A EUROPEAN LAW OF SET-OFF AND PRESCRIPTION 154 (2002) (When prescription has run, a debtor "has a defense which he has to invoke if prescription of a claim is to be taken into consideration.") (describing German law); Greek Civil Code art. 277 (Constantin Taliadoros transl. 2000) ("A Court shall not on its own initiative take into consideration a prescription that has not been invoked."); Burgerlijk Wetboek art. 3:322(1) ("The court is not allowed to apply of its own motion the defence that a right of action has become prescribed.") (Dutch law).

[3] *See, e.g*., Convention on the Limitations Period in the International Sale of Goods art. 24 ("Expiration of the limitation period shall be taken into consideration in any legal proceedings only if invoked by a party to such proceedings."); Unidroit Principles art. 10.9(2) ("For the expiration of the limitation period to have effect, the obligor must assert it as a defence.").

[4] *See* 51 Am. Jur. 2d, Limitations of Actions § 377 ("[a]n appropriate pleading is required to affirmatively raise the statute of limitations as a defense barring an action, excepting statutes of repose or nonclaim statutes. The defendant must plead the statute of limitations as an affirmative defense specifically in the answer or responsive pleading, or amendment, unless the bar appears from the face of the complaint, rendering it subject to demurrer, motion to dismiss

Moreover, the general policy underlying the rule preventing a court from raising the objection of prescription is based, at least in part, upon the idea that prescription is unlike other peremptory exceptions, such as no right of action, no cause of action, or peremption. Prescription does not, unlike peremption, extinguish a cause of action. Rather, prescription is a defense given to an obligor when an obligee sleeps on his rights for too long. It is a mere "mode of barring of actions as a result of inaction."[5] After prescription has accrued, an obligation – albeit a natural one – still exists and thus performance freely rendered cannot be reclaimed by the debtor.[6] Due to the existence of this natural obligation to perform even a prescribed obligation, sound policy reasons exist to distinguish the defense of prescription from other peremptory exceptions. Consequently, the debtor should be required to raise the defense of prescription himself, which he may alternatively choose to waive or to renounce.[7]

In fact, the existence of a natural obligation after prescription has run is one of the main distinctions between prescription and peremption. After a peremptive period – unlike a prescriptive one – has accrued, a right no longer exists.[8] Thus, courts should be able to raise peremption, as a plaintiff who sues on a perempted cause of action has no right upon which to base his claim. The same cannot be said for a plaintiff who sues on a prescribed obligation. The general rule allowing a court to raise peremption but not prescription is rationally connected to the important distinction between these two concepts.

As a result, the Law Institute has concluded that the longstanding rule in Louisiana prohibiting courts from raising the issue of prescription on their own motion should be maintained. Nevertheless, the Law Institute recognizes the concern expressed in House Concurrent Resolution No. 88 with respect to the possibility that default judgments on prescribed debts will result in unenforceable obligations being treated as effective if unrepresented consumers fail to raise a defense of prescription.

Even in the context of a suit upon a prescribed debt, a distinction should be made between original creditors and third-party debt collectors. To the extent that a prescribed debt is sued upon by the original obligee, an argument could be made that the obligee advanced money or other value to the obligor and thus the obligor should be required to plead prescription to defend against the obligee's claim. This argument is weaker, however, when a third party has purchased the debt, often after it has prescribed and sometimes collectively from a large group of obligees. In such a case, the third party usually acquires an interest in the claims on a heavily discounted basis. In a sense, the third party speculates that some of the debts he purchased will be unrecoverable but more will successfully be recovered, such that the third party can overall recoup his expenditures and earn some profit. It should be noted, however, that federal law, specifically the Fair Debt Collection Practices Act, precludes third-party assignees, so-called debt collectors, from deliberately suing on a prescribed debt. Specifically, federal law provides that any debt collector

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or strike, judgment on the pleadings, or a summary judgment. If the defendant fails to assert the statute of limitations, the defense is waived. Courts are under no obligation to raise the time bar sua sponte where the statute of limitations is not jurisdictional. The statute does not operate as a bar by its own force. If the defense is not pled, the court should assume the action is timely filed.")

[5] La. Civ. Code art. 3447.

[6] La. Civ. Code art. 1761-1762.

[7] La. Civ. Code art. 3449.

[8] La. Civ. Code art. 3458.

who intentionally files suit to recover on a prescribed debt is liable not only for damages sustained by the obligor but also for "a reasonable attorney's fee as determined by the court." *See, e.g.*, 15 U.S.C. § 1692k(a)(3). In fact, one federal court has noted that the "filing of a lawsuit on a debt that appears to be time-barred, without the debt collector having first determined after a reasonable inquiry that that limitations period has been or should be tolled, is an unfair and unconscionable means of collecting the debt." *Kimber v. Fed. Financial Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987). The court further explained that "time-barred lawsuits are, absent tolling, unjust and unfair as a matter of public policy, and this is no less true in the consumer context." *Id*.

In light of the above, the Law Institute recommends a very narrowly tailored amendment to Civil Code Article 3452 and to Code of Civil Procedure Articles 927, 1702, 4904, and 4921 to address the specific situation of debt collectors suing on prescribed debts. Again, the Law Institute believes the general rule in Louisiana prohibiting a court from raising the defense of prescription is a sound one, but the minor amendments below can serve to address the concerns expressed above and yet preserve the general rule. These recommendations, among others, were submitted to the Legislature in House Bill No. 176 of the 2020 Regular Session.

Civil Code Article 3452. Necessity for pleading prescription

Prescription must be pleaded. ~~Courts~~ Except as otherwise provided by legislation, courts may not supply a plea of prescription.

Code of Civil Procedure Article 927. Objections raised by peremptory exception

A. The objections which may be raised through the peremptory exception include but are not limited to the following:

(1) Prescription.

(2) Peremption.

(3) Res judicata.

(4) Nonjoinder of a party under Articles 641 and 642.

(5) No cause of action.

(6) No right of action, or no interest in the plaintiff to institute the suit.

(7) Discharge in bankruptcy.

B. ~~The~~ Except as otherwise provided by Articles 1702(D), 4904(D), and 4921(C), the court may not supply the objection of prescription, which shall be specially pleaded. The nonjoinder of a party, peremption, res judicata, the failure to disclose a cause of action or a right or interest in the plaintiff to institute the suit, or discharge in bankruptcy, may be noticed by either the trial or appellate court on its own motion.

Code of Civil Procedure Article 1702. Confirmation of preliminary default

A. A preliminary default must be confirmed by proof of the demand that is sufficient to establish a prima facie case and that is admitted on the record prior to the entry of a final default judgment. The court may permit documentary evidence to be filed in the record in any electronically stored format authorized by the local rules of the district court or approved by the clerk of the district court for receipt of evidence. If no answer or other pleading is filed timely, this confirmation may be made after two days, exclusive of holidays, from the entry of the preliminary default. When a preliminary default has been entered against a party that is in default after having made an appearance of record in the case, notice of the date of the entry of the preliminary default must be sent by certified mail by the party obtaining the preliminary default to counsel of record for the party in default, or if there is no counsel of record, to the party in default, at least seven days, exclusive of holidays, before confirmation of the preliminary default.

B.(1) When a demand is based upon a conventional obligation, affidavits and exhibits annexed thereto which contain facts sufficient to establish a prima facie case shall be admissible, self-authenticating, and sufficient proof of such demand. The court may, under the circumstances of the case, require additional evidence in the form of oral testimony before entering a final default judgment.

(2) When a demand is based upon a delictual obligation, the testimony of the plaintiff with corroborating evidence, which may be by affidavits and exhibits annexed thereto which contain facts sufficient to establish a prima facie case, shall be admissible, self-authenticating, and sufficient proof of such demand. The court may, under the circumstances of the case, require additional evidence in the form of oral testimony before entering a final default judgment.

(3) When the sum due is on an open account or a promissory note or other negotiable instrument, an affidavit of the correctness thereof shall be prima facie proof. When the demand is based upon a promissory note or other negotiable instrument, no proof of any signature thereon shall be required.

C. In those proceedings in which the sum due is on an open account or a promissory note, other negotiable instrument, or other conventional obligation, or a deficiency judgment derived therefrom, including those proceedings in which one or more mortgages, pledges, or other security for the open account, promissory note, negotiable instrument, conventional obligation, or deficiency judgment derived therefrom is sought to be enforced, maintained, or recognized, or in which the amount sought is that authorized by R.S. 9:2782 for a check dishonored for nonsufficient funds, a hearing in open court shall not be required unless the judge, in his discretion, directs that such a hearing be held. The plaintiff shall submit to the court the proof required by law and the original and not less than one copy of the proposed final default judgment. The judge shall, within seventy-two hours of receipt of such submission from the clerk of court, sign the proposed final default judgment or direct that a hearing be held. The clerk of court shall certify that no answer or other pleading has been filed by the defendant. The minute clerk shall make an entry

showing the dates of receipt of proof, review of the record, and rendition of the final default judgment. A certified copy of the signed final default judgment shall be sent to the plaintiff by the clerk of court, and notice of the signing of the final default judgment shall be given as provided in Article 1913.

D. When the demand is based on an open account, promissory note, or other negotiable instrument that the plaintiff acquired by assignment, the court may raise an objection of prescription before entering a final default judgment if the grounds for the objection appear from the pleadings or from the evidence submitted by the plaintiff. In that event, the court shall not enter the final default judgment unless the plaintiff presents prima facie proof that the action is not barred by prescription. If the plaintiff requests, the court shall hold a hearing for the submission of such proof.

~~D.~~ E. When the demand is based upon a claim for a personal injury, a sworn narrative report of the treating physician or dentist may be offered in lieu of his testimony.

~~E.~~ F. Notwithstanding any other provisions of law to the contrary, when the demand is for divorce under Civil Code Article 103(1) or (5), whether or not the demand contains a claim for relief incidental or ancillary thereto, a hearing in open court shall not be required unless the judge, in his discretion, directs that a hearing be held. The plaintiff shall submit to the court an affidavit specifically attesting to and testifying as to the truth of all of the factual allegations contained in the petition, the original and not less than one copy of the proposed final judgment, and a certification which shall indicate the type of service made on the defendant, the date of service, the date a preliminary default was entered, and a certification by the clerk that the record was examined by the clerk, including the date of the examination, and a statement that no answer or other pleading has been filed. If the demand is for divorce under Civil Code Article 103(5), a certified copy of the protective order or injunction rendered after a contradictory hearing or consent decree shall also be submitted to the court. If no answer or other pleading has been filed by the defendant, the judge shall, after two days, exclusive of holidays, of entry of a preliminary default, review the affidavit, proposed final default judgment, and certification, render and sign the proposed final default judgment, or direct that a hearing be held. The minutes shall reflect rendition and signing of the final default judgment.

Code of Civil Procedure Article 4904. Final default judgment in parish and city courts

A. In suits in a parish court or a city court, if the defendant fails to answer timely, or if he fails to appear at the trial, and the plaintiff proves his case, a final default judgment in favor of plaintiff may be rendered. No preliminary default is necessary.

B. The plaintiff may obtain a final default judgment only by producing relevant and competent evidence which establishes a prima facie case. When the suit is for a sum due on an open account, promissory note, negotiable instrument, or other conventional obligation, prima facie proof may be submitted by affidavit. When the demand is based upon a promissory note or other negotiable instrument, no proof of any signature thereon shall be required.

C. When the sum due is on an open account, promissory note, negotiable instrument, or other conventional obligation, a hearing in open court shall not be required unless the judge in his discretion directs that such a hearing be held. The plaintiff shall submit to the court the proof required by law and the original and not less than one copy of the proposed final default judgment. The judge shall, within seventy-two hours of receipt of such submission from the clerk of court, sign the proposed final default judgment or direct that a hearing be held. The clerk of court shall certify that no answer or other pleading has been filed by the defendant. The minute clerk shall make an entry showing the dates of receipt of proof, review of the record, and rendition of the final default judgment. A certified copy of the signed final default judgment shall be sent to the plaintiff by the clerk of court.

D. When the demand is based on an open account, promissory note, or other negotiable instrument that the plaintiff acquired by assignment, the court may raise an objection of prescription before entering a final default judgment if the grounds for the objection appear from the pleadings or from the evidence submitted by the plaintiff. In that event, the court shall not enter the final default judgment unless the plaintiff presents prima facie proof that the action is not barred by prescription. If the plaintiff requests, the court shall hold a hearing for the submission of such proof.

Code of Civil Procedure Article 4921. Final default judgment; justice of the peace courts; district courts with concurrent jurisdiction

A. If the defendant fails to answer timely, or if he fails to appear at the trial, and the plaintiff proves his case, a final default judgment in favor of plaintiff may be rendered. No preliminary default is necessary.

B. The plaintiff may obtain a final default judgment only by producing relevant and competent evidence which establishes a prima facie case. When the suit is for a sum due on an open account, promissory note, negotiable instrument, or other conventional obligation, prima facie proof may be submitted by affidavit. When the demand is based upon a promissory note or other negotiable instrument, no proof of any signature thereon shall be required.

C. When the demand is based on an open account, promissory note, or other negotiable instrument that the plaintiff acquired by assignment, the court may raise an objection of prescription before entering a final default judgment if the grounds for the objection appear from the pleadings or from the evidence submitted by the plaintiff. In that event, the court shall not enter the final default judgment unless the plaintiff presents prima facie proof that the action is not barred by prescription. If the plaintiff requests, the court shall hold a hearing for the submission of such proof.