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The Anomalous Interaction Between Code and Statute--Lessor's Warranty and Statutory Waiver

Melissa T. Lonegrass

Louisiana State University Law Center, missy.lonegrass@law.lsu.edu

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The Anomalous Interaction Between Code and Statute—Lessor’s Warranty and Statutory Waiver

Melissa T. Lonegrass*

This Article takes up the debate regarding the Louisiana Civil Code’s role and status as the foremost source of private law in this state, focusing on an aspect of the “ongoing revision” of the Code of 1870 that has thus far been largely ignored by the scholarly dialogue—the complex relationship between the Louisiana Civil Code and the Louisiana Revised Statutes. Although special legislation plays an essential role in all codified legal systems, its relationship to the Civil Code must be clearly understood, lest statutory law be allowed to undermine core principles of the legal system. Although the code is no longer the sole, or even primary, source of law in many civil law jurisdictions, special legislation must be made and applied cautiously, so to minimize deviations from the default rules of the code. In Louisiana, statutory law, particularly that found in the Civil Code Ancillaries, too often subverts the Civil Code rather than supporting it. This Article seeks to elucidate the causes and consequences of this anomalous interaction between code and statute, using as a case study the law governing waivers of the lessor’s responsibility for the condition of the leased premises.

* © 2014 Melissa T. Lonegrass. Harriet S. Daggett-Frances Leggio Landry Associate Professor of Law and Bernard Keith Vetter Associate Professor of Civil Law Studies, Paul M. Hebert Law Center, Louisiana State University. I would like to thank the participants in the 2009 Tulane Colloquium on the Civil Code, at which an early iteration of this Article was presented, for their helpful insights and comments, as well as William R. Corbett, L. David Cromwell, Dian Tooley-Knoblett, Olivier Moréteau, Ronald J. Scalise Jr., Peter Title, and Vernon V. Palmer for their thoughtful comments on later drafts. I would also like to thank the LSU Law Center for its generous research support and the many LSU Law Center students who have worked on this project over the years, including Meghan Carter, Jessica Engler, Heidi Kemple, Kevin McNally, and David Greene. Professor Vernon V. Palmer is credited for the title to this piece.

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I. INTRODUCTION

Louisiana’s legal history is beleaguered by a number of “great debates,” all of which center around Louisiana’s sources of law and the methodology utilized in their application.¹ One of the earliest such debates was sparked in the 1930s by academic critique of Louisiana’s

1. See John A. Lovett, *Another Great Debate?: The Ambiguous Relationship Between the Revised Civil Code and Pre-Revision Jurisprudence as Seen Through the Prytania Park Controversy*, 48 LOY. L. REV. 615, 618-20 (2002).

fidelity to its civilian roots.² The accusation that Louisiana law, both in substance and in application, had lost its civilian character led to a renaissance of the civil law tradition in this state and to a more nuanced understanding of Louisiana's condition as a mixed jurisdiction.³ The second great debate of Louisiana's legal history centered on the precise origins of the Louisiana Digest of 1808, sparking detailed investigation into whether this state's private law can be more closely traced to the laws of France or those of Spain.⁴ The most recent great debate, like the great debate of the 1930s, questions whether Louisiana's legal system functions like that of a civil law jurisdiction, or whether we have in some ways abdicated our civilian heritage.⁵ The discourse surrounds the process of the "rolling revision" of the Louisiana Civil Code of 1870 and the status of the Revised Civil Code as the fountainhead of Louisiana's private law.⁶ However, unlike the accusations of Professor Ireland in 1937 that Louisiana had become "a common law state,"⁷ the criticism of the rolling revision has

2. See Gordon Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585 (1937) (arguing that Louisiana lawyers should accept that Louisiana is slowly becoming a common law state in practice); Harriet Spiller Daggett, Joseph Dainow, Paul M. Hébert & Henry George McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12 (1937) (arguing that Ireland's view of the civil law is too static and that the civil law is capable of retaining its roots while incorporating common law concepts).

3. See Lovett, *supra* note 1, at 618.

4. See Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628 (1972); Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971); Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972); Joseph Modeste Sweeney, *Tournament of Scholars over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585 (1972). Although not entirely resolved, academic fervor over this dispute has faded from view. See A.N. Yiannopoulos, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in LOUISIANA'S LEGAL HERITAGE 87, 100-03 (Edward F. Haas ed., 1983) ("There remains the question whether the provisions of the Louisiana Civil Code of 1808 were essentially French or essentially Spanish in origin. The answer to this question will await a study of the *substance* of the provisions of the 1808 Code in comparison with French and Spanish laws.").

5. See Lovett, *supra* note 1, at 618-20.

6. See generally Julio C. Cueto-Rua, *The Civil Code of Louisiana Is Alive and Well*, 64 TUL. L. REV. 147 (1989); James Dennis, Julio Cueto-Rua, David Gruning, Shael Herman, Vernon Palmer, Cynthia Samuel & A.N. Yiannopoulos, *The Great Debate over the Louisiana Civil Code's Revision*, 5 TUL. CIV. L.F. 49 (1990); Vernon V. Palmer, *Revision of the Code or Regression to a Digest? A Rejoinder to Professor Cueto-Rua*, 64 TUL. L. REV. 177 (1989) [hereinafter Palmer, *Revision of the Code*]; Vernon V. Palmer, *The Death of a Code—The Birth of a Digest*, 63 TUL. L. REV. 221 (1988) [hereinafter Palmer, *Death of a Code*].

7. Ireland, *supra* note 2, at 596 (emphasis omitted) ("*Louisiana is today a common law state.*").

yet to be laid to rest.⁸ Instead, the discussion simply evolves as scholars continue to identify additional evidence of the Code's undoing.⁹

This Article takes up the debate regarding the Louisiana Civil Code's role and status as the foremost source of private law in this state, focusing on an aspect of the rolling revision that has thus far been largely ignored by the scholarly dialogue—the complex relationship between the Louisiana Civil Code and the Louisiana Revised Statutes. The proliferation of legislation enacted outside of the Civil Code (referred to in this Article as “statutory law”) was one of the primary reasons why the Louisiana legislature directed the Louisiana State Law Institute (Law Institute) in 1948 to undertake a large-scale revision of the Code of 1870. Large volumes of statutory law do damage to a civil code by detracting from the primacy of the general principles of law contained within it. When external bodies of statutory law entirely supplant code principles, the code is made to be a ghost whose presence is only detected at the borders of the law. Even isolated provisions of statutory law wreak havoc when they conflict with code principles that articulate matters of public policy. A large-scale revision, it was hoped, would permit lawmakers to reconcile code and statutory law and to reestablish the primacy of the Civil Code in Louisiana.

However, despite the prodigious revision efforts of the Law Institute over the course of the last forty years, statutory law continues to undermine fundamental principles and policies of the Civil Code in nearly all key areas of private law. In some cases, the conflict between code and statute results, understandably, from the piecemeal revision process—revision in one area of law often produces unforeseen consequences in other areas not simultaneously amended. In other, more disappointing cases, the conflict between code and statute results from legislative oversight owing to hasty drafting or insufficient study. In all cases, the consequences are dire and range from the creation of legal uncertainty to the implied repeal of essential elements of the Civil Code.

The pages that follow explore the effects of statutory law in Louisiana, focusing particularly on Title 9 of the Louisiana Revised

8. See Lovett, *supra* note 1, at 639-52 (describing in detail Professor Palmer's critique of the revision process and the academic responses of Professors Yiannopoulos, Cueto-Rua, and Herman and Judge James Dennis).

9. See, e.g., *id.* at 714 (concluding that recent “controversy” surrounding Louisiana Civil Code article 466 supports Professor Palmer's thesis).

Statutes, whose provisions are known as the Civil Code Ancillaries. Part II of this Article addresses the relationship between civil codes and statutory law in the civil law tradition. Louisiana is not alone in its struggle to reconcile code law with statutory law,¹⁰ and the experience of this state should not be assessed without reference to the extensive scholarly discourse surrounding this vexing problem of legal methodology. Following this foundation, Part III reviews the history of statutory law in Louisiana and the Law Institute's attempts at the "recodification" of Louisiana law. Part III further addresses the increasing conflict between statutory enactments and code law resulting from the rolling revision and investigates both the causes and effects of this phenomenon. Because dysfunctional interaction between code law and statutory law is best studied within the context of specific examples, in Part IV, Louisiana Revised Statutes section 9:3221 (R.S. 9:3221), a statute that addresses the effect of a lessee's assumption of liability for defects in the leased premises, is used as a case study to demonstrate the substantive and methodological difficulties that result when statutory law and code law conflict. Part V briefly concludes.

II. STATUTORY LAW AND CODE LAW IN THE CIVIL LAW TRADITION

Louisiana's civilian experience is in many ways unique, but at the same time is inseparably tied to the broader narrative of codified law that defines the civil law tradition. This discourse is a long one, dating at least to the promulgation of the French *Code civil* in the early nineteenth century. But the conversation surrounding codification has not become stale. Rather, it remains lively, as the viability, and even the desirability, of codification remain subjects of continual debate.¹¹ An important thread of this discussion concerns the relationship between codified law and law that exists beyond the borders of the code. An examination of the necessity of special legislation, and its impact on a codified system, sheds crucial light on the problems faced here at home.

10. See, e.g., MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 226-27 (3d ed. 2007) (describing how France and the European Union have created hierarchies within the law to reconcile different forms of legislation with the civil code and with judicial decisions).

11. See A.N. Yiannopoulos, *The Civil Codes of Louisiana*, in 1 *LOUISIANA CIVIL CODE* 2012, at XLVII, LIX (A.N. Yiannopoulos ed., 2012) ("The question of the desirability of codification is by no means settled in comparative legal theory.").

A. *The Realms and Roles of Civil Codes and Special Statutes*

It is axiomatic that the highest source of law in civil law jurisdictions, second only to constitutions, is legislation.¹² And yet all legislation does not enjoy the same stature. Civilians distinguish legislation that is encompassed within the civil code from law that, while emanating from the legislative will, exists outside of that central text.¹³

Codification involves a particular methodology, a full exploration of which lies far outside the aim or capacity of this Article.¹⁴ The technique of codification is at the same time both an art¹⁵ and a science¹⁶ and is thereby distinguished from the promulgation of other statutory law. It involves “a systematic presentation, synthetically and methodically organizing a body of general and permanent rules” for a given jurisdiction.¹⁷ Perhaps most importantly, the philosophy of codification, predicated on *ius rationalism*, teaches that civil codes are to treat the whole of private law, without gaps or contradictions.¹⁸ They must therefore be systematic, comprehensive, and complete.¹⁹

12. See GLENDON ET AL., *supra* note 10, at 227; Yiannopoulos, *supra* note 11, at LXVI.

13. See GLENDON ET AL., *supra* note 10, at 227; Olivier Moréteau, *De Revolutionibus: The Place of the Civil Code in Louisiana and in the Legal Universe*, 5 J. CIV. L. STUD. 31, 32-33 (2012).

14. For an excellent sampling of the vast literature surrounding the subject of codification in the civilian tradition, see KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 85-98 (Tony Weir trans., 3d rev. ed. 1998); Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073 (1988); Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762 (1969) [hereinafter Levasseur, *Napoleon*]; Alain Levasseur, *On the Structure of a Civil Code*, 44 TUL. L. REV. 693, 697 (1970) [hereinafter Levasseur, *Structure*]; Ferdinand Fairfax Stone, *A Primer on Codification*, 29 TUL. L. REV. 303 (1955).

15. Levasseur, *Structure*, *supra* note 14, at 697 (“Codification is an art that obeys some stringent rules.”).

16. Michael McAuley, *Proposal for a Theory and a Method of Recodification*, 49 LOY. L. REV. 261, 264 (2003) (“Codification is a science of lawmaking. Yet there is also a science of codification.”).

17. Bergel, *supra* note 14, at 1074.

18. See Jean-Louis Baudouin, *Reflections on the Process of Recodification of the Quebec Civil Code*, 6/7 TUL. CIV. L.F. 283, 283 (1991-92); Maria Luisa Murillo, *The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification*, 11 J. TRANSNAT'L L. & POL'Y 163, 167 (2001); see also Catherine Valcke, *The Unhappy Marriage of Corrective and Distributive Justice in the New Civil Code of Quebec*, 46 U. TORONTO L.J. 539, 543 (1996) (arguing that the three main characteristics of civil codes are “their comprehensiveness, internal coherence, and gaplessness”).

19. See Bergel, *supra* note 14, at 1077-88 (discussing the features of true (substantive) codification). This is not to say that systematization and comprehensiveness are the only aims of codification. A number of other aims are associated with codification, including:

Although the methodology of codification is a defining characteristic of the civil law tradition, the vast majority of legislation in civilian systems is made in the form of “special legislation”—laws that are created outside of the codes to regulate topics that the codes also address, though only generally.²⁰ Some special legislation is compiled by topic to create entire regimes of law existing outside of the code. These separate legal regimes—termed “microsystems,”²¹ “mini-codes,”²² “pseudo-codes,”²³ and even “satellite codes”²⁴—are at both substantive and methodological odds with civil codes.²⁵ A prime example involves the development of labor law.²⁶ Whereas the civil codes of France and Germany did little to restrict the freedom of parties to an employment contract, later-evolving social policies geared toward the protection of the labor force prompted rules quite alien to the codes.²⁷ As a result, in both jurisdictions, labor law is governed by statutory provisions compiled in labor “codes” that supplant almost entirely the civil code law that would otherwise apply.²⁸ Other

clarification of legal doctrine; simplicity and plain redaction for the citizenry; certainty, justice and modernity; . . . rationalization, pedagogy, and utopia; compression and reduction of legal norms; continuity and stability; popularization of knowledge of the law and facilitation of practitioners’ search for authorities; and exclusion of arbitrariness and the end of a shackling to tradition.

McAuley, *supra* note 16, at 265-66.

20. John Henry Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. CAL. L. REV. 1865, 1868 (1988).

21. *Id.*

22. Jason Kilborn, *Civil Codes and Consumers*, 51 LOY. L. REV. 11, 14 (2005).

23. See H. Patrick Glenn, *The Grounding of Codification*, 31 U.C. DAVIS L. REV. 765, 770 (1998); McAuley, *supra* note 16, at 275.

24. See Olivier Moréteau & Agustín Parise, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103, 1110 (2009).

25. McAuley, *supra* note 16, at 275. Monikers proliferate as the statutes do themselves. See Glenn, *supra* note 23, at 770 (“Hence, a new vocabulary of ‘pseudo-codes,’ ‘codes suiveurs,’ and even ‘codes dangereux’ has emerged to designate the new body of codes whose content, structure, and style would constitute a major departure from the classic nineteenth century codes (themselves ‘veritable codes’).”).

26. See Merryman, *supra* note 20, at 1868-69; Hein Kötz, *Civil Code Revision in Continental Europe: The Experience in the Fields of Contract and Tort*, 52 REV. JUR. U.P.R. 235, 236-37 (1983).

27. See Merryman, *supra* note 20, at 1868-69; Kötz, *supra* note 26, at 236-37.

28. See Kötz, *supra* note 26, at 236-37 (noting that in France and Germany, “it is generally admitted today that labor law has virtually ‘emigrated’ from the civil codes”). In France, labor law is presently governed primarily by the *Code du travail*. See CODE DU TRAVAIL [C. TRAV.] (Fr.). In contrast, German labor and employment law is not collected into a single statutory volume; rather, the provisions of the German Civil Code are supplemented by numerous statutory enactments relating to all manner of subjects, including collective bargaining, leave, wages, training, and safety. See Liliane Jung, *National Labour Law Profile: Federal Republic of Germany*, INT’L LABOUR ORG. (June 17, 2011), <http://www.ilo.org/public/libdoc/iloorg/2011/01/110101.pdf>.

representative bodies of law now entirely removed from the civil code framework in many civil law jurisdictions include intellectual property, insurance, contracts of carriage, urban and agrarian leases, and consumer protection, among others.²⁹ As these bodies of specialized law grow and evolve, the civil codes become ever more obsolete, at least with respect to certain subject matters.³⁰

Other special legislation is less cohesive, treating individual issues within the law rather than seeking to regulate a particular subject matter completely.³¹ These statutes either articulate particular applications of the general code provisions or pronounce exceptions to them.³² In either case, extracodal statutory laws not only supplant the specific civil code provisions from which they derogate, but also weaken the core principles underlying the code itself.³³

B. *Statutory Law, Decodification, and Recodification*

The proliferation of statutory law and its detractor from the civil codes has led civilian scholars to denominate a phenomenon known as “decodification.”³⁴ At its heart, decodification can be understood as a transference of focus from the civil code as the central source of law to

ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158899/lang--en/index.htm.

29. See Murillo, *supra* note 18, at 173 (observing that statutory law has been utilized in civil law jurisdictions to regulate employment law, urban and agrarian leases, intellectual property, insurance, contracts of carriage, competition, monopoly, and consumer protection law); Mathias Reimann, *The Good, the Bad, and the Ugly: The Reform of the German Law of Obligations*, 83 TUL. L. REV. 877, 882 (2009) (noting the use of special legislation to provide remedies to consumers, regulate the employment relationship, and govern rights to apartments and timeshares).

30. See Murillo, *supra* note 18, at 173; see also Kötz, *supra* note 26, at 237 (“The code rules on the traditional master and servant relationship have therefore lost their importance for the majority of employees, and the law relating to employment contracts is now treated as an independent area of law both in the universities and in the legal literature.”).

31. See Kötz, *supra* note 26, at 237; Murillo, *supra* note 18, at 173.

32. See Kötz, *supra* note 26, at 237; Murillo, *supra* note 18, at 173.

33. See McAuley, *supra* note 16, at 274-75.

34. Decodification was first observed by Italian scholar Natalino Irti in his article *L'età della decodificazione*. See Natalino Irti, *L'età della decodificazione*, in DIRITTO E SOCIETÀ 613 (1978). Statutory law has been a principal contributor to decodification in most, if not all, codified civil law jurisdictions. See, e.g., E.-M. MEIJERS, LA RÉFORME DU CODE CIVIL NÉERLANDAIS 3-5 (1948) (Netherlands); Bergel, *supra* note 14, at 1093-97 (France); Xavier Blanc-Jouvan, *Towards the Reform of the Law of Obligations in France: The Reasons for the Reform*, 83 TUL. L. REV. 853, 859-60 (2009) (France); Marta Figueroa-Torres, *Recodification of Civil Law in Puerto Rico: A Quixotic Pursuit of the Civil Code for the New Millennium*, 23 TUL. EUR. & CIV. L.F. 143, 145-46 (2008) (Puerto Rico); Kötz, *supra* note 26, 236-38 (Germany and France); McAuley, *supra* note 16, at 271 (Netherlands); Moréteau & Parise, *supra* note 24, at 1125-61 (Latin America); Murillo, *supra* note 18, at 178-79 (Argentina and Peru).

other external replacements.³⁵ While statutory law is not the only code “replacement” leading to decodification,³⁶ its effects are significant.³⁷ Statutory law creates “fissures” in the code as large portions of the law are excised and housed elsewhere, or are simply overridden.³⁸ The code, rather than being the central and primary source of law, becomes a law of last resort, consulted only if statutory law does not speak to a particular legal dispute.³⁹ The use of statutory law also invites overactive legislation, an inundation which in turn further undermines the stability and coherence of the legal system.⁴⁰

When decodification has occurred, “recodification” is advocated as a solution to bring unity back to the legal system.⁴¹ Generally, recodification is a process involving the incorporation of special legislation into the current code system.⁴² However, the task of recodification is not a simple one, and indeed, the entire enterprise of

35. See Glenn, *supra* note 23, at 768-69 (“The particular laws and regimes multiply. The common law may, or may not, be found in the codes.”); McAuley, *supra* note 16, at 274 (“[D]ecodification takes place when a code loses its status as the one and true source of the private law.”).

36. Decodification is attributed to at least four forces beyond the proliferation of statutory law. First is the growth of judge-made law. Particularly where code law is sparse, as in the realm of torts, judicially developed rules and doctrines tend to obviate the need to consult the civil code. See Merryman, *supra* note 20, at 1869; Murillo, *supra* note 18, at 173. Second, the rise of the administrative state and its attendant explosion in executive and administrative regulation has removed the focus from legislatures, and in turn, civil codes. See Merryman, *supra* note 20, at 1869-70. Third, decodification has resulted from the growth of constitutionalism. Whereas individual rights of the citizenry—to property, liberty, and personality—were once guaranteed through the codes, today these rights are increasingly secured by constitutional law. See *id.* at 1870-72; Murillo, *supra* note 18, at 174. Fourth, the expansion of supranational law in all of its forms—international treaties, conventions, and European Community directives—obscures the centrality of code law. See Merryman, *supra* note 20, at 1872-73; Murillo, *supra* note 18, at 174.

37. See Murillo, *supra* note 18, at 164.

38. *Id.* (quoting Luis Diez-Picazo & Ponce de Leon, *Codificación, descodificación y recodificación*, 45 ANUARIO DE DERECHO CIVIL 475, 478 (Apr.-June 1992) (Spain)).

39. See Murillo, *supra* note 18, at 172-73 (implying that special legislation becomes the primary source of law, rendering the code only relevant when statutes or judge-made law do not cover a particular area).

40. See Figueroa-Torres, *supra* note 34, at 146 (“Acquiescence to legislative inflation, instability and opacity of norms is a threat to juridical certainty, one of the most appreciated values of law, which in turn depends on the stability, uniformity, and coherence of norms.”).

41. See Moréteau & Parise, *supra* note 24, at 1107 (“When the law is decodified, by revision of the code or addition of too many revision statutes, a recodification process is sometimes advocated as the only means of bringing back unity to a system that has lost the gravity it once had.”); see also, e.g., Blanc-Jouvan, *supra* note 34, at 861 (recommending recodification of French obligations law to “avoid an excessive dispersion of the law of contract”).

42. See Murillo, *supra* note 18, at 175.

recodification is controversial.⁴³ No single, agreed-upon methodology exists.⁴⁴ In some jurisdictions, recodification is achieved through partial revision of the law.⁴⁵ In other places, large-scale reform is achieved through the supplanting of old codes with entirely new ones.⁴⁶ Recodification may involve mere structural reform—a compilation of disparate rules into an organized system.⁴⁷ In other circumstances, recodification may take on the more ambitious task of incorporating decodified law into the structural and philosophical framework of a code.⁴⁸ Only the latter involves recommitment to the traditional ideals of codification.⁴⁹

Regardless of the method of recodification employed, once it is completed, a substantial amount of ancillary legislation often remains.⁵⁰ This should not be perceived as an indication that recodification has somehow failed. Some measure of extracodal legislation will always be required to elaborate rules that are subject to frequent revision, so as not to disrupt the integrity of the now-reformed code. Additionally, a perhaps unpleasant reality exists that politically motivated special-interest legislation will, when passed, be housed outside of the code rather than integrated into its fabric.⁵¹ Moreover, there exists a view that some special legislation must always exist outside of the code because a true “unity of private law” no longer exists.⁵² According to this perspective, whereas private law was once motivated by a single philosophy, today a plurality of ideologies

43. *See id.*

44. *See* McAuley, *supra* note 16, at 262 (“Recodification . . . is unexplored.”).

45. *See* Murillo, *supra* note 18, at 176 (“France, Germany, Belgium, Italy, Swiss [sic] and Spain have revised and reformed partially their ancient civil codes covering major civil areas as family law, property law, individual rights, etc.”).

46. *See id.* at 176 n.75, 179 (“[S]everal civil law countries pursued global reforms drafting a second and a third generation of new codes that repealed the old ones.”).

47. *See* GÉRARD CORNU, VOCABULAIRE JURIDIQUE 770 (8th ed. 2007) (“Recodification: . . . Regroupement dans un code de lois postérieures qui lui étaient demeurées extérieures; réincorporation de loi spéciales éparses relatives à une matière. Comp. Codification à droit constant.” (emphasis omitted) (citation omitted)).

48. *See id.* (“Recodification: Rénovation d’un code par la refonte de parties importantes de sa structure; réforme s’apparentant, en reprise, à une codification réelle.”); McAuley, *supra* note 16, at 262 (“Recodification is a reconstruction of a systematic, synthetic, and syncretic approach to law. . . . Recodification, like codification, has its central ideas.” (citation omitted)).

49. *See* Moréteau & Parise, *supra* note 24, at 1110.

50. For example, in France today there are over forty-six different codes in addition to the *Code civil*. *See id.* at 1109; Les Codes en Vigueur, LEGIFRANCE, <http://www.legifrance.gouv.fr/initRechCodeArticle.do> (last visited Jan. 26, 2014) (providing a drop-down menu listing France’s various codes).

51. *See* Kötz, *supra* note 26, at 247.

52. *See id.* at 246.

motivates the law governing interpersonal relationships.⁵³ Thus, the argument goes, the law governing contracts entered between merchants and consumers must necessarily be separated—both physically and ideologically—from the law governing commercial transactions.⁵⁴

However, while it is generally conceded that some special legislation is inevitable for reasons practical, ideological, or political in nature, advocates of recodification insist that it ought to be kept to an absolute minimum.⁵⁵ Moreover, because code law and statutory law must ultimately coexist within the same legal sphere, ancillary statutes should be read *in light of* simultaneously applicable civil code provisions.⁵⁶ The jurist must never forget that statutory law is not “an autonomous world for itself.”⁵⁷ Although the code is no longer the sole, or even primary, source of law, it must be understood that it contains the general principles upon which the legal system is founded, along with the rules that will apply by default in the absence of special legislation on point.⁵⁸ Therefore, the statutory rules that contradict the code must be applied restrictively so that they are not allowed to encroach excessively upon the broader general principles of the law.⁵⁹ The maxim *exceptio est strictissimae interpretationis* is applicable here—special statutes must be interpreted narrowly and according to their distinct legislative purpose, and must not be enlarged by analogy.⁶⁰

53. *Id.*

54. *Id.* But see Blanc-Jouvan, *supra* note 34, at 859-60 (suggesting that the absorption of special legislation governing consumer transactions into the French law of obligations “might be an important step in the direction of greater contractual fairness”).

55. See, e.g., Franz Bydlinski, *Civil Law Codification and Special Legislation*, in QUESTIONS OF CIVIL LAW CODIFICATION 25, 32-33 (1990); Kötz, *supra* note 26, at 247.

56. See Bydlinski, *supra* note 55, at 32-33; Olivier Moréteau, *An Introduction to Contamination*, 3 J. CIV. L. STUD. 9, 13 (2010). In Quebec, this principle has been codified as law. The preliminary provision of the 1991 Civil Code provides in part:

The Civil Code comprises a body of rules which, in all matters within the letter, spirit, or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

Civil Code of Quebec, S.Q. 1991, c. 64, Preliminary Provision (Can.). Professor Olivier Moréteau has advocated in his writing for the adoption of similar legislation in the preliminary title of the Louisiana Civil Code. See Moréteau, *supra*, at 15; Moréteau, *supra* note 13, at 65-66.

57. Bydlinski, *supra* note 55, at 33.

58. See Moréteau, *supra* note 56, at 13.

59. *Id.*

60. Bydlinski, *supra* note 55, at 33; Moréteau, *supra* note 56, at 13.

III. STATUTORY LAW AND CODE LAW IN LOUISIANA

Thus, statutory law pervades the civil law tradition, and its judicious use is at least begrudgingly accepted, if not occasionally welcomed, provided caution is exercised both in its enactment and its application. With this outlook in mind, it is possible to evaluate with some clarity Louisiana's experience with statutory law and the attempts of reformers at recodification.

A. *The Proliferation of Statutory Law*

During the first years following the Louisiana Purchase, most of Louisiana's private law was contained within the Civil Code.⁶¹ This state of affairs was short-lived, however, as over time the Louisiana legislature enacted voluminous amounts of special legislation that served to supplement or, in many instances, supplant Civil Code provisions.⁶² The Civil Code of 1870 largely improved the situation, at least temporarily, because its principal drafter included in the revision many of the legislative enactments passed since the 1825 Code had been enacted.⁶³

In the years following the promulgation of the 1870 Code, statutory law "accumulated at a prodigious rate and with little rhyme or reason."⁶⁴ By the midpoint of the last century, the body of legislation existing outside of the Civil Code was a jumbled mess—a tangle of over twelve thousand separate enactments, often contradictory, sometimes completely obsolete.⁶⁵ These statutes encompassed all manner of topics covering both private and public law.⁶⁶ Statutory interpretation, labor and employment law, workers' compensation, corporate law, taxation, and criminal law were all touched upon.⁶⁷ In order to remedy what had become an unsustainable

61. A.N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 TUL. L. REV. 830, 837 (1980).

62. *See id.*

63. Charles E. Fenner, *The Genesis and Descent of the System of Civil Law Prevailing in Louisiana*, in K.A. CROSS, A TREATISE, ANALYTICAL, CRITICAL AND HISTORICAL ON SUCCESSIONS, at vii (1891); Moréteau & Parise, *supra* note 24, at 1116 (citing JOHN RAY, THE CIVIL CODE OF THE STATE OF LOUISIANA: REVISED, ARRANGED AND AMENDED, at vii-viii (1869)); John H. Tucker, *Source Books of Louisiana Law*, 6 TUL. L. REV. 280, 295 (1932).

A prominent example of one of the statutes "absorbed" into the 1870 code is the usufruct of the surviving spouse in community. *See* LA. CIV. CODE art. 916 (1870); 1844 La. Acts 99.

64. Dale E. Bennett, *Louisiana Revised Statutes of 1950*, 11 LA. L. REV. 4, 4 (1950).

65. *Id.*

66. *See id.*

67. *See id.*

state of affairs, the Louisiana legislature in 1942 directed the Law Institute to “prepare a comprehensive revision” of the statutory law.⁶⁸ This project was not meant to effect any reform of the law, but instead was merely intended to reorganize and synthesize existing statutory law, and in the words of the Law Institute, “to bring some semblance of order out of chaos.”⁶⁹ The result was the compilation now referred to as the Revised Statutes of 1950.⁷⁰

B. Statutory Law and the Rolling Revision

Although the compilation of statutory law into a single compendium partially ameliorated the state of disorder characterizing those rules, the proliferation of statutory law outside of the Civil Code caused more than mere organizational problems. In particular, the many statutes bearing on civil law matters began to obscure the legal precepts in the Code itself.⁷¹ The confusion wrought by statutory law was compounded by other difficulties faced by the aging Code of 1870. Not only had a large body of jurisprudence grown up around its many provisions, but much of its conceptual framework was simply outdated in light of evolving societal conditions.⁷² Recognizing the

68. The legislature directed the Law Institute to “prepare a comprehensive revision of the Statutes of the State of a general character . . . including those contained within the revision of 1870” to simplify their language; to correct their incongruities; to supply their deficiencies; to arrange them in order, the sections thereof being numbered so as to provide for additions and amendments; and to reduce them to one connected text. 1942 La. Acts 136.

69. Bennett, *supra* note 64, at 5-6 & n.2 (quoting LA. REV. STAT. ANN., at xiii (1950)); see also William E. Crawford & Cordell H. Haymon, *Louisiana State Law Institute Recognizes 70-Year Milestone: Origin, History and Accomplishments*, 56 LA. B.J. 85, 90 (2008) (“Since the adoption of the Revised Statutes of 1950, the practicing bar and the courts have been able to rely upon an organized set of statutes.”).

70. Bennett, *supra* note 64, at 4-5. Louisiana Revised Statutes Title 1, section 16, states:

The Louisiana Revised Statutes of 1950 shall be construed as continuations of and substitutes for the laws or parts of laws whereof are revised and consolidated herein. The adoption of these Revised Statutes shall not affect the continued existence and operation, subject to the provisions hereof, of any department, agency, or office heretofore legally established or held, nor any acts done, any funds established, any rights acquired or accruing, any taxes or other charges incurred or imposed, any penalties incurred or imposed, or any judicial proceedings had or commenced prior to the effective date of these Revised Statutes.

LA. REV. STAT. § 1:16 (2013).

71. See A.N. YIANNPOULOS, *CIVIL LAW SYSTEM: LOUISIANA AND COMPARATIVE LAW* § 70, at 76 (2d ed. 1999).

72. See A.N. Yiannopoulos, *Requiem for a Civil Code: A Commemorative Essay*, 78 TUL. L. REV. 379, 396 (2003).

Civil Code's decline, the Louisiana legislature in 1948 directed the Law Institute to undertake a large-scale revision of the document.⁷³

Before the revision could begin, the Law Institute was faced with the decision whether to perform a mere revision of the law or a true recodification.⁷⁴ The former, mere revision, would involve "bringing the text of the Code up to date in the light of judicial precedents and special legislation bearing on civil law matters" with "no major changes in organization and policies."⁷⁵ The latter, true recodification, would consist of "substantial revision" of the Code "with regard to structure, determination of policies, and drafting of new provisions."⁷⁶ Ultimately, the Law Institute settled upon an approach lying between these two extremes, but closely approximating true recodification.⁷⁷ To accomplish its purpose, the Law Institute chose to engage in a series of incremental revisions over the course of time—a rolling revision—as opposed to a single overhaul of the entire Civil Code.⁷⁸ A global revision was simply an impossible task for a volunteer law reform commission such as the Law Institute.⁷⁹ Title-by-title revision began in the 1970s and continues today.⁸⁰

Once the rolling revision was well under way, Professor Vernon Palmer famously questioned whether the Civil Code had been transmuted through the revision process into a "mere" digest of laws. In his article "The Death of a Code—The Birth of a Digest," Palmer's central observation was that the revision process had largely failed to effect a clean break from past Civil Code articles.⁸¹ According to Palmer, this problem stemmed primarily from the construction of the provisions' enabling statutes, which did not clearly repeal prior law.⁸² Palmer additionally complained that revised code provisions had been crafted to coexist with a body of jurisprudence predicated on the old law, thus carrying forward not only the prior articles as a type of

73. See 1948 La. Acts 810; Yiannopoulos, *supra* note 72, at 396-97. This was not the first call for revision of the Civil Code of 1870. A prior 1910 draft revision commissioned by the Louisiana legislature was ultimately rejected. See Lovett, *supra* note 1, at 626.

74. Yiannopoulos, *supra* note 11, at LX.

75. *Id.*

76. *Id.*

77. See Crawford & Haymon, *supra* note 69, at 89.

78. *Id.*

79. *Id.*

80. *Id.* at 91. As of this writing, most of the Civil Code has undergone substantive revision. For a comprehensive listing of the portions of the code updated as of this writing, see Yiannopoulos, *supra* note 11, at LX-LXIII.

81. Palmer, *Death of a Code*, *supra* note 6, at 224.

82. *Id.* at 235.

“shadow code,” but the judge-made law as well.⁸³ At its core, Professor Palmer’s argument “raised the question of whether the then half-complete process of revising the Civil Code was actually undermining and unnecessarily complicating Louisiana’s civil law system, rather than modernizing, clarifying, and streamlining the law.”⁸⁴ Palmer’s critique of the revision process sparked a scholarly debate regarding the very nature of civil codes and their interaction with other sources of law.⁸⁵

Although this most recent great debate regarding the primacy of the Civil Code over other, subsidiary sources of law has persisted for nearly a quarter of a century, the focus has been predominantly on the interaction among the revised Civil Code articles, their predecessors, and the jurisprudence interpreting them.⁸⁶ On the other hand, little attention has been paid to the relationship between the revised Civil Code and external statutory law, despite the fact that the simplification of this relationship was one of the primary goals of the revision. Thus, a question remains whether “recodification”—in any sense—of Louisiana *statutory* law (as opposed to jurisprudential or other sources of law) has been accomplished.⁸⁷

Now that the revision is winding down, it is clear that the bulk of Louisiana law is still to be found in the Louisiana Revised Statutes, not in the Civil Code.⁸⁸ Indeed, there are fifty-six separate titles in the Louisiana Revised Statutes.⁸⁹ Much of the legislation found within those titles is parsed out into individual “mini-codes,” cohesive systems governing entire subject matters within the private law. Examples include the Mineral Code,⁹⁰ the Insurance Code,⁹¹ and the Commercial Code.⁹² These statutes are arranged, much as common law codes, in alphabetical order, ranging from Aeronautics⁹³ to Wildlife and Fisheries.⁹⁴

83. *Id.* at 224.

84. Lovett, *supra* note 1, at 619.

85. For an excellent summary of this discourse, see *id.* at 645-52.

86. See Cueto-Rua, *supra* note 6; Dennis et al., *supra* note 6; Lovett, *supra* note 1, at 618; Palmer, *Revision of the Code*, *supra* note 6; Palmer, *Death of a Code*, *supra* note 6.

87. See Moréteau & Parise, *supra* note 24, at 1120.

88. *Id.* (“The big bulk of legislation in Louisiana is to be found in the Revised Statutes.”).

89. This figure does not include the numerous volumes of court rules that are associated with, but not included within, Title 13—Courts and Judicial Procedure.

90. LA. REV. STAT. §§ 31:1-:217 (2013).

91. *Id.* §§ 22:1-:2382.

92. *Id.* §§ 10:1-101 to :9-809.

93. *Id.* §§ 2:1-:1004.

94. *Id.* §§ 56:1-:2037.

However, in light of the experience of foreign jurisdictions with efforts at the recodification of law, the persistence of large volumes of statutory law in Louisiana should not be viewed as a failure of process.⁹⁵ Rather, much of this legislation is not only necessary, but also is clearly inappropriate for inclusion within a civil code. For one thing, a good deal of the law contained within the Louisiana Revised Statutes is of a public nature.⁹⁶ Criminal law, state administration, taxation, and other such matters have traditionally been treated outside of the Civil Code, whose purview is restricted to matters of private law.⁹⁷ Even certain private law topics are sensibly excised from the code for treatment by special legislation. Louisiana's Mineral Code, for example, though derived from Civil Code principles, extends those rules in a most specialized, *sui generis* manner.⁹⁸ Other matters, particularly those commercial in nature, are far too technical and complex to be incorporated into the framework of the Civil Code. Thus, although the volume of statutory law continues to grow, its expansion permits the adoption of highly specialized legislation without disturbing the elegance and simplicity of the Civil Code.

C. *The Anomalous Interaction Between Code and Statute*

The more troublesome portion of the Revised Statutes, at least from a methodological perspective, is Title 9. During the 1950 reorganization of statutory law, it was discovered that many statutes relating directly to the Civil Code of 1870 had been enacted independently rather than as amendments to the appropriate Code articles.⁹⁹ These statutes were compiled into a single volume, referred to as the Civil Code Ancillaries.¹⁰⁰ This compilation was unique among the Revised Statutes of 1950 because it, more so than any of the others, was intended to supplement and complement the Civil

95. *Id.*; see Murillo, *supra* note 18, at 176 (discussing multiple countries that have engaged in recodification).

96. *See, e.g.*, LA. REV. STAT. §§ 14, 49 (governing criminal law and state administration).

97. *See id.*; Moréteau & Parise, *supra* note 24, at 1111.

98. 3 A.N. YIANNPOULOS, LOUISIANA CIVIL LAW TREATISE, PERSONAL SERVITUDES § 2:19 (5th ed. 2011) (“The Mineral Code has been conceived as a specialized extension of the Civil Code in matters of mineral law. Therefore, it must be interpreted and applied as a true code against the background of the Civil Code and the Louisiana civilian tradition.”).

99. Bennett, *supra* note 64, at 10.

100. *See id.* Professor Bennett noted that the compilation of Title 9 was facilitated by a prior 1942 report of the Law Institute, under the direction of Reporter Professor Harriet S. Daggett, compiling “Louisiana Statutes Related to the Civil Code.” *See id.* at 10 n.16.

Code directly, almost as an extension of the primary text.¹⁰¹ To facilitate their use, the redactors arranged these provisions in a preliminary title and three books—Persons, Things, and Modes of Acquiring Things.¹⁰² Further subdivision was made into titles and chapters corresponding to the structure of the Civil Code.¹⁰³ Within this edifice, some of these ancillary provisions were themselves assembled into “mini-codes” contained within the larger work, such as the Trust Estates Act, a rudimentary trust code enacted in 1938.¹⁰⁴ Others were isolated provisions, handling various matters of Civil Code purview without any cohesive strength or purpose.¹⁰⁵

The rolling revision has not changed the variety of content found within Title 9. Still to be found are numerous “satellite” codes, self-contained works designed to treat matters once addressed by the Code, but whose policies are at least in part at odds with traditional code principles. These include the Trust Code,¹⁰⁶ the Consumer Credit Law,¹⁰⁷ the Louisiana Condominium Act,¹⁰⁸ and the Louisiana Lease of Movables Act.¹⁰⁹ Other provisions articulate detailed schemes designed to effectuate Code principles.¹¹⁰ Though not at odds with the Civil Code, their level of particularity makes them unsuitable for placement within the Code itself. The child support guidelines provide an excellent example of legislation of this sort.¹¹¹ Still other provisions are of a third type—isolated rules announcing particularized applications of,¹¹² or exceptions to, Code principles.¹¹³ At times, these

101. See *id.* at 10 n.16; see also LA. REV. STAT. ANN. Preliminary Title, cmt. (1950) (“As indicated by the word Ancillaries, Title 9 of the Revised Statutes of 1950 is auxiliary to the Civil Code of Louisiana.”).

102. See LA. REV. STAT. ANN. (1950).

103. Bennett, *supra* note 64, at 10.

104. See *id.*; John Minor Wisdom, *A Trust Code in the Civil Law, Based on the Restatement and Uniform Acts: The Louisiana Trust Estates Act*, 13 TUL. L. REV. 70, 70 (1938).

105. See, e.g., Bennett, *supra* note 64, at 10 (noting that various married women’s emancipatory statutes were grouped by subject matter under the heading “Married Women”).

106. LA. REV. STAT. §§ 9:1721-9:2252 (2013).

107. *Id.* §§ 9:3510-:3577.5. The Consumer Credit Law provides detailed regulations for consumer loans and permits much higher interest rates than are permitted by the provisions of the Civil Code title “On Loan.” See Kilborn, *supra* note 22, at 12-13.

108. LA. REV. STAT. § 9:1121.101-:1124.115.

109. *Id.* §§ 9:3301-:3342.

110. *Id.* §§ 9:315-:315.19.

111. *Id.*

112. See, e.g., *id.* § 9:1254 (providing for forced passage over a waterway on neighboring property).

113. Compare *id.* § 9:211 (permitting marriage between collaterals within the fourth degree under certain circumstances) with LA. CIV. CODE. ANN. art. 90 (2013) (prohibiting generally marriage between collaterals within the fourth degree); compare LA. REV. STAT.

provisions are designed to work justice in unique situations where the application of Code law unexpectedly fails to do so. More disappointing are the statutes designed by good politics, rather than by good policy.¹¹⁴

Not all ancillary or supplemental legislation is antithetical or detrimental to the Civil Code. Numerous legal issues are sensibly dealt with outside its ambit.¹¹⁵ However, much of the legislation found within the Civil Code Ancillaries is far from salutary. So many poorly conceived and hastily drafted statutes are found there that Title 9 has come to be known as the “dumping place” of special legislation.¹¹⁶ A great potential exists for unintended and undesirable conflict between core principles of the Civil Code and this type of statutory law, and sadly, this potential is all too often realized. It is not uncommon for Louisiana judges, under the influence of the common law methodology, to forget the maxims of interpretation generally applicable to revised statutes.¹¹⁷ Statutory law is applied as if it were autonomous, without reference to the Civil Code provisions against which it ought to be read or the purpose for which it was originally enacted.¹¹⁸ Divorced from both cause and context, these rules are allowed to do grave damage to the fabric of the Code.

§ 9:406 (providing time limitations for revocation of authentic act of acknowledgment of paternity) *with* LA. CIV. CODE ANN. art. 196 & cmt. D (providing for acknowledgment of paternity by authentic act the revocation of which is subject to no explicit time periods); *compare* LA. REV. STAT. § 9:1106 (providing for the de-immobilization of certain storage tanks placed on the land of another) *with* LA. CIV. CODE ANN. arts. 465-466 (providing for the immobilization of things incorporated into a tract of land and component parts of buildings and other constructions).

114. *See, e.g.*, LA. REV. STAT. § 9:211 (“Notwithstanding the provisions of Civil Code Article 90, marriages between collaterals within the fourth degree, fifty-five years of age or older, which were entered into on or before December 31, 1992, shall be considered legal and the enactment hereof shall in no way impair vested property rights.”). Professor Katherine Spaht describes this statute as “special legislation designed for two constituents.” Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 260 n.85 (2003).

115. For example, see the Insurance Code. LA. REV. STAT. § 22:1-:2371.

116. *See* Yiannopoulos, *supra* note 61, at 843 (“The Revised Statutes have become the ‘dumping place of legislation considered to be ancillary to the Civil Code.’”); *see also* Yiannopoulos, *supra* note 72, at 403 (“The corrosive force is the adoption and inclusion of . . . comprehensive statutes into Title 9 that incorporate Uniform Acts of common law vintage and ‘frequently conflict[] with the rules, principles, and policies of the Civil Code, which must be regarded as impliedly repealed.’” (quoting Yiannopoulos, *supra* note 61, at 843)).

117. Moréteau, *supra* note 56, at 14; *see* LA. CIV. CODE ANN. arts. 9-13 (2013); LA. REV. STAT. §§ 1:2-:17.

118. *See* Moréteau, *supra* note 56, at 14; *Rodriguez v. La. Med. Mut. Ins. Co.*, 618 So. 2d 390, 394 (La. 1993) (“[A] statute which is in derogation of common or natural rights is to be strictly construed and not extended beyond its obvious meaning.”).

IV. A CASE STUDY: LESSOR'S WARRANTY AND STATUTORY WAIVER

The anomalous interaction between code law and statutory law thus described is, by its nature, best studied in the context of specific examples. In light of the foregoing discussion, the remainder of this Article examines a particular conflict between the Louisiana Civil Code and the Civil Code Ancillaries that has emerged in the law of lease. The statutory culprit in this tale is R.S. 9:3221, an isolated provision that addresses the potential liability of an owner of "premises" who has both leased the property to a tenant and shifted responsibility for the condition of the premises to the lessee.¹¹⁹

As will be revealed, this statute, originally enacted to serve a narrow legislative purpose, has at various times in its eighty-year history threatened to undo core principles of code law relating to the limits of contractual freedom.¹²⁰ Because of insufficient understanding of the provision's scope and history, courts and the redactors of the rolling revision have both repeatedly failed to harmonize the statute with code provisions.¹²¹ The consequence is that a key component of the law of lease—that is, the lessor's responsibility for the condition of the leased premises—is currently governed by a tangle of conflicting rules. Rather than modernizing, clarifying, and streamlining the law of lease, the rolling revision has introduced unnecessary confusion and, unwittingly, perpetuated obsolescent policies underlying the responsibilities of lessors and lessees.

A. *Lessor Liability in Contract and in Tort—An Overview*

Because R.S. 9:3221 regulates waivers of a lessor's obligations, an exploration of the statute necessarily must begin with an overview of the lessor's obligations themselves. Potentially, a lessor's liability for defects in the leased premises lies both in contract and in tort.¹²² First, Louisiana Civil Code article 2696 (formerly 2695) provides,

119. LA. REV. STAT. § 9:3221. The statute provides in full:

Notwithstanding the provisions of Louisiana Civil Code Article 2699, the owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury caused by any defect therein to the lessee or anyone on the premises who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.

120. See discussion *infra* Part IV.C.

121. See discussion *infra* Part IV.C.

122. See *infra* notes 123, 130, 137-139 and accompanying text.

“The lessor warrants the lessee that the thing is suitable for the purpose for which it was leased and that it is free of vices or defects that prevent its use for that purpose.”¹²³ The warranty applies both to defects present in the property at the inception of the lease and those that arise thereafter, provided they are not attributable to the fault of the lessee.¹²⁴ The warranty also encompasses defects both known and not known to the lessor.¹²⁵

Breach of the warranty entitles the lessee to the full range of remedies generally allowed for breach of contract.¹²⁶ If the defect is so severe that the premises no longer serve the purpose for which they were leased, the lessee may obtain dissolution of the lease.¹²⁷ If repairs are needed, the lessee may notify the lessor, and upon the lessor’s failure to act, the lessee may make the repairs himself and deduct the costs of doing so from the rent.¹²⁸ The lessee may also seek damages resulting from a vice or defect in the premises.¹²⁹

Additionally, a lessor is answerable in delict (tort) for the condition of the leased premises in his capacity as owner or custodian of the thing leased. Under article 2317.1, which deals with liability for “custody” or “garde” of a thing, the lessor of a building is “answerable for damage occasioned by its ruin, vice, or defect.”¹³⁰ Article 2322, addressing the responsibility of an owner of a building, imposes liability for “damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its

123. LA. CIV. CODE ANN. art. 2696 (2013); *see also* ALAIN LEVASSEUR & DAVID GRUNING, *LOUISIANA LAW OF SALE AND LEASE: A PRÉCIS* § 3.1.2 (2007) (“The idea of a defect in the thing is linked to the purpose for which the thing is leased. Thus, the lessor first warrants that the thing is right for the lessee’s acknowledged purpose or cause.”).

124. LA. CIV. CODE ANN. art. 2696.

125. *Id.* arts. 2696-2697; *see also* LEVASSEUR & GRUNING, *supra* note 123, § 3.1.2 (illustrating a scenario where a lessor’s warranty would be extended to a defect of which the lessor was unaware).

126. *See* LEVASSEUR & GRUNING, *supra* note 123, § 3.1.2.

127. LA. CIV. CODE ANN. art. 2719; *see also* GEORGE M. ARMSTRONG, JR., *LOUISIANA LANDLORD AND TENANT LAW* § 7.1 (Catherine Kirgis Kuhlman Supp. 1995).

128. LA. CIV. CODE ANN. arts. 2691, 2694; ARMSTRONG, *supra* note 127, § 7.3.

129. *See* LA. CIV. CODE ANN. arts. 1994-2003. Prior to the 2005 revision of the title “Lease,” article 2695 specifically required the lessor to indemnify the lessor for “any loss” resulting from a vice or defect in the leased thing. *Id.* art. 2695 (2004) (“[I]f any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same.”); *see also* ARMSTRONG, *supra* note 127, § 7.3 (“The tenant may sue for damages for breach of implied warranty.”). Although revised article 2696 makes no reference to “loss” suffered by the lessee, it does not appear that any change in the law was intended.

130. LA. CIV. CODE ANN. art. 2317.1 (2013).

original construction.”¹³¹ Also applicable is article 660 (formerly 670), which appears in the title of the Civil Code dealing with legal servitudes, and which provides that an “owner is bound to keep his buildings in repair so that neither their fall nor that of any part of their materials may cause damage to a neighbor or to a passerby.”¹³² Together, these provisions make the lessor who is also the owner or custodian of the property responsible not only to his tenant, but to anyone who is injured by a defect in the premises.

Article 2697 makes clear that the lessor’s contractual warranty imposes a strict liability standard—the lessor is liable for damage caused by a vice or defect in the leased thing regardless of whether the lessor knew of those defects.¹³³ Thus, in order to recover damages for breach of this warranty, the lessee must prove only that a defect existed and that the defect caused damages.¹³⁴ Historically, the lessor’s delictual liability as owner or custodian was also assessed according to a strict liability standard.¹³⁵ However, in 1996, the Louisiana legislature introduced landmark legislation eliminating the strict liability formerly imposed on property owners and replacing it with liability for negligence only.¹³⁶ The new provisions contain parallel language making clear that an owner or custodian is liable “only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.”¹³⁷ In contrast to this change, the articles providing for the lessor’s contractual liability were left untouched. Thus, while the lessor’s delictual responsibilities as

131. *Id.* art. 2322. Unlike article 660, article 2322 is not restricted to an injured “neighbor” or “passerby,” but applies also to anyone lawfully on the premises. *Ciaccio v. Carbajal*, 76 So. 583, 584 (La. 1917); *Cristadoro v. Von Behren’s Heirs*, 44 So. 852, 854-55 (La. 1907).

132. LA. CIV. CODE ANN. art. 660.

133. *Id.* art. 2697.

134. *Wood v. Cambridge Mut. Fire Ins. Co.*, 486 So. 2d 1129, 1132 (La. App. 2 Cir. 1986); John C. Morris, Jr., Comment, *Lessor’s Liability for Personal Injuries*, 7 LA. L. REV. 406, 408 (1947).

135. Frank L. Maraist & Thomas C. Galligan, Jr., *Burying Caesar: Civil Justice Reform and the Changing Face of Louisiana Tort Law*, 71 TUL. L. REV. 339, 342-43, 350-51, 368-69 (1996). Under prior law, the lessor’s negligence also served as a basis for recovery in appropriate cases. See ARMSTRONG, *supra* note 127, § 8.5.

136. Maraist & Galligan, *supra* note 135, at 342.

137. LA. CIV. CODE ANN. art. 2317.1; see also *id.* arts. 660, 2322 (exhibiting the same language changes, minus the word “ruin,” by saying “only upon a showing that he knew or, in the exercise of reasonable care, should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care”).

owner or custodian of a building are now assessed according to a negligence standard, a lessor's liability in contract remains strict.¹³⁸

The contractual and delictual obligations are imposed upon the lessor concurrently, so that an injured lessee may recover under either theory, or both.¹³⁹ However, an injured lessee is most likely to allege a violation of the lessor's contractual responsibilities. This has been the case historically¹⁴⁰ and remains true under current law, likely because the contractual action is generally far more advantageous to the lessee.¹⁴¹ As noted above, the lessor is strictly liable for a breach of the warranty against vices and defects, while liability in tort lies in negligence alone.¹⁴² Additionally, the lessee's breach of warranty claim is subject to a generous ten-year period of prescription, as opposed to

138. *Montecino v. Bunge Corp.*, 04-875, pp. 4-5 (La. App. 5 Cir. 2/15/05); 895 So. 2d 603, 605-07 (quoting *Barnes v. Riverwood Apartments P'ship*, 38,331, p. 6 (La. App. 2 Cir. 4/7/04); 870 So. 2d 490, 494-95 (finding that tort reform legislation reducing tort standard of care to negligence did not impact strict liability standard of care applicable to lessors in contract)).

Of course, in addition to articles 660, 2317.1, and 2322, article 2315 serves as a source of delictual liability for lessors whose "fault" in failing to repair known defects in leased premises results in "damage to another." LA. CIV. CODE ANN. art. 2315. Given that the other provisions address liability for owners and custodians more specifically and, until recently, imposed a more stringent standard of liability, article 2315 is rarely referred to by litigants or courts when defining the lessor's delictual obligations.

139. *See Barnes*, 38,331 at p. 10; 870 So. 2d at 497 ("Having decided that Mr. Barnes has a strict liability claim under article 2695, we also note that plaintiffs like Mr. Barnes are not limited to actions under article 2695, but, in appropriate factual contexts, may be entitled to recovery via the negligence route under articles 2317 and 2317.1."); *Evans v. Does*, 283 So. 2d 804, 807 (La. App. 2 Cir. 1973) (recognizing tenant's cause of action exists both *ex contractu* and *ex delicto*).

Louisiana courts have sometimes required litigants whose complaints established the possibility of recovery in both contract and in tort to choose the theory under which the case will be decided. This approach is improper in light of article 862 of the Louisiana Code of Civil Procedure, which suppresses the "theory of the case" doctrine. *See* LA. CODE CIV. PROC. ANN. art. 862 & cmt. (b) (2013); 6 SAÚL LITVINOFF, LOUISIANA CIVIL LAW TREATISE, THE LAW OF OBLIGATIONS § 16.20 (1999). Under Louisiana Code of Civil Procedure article 862, courts are required to "grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief." LA. CODE CIV. PROC. ANN. art. 862; *see also* Fed. Ins. Co. v. Ins. Co. of N. Am., 263 So. 2d 871, 874 (La. 1972) (Tate, J., concurring) ("A plaintiff who pleads and proves the necessary facts should be allowed to recover under any available theory, whether tort, quasi contract, or contract. To bar recovery simply by strictly construing the pleadings is to abandon the spirit of the 1960 Code of Civil Procedure.").

140. *See* Ben R. Miller, Jr., Comment, *Responsibility of Landlord and Tenant for Damages from Defects in Leased Premises*, 20 LA. L. REV. 76, 79 (1959) ("Although the language of [article 2322] does not preclude recovery by tenants, it has been customary for only third persons injured by defects in the premises to make use of this provision.").

141. *See supra* notes 133-138 and accompanying text.

142. *See supra* notes 133-138 and accompanying text.

the one-year period applicable to delictual claims.¹⁴³ Moreover, Louisiana courts have traditionally awarded damages for all types of harm resulting from breach of the lessor's contractual warranty, including damages for economic loss,¹⁴⁴ loss of property,¹⁴⁵ personal injury,¹⁴⁶ and nonpecuniary damages for mental anguish, anxiety, and worry.¹⁴⁷

143. LA. CIV. CODE ANN. arts. 3492, 3499. Although the plaintiff should by all rights have the option to pursue his claim for personal injuries as a breach of contract claim, Louisiana courts have erroneously characterized such claims as arising *ex delicto* and thus governed by the one-year, as opposed to the ten-year, prescriptive period. *See, e.g.*, *Washington v. Battard*, 523 So. 2d 7, 7 (La. App. 4 Cir. 1988); *Singleton v. Sims*, 438 So. 2d 633 (La. App. 4 Cir. 1983). The reasoning in these cases appears to originate from the Louisiana Supreme Court's 1904 decision in *Schoppel v. Daly*, 36 So. 322 (La. 1904). There, the court was called upon to determine the nature of a claim levied against a lessor for personal injuries suffered by a tenant's wife. *Id.* at 325. Upon assuming that the wife was not a signatory to the contract, the court concluded that her claim was therefore grounded in tort rather than in contract. *Id.* Later decisions have relied on *Daly* to hold, improperly, that an "action by a lessee against a lessor for damages caused by defects in the leased premises" is an action *ex delicto* rather than *ex contractu* and therefore subject to a prescriptive period of one year. *Washington*, 523 So. 2d at 7; *Singleton*, 438 So. 2d at 635.

144. *See, e.g.*, *Laura's Prods., Inc. v. 600 Conti St., LLC*, 2007-0819, pp. 10-12 (La. App. 4 Cir. 4/9/08); 982 So. 2d 934, 940-41.

145. *See, e.g.*, *Nickens v. McGehee*, 184 So. 2d 271, 276-77 (La. App. 1 Cir. 1966).

146. *See Bates v. Blitz*, 17 So. 2d 816, 820 (La. 1944); *Barnes v. Riverwood Apartments P'ship*, 43,798, p. 19 (La. App. 2 Cir. 2/04/09); 16 So. 3d 361; *McGinty v. Pesson*, 96-850, p. 8 (La. App. 3 Cir. 12/11/96); 685 So. 2d 541, 545; *Wexler v. Occhipinti*, 378 So. 2d 1073, 1081 (La. App. 4 Cir. 1979); *Kepper v. Cont'l Ins. Co.*, 340 So. 2d 1033, 1034 (La. App. 1 Cir. 1976); *Revon v. Am. Guarantee & Liab. Ins. Co.*, 285 So. 2d 354, 359 (La. App. 4 Cir. 1973); *Tewis v. Zurich Ins. Co.*, 233 So. 2d 357, 361 (La. App. 1 Cir. 1970); *Johnson v. Crescent Arms Apartments, Inc.*, 221 So. 2d 633, 638 (La. App. 4 Cir. 1969); *Estes v. Aetna Cas. & Sur. Co.*, 157 So. 395, 403 (La. App. Orleans 1934); *see also Schoppel v. Daly*, 36 So. 322 (La. 1904) (rejecting, *in dicta*, an argument that article 2695, predecessor to article 2696, which sets forth lessor's warranty against vices and defects, does not extend to damages for personal injuries).

147. *See, e.g.*, *Gele v. Markey*, 387 So. 2d 1162, 1163 (La. 1980); *Tidwell v. Meyer Bros., Ltd.*, 107 So. 571, 575 (La. 1926); *Ganheart v. Exec. House Apartments*, 95-1278, pp. 6-9 (La. App. 4 Cir. 2/15/96); 671 So. 2d 525, 529-30; *Gennings v. Newton*, 567 So. 2d 637, 642 (La. App. 4 Cir. 1990); *Smith v. Castro Bros.*, 443 So. 2d 660, 661 (La. App. 4 Cir. 1983); *Evans v. Does*, 283 So. 2d 804, 807 (La. App. 2 Cir. 1973); *Nacol v. WAIL, Inc.*, 219 So. 2d 333, 338 (La. App. 1 Cir. 1969); *Nickens*, 184 So. 2d at 278-79.

Although article 1998 now limits the circumstances in which nonpecuniary damages may be recovered for breach of contracts, it seems clear that at least in residential leases, the contract is one "intended to gratify a nonpecuniary interest," of which the lessor "either knew or should have known"—i.e., the enjoyment of a habitable dwelling. *See, e.g.*, *Ganheart*, 95-1278 at pp. 6-7; 671 So. 2d at 529-30 ("A lease for residential purposes includes, as one of its objects, the enjoyment of habitable living quarters, arguably a nonpecuniary interest." (quoting LA. CIV. CODE ANN. art. 1998 (1990))). Furthermore, because the warranty against vices and defects is implied in *all* lease contracts, it may even be argued that even commercial leases involve interests of human safety significant enough to justify nonpecuniary damages resulting from personal injury. On the other hand, where commercial lessees suffer emotional distress unrelated to physical harm, recovery of nonpecuniary damages could be limited to

While an injured lessee is entitled to recover under either contract or tort principles, when third parties to the lease claim damage resulting from defects in the premises, tort is generally the only theory of recovery available. The warranty, being contractual in nature, traditionally extended only to the lessee.¹⁴⁸ Thus, under prior law, a nonsignatory to the lease who was injured on the premises was restricted to a tort claim against the lessor.¹⁴⁹ The distinction between the contract and tort claims, particularly the disparity in the standard of liability, was a source of serious potential unfairness, especially for the lessee's spouse and children who resided in the house but who did not sign the lease contract.¹⁵⁰ To remedy this unfairness, article 2698 was revised in 2005 to extend the lessor's contractual obligations to "all persons who reside in the premises in accordance with the lease."¹⁵¹ However, other invitees and passersby remain outside of the protective scope of the contractual warranty and are limited to claims in tort only.

A paradigmatic example best illustrates the operation of the foregoing principles. Assume that a residential lessee executes a lease for a house.¹⁵² The lessee moves into the premises with his wife and minor child, neither of whom are signatories to the lease. Shortly after the family moves in, the house catches fire. The lessee, his wife, and his child suffer serious injuries. All of their possessions are destroyed. A friend who was visiting their home is injured. An investigation reveals that faulty wiring located inside of the walls of the house caused the fire.

Under these facts, the lessor is potentially liable both in contract and in tort. First, the faulty wiring constitutes a defect for which the

those cases where the lessee could show that the contract was made to gratify a nonpecuniary interest other than commercial success and that the lessor either knew or should have known of that interest. For general discussion of the availability of nonpecuniary damages in Louisiana, see Vernon Valentine Palmer, *Contracts of Intellectual Gratification—A Louisiana-Scotland Creation*, in *MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND* 208 (Vernon Palmer & Elspeth Reid eds., 2009); Melissa T. Lonegrass, *Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective*, 85 TUL. L. REV. 413, 453-55 (2010).

148. *Weiland v. King*, 281 So. 2d 688, 690 (La. 1973).

149. *Id.*

150. VERNON VALENTINE PALMER, *THE CIVIL LAW OF LEASE IN LOUISIANA* § 3-17 (1997). Courts occasionally applied the lessor's contractual warranty to the tenant's spouse or children, in apparent recognition of the potential for unjust results. *See, e.g., Crawford v. Magnolia*, 4 So. 2d 48, 50 (La. App. 1 Cir. 1941).

151. LA. CIV. CODE ANN. art. 2698 (2005).

152. This hypothetical is adapted from the facts of *Wells v. Norris*, 46,458 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1165.

lessor is answerable in contract.¹⁵³ The strict nature of the warranty against vices and defects imposes responsibility on the lessor even if he was unaware of the danger.¹⁵⁴ The lessee is entitled to damages for his injuries and other losses,¹⁵⁵ as are his family members.¹⁵⁶ They have ten years in which to sue.¹⁵⁷ The lessor's liability is not the same with respect to the family friend, however. Her rights arise from the law of delict rather than the contract that exists between the lessor and the lessee.¹⁵⁸ Thus, her claim lies in negligence and requires that she show the lessor's lack of reasonable care.¹⁵⁹ Additionally, the family friend must sue within one year or risk forfeiting her claim.¹⁶⁰

B. Contractual Alterations of the Lessor's Obligations

The responsibilities of a lessor to lessees and third parties, while significant, are not entirely immutable. Indeed, Louisiana courts have long held that the lessor may be contractually relieved of his obligations both to his tenant and third parties to the lease.¹⁶¹ However, core principles of contractual privity implicit within the Code and acknowledged by the Louisiana Supreme Court work to prevent a lessor who has contractually shifted responsibility for the condition of the leased premises to his tenant from avoiding tort responsibility to third persons who are not parties to the contract.¹⁶² The inability of landlords to protect themselves from tort liability arising from defects in premises over which they had no control prompted legislative intervention. In 1932, the Louisiana legislature enacted R.S. 9:3221, a statute designed to permit landlords to partially shift the tort liability owed to third parties to the tenant through a contractual assumption clause.¹⁶³ Although this narrow exception to the limits of contractual privity initially sought to protect Louisiana landlords and encourage the letting of residential and commercial space at affordable prices, in

153. See LA. CIV. CODE ANN. art. 2696 (2013).

154. See *id.* art. 2697.

155. See *supra* notes 144-147 and accompanying text.

156. See LA. CIV. CODE ANN. art. 2698.

157. See *id.* art. 3499; see also discussion *supra* note 143 (discussing jurisprudence addressing the prescriptive period applicable to suits for personal injury resulting from breach of the lessor's obligations). Although not necessary for their recovery, the family may choose also to plead the lessor's liability in tort. See *supra* note 139 and accompanying text.

158. See *Weiland v. King*, 281 So. 2d 688, 690 (La. 1973).

159. See *id.*

160. See LA. CIV. CODE ANN. art. 3492.

161. See *infra* notes 164-174 and accompanying text.

162. See *infra* notes 175-178 and accompanying text.

163. See *infra* notes 181-186 and accompanying text.

the end it dramatically altered the rights and obligations of both parties to the lease.

1. Early Jurisprudence

The freedom of parties to contractually alter the lessor's obligations with respect to the condition of the premises has long been recognized by the Louisiana jurisprudence. This freedom was first addressed by the Louisiana Supreme Court in its 1901 decision in *Pierce v. Hedden*, where it was held, with reference to French jurisprudence, that "[t]he parties to a lease have the right . . . to broaden or restrict their respective rights and obligations as to warranty by a clause in their contract."¹⁶⁴ Later appellate decisions concurred in this holding.¹⁶⁵ For example, in the 1927 case of *Pecararo v. Grover*, a lessee sued her landlord after part of the plaster ceiling in her rented home fell and injured her.¹⁶⁶ The lease contained a stipulation that stated, "The lessor will not be responsible for damages caused . . . by any vice or defects of the leased property."¹⁶⁷ In upholding the waiver, the court relied on article 11 of the Louisiana Civil Code of 1870, authorizing individuals to "renounce what the law has established in their favor when the renunciation does not affect the rights of others, and is not contrary to the public good."¹⁶⁸ According to the court, because the provision in question affected the lessee alone and did not violate public policy, it was valid.¹⁶⁹ In deciding the issue of public policy, the court cited French doctrine and jurisprudence concluding that, under French law, then in effect, the warranty against vices and defects could be freely renounced.¹⁷⁰

The court also addressed early on the possibility that a lessor's delictual responsibilities could be altered by contract. In the 1919 case of *Clay v. Parsons*, the wife of a residential tenant was injured when a portion of her porch collapsed.¹⁷¹ When she sued her landlord for

164. 29 So. 734, 738 (La. 1901) (citing CODE CIV. [C. CIV.] art. 1721). The court ultimately found, however, that although the parties to the lease had excluded the warranty against vices and defects, they had not contemplated that the defects would be severe enough to justify complete demolition of the building, and thus held that the clause did not relieve the lessor of his obligation to the lessee. *Id.*

165. *See, e.g., Pecararo v. Grover*, 5 La. App. 676 (La. App. Orleans 1927); *Cordona v. Glenny*, Orleans App. 22 (La. App. 1903).

166. 5 La. App. at 676.

167. *Id.* at 676-77.

168. *Id.* at 677 (quoting LA. CIV. CODE art. 11 (1870)).

169. *Id.* at 677-78.

170. *Id.* at 677.

171. 81 So. 597, 597 (La. 1919).

damages, the court rejected her claim, holding that she had expressly assumed the risk of harm.¹⁷² Although the plaintiff was technically a third party to the written lease, she had verbally agreed to an understanding that the lessor—her husband—would not be responsible for any repairs to the premises.¹⁷³ Concluding that the plaintiff’s tort claim was therefore barred, the court stated:

Our opinion is that the provisions of the Civil Code that hold the owner of a building answerable for any injury that may befall another because of the landlord’s neglect to make repairs are subject to the general law of negligence, and that the obligation thus imposed by law upon the landlord may be dispensed with, not only by a lessee as a condition of his contract of lease, but by any one desiring to occupy the house and willing to assume the risk.¹⁷⁴

Thus, the court concluded that any person—whether a lessee or a third party to the lease—could expressly assume the risk of harm resulting from a defect in the premises and thereby absolve the lessor from delictual responsibility.

Following *Clay v. Parsons*, it seemed clear that the lessor could potentially be relieved contractually of all liability for the condition of the premises. Soon, however, the Louisiana Supreme Court articulated an important limitation on contractual waivers of a lessor’s obligations. In *Klein v. Young (In re Klein)*, the court held that a lease agreement allocating responsibility for the condition of the premises to the tenant could not absolve the landlord from injuries suffered by a *third person* who was not a party to the lease and who had not assumed the risk of danger.¹⁷⁵ The case involved a nurse who worked for and resided in the home of a residential tenant and who was injured by the collapse of a staircase in the building.¹⁷⁶ When the plaintiff sued in tort, the lessor defended the case on the ground that the tenant had contractually assumed all responsibility for the safety of the building in the lease.¹⁷⁷ The court rejected the defense, holding that “the lessee cannot, by assuming the obligation, absolve the owner of the building from his

172. *Id.*

173. *Id.*

174. *Id.*

175. 111 So. 495, 496-97 (La. 1926). This limitation was articulated by the United States Court of Appeals for the Fifth Circuit about a decade earlier. *See Hero v. Hankins*, 247 F. 664, 666 (5th Cir. 1917).

176. *Klein*, 111 So. at 496.

177. *Id.*

responsibility to third persons who may be injured in consequence of the owner's neglect of a duty imposed by law in their favor."¹⁷⁸

Though conceptually sound, the Louisiana Supreme Court's ruling in *Klein* produced a harsh result for landlords. While an owner's liability to *his tenant* could be avoided by the tenant's assumption of responsibility for the condition of the premises, the owner's liability to *third parties* remained unaffected by such a stipulation, even though the lessor had no obligation vis-à-vis the tenant to maintain the premises in a safe condition. This result was even more unfair when the complaining party was the spouse or child of the lessee, entitled to sue the lessor in tort despite a clause in the lease absolving the lessor of the obligation to maintain the premises. Furthermore, at the time of the court's ruling in *Klein*, Louisiana Civil Code article 2322 imposed strict liability on the owner of a building for damage caused by a vice or defect in the property.¹⁷⁹ Thus, a lessor-owner could be held strictly liable for damage of which he was entirely unaware and unlikely to discover due to the specifics of the lease. And, although the lessor in such a case could sue the lessee for indemnity under the lease agreement,¹⁸⁰ he would still be subjected to the cost and inconvenience of litigation with no guarantee of recovery against his tenant.

2. Legislative Intervention

The result in *Klein* prompted the Louisiana legislature to intervene. In 1932, the legislature enacted a statute designed to overrule *Klein* and lessen the potential liability of a lessor-owner to

178. *Id.* at 497.

179. *See Barnes v. Beirne*, 38 La. Ann. 280, 282 (1886) (holding that ignorance of defect does not exempt owner of liability under article 2322).

180. *See Terrenova v. Feldner*, 28 So. 2d 287, 290-91 (La. App. Orleans 1946) ("The Supreme Court did not declare in *Klein v. Young* that provisions in a lease, under which the lessee assumed responsibility for the condition of the premises, were contrary to public policy or that they were not enforceable as between the parties to the lease. The court merely held that stipulations of this sort could not affect the right of a third person to recover damages from an owner for nonperformance of the legal duties required of him by Articles 670 and 2322 of the Code. The opinion does not say, nor do we think that it was ever contemplated by the court, that an owner, condemned to pay damages to a third person as a result of the lessee's breach of a provision in the lease whereby the latter assumed responsibility for vices and defects in the property, could not maintain an action against the lessee for the damages he sustained by the breach or that the lessor, who was compelled to defend a suit brought by a third person sustaining injuries by reason of the lessee's breach of covenant, could not call the lessee in warranty:").

third parties to the lease.¹⁸¹ In effect, the statute served to shield lessors who shifted responsibility for the premises to their tenants from the unforgiving standards of strict liability. Act No. 174 of 1932 (later incorporated into the Revised Statutes as Title 9, Section 3221) provided:

[T]he owners of buildings or premises which have been leased under a contract whereby the tenant or occupant assumes responsibility for the condition of the premises shall not be liable in damages for injury caused by any vice or defect therein to any tenant or occupant, nor to anyone in the building or on the premises by license of the tenant or occupant, unless the owner knew of such vice or defect, or should within reason have known thereof, or had received notice of such vice or defect and failed to remedy same within a reasonable time thereafter.¹⁸²

The new legislation thus permitted what *Klein* did not by absolving the lessor from liability “to anyone in the building or on the premises” when the lessee assumed responsibility for the premises.¹⁸³ By allowing lessors to shift contractually to the tenant a portion of their delictual liability, the new statute served to encourage lessors to grant residential and commercial leases, thus fostering housing and commercial needs of the state by ensuring the affordability of leased space.¹⁸⁴ The statute also served to bring the lessor’s liability closer into line with the common law, which at the time granted landlords virtual immunity from liability for the condition of leased premises.¹⁸⁵ The legislature’s deference to lessor-owners was not absolute, however—by enforcing waivers except where the lessor “knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time,” the statute made clear that the lessee could not assume responsibility toward third parties for the lessor’s negligence.¹⁸⁶

181. See Richard D. Moreno, *Lease Law*, 55 LA. L. REV. 555, 569 (1995); P. Ryan Plummer, Comment, *Personal Injury and the Louisiana Law of Lease*, 64 LA. L. REV. 177, 180 (2003).

182. 1932 La. Acts 552.

183. *Id.*

184. See sources cited *supra* note 181.

185. Morris, *supra* note 134, at 406, 414; see also Lonegrass, *supra* note 147, at 419-31 (tracing the evolution of English and American landlord-tenant law with respect to the liability of landlords for defective conditions).

186. 1932 La. Acts 552.

C. *A Series of Anomalous Interactions*

Since R.S. 9:3221 was first enacted, its interpretation and application by courts, and even its treatment by the Law Institute and legislature, have at all times reflected a poor understanding of the statute's original legislative purpose and the proper relationship between statutory law and principles of a civil code. The story of the misapplication and ill-advised amendment of R.S. 9:3221 is told here in a series of four episodes, each of which illustrates how this single piece of narrowly targeted statutory law has been allowed to shape the contours of the lessor-lessee relationship at the expense of core Code provisions.

1. Episode 1: Undue Restriction of Contractual Freedom

Although R.S. 9:3221 was broadly worded to refer to the lessor's ability to shield himself from liability for damage caused "to any tenant or occupant" of the property as well as "anyone in the building or on the premises by license of the tenant or occupant," the prevailing academic view at the time of its adoption was that the statute changed only the law affecting third parties to the lease, and not the law governing the rights of lessees.¹⁸⁷ Commentators discussing the statute surmised that the impetus behind R.S. 9:3221 was to overrule *Klein* and to thereby *increase* protections for lessors beyond what the law previously allowed.¹⁸⁸ This construction of the statute is sensible when viewed in light of preexisting law. Because the law already permitted the lessor to contract away his liability to his tenant, application of a statute imposing liability for negligence despite the existence of a waiver to disputes between the landlord and tenant would *decrease*, rather than increase, landlord protection, contrary to the statute's supposed purpose.

The case law in the years following the statute's enactment also reflected a view that the statute applied to the claims of third parties and not to those of lessees.¹⁸⁹ And, although several courts cited R.S.

187. *Id.*; see ARMSTRONG, *supra* note 127, § 8.72; Philip deV. Claverie et al., Comment, *The Louisiana Law of Lease*, 39 TUL. L. REV. 798, 846-47, 849 (1965); Miller, *supra* note 140, at 87-89.

188. See ARMSTRONG, *supra* note 127, § 8.72; Claverie et al., *supra* note 187, at 846-47, 849; Miller, *supra* note 140, at 87-89; see also Vernon V. Palmer, *The Residential Lease in the Civil Law*, 4 TUL. CIV. L.F. 3, 20 (1988) (describing R.S. 9:3221 as "a 1932 statute that gave owner-lessors a certain degree of protection from strict liability tort claims by third persons injured on the premises").

189. See, e.g., *Gilliam v. Lumbermens Mut. Cas. Co.*, 124 So. 2d 913, 916 (La. 1960) ("Act 174 of 1932, which was passed subsequent to the decision in the *Klein* case, was

9:3221 when discussing the effect of assumption of liability clauses on claims of *lessees*,¹⁹⁰ in no case was the statute applied to limit the enforceability of a contractual waiver and permit a lessee to recover despite his assumption of responsibility for the condition of the premises.

This view of R.S. 9:3221 remained in place for nearly half a century, until the Louisiana Supreme Court abruptly reversed course in 1981. In *Tassin v. Slidell Mini-Storage, Inc.*, the court explicitly found a clause limiting the lessor's contractual warranty against vices and defects invalid under R.S. 9:3221.¹⁹¹ *Tassin* involved the claims of lessees of storage space units who brought suit against their lessor, seeking compensation for water damage to their personal property

undoubtedly designed to relieve the owner of some of the burdens imposed on him by law in cases where he has given dominion or control of his premises to a tenant under a lease, for the Act permits the owner to transfer his legal liability by contract to his lessee insofar as it may pertain to injuries received by third persons who come on the property by license or invitation of the lessee.”); *Terrenova v. Feldner*, 28 So. 2d 287, 289 (La. App. Orleans 1946) (“Having become aware of the hardships imposed upon the owners of buildings by Articles 670 and 2322 of the Code under the broad interpretation given to those articles by our courts (particularly where the buildings were occupied by tenants under a lease contract), the Legislature of 1932 sought to provide an outlet for relief by the passage of Act No. 174.”).

190. See, e.g., *Clofort v. Matmoor, Inc.*, 370 So. 2d 1305, 1307 (La. App. 4 Cir. 1979) (finding that R.S. 9:3221 did not bar liability of lessor under articles 670, 2322, and 2695, where an assumption of liability clause appeared only on rent receipts and not in the written lease); *ADD Chem. Co. v. Gulf-Marine Fabricators, Inc.*, 345 So. 2d 216, 220 (La. App. 3 Cir. 1977) (holding that the lessee was not entitled to damages caused by defect in leased storage tanks where lessee assumed responsibility for condition of premises under R.S. 9:3221 and lessor did not know nor should have known of existence of defect); *Nelson v. Parkhurst*, 304 So. 2d 72, 73 (La. App. 1 Cir. 1974) (finding that R.S. 9:3221 did not exonerate the lessor from personal injuries suffered by the lessee where a provision in the lease imposed upon the lessee the mere obligation to “keep ‘the premises in a reasonably good condition,’ and to return it ‘in the same condition’” and did not clearly impose the responsibility for the condition of the premises on the lessee); *Standard Office Supply Co. v. Stonewall Inv. Co.*, 267 So. 2d 768, 770 (La. App. 2 Cir. 1972) (holding that R.S. 9:3221 does not apply to damages resulting from a defect that is not part of the leased premises and over which the lessee has no supervision or control); *Darnell v. Taylor*, 236 So. 2d 57, 62 (La. App. 3 Cir. 1970) (finding that R.S. 9:3221 barred the sublessor's claim against the lessor for damages owed to the sublessee resulting from a defect in the premises); *Meyers v. Drewes*, 196 So. 2d 607, 611 (La. App. 4 Cir. 1967) (holding that under R.S. 9:3221, a contractual provision barred the lessee's demand for damages resulting from a defect in the premises); *Abbott & Barnes Credit Clothiers, Inc. v. Crane Clothing Co.*, 141 So. 2d 916, 919 (La. App. 4 Cir. 1962) (holding that the defendant could not “claim immunity” under R.S. 9:3221 because the defect occurred outside of the leased premises and was therefore outside the scope of the contractual assumption of responsibility); *Hoffman v. Zimmer*, 175 So. 115 (La. App. Orleans 1937) (noting that R.S. 9:3221 would apply to the injured tenant's claim if the assumption of liability could be proven, but ultimately finding that the evidence was insufficient to establish the existence of contractual waiver).

191. 396 So. 2d 1261, 1264 (La. 1981).

caused by a defect in the storage unit doors.¹⁹² The lessor defended the actions by relying on provisions in the leases absolving the lessor from any liability resulting from water damage.¹⁹³ The trial court found in favor of the lessees, relying on R.S. 9:3221 and reasoning that despite the provision in the leases, the lessor knew or should have known that the doors would not withstand the heavy rains and thunderstorms common in southeast Louisiana.¹⁹⁴ The Louisiana Court of Appeal for the First Circuit reversed, finding no evidence that the lessor knew or should have known that the doors would allow water seepage.¹⁹⁵ The appellate court also suggested, albeit indirectly, that R.S. 9:3221 may have no application to claims between lessors and lessees, who were at that time generally free under the Civil Code to waive the lessor's responsibility for the premises.¹⁹⁶

The Louisiana Supreme Court disagreed with the court of appeal on both counts. Although the court recognized that "the usual warranties and obligations imposed under the codal articles and statutes dealing with lease may be waived," the court applied R.S. 9:3221 to invalidate the waiver in the lease.¹⁹⁷ According to the court, it should have been obvious to the lessor that the doors, which did not close flush with the concrete flooring of the storage units, would permit the flow of water and cause damage to the lessees' property.¹⁹⁸

It is not immediately apparent that the Louisiana Supreme Court's application of R.S. 9:3221 to waivers of the lessor's contractual warranty against vices and defects was in any way improper.¹⁹⁹

192. *Id.* at 1262.

193. *Id.*

194. *Id.*

195. *Tassin v. Slidell Mini-Storage, Inc.*, 388 So. 2d 67, 68-69 (La. App. 1 Cir. 1980), *rev'd*, 396 So. 2d 1261.

196. *See id.* at 68 (quoting *General Leasing Co. v. Leda Towing Co.*, 286 So. 2d 802 (La. App. 4 Cir. 1974) ("[S]tatutes dealing with obligations and rights of lessors . . . are not prohibitory laws which would be unalterable by contractual agreement but are simply intended to regulate the relationship between lessor and lessee when there is no contractual stipulation imposed in the lease." (internal quotation marks omitted)). At the time of the *Tassin* decision, warranty waivers were not yet limited by either Louisiana Civil Code article 2004, which was enacted in 1985, or article 2699, which was enacted in 2005. *See infra* notes 221-227 and accompanying text (discussing restrictions imposed by article 2004); *see also infra* notes 274, 288-289, 299-304, 307-314 and accompanying text (discussing restrictions imposed by article 2699).

197. *Tassin*, 396 So. 2d at 1264.

198. *Id.*

199. Noteworthy, however, is the fact that the *Tassin* decision was rendered in a plurality opinion. The majority opinion authored by Justice Marcus was concurred in, rather than joined, by Chief Justice Dixon and Justices Calogero, Dennis, Watson, Lemmon, and

Although the *Tassin* court did not engage in a textual analysis of R.S. 9:3221, its use of the statute to limit the effect of a waiver of the lessor's warranty is certainly supported by a literal reading of the legislation. Indeed, R.S. 9:3221 insulates the lessor from liability "to *the lessee* or anyone on the premises who derives his right to be thereon from the lessee" unless the notice provisions of the statute are met.²⁰⁰ Thus by its terms, the statute regulates the enforceability of a waiver of liability when the *lessee* complains of damage resulting from a defect in the premises.

However, the plain language of the legislation clearly derogates from the general principles of the Civil Code, as articulated by the court in *Klein*, regarding the contractual freedom afforded to a tenant.²⁰¹ Whereas *Klein* recognized a tenant's power to waive the lessor's obligations, *Tassin* interpreted R.S. 9:3221 to impose responsibility on a lessor for known defects in spite of the lessee's clear waiver.²⁰² Moreover, *Tassin's* application of R.S. 9:3221 to a breach of warranty claim between landlord and tenant produces a result directly contrary to the purpose of the legislation, which was to permit lessors to insulate themselves from liability in a manner previously unrecognized by Louisiana law.²⁰³ Prior to the statute's enactment in 1932, Louisiana courts freely allowed the lessee's assumption of responsibility for the condition of the premises to absolve the lessor from any liability *to the lessee* for injuries caused by defects in the premises.²⁰⁴ Although no specific statutory provision expressly authorized contractual waivers of the lessor's warranty, Louisiana courts upheld such provisions as consistent with general principles of the Civil Code as well as French jurisprudence and doctrine addressing the validity of contractual waivers in France.²⁰⁵ Thus, when R.S. 9:3221 was enacted, it was already the law that a lessee who assumed responsibility for the condition of the premises was contractually barred from recovering from the lessor for his injuries.²⁰⁶ Not permitted were attempts by a lessor to shift his responsibility entirely

Blanche. None of the concurring Justices authored a separate opinion explaining why he concurred in the result but not in the reasoning of the majority.

200. LA. REV. STAT. ANN. § 9:3221 (1950) (emphasis added).

201. *Klein v. Young*, 111 So. 495, 497-99 (La. 1926).

202. *Tassin*, 396 So. 2d at 1264; *Klein*, 111 So. at 497.

203. *Compare Tassin*, 396 So. 2d at 1264 (holding landlord liable despite waiver), *with* 1932 La. Acts 552 (explaining that the purpose of R.S. 9:3221 was to insulate lessors from liability, as applied to expanding liability).

204. *See* discussion *supra* Part IV.B.1.

205. *See* discussion *supra* Part IV.B.1.

206. *See* discussion *supra* Part IV.B.1.

to third parties to his lessee by way of an assumption clause.²⁰⁷ Hence, R.S. 9:3221 was enacted not to permit contractual waivers of the lessor's obligations *to his lessee*, but to extend the effect of a stipulation in the lease to third parties and to provide *greater* protection to the lessor than was possible under *Klein*. When the statute is applied to disputes between lessor and lessee, however, the result is that the lessor receives *less* protection than was previously allowed by Louisiana courts.

Not only does the application of R.S. 9:3221 to the rights of lessees appear to contradict the legislative intent, it produces irrational effects in that it renders contractual waivers of the lessor's warranty practically meaningless. Even if the lessee assumes responsibility for the condition of the premises, according to the statute the responsibility for damages resulting from defects is transferred back to the lessor by either actual or constructive knowledge.²⁰⁸ Thus, a lessee who is contractually obligated to maintain the premises is all but relieved of this obligation merely by notifying the lessor of the existence of the defect.²⁰⁹ Presumably, the lessee's assumption of liability encourages the lessor to let the space for a reduced rent, but the notice provisions that result in the invalidation of an assumption clause effectively render the landlord the insurer of the lessee. As a result, lessees who assume responsibility for the condition of the premises may be better off than those who do not, at least in terms of the rental cost.²¹⁰

Additionally, *Tassin's* holding that R.S. 9:3221 limits the enforceability of waivers of the lessor's contractual warranty produced a strange rift in the law governing leases of immovables versus leases of movables. By its terms, R.S. 9:3221 applies only to leases of "premises" and does not affect the validity of waivers of the lessor's

207. *Klein*, 111 So. at 497.

208. See LA. REV. STAT. § 9:3221 (2013).

209. *Great Am. Surplus Lines Ins. Co. v. Bass*, 486 So. 2d 789, 796 (La. App. 1 Cir. 1986) (Carter, J., dissenting). R.S. 9:3221 addresses only the lessor's liability for "damages" resulting from defects in the premises, and does not specifically address the duty to make repairs. See *Hebert v. Neyrey*, 445 So. 2d 1165, 1168 n.3 (La. 1984) ("There is a distinction between liability for damages occasioned by defects in the premises and who has the obligation to repair such defects."). However, as a practical matter, because R.S. 9:3221 imposes liability for damages on landlords who fail to make repairs in a timely manner, the statute acts to shift responsibility for taking steps to make repairs to the landlord once he is notified of the defect. For further discussion of this point, see *infra* note 304 and accompanying text.

210. Thomas C. Galligan Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457, 531-32 (1994).

warranty in leases of movable things.²¹¹ Indeed, just several years prior to *Tassin*, the Louisiana Supreme Court reaffirmed, in a case involving a lease of equipment, the basic principle that the lessor's warranty against vices and defects is freely waivable.²¹² In so doing, the court relied on provisions of the Civil Code underscoring the sanctity of contractual freedom²¹³ and the power of parties to a contract to alter or renounce implied warranties.²¹⁴ Following *Tassin*, two distinct bodies of jurisprudence developed surrounding the enforceability of warranty waivers affecting movable things on the one hand,²¹⁵ and immovable things on the other.²¹⁶ Worse still, Louisiana courts have offered absolutely no basis for this distinction other than the mere existence of the special legislation relating to "premises" only.²¹⁷

Because the *Tassin* opinion contains minimal analysis, it is difficult to know precisely what motivated the court's decision. It may be that the court favored an interpretation of the statute that would ameliorate the harsh effects of what was very likely a contract of adhesion.²¹⁸ On the other hand, perhaps a more thorough parsing of the

211. La. REV. STAT. § 9:3221.

212. La. Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92, 95 (La. 1979). *But see* Andrus v. Cajun Insulation Co., 524 So. 2d 1239 (La. App. 3 Cir. 1988) (holding that the lessor's waiver of warranties was against public policy and invalid).

213. La. Nat'l Leasing Corp., 377 So. 2d at 95 ("Individuals cannot, by their conventions, derogate from the force of laws made for the preservation of public good or good morals; however, in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the public good." (quoting LA. CIV. CODE art. 11 (1870))).

214. *Id.* at 94 ("All things that are not forbidden by law, may legally become the subject of, or the motive for contracts; but different agreements are governed by different rules, adapted to the nature of each contract, to distinguish which it is necessary in every contract to consider: . . . (2) Things which, although not essential to the contract, yet are implied from the nature of such agreement, if no stipulation be made respecting them, but which the parties may expressly modify or renounce, without destroying the contract or changing its description; of this nature is warranty, which is implied in every sale, but which may be modified or renounced, without changing the character of the contract or destroying its effect." (quoting LA. CIV. CODE art. 1764 (1870))).

215. *See* Walnut Equip. Leasing Co. v. Moreno, 26,004 (La. App. 2 Cir. 9/21/94); 643 So. 2d 327; First Cont'l Leasing Corp. v. Howard, 618 So. 2d 642 (La. App. 2 Cir. 1993).

216. *See supra* notes 211-212 and accompanying text.

217. *See, e.g.*, Ford v. Bienvenu, 2000-2376, p. 7 (La. App. 4 Cir. 8/29/01); 804 So. 2d 64, 69.

218. A contract of adhesion is a standard form contract, often preprinted, prepared by a party in a position of superior bargaining power and offered to the other party on a take-it-or-leave-it basis. Aguillard v. Auction Mgmt. Corp., 2004-2804, 2004-2857, pp. 9-10 (La. 6/29/05); 908 So. 2d 1, 8-9; Saúl Litvinoff, *Consent Revisited: Offer Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations*, 47 LA. L. REV. 699, 757-59 (1987).

statute's legislative history and its relationship to Civil Code principles governing contractual freedom would have produced a different result. In any event, after *Tassin*, Louisiana courts have consistently applied R.S. 9:3221 to regulate not only the lessor's liability to third parties to the lease, but also contractual waivers of the lessor's warranty against vices and defects.²¹⁹ Indeed, with very few exceptions, every subsequent reported decision involving a contractual waiver of the lessor's warranty against vices and defects in a lease of premises has raised R.S. 9:3221 in some fashion.²²⁰ Yet, as will be shown below, this transmutation of the statute was merely the first step in the severance of R.S. 9:3221 from the Civil Code's elemental policies governing freedom of contract.

2. Episode 2: A Poor Fit with Public Policy

Episode 2 begins with comprehensive revision of the Civil Code title on Conventional Obligations in 1985. In that revision, a new article was added which, for the first time, directly addressed public policy limitations on exculpatory contracts—agreements by which an obligee relieves an obligor of some or all responsibility for failure to perform an obligation. Article 2004 provides in full:

Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.

219. See, e.g., *Volkswagen of Am., Inc. v. Robertson*, 713 F.2d 1151, 1160 (5th Cir. 1983); *Brown v. Floyd*, 2007-0478, pp. 4-5 (La. App. 1 Cir. 1/30/08); 2008 WL 241278 at *2-3; *Owens v. Entergy Corp.*, 2007-616, p. 4 (La. App. 3 Cir. 11/21/07); 970 So. 2d 1212, 1215; *Allstate Ins. Co. v. Veninata*, 2006-1641, 2006-1642, pp. 3-5 (La. App. 4 Cir. 11/7/07); 971 So. 2d 420, 423-24; *Thompson v. BGK Equities, Inc.*, 2004-2366, p. 5 n.3 (La. App. 1 Cir. 11/4/05); 927 So. 2d 351, 354 n.3; *Barnes v. Riverwood Apartments P'ship*, 38,331, pp. 9-10 (La. App. 2 Cir. 4/7/04); 870 So. 2d 490, 496-97; *Hampton v. Succession of Malter*, 2001-1149, pp. 4-5 (La. App. 4 Cir. 1/9/02); 806 So. 2d 900, 903; *Ford*, 2000-2376 at p. 9; 804 So. 2d at 70; *GEO Consultants Int'l v. Prof'l Roofing & Constr., Inc.*, 95-1016, pp. 4-6 (La. App. 5 Cir. 3/26/96); 672 So. 2d 1002, 1005-06; *Ganheart v. Exec. House Apartments*, 95-1278, p. 8 (La. App. 4 Cir. 2/15/96); 671 So. 2d 525, 530; *Robert v. Espinosa*, 576 So. 2d 555, 556-57 (La. App. 4 Cir. 1991); *Ostrander v. Parkland Villa Apartments*, 511 So. 2d 1293, 1294-95 (La. App. 2 Cir. 1987); *Great Am. Surplus Lines Ins. Co. v. Bass*, 486 So. 2d 789, 792-93 (La. App. 1 Cir. 1986); *Matt v. Cox*, 478 So. 2d 918, 919-20 (La. App. 1 Cir. 1985); *Pylate v. Inabnet*, 458 So. 2d 1378, 1386 (La. App. 2 Cir. 1984); *St. Paul Fire & Marine Ins. Co. v. French Eighth*, 457 So. 2d 35, 36-37 (La. App. 4 Cir. 1984); *Savoy v. DeLaup*, 442 So. 2d 1209, 1211 (La. App. 5 Cir. 1983); *Walsh Filter Co. v. Rice*, 439 So. 2d 1130, 1132 (La. App. 4 Cir. 1983).

220. See cases cited *supra* note 219.

Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.²²¹

In order for an exculpatory contract to comply with the first paragraph of article 2004, it must not insulate the obligor from “intentional or gross fault.”²²² This prohibition derives from the principle that contracts must always be performed in good faith.²²³ The enforcement of a clause shifting liability from obligor to obligee when the obligor has acted in bad faith would violate this most basic precept.²²⁴ On the other hand, by implication, exculpatory clauses that shield an obligor from negligence in acting or failing to act are permissible. Ostensibly, because merely negligent behavior does not involve bad faith, the parties are free to contract for the eventuality that the obligor may cause damage through his own carelessness.

Regardless of the obligor’s fault, under the second paragraph of article 2004, an exculpatory contract may never exclude or limit the obligor’s liability for physical injury suffered by the obligee.²²⁵ This rule, which operates as a significant retrenchment on the power of the parties to contract away an obligor’s negligence, derives from a fundamental public policy that the physical integrity of human beings is sacrosanct.²²⁶ By prohibiting exculpatory clauses from shielding liability for personal injuries, the Code ensures that bodily harm and concomitant emotional trauma do not go uncompensated.²²⁷

The potential conflicts between article 2004 and R.S. 9:3221 are immediately apparent. First, the statute’s notice provisions invalidate waivers of the lessor’s obligations when the lessor “knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.”²²⁸ Thus, the statute invalidates an exculpatory clause when the lessor is merely negligent in failing to remedy a defect in a timely manner. In this way, R.S. 9:3221 is far more restrictive than the Civil Code with respect to the enforceability of exculpatory clauses, because it is clear that article 2004 permits

221. LA. CIV. CODE ANN. art. 2004 (2013).

222. *Id.*

223. *Id.* art. 1983.

224. LITVINOFF, *supra* note 139, § 11.11.

225. LA. CIV. CODE ANN. art. 2004.

226. LITVINOFF, *supra* note 139, § 11.14.

227. Professor Litvinoff has also argued along the same lines that moral damages, even if unaccompanied by physical harm, should be protected against complete exculpation. See Saul Litvinoff, *Stipulations as to Liability and as to Damages*, 52 TUL. L. REV. 258, 281 (1978).

228. LA. REV. STAT. § 9:3221 (2013).

waiver of liability resulting from mere negligence, except when that negligence results in physical injury.²²⁹ Second, R.S. 9:3221 makes no distinction between damages to the lessee's person and other forms of harm.²³⁰ Thus, to the extent that the statute absolves a lessor from liability for physical injuries, the statute is far more permissive than article 2004. The discord between the two provisions is a source of consternation and confusion for landlords, tenants, and the lawyers who represent them.

Despite the poor fit between code and statute, R.S. 9:3221 was not altered when article 2004 was enacted. According to the official legislative comments, article 2004, though new, did not change the law.²³¹ Furthermore, official comment (f) to article 2004 states that the article "does not supersede R.S. 9:3221."²³² Though the comments do not carry the force of legislation,²³³ they are at least indicative of the mindset of the reporter primarily responsible for the revision of the title on Conventional Obligations. On its face, comment (f) articulates implicit approval of a rule permitting a lessor to insulate himself from responsibility for physical harm suffered by his tenant in cases involving his strict liability, though not in cases involving his negligence.²³⁴

On the other hand, it is difficult to discern why leases of premises should provide the *sole* exception to the policy-based prohibition on exculpation of personal injury. Are tenants any less deserving of protection than other victims of physical harm? If, as comment (f) suggests, article 2004 and R.S. 9:3221 are to coexist reasonably, it is necessary to return to the original purpose of the law. If R.S. 9:3221 applies only to tort claims brought by third parties to the lease, and not to claims between lessor and lessee, then no conflict between code and statute arises. As written, article 2004 contemplates solely two parties and is concerned only with contracts by which one party exculpates the other from liability for damage.²³⁵ Contracts by which two parties allocate between themselves liability owed to a third person, such as indemnity agreements, are not covered by the article, for these types of agreements do not affect the right of the injured party to seek

229. See LA. CIV. CODE ANN. art. 2004.

230. See LA. REV. STAT. § 9:3221.

231. LA. CIV. CODE ANN. art. 2004 cmt. (a).

232. *Id.* art. 2004 cmt. (f).

233. 1984 La. Acts 910 ("The headings and comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act.").

234. See LITVINOFF, *supra* note 139, § 11.14.

235. See LA. CIV. CODE ANN. art. 2004.

compensation.²³⁶ While R.S. 9:3221, when applied to a third party, impacts *whom* the injured party may sue, it does not necessarily foreclose the right of action altogether, as an exculpatory agreement between two parties would.²³⁷ However, *Tassin's* application of R.S. 9:3221 to claims between *lessor* and *lessee* paved the way for conflict between the statute and the Civil Code's newly articulated boundaries on contractual freedom.

Soon after article 2004 was enacted, the Louisiana Supreme Court rendered a ruling that appeared to prevent R.S. 9:3221 from shielding lessors from liability for personal injuries suffered by tenants. In *Ramirez v. Fair Grounds Corp.*, the court considered the validity of an exculpatory clause in a permit for the use of the Fair Grounds' stall facilities to stable horses.²³⁸ The permittee sued the Fair Grounds after he fell from a loft in the stables that lacked handrails or bannisters, in violation of applicable building codes.²³⁹ The court concluded that because the permittee was physically injured, article 2004 rendered the exculpatory provision in the permit agreement unenforceable.²⁴⁰ Because *Ramirez* technically involved a permit, as opposed to a lease, the court did not consider R.S. 9:3221. However, the distinction between the permit in *Ramirez* and a lease of premises is a thin one, and *Ramirez* raises serious questions concerning the continued enforceability of a clause in a lease that would absolve the lessor from liability for physical injuries of the tenant.²⁴¹

Following *Ramirez*, only two courts have directly addressed the relationship between R.S. 9:3221 and article 2004, and both did so unsatisfactorily. In *Mendoza v. Seidenbach*, the Louisiana Court of Appeal for the Fourth Circuit applied R.S. 9:3221 to shield a landlord from liability for personal injuries suffered by the tenant's employee.²⁴² Dismissing the plaintiff's argument that *Ramirez* required the court to find that a lease provision cannot exclude the lessor's liability for personal injuries, the court merely remarked, "*Ramirez* did not address a 'lease' provision and is inapplicable to the present case."²⁴³ The Louisiana Court of Appeal for the Third Circuit addressed the interplay

236. *Id.* art. 2004 cmt. (e).

237. *See* *Weiland v. King*, 281 So. 2d 688, 690 (La. 1973).

238. 575 So. 2d 811, 812 (La. 1991).

239. *Id.*

240. *Id.* at 813.

241. *See* Galligan, *supra* note 210, at 528; Maraist & Galligan, *supra* note 135, at 359 n.100; Plummer, *supra* note 181, at 190-92.

242. 598 So. 2d 404, 404 (La. App. 4 Cir. 1992).

243. *Id.* at 406.

between R.S. 9:3221 and article 2004 in *Guillory v. Foster*, a case also involving a lessor's liability to a tenant's employee.²⁴⁴ There, the court reasoned, "[I]f Article 2004 had been intended to negate La.R.S. 9:3221, the latter statute would have been repealed in the act which enacted the former statute."²⁴⁵ Both cases involved tort claims brought by third parties who were not signatories to the lease contracts. Thus, the courts could have reasoned that the limitations of the Civil Code did not apply because article 2004 is designed to prevent a party who is physically injured from contracting away his right of action in advance of the harm and does not extend to agreements by which two parties allocate between themselves responsibility to third persons. Instead, however, both opinions broadly endorsed the continued viability of R.S. 9:3221. Later appellate court decisions have continued to assume that R.S. 9:3221 articulates an exception to the limitations of article 2004, even when personal injuries suffered by tenants are concerned.²⁴⁶ Though these cases have not directly addressed the relationship between R.S. 9:3221 and article 2004, it is clear that the courts do not regard the Civil Code as an obstacle to the statute's application to personal injury claims.

The discord between R.S. 9:3221 and the policies implicit in article 2004 has also been raised in cases involving employees complaining of defective conditions in the premises leased by their employers. Here, Louisiana courts have applied R.S. 9:3221 to preclude employees from recovering personal injury damages from their employers' lessors.²⁴⁷ Although the application of R.S. 9:3221 to bar the claims of *third parties* to a lease does not at first blush appear at odds with article 2004, the particulars of Louisiana workers' compensation law complicate the interaction of these rules in this context. According to the exclusive remedy provision of the Louisiana Workers' Compensation Law, employers and their agents cannot be held liable for workers' injuries caused by negligence.²⁴⁸ Applying this exclusivity provision, Louisiana

244. 634 So. 2d 1372, 1373 (La. App. 3 Cir. 1994).

245. *Id.* at 1374.

246. *See, e.g.*, *Simon v. Hillensbeck*, 2012-0087, pp. 7-8 (La. App. 4 Cir. 9/19/12); 100 So. 3d 946, 951; *Wells v. Norris*, 46,458, pp. 4-6 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1165, 1168-69; *Shubert v. Tonti Dev. Corp.*, 09-348, p. 13 (La. App. 5 Cir. 12/29/09); 30 So. 3d 977, 986; *Stuckey v. Riverstone Residential SC, LP*, 2008-1770, pp. 7-8 (La. App. 1 Cir. 8/5/09); 21 So. 3d 970, 974-75; *Greely v. OAG Props., LLC*, 44,240, p. 9-10 (La. App. 2 Cir. 5/13/09); 12 So. 3d 490, 495-96; *Owens v. Entergy Corp.*, 2007-616, p. 4 (La. App. 3 Cir. 11/21/07); 970 So. 2d 1212, 1215.

247. *See Mendoza*, 598 So. 2d at 405-07.

248. *See* LA. REV. STAT. § 23:1032 (2013).

courts have repeatedly found that employer-lessees who assume the responsibility for the condition of leased premises are immune from suit for damages resulting from defects in the property.²⁴⁹ The combination of R.S. 9:3221 and the Workers' Compensation Law thus has denied the injured employees of any recourse in tort whatsoever: the lessor is immune under R.S. 9:3221, and at the same time, the employer is immune from tort claims under the Workers' Compensation Law. The enforcement of a contractual provision that has the effect of entirely denying the claim of an injured employee arguably violates the spirit of article 2004, which is primarily concerned with ensuring that a physically injured party retains the right to sue despite contractual language to the contrary.²⁵⁰ Although some courts have relied on article 2004 to deny immunity to a lessor under R.S. 9:3221 when the lessee was also immune from tort claims under the Workers' Compensation Law, this approach has not been uniform.²⁵¹

Furthermore, following the enactment of article 2004, no one—neither courts nor commentators—questioned the continued wisdom of applying R.S. 9:3221 to limit the contractual freedom of the parties to a lease when physical injury is *not* at issue. Article 2004 prohibits the enforcement of exculpatory clauses when the obligor is intentionally or grossly at fault, but does not prohibit exculpation of an obligor's negligence unless physical injury results.²⁵² Thus, under article 2004, the parties to a lease could agree that the lessor will not be liable for property damage or economic loss resulting from a defect

249. See *Dufrene v. Ins. Co. of Pa.*, 01-47, p. 12 (La. App. 5 Cir. 5/30/01); 790 So. 2d 660, 669; *Douglas v. Hillhaven Rest Home, Inc.*, 97-0596, p. 5 (La. App. 1 Cir. 4/8/98); 709 So. 2d 1079, 1082; *Hesse v. Champ Serv. Line*, 97-1090, pp. 5-6 (La. App. 3 Cir. 2/4/98); 707 So. 2d 1295, 1298; *Dumestre v. Hansell-Petetin, Inc.*, 96-1778, pp. 5-6 (La. App. 4 Cir. 1/29/97); 688 So. 2d 187, 190. Note that a lessee-employer, though immune from suit by the injured employee, may enter into a valid contract to indemnify the lessor-owner for damages resulting from defects in the premises. See *Byrne v. Sealy & Co.*, 99-288, p. 7 (La. App. 5 Cir. 8/31/99); 742 So. 2d 668, 671; 14 H. ALSTON JOHNSON, III, LOUISIANA CIVIL LAW TREATISE, WORKERS' COMPENSATION LAW AND PRACTICE § 374 (5th ed. 2010).

250. See LA. CIV. CODE ANN. art. 2004 (2013); *Ramirez v. Fair Grounds Corp.*, 575 So. 2d 811 (La. 1991). Of course, because the injured employee retains the right to recover under the Workers' Compensation Law, his right to recovery is not entirely foreclosed. See LA. REV. STAT. § 23:1032.

251. Compare *Wallace v. Helmer Directional Drilling, Inc.*, 93-901 (La. App. 3 Cir. 7/13/94); 641 So. 2d 624 (relying on article 2004 to deny immunity to lessor), with *Dufrene*, 01-47 at pp. 13-14; 790 So. 2d at 670 (holding that the tenant as defendant was afforded immunity, without considering article 2004), and *Plauche v. Bell*, 98-2987, 99-0707, p. 6 (La. App. 4 Cir. 5/3/00); 762 So. 2d 130, 134 (same), and *Haley v. Calcasieu Parish Sch. Bd.*, 99-883, pp. 10-11 (La. App. 3 Cir. 12/8/99); 753 So. 2d 882, 888 (same).

252. See LA. CIV. CODE ANN. art. 2004.

in the leased premises, even if the lessor learned of the defect and did not take steps to repair it. No explanation obviously comes to mind for a rule that invalidates exculpatory clauses in cases where damage is caused by the mere negligence of a *lessor*, when greater latitude is afforded to obligors of other types. The restrictive tenor of R.S. 9:3221 may seem sensible when applied to third party tort claims against the lessor, because the statute insulates the lessor from liability toward a person who did not agree to such a limitation. But when the statute is applied to a lessee's claim in warranty, it quite visibly conflicts with article 2004's articulation of public policy limitations on contractual waivers.

3. Episode 3: Statutory Anachronism Following Tort Reform

The utility of contractual provisions allocating responsibility between lessor and lessee for the condition of the premises was dramatically altered in 1996. In that year, the Louisiana legislature enacted sweeping tort reform, the effects of which included reducing the standard of liability for landowners and those with custody of a thing from strict liability to negligence.²⁵³ Under the new legislation, a lessor is no longer held strictly liable in tort for damages resulting from defects in the premises. This change in the underlying tort standard obviated the purported need for R.S. 9:3221, which was to reduce the lessor's tort liability to a negligence standard when the lease contained an assumption of liability clause.²⁵⁴ Today, the inclusion of an assumption of liability clause in a lease does nothing to alter the delictual standard of liability—the lessor is simply liable for his own negligence, regardless of any agreement of the parties to the contrary.²⁵⁵

Despite the fact that R.S. 9:3221 no longer serves the original purpose for which it was enacted, the statute was not repealed in 1996. As a result, it continued to constrain the freedom of parties to a lease to waive the contractual warranty against vices and defects.²⁵⁶ However,

253. 1996 La. Acts 710; *see also* Maraist & Galligan, *supra* note 135, at 342-43, 350-51, 368-69 (discussing the reduction of landowner's liability in Act 1 of the first extraordinary session of 1996).

254. *See supra* notes 180, 186-187 and accompanying text.

255. *See* Plummer, *supra* note 181, at 188-89.

256. *See, e.g.*, FRANK L. MARAIST & THOMAS C. GALLIGAN, LOUISIANA TORT LAW § 9.12[5] (2004 ed. Supp. 2006) (“[S]trict liability, the only significant tort liability from which 9:3221 protected the lessor, is no longer as serious a concern. However, it may still be significant in cases where a lessor *is* still strictly liable under the Civil Code articles dealing with lease.”); Maraist & Galligan, *supra* note 135, at 359 n.100 (“[Following the 1996 tort

it is not entirely clear that the intent of the drafters in leaving the statute untouched was to restrict the freedom of parties to a lease to alter the lessor's warranty obligations. A review of the limited scholarly doctrine commenting upon the retention of R.S. 9:3221 reflects some belief that the statute provides the *sole* authority for waivers of the lessor's warranty against vices and defects.²⁵⁷ The post-*Tassin* jurisprudence reflects a similar view.²⁵⁸ Thus, by 1996 the prevailing view among academics, judges, and likely legislators was an erroneous one—that R.S. 9:3221, and not the Civil Code, contained the standards of contractual freedom that would *permit* parties to a lease to alter the lessor's obligations.²⁵⁹ This error, it seems, led directly to the statute's preservation.

Of course, the suggestion that R.S. 9:3221 is the source of law authorizing the lessee's waiver of the lessor's obligation is misguided. Prior to the statute's enactment, Louisiana courts had uniformly held that the lessor's contractual and delictual obligations to the lessee could be freely altered by the parties.²⁶⁰ And indeed, even after R.S. 9:3221 was made law, Louisiana courts continued to hold that the parties to leases of movables enjoyed complete contractual freedom to waive the

reforms,] section 9:3221 is of much less practical utility. If the lessor is not strictly liable for building defects, why include the 9:3221 clause? The answer is that the lessor may have a vestige of strict liability, at least to the lessor [sic], under Article 2695. Undoubtedly, commercial lawyers representing lessors would be well advised to continue to include the 9:3221 clause in leases in which they draft.”)

257. See, e.g., Galligan, *supra* note 210, at 529 (“This statute allows a lessor to contract away his strict liability under landlord-tenant law, as provided in Article 2695.”); see also 12 WILLIAM E. CRAWFORD, LOUISIANA CIVIL LAW TREATISE, TORT LAW § 18.29 (2d ed. 2009) (“[T]he protection of R.S. 9:3221 may be said to be surplusage when responsibility of the lessor is sought under Articles 660 and 2322 since liability under those articles after the 1996 Tort Reform is in negligence. C.C. art. 2695 was not so amended. The lessor's responsibility thereunder remains in strict liability and the protection of R.S. 9:3221 is still meaningful under that article.”); *id.* § 18.30 (“The responsibility of the nonowner lessor would be found only under C.C. art. 2695 as discussed above. The transfer of responsibility to the lessee under R.S. 9:3221 would be very beneficial to the lessor under the circumstances.”); 18 H. ALSTON JOHNSON, III, LOUISIANA CIVIL LAW TREATISE, CIVIL JURY INSTRUCTIONS § 12.14 (2d ed. 2001) (“One of the defenses which the law permits the lessor of defective premises to raise is that, by contract, the lessee has assumed responsibility for the condition of the premises, thus relieving the lessor of that responsibility to the lessee or to anyone on the premises who derives the right to be there from the lessee. The law *permitting* this defense reads as follows . . .” (emphasis added)).

258. For example, one Louisiana Court of Appeal for the First Circuit opinion pronounces, “LSA-R.S. 9:3221 clearly *gives authority* for contractual modification of the lessor's warranty imposed by the Civil Code.” *Matt v. Cox*, 478 So. 2d 918, 919 (La. App. 1 Cir. 1985) (emphasis added).

259. See *supra* notes 257-258 and accompanying text.

260. See *supra* notes 164-174 and accompanying text.

lessor's warranty against vices and defects.²⁶¹ These decisions were predicated on core principles of the Civil Code regarding contractual freedom. Article 11, appearing in the Preliminary title of the 1870 Code, provided:

Individuals cannot by their conventions, derogate from the force of laws made for the preservation of public order or good morals. But in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the public good.²⁶²

Article 1764 of the Code of 1870 further stated that implied warranties are not essential elements of contracts, but instead can be "modified or renounced."²⁶³ Ideally, had R.S. 9:3221 been repealed in 1996, contractual agreements between lessor and lessee would again be regulated by those general principles of the law, together with the newly articulated limitations of article 2004.²⁶⁴

Additionally, and most certainly contrary to the expectations of the legislature, R.S. 9:3221 has persisted in courts' analyses of *tort*

261. See *supra* notes 211-217 and accompanying text.

262. LA. CIV. CODE art. 11 (1870).

263. *Id.* art. 1764.

264. Because both article 11 and article 1764 were suppressed in the respective revisions of the Preliminary Title and the title on Obligations in General, it may be the case that the redactors retained R.S. 9:3221 out of concern that its repeal would signal to courts that clauses purporting to alter the lessor's obligation to maintain in the premises were no longer legislatively authorized. Although it cannot be seriously maintained that the revision in any way changed the tenor of the law, it may be maintained that the redactors' suppression of articles 11 and 7 did some damage to the fabric of the Code by making those principles relating to contractual freedom implicit rather than explicit. When the Preliminary Title was revised in 1987, for example, article 7 was amended to state: "Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity." LA. CIV. CODE ANN. art. 7 (1987). New article 7 does not reproduce the second paragraph of old article 11, upon which the early jurisprudence upholding waivers of the lessor's obligations were based. Comment (a) to new article 7 states that article 7 "is based on Articles 11 and 12 of the Louisiana Civil Code of 1870" and "does not change the law." *Id.* art. 7 cmt. (a).

The comments further explain:

The second paragraph of Article 11 of the Louisiana Civil Code of 1870 contains a self-evident proposition, that a private person may renounce a right or privilege unless renunciation is expressly or impliedly forbidden, affects the rights of others, or is contrary to public good. For this reason, that paragraph has not been reproduced in this revision.

Id. art. 7 cmt. (c).

It should be noted that article 11 was never explicitly repealed but instead was "amended and reenacted." See 1987 La. Acts 404. Professor Vernon Palmer has argued that provisions of the Code of 1870 that are not explicitly repealed are still in force and effect. See Palmer, *Death of a Code*, *supra* note 6, at 230.

claims brought against lessors. Indeed, many cases examining the tort liability of a lessor whose lease contains a clause shifting responsibility for the condition of the premises to the lessee rely on R.S. 9:3221 to evaluate the effect of that clause.²⁶⁵ Facially this appears appropriate—when the lessor defends the claim by relying upon the language of the contract, the court turns to the statute addressing the enforceability of a provision that would exculpate the lessor. However, not a single court has commented upon the fact that since the change in the underlying tort standard brought about by the 1996 tort reforms, an attempt by the lessor to shift tort liability to his lessee has *absolutely no effect*. While the statute provides that such a provision is effective unless the lessor is negligent in failing to remedy a known defect, tort liability does not

265. See, e.g., *Price v. Roadhouse Grill, Inc.*, 512 F. Supp. 2d 511, 520-21 (W.D. La. 2007) (“[E]ven if the car stop constituted a defect, Section 3221 and the provisions of the ground lease absolve [defendant] of liability unless [defendant] knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.”); *Pourciau v. ECCO Nino, Inc.*, 2011-2031, p. 7 (La. App. 1 Cir. 8/23/12); 2012 WL 3631123, at *4 (“Additionally, La. R.S. 9:3221 requires that plaintiffs demonstrate that Equity One had knowledge of a defect in its premises or should have known that its lessees failed to act reasonably to prevent a defect.”); *Jamison v. D’Amico*, 2006-0842, p. 8 (La. App. 4 Cir. 3/14/07); 955 So. 2d 161, 166 (“La. Rev. Stat. 9:3221 was appropriately applied in the instant case.”); *Altvater v. Labranche Props., Inc.*, 2004-1484, pp. 5-6 (La. App. 4 Cir. 4/20/05); 901 So. 2d 584, 586-87 (holding that lessor had shifted responsibility for condition of premises to lessee under terms of lease and did not have any kind of notice of alleged design defect in premises that would establish liability under R.S. 9:3221); *Smith v. French Mkt. Corp.*, 2003-1412, p. 6 (La. App. 4 Cir. 10/6/04); 886 So. 2d 527, 531 (holding that plaintiff did not establish that lessor knew or should have known of alleged defect as required to establish liability under R.S. 9:3221); *Pamplin v. Bossier Parish Cmty. Coll.*, 38,533, p. 7 n.2 (La. App. 2 Cir. 7/14/04); 878 So. 2d 889, 894 n.2 (“Even in those contexts where the lessor has contractually placed responsibility on the lessee and has no garde of the premises, La. R.S. 9:3221 nevertheless recognizes liability on the lessor who ‘knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.’”); *Raines v. Colley*, 2003-1630, p. 4 (La. App. 4 Cir. 4/7/04); 872 So. 2d 537, 540 (“[W]e find that the indemnity/hold harmless clause transferred responsibility for the condition of the [premises] from . . . lessor to . . . lessee.”); *Cochran v. Safeguard Self-Storage, Inc.*, 02-1272, 02-1273, 02-1274, pp. 7-8 (La. App. 5 Cir. 4/29/03); 845 So. 2d 1128, 1132 (holding that R.S. 9:3221 did not apply to plaintiff’s claim because defect occurred in common area not covered by assumption clause); *Dufrene v. Doctor’s Hosp., Inc.*, 02-654, p. 8 (La. App. 5 Cir. 12/11/02); 836 So. 2d 309, 313 (“[T]o establish the liability of [the lessor], under La. R.S. 9:3221, Plaintiffs’ [sic] must prove that [the lessor] ‘knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time period.’”); *Marcades v. Cleanerama, Inc.*, 2002-0357, pp. 3-4 (La. App. 4 Cir. 9/25/02); 831 So. 2d 288, 289 (analyzing liability of lessor under R.S. 9:3221); *Jones v. Gatusso*, 00-1654, p. 5 (La. App. 5 Cir. 2/14/01); 782 So. 2d 11, 13 (“Defendants contend that by this provision of the lease and in accordance with LSA-R.S. 9:3221, [lessor] contractually relinquished responsibility for any alleged defects within the building. We agree.”); *Ledet v. Doe*, 00-112, pp. 7-8 (La. App. 5 Cir. 5/17/00); 762 So. 2d 242, 245-46 (noting in dicta that lessor transferred responsibility for condition of the premises to lessee).

attach in the first instance unless the lessor is negligent.²⁶⁶ Thus, the very set of facts that supports a lessor's delictual liability simultaneously destroys the effectiveness of an attempted waiver. The existence or nonexistence of the assumption of liability clause is entirely irrelevant to the strength of the plaintiff's claim.

Although the statute's continued application to tort liability has not drastically undermined the courts' analyses of these claims, it has muddied the jurisprudence. For example, some courts rely on R.S. 9:3221 to utilize a distinct "test" for liability when the lease contains an assumption of liability clause, though in substance the inquiry is no different from the negligence analyses under articles 2317.1, 2322, and 2315.²⁶⁷ According to these courts, in order to establish liability on the part of a lessor who has passed on responsibility for the condition of his property to his lessee under R.S. 9:3221, a plaintiff must establish that (1) he sustained damages, (2) there was a defect in the property, and (3) the lessor knew or should have known of the defect.²⁶⁸ This divides the jurisprudence down artificial lines, creating two distinct bodies of case law—one for tort cases involving waivers, another for cases involving no waiver—where there should be only one.²⁶⁹ Moreover, courts spend time examining the scope of assumption clauses to determine whether alleged defects fall within their purview, even though ultimately the clause can have no effect on a tort claim.²⁷⁰ Not only is this a waste of judicial resources, it is misleading to the public, who wrongly continue to regard assumption clauses as an important contractual component for the management of tort liability.²⁷¹ Even when misunderstanding does not occur, this

266. LA. REV. STAT. § 9:3221 (2013); *see supra* notes 256-257 and accompanying text.

267. *See, e.g., Jamison*, 2006-0842 at p. 8; 955 So. 2d at 166; *Smith*, 2003-1412 at pp. 5-6; 886 So. 2d at 530.

268. *Jamison*, 2006-0842 at p. 8; 955 So. 2d at 166.

269. For example, when a waiver is in place, courts apply R.S. 9:3221 to hold that the lessor is not under any duty to inspect. *See, e.g., id.*; 955 So. 2d at 165. The general analysis of a lessor's duty under articles 2322 and 2317.1 to inspect the leased premises for potential defects is as yet undeveloped. The "waiver" jurisprudence could be helpful in ascertaining what duty an owner who has not leased his property has to inspect, but because it is tied to the statute rather than to the fact of the lease, it is divorced from the rest of the larger body of law.

270. *See, e.g., Cochran*, 02-1272, 02-1273, 02-1274 at pp. 7-8; 845 So. 2d at 1132 (finding that trial court inappropriately applied R.S. 9:3221 because lessee did not assume responsibility for condition of common areas); *Jones*, 00-1654 at p. 5; 782 So. 2d at 13-14 (analyzing clarity of waiver before turning to discussion of lessor's negligence).

271. *See* 2 PETER S. TITLE, LOUISIANA PRACTICE SERIES, LOUISIANA REAL ESTATE TRANSACTIONS § 18:26 (2012) ("Practice Tip: The lessor should be careful to include a clause in the lease that shifts responsibility for injury to third parties to the lessee to the extent provided by La. Rev. Stat. Ann. § 9:3221."). Indeed, following the 1996 tort reforms, the only

jurisprudence is damaging to the clarity and integrity of the rationales and policies underlying this area of the law.

4. Episode 4: The Exception Swallows the New Rules

R.S. 9:3221's final episode is perhaps the most unsettling, because it relates less to judicial misapplication of the statute and more to legislative oversight in the revision process. R.S. 9:3221 contained the only legislative treatment of contractual waivers of the lessor's warranty against vice and defects until 2005, when a comprehensive revision of the Civil Code's title on Lease was undertaken.²⁷² The revision introduced new article 2699, which makes clear that the lessor's warranty against vices and defects may be waived, but places important limitations on that waiver.²⁷³ The article provides in full:

The warranty provided in [articles 2696-2698] may be waived, but only by clear and unambiguous language that is brought to the attention of the lessee.

Nevertheless, a waiver of warranty is ineffective:

- (1) To the extent it pertains to vices or defects of which the lessee did not know and the lessor knew or should have known;
- (2) To the extent it is contrary to the provisions of Article 2004; or
- (3) In a residential or consumer lease, to the extent it purports to waive the warranty for vices or defects that seriously affect health or safety.²⁷⁴

The specificity of the enumerated limitations in article 2699 would seem to indicate that the legislature intended for the article to provide the exclusive grounds for invalidation of a clause in the lease altering the lessor's obligations in warranty. However, the introduction of article 2699 was not coupled with a repeal of R.S. 9:3221. To the contrary, in the same legislation enacting new article 2699, the legislature amended and reenacted R.S. 9:3221.²⁷⁵ The amended version of the statute is nearly identical to its previous iteration, but includes an introductory phrase that purports to address the statute's relationship to article 2699. The statute now reads:

continued effect of R.S. 9:3221 in the realm of tort is to prevent the lessor from waiving liability for a lessee's damages resulting from the lessor's negligence, in direct contravention of article 2004, which would allow such waivers in the absence of physical injury. *See supra* notes 228-229 and accompanying text.

272. 2004 La. Acts 2556-57.

273. LA. CIV. CODE ANN. art. 2699 (2005).

274. *Id.*

275. 2004 La. Acts 2614.

Notwithstanding the provisions of Louisiana Civil Code Article 2699, the owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury caused by any defect therein to the lessee or anyone on the premises who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.²⁷⁶

The introductory language suggests that R.S. 9:3221 operates as an exception to article 2699, though it remains unclear when precisely the exception, as opposed to the rule, should apply. R.S. 9:3221 has applied historically to all claims for damages relating to the enforceability of a waiver of the lessor's warranty against vices and defects, regardless of whether those claims involved damages for personal injury, loss of property, or other economic losses.²⁷⁷ Thus, it would appear that R.S. 9:3221, not article 2699, applies to every claim for damages resulting from breach of the lessor's warranty. This reading results in a marked restriction of the protective scope of article 2699—warranty waivers in leases of immovables would be practically exempt from the limitations of the Civil Code. Nonetheless, this is the prevailing view of the appellate courts²⁷⁸ and the leading practice manual on Louisiana real estate.²⁷⁹

The redactors of the legislation enacting article 2699 and amending R.S. 9:3221 apparently anticipated the conflict that would arise from a plain reading of the legislation *in pari materia* and sought to address the relationship between the two provisions in the official comments to article 2699. To that end, comment (h) to article 2699 provides:

Civil Code Article 2699 (Rev. 2004) deals with the contractual obligations between the parties rather than with the delictual or quasi-delictual obligations that one party may incur vis a vis the other party, or vis a vis third parties. Consequently, Civil Code Article 2699 (Rev. 2004) does not supersede the provisions of R.S. 9:3221 which provides for delictual or quasi-delictual obligations incurred as a result of injury occurring in the leased premises. Section 3 of this Act amends and

276. *Id.* (emphasis added).

277. *See, e.g.,* *Wells v. Norris*, 46,458, pp. 6-7 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1165, 1169; *Stuckey v. Riverstone Residential SC, LP*, 2008-1770, p. 10 (La. App. 1 Cir. 8/5/09); 21 So. 3d 970, 976; *Greely v. OAG Props., LLC*, 44,240, pp. 9-10 (La. App. 2 Cir. 5/13/09); 12 So. 3d 490, 495.

278. *Wells*, 46,458 at pp. 6-7; 71 So. 3d at 1169; *Stuckey*, 2008-1770, at p. 10; 21 So. 3d at 976; *Greely*, 44,240 at pp. 9-10; 12 So. 3d at 495.

279. 2 TITLE, *supra* note 271, § 18.24 (“La. Rev. Stat. Ann. § 9:3221 controls and supersedes any contrary provision of Civil Code Article 2699.”).

reenacts R.S. 9:3221 to provide that the amendment and reenactment of Civil Code Article 2699 does not change the law of R.S. 9:3221.²⁸⁰

Thus, according to comment (h), article 2699's limitations apply only to waivers of the lessor's contractual obligations, while R.S. 9:3221 applies only to waivers of the lessor's obligations in tort.

There are a number of obvious problems with this comment. First is the question of whether it reflects an accurate statement of the law. While it may be true that the statute, when originally enacted in 1932, was intended to govern delictual obligations only,²⁸¹ it cannot be said with confidence that the statute currently deals only with the lessor's responsibilities in tort. Such a statement would be contrary to the jurisprudential history of R.S. 9:3221, throughout which the statute has been applied to govern a lessor's *contractual* obligations in warranty.²⁸² Moreover, if indeed R.S. 9:3221 applies to actions in tort only, then it currently serves no practical purpose whatsoever other than to prevent the lessor from waiving liability for a lessee's damages resulting from the lessor's negligence, in direct contravention of article 2004, which would allow such waivers in the absence of physical injury. As discussed above, since 1996, a landlord's delictual responsibility for defective premises is assessed according to a negligence standard.²⁸³ Thus, there is no longer any need for special legislation that reduces the standard of liability to negligence when certain preconditions are met. So far, the comment has worked to lead courts entirely astray. Attempting to find some purpose for this statute in "tort," numerous courts have now concluded (quite wrongly) that a case involving personal injuries, even when predicated on article 2696, is necessarily an action in tort.²⁸⁴

Comment (h) states that that the amendment and reenactment of Civil Code article 2699 "does not change the law of R.S. 9:3221."²⁸⁵ Indeed, the amendment and reenactment of R.S. 9:3221 with an introductory clause instructing that the provision applies "[n]otwithstanding the provisions of . . . Article 2699" leads to the conclusion

280. LA. CIV. CODE ANN. art. 2699 cmt. (h) (2013).

281. See *supra* notes 181-186 and accompanying text.

282. See *supra* notes 187-220 and accompanying text.

283. See *supra* notes 253-255 and accompanying text.

284. See, e.g., *Wells v. Norris*, 46,458 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1165; *Stuckey v. Riverstone Residential SC, LP*, 2008-1770 (La. App. 1 Cir. 8/5/09); 21 So. 3d 970; *Greely v. OAG Props., LLC*, 44,240 (La. App. 2 Cir. 5/13/09); 12 So. 3d 490. This conclusion is only implicit in the reasoning of these cases.

285. LA. CIV. CODE ANN. art. 2699 cmt. (h).

that the statute and its interpreting jurisprudence remain in place.²⁸⁶ The result is therefore that code and statute must be interpreted as occupying the same territory, with the consequence that the statute dominates over the Civil Code. This is no less than disastrous, because the drafting of article 2699 involved a careful balancing of the rights of lessor and lessee, and that work now has been undermined by the persistence of the statute and its jurisprudential gloss.²⁸⁷ The protections of article 2699, and the extent to which they are undermined, are explored below.

a. Requirements for Formation

Article 2699 sets forth explicit formal requirements for a waiver of the lessor's warranty. The article provides that the warranty may be waived "only by clear and unambiguous language that is brought to the attention of the lessee."²⁸⁸ This limitation seeks to make the lessee aware that the lease dramatically alters his legal rights regarding the condition of the premises leased. Its effect is to require that the waiver be not only clear and unambiguous, but also explained to the lessee.²⁸⁹

The case law interpreting R.S. 9:3221 has developed a different set of requirements for the formation of a valid assumption clause. While it is imperative that the contract clearly and unambiguously waive the lessee's right to recovery, it is not necessary that the assumption clause be brought to the attention of the lessee or explained to him.²⁹⁰ The foundational case in this line of jurisprudence is *Ford v. Bienvenu*, a case predating the amendments to article 2699 and involving a condominium tenant who sued his landlord for loss of property resulting from a fire.²⁹¹ When the landlord defended on the ground that the lease contained a valid waiver of the warranty against vices and defects, the plaintiff insisted that "although warranties and obligations imposed under the Civil Code may sometimes be waived, the waiver of warranties is only valid if they are clear and unambiguous and brought to the attention of the lessee."²⁹² The court dismissed this assertion, stating that the plaintiff's argument was

286. 2004 La. Acts 2614.

287. See Palmer, *supra* note 188, at 34 (calling for making the lessor's obligation to guarantee the safety of the premises imperative (i.e., nonwaivable)).

288. LA. CIV. CODE ANN. art. 2699.

289. See LEVASSEUR & GRUNING, *supra* note 123, § 3.1.2.

290. See *Ford v. Bienvenu*, 2000-2376, pp. 8-9 (La. App. 4 Cir. 8/29/01); 804 So. 2d 64, 69-70.

291. *Id.*

292. *Id.* at p. 7; 804 So. 2d at 69 (internal quotation marks omitted).

improperly based on the law governing waivers of a *seller's* warranties.²⁹³ According to the court, although article 2548, which pertains to waivers of the seller's warranty against redhibitory defects, requires waivers to be clear and unambiguous and brought to the attention of the buyer, "[t]here is no similar provision contained in the codal articles relating to 'lease.'"²⁹⁴

The comments to article 2699 state that the amended article seeks to bring the law of lease into line with the law of sale.²⁹⁵ Thus, it seems clear that the new legislation is designed to overrule *Ford* and its progeny. However, since the 2005 revision, Louisiana courts have continued to hold that waivers of the lessor's warranty against vices and defects need *not* be brought to the attention of the lessee despite the clear requirements of article 2699—a result that is devastating to the policies behind the article.²⁹⁶ The reasoning behind this conclusion rests precariously on the new introductory language to revised R.S. 9:3221. As articulated recently by the Louisiana Court of Appeal for the First Circuit:

La. R.S. 9:3221 operates as an express statutory exception to La. C.C. art. 2699 where the lessee assumes responsibility for the condition of leased premises. Where the language of a provision transferring delictual liability under La. R.S. 9:3221 is clear and unambiguous, the law does not require that the provision be brought to the lessee's attention or explained to him. Thus, La. C.C. art. 2699's requirement that a waiver of the lessor's warranty against vices or defects be brought to the attention of the lessee does not apply to a provision transferring responsibility for purposes of La. R.S. 9:3221.²⁹⁷

293. *Id.* (“[Defendants] argue that those cases are distinguishable because they involve the sale or lease of movables. We agree. . . . La. C.C. art. 2548 provides that the parties to a sale may agree to an exclusion or limitation of the warranty against redhibitory defects, and the terms of such exclusion or limitation ‘must be clear and unambiguous and must be brought to the attention of the buyer.’”).

294. *Id.*

295. LA. CIV. CODE ANN. art. 2699 cmt. (c) (2013). The comments go on to state that the mandate that warranty waivers must be “clear and unambiguous” and “brought to the attention of the lessee” is derived from Louisiana jurisprudence involving waivers of the lessor's warranty against vices and defects. It is notable, however, that these jurisprudential sources are cases that involved leases of movable, rather than immovable, things. *See id.* (citing *Andrus v. Cajun Insulation Co.*, 524 So. 2d 1239, 1245-46 (La. App. 3 Cir. 1988) (King, J., concurring)).

296. *See, e.g.*, *Wells v. Norris*, 46,458, p. 6 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1165, 1169; *Stuckey v. Riverstone Residential SC, LP*, 2008-1770, p. 10 (La. App. 1 Cir. 8/5/09); 21 So. 3d 970, 976; *Greely v. OAG Props., LLC*, 44,240, p. 8 (La. App. 2 Cir. 5/13/09); 12 So. 3d 490, 494.

297. *Stuckey*, 2008-1770 at p. 10; 21 So. 3d at 976 (citations omitted).

Strikingly, all of the cases reaching this result involved residential tenants—those most in need of explanations of the contracts that they sign. Article 2699's mandate that a waiver be not only clearly drafted but also specifically pointed out to the lessee is a progressive, policy-based requirement that seeks to ensure that waivers result from actual bargaining.²⁹⁸ By requiring the lessor to point out the exculpatory provision and explain it to the lessee, the law protects the lessee from unfair surprise. This protection is especially important in residential leases, which are often adhesive. And yet, this protection has now been denied repeatedly to its intended recipients.

b. The Effect of the Parties' Knowledge

Article 2699(1) provides that a waiver of warranty is ineffective if it "pertains to vices or defects of which the lessee did not know and the lessor knew or should have known."²⁹⁹ This provision is designed to prohibit the lessor from unfairly inducing the lessee's acquiescence in the waiver. Waiver is only disallowed under this provision if the lessee is unaware of the defect; if the lessee does know of a defect's existence, then he may effectively waive the warranty with respect to that item.³⁰⁰ Even if the lessee is unaware of the defect, the waiver is invalid only if the lessor knew or should have known of its presence. Where the lessor had actual knowledge of the defect's existence and concealed it from the lessee to induce a waiver, it may be argued that the lessor committed fraud.³⁰¹ Article 2699(1) goes further than existing law, however, by making a waiver ineffective when the lessee merely *ought* to have known about the defect.³⁰²

Significantly, article 2699(1)'s limitations relate to the parties' knowledge at the time the waiver is *executed*. The same provision

298. See LA. CIV. CODE ANN. art. 2699 cmt. (c).

299. *Id.* art. 2699(1). The comments explain:

A waiver is ineffective if: (a) the lessee did not know of the vice or defect; *and* (b) the lessor either knew or should have known of it. Conversely, a waiver is effective: (a) if, regardless of the lessor's knowledge, the lessee knew of the vice or defect; *or* (b) if, regardless of the lessee's knowledge, the lessor did not know nor should he have known of the vice or defect.

Id. art. 2699 cmt. (e).

300. See LEVASSEUR & GRUNING, *supra* note 123, § 3.1.2.

301. See *id.*; LA. CIV. CODE ANN. arts. 1953-1954. Additionally, an argument exists that such a waiver would be unenforceable simply on the basis of the lessor's bad faith. See *Andrus v. Cajun Insulation Co.*, 524 So. 2d 1239, 1243 (La. App. 3 Cir. 1988) (citing PHILIPPE MALAURIE & LAURENT AYNÈS, COURS DE DROIT CIVIL, LES CONTRATS SPÉCIAUX § 647 (Cujas ed. 1986)).

302. See LEVASSEUR & GRUNING, *supra* note 123, § 3.1.2.

does not lead to the invalidation of a waiver if the lessor learns or should learn of the defect *after* the execution of the lease. This is suggested, though rather opaquely, by article 2699(2), which states that waivers are also invalid to the extent they are “contrary to the provisions of Article 2004.”³⁰³ While article 2004 prohibits any clause that shields an obligor from his own intentional or gross fault, the article clearly permits parties to a contract to agree that an obligor will not be liable for his own negligence.³⁰⁴ Thus, reading articles 2004 and 2699 *in pari materia*, it becomes clear that a lessor does not lose the protection of an otherwise valid waiver of the warranty against vices and defects merely because he subsequently learns of a defect in the leased premises and fails to remedy it.

As discussed above, the law of warranty waivers up until the 2005 revision had always been a poor fit with the public policy norms inherent in article 2004.³⁰⁵ By permitting waivers not colored by the bad faith of the lessor, article 2699 endeavors to bring the law governing warranty waivers into line with more modern pronouncements of the permissible with respect to exculpatory clauses. And yet, R.S. 9:3221, which *invalidates* a waiver of warranty when the lessor fails to repair a known defect, not only remains in force but operates as an exception to the new Civil Code provision. Thus, in leases of premises only, warranty waivers apply only to defects of which the lessor could not have been aware.

From the tenant’s point of view, this result is hardly detrimental. However, the dominance of R.S. 9:3221 over general principles of law has distressing effects for landlords. Even after contractually shifting responsibility for the condition of the premises to the tenant, the landlord is not relieved of his burden. The mere notification of a defect by a tenant suddenly subjects the landlord to practical necessity, if not the obligation, to make necessary repairs.³⁰⁶ This state of affairs

303. LA. CIV. CODE ANN. art. 2699(2).

304. *See supra* notes 221-224 and accompanying text.

305. *See* discussion *supra* Part IV.C.2.

306. As discussed *supra* note 209, the Louisiana Supreme Court has drawn a technical distinction under R.S. 9:3221 between the responsibility to make repairs and the responsibility for damages resulting from injuries caused by defects in the premises. For example, in *Hebert v. Neyrey*, a case involving a lease stating that the lessee assumed responsibility for the condition of the premises but also providing that the lessor would make necessary repairs caused by fire or other casualty and not caused by the lessee’s fault, the lessor was held responsible for the repair of pipes damaged by freezing weather. 445 So. 2d 1165, 1168 n.3 (La. 1984). However, as a practical matter, because R.S. 9:3221 imposes liability for damages on landlords who fail to make repairs in a timely manner, the statute acts to shift responsibility for taking steps to make repairs to the landlord once he is notified of the

is especially irrational in the context of commercial leasing, where sophisticated parties take the costs of repairs and defects and resulting damages into consideration when negotiating rent and procuring insurance.

c. Actual and Threatened Physical Harm

Article 2699's reference to article 2004 does more than speak to the effect of the lessor's knowledge. It also makes clear that a waiver of the warranty against vices and defects can never shield the lessor from liability for personal injuries. At first blush, this provision appears to be designed to close the door on the debate surrounding whether article 2004 applies to a lessee's claim for personal injuries.³⁰⁷ Indeed, the explicit reference to article 2004 leads inexorably to this conclusion. Article 2004's placement in the title on Conventional Obligations implies that it applies by default to *all* contracts, including leases, unless a contrary and more specific rule states otherwise.³⁰⁸ No explicit reference to article 2004 is necessary, unless the redactors sought to emphasize its application. However, because the introductory phrase of R.S. 9:3221 states that the statute applies "[n]otwithstanding the provisions of Article 2699," a court could decide to ignore the public policy limitations of article 2004 in leases of premises.³⁰⁹ Indeed, this interpretation is encouraged by the leading practice manual on real estate.³¹⁰

Moreover, article 2699(3) extends protection beyond that required in article 2004 when it states that in a residential or consumer lease a warranty waiver is invalid "to the extent it purports to waive the warranty for vices or defects that seriously affect health or safety."³¹¹ The comments explain that this limitation, while not reflected in the Louisiana jurisprudence, was added to bring Louisiana law into closer

defect, lest he subject himself to potential liability for damages resulting from his failure to do so. Ostensibly, in such a case the landlord could seek compensation from the tenant for the cost of the repairs that were made. Even then, the statute shifts to the landlord the burden of outlaying expenses in the first place and seeking recompense from a tenant who may refuse or be unable to pay.

307. See *supra* notes 225-246 and accompanying text.

308. See LA. CIV. CODE ANN. art. 2699 ("In all matters not provided for in this Title, the contract of lease is governed by the rules of the Titles of 'Obligations in General' and 'Conventional Obligations or Contracts'").

309. See LA. REV. STAT. § 9:3221 (2013).

310. 2 TITLE, *supra* note 271, § 18:26 ("As amended in 2004, La. Rev. Stat. Ann. § 9:3221 clearly supersedes Civil Code Article 2004.").

311. LA. CIV. CODE ANN. art. 2699(3).

alignment with the law of other states.³¹² In most American jurisdictions, waiver of the common law warranty of habitability is prohibited in residential and consumer leases.³¹³ Although article 2699 does not completely prohibit waivers of the lessor's warranty, it adopts a "middle position" of prohibiting waivers that would insulate the lessor from liability resulting from a defect that would pose a serious threat to the health or safety of the lessee.³¹⁴

R.S. 9:3221 contains no language limiting the enforceability of waivers when a tenant's health or safety is at risk. Instead, by its plain terms the statute sanctions waivers resulting from defects of all types, regardless of the potential harm to the lessee or third parties, as long as the lessor was not negligent in failing to repair a known defect. Interpreting the statute as an exception to article 2699 thus has the effect of nullifying the carefully considered limitations on contractual freedom contained within the Code.³¹⁵

V. CONCLUSION

Numerous conclusions can be drawn from the foregoing discussion of R.S. 9:3221 and its relationship with the Civil Code. First, it is apparent that the current state of the law governing contractual waivers of the lessor's responsibility for defective premises is untenable. Although clauses purporting to shift responsibility from the lessor to the lessee are included in both residential and commercial leases as a matter of course,³¹⁶ their enforceability is highly questionable. It is unknown whether these clauses, as a prerequisite to

312. *Id.* art. 2699 cmt. (g).

313. *Id.*

314. *Id.*

315. *See, e.g.,* Wells v. Norris, 46,458 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1165 (holding that waiver shielded landlord from liability for personal injuries resulting from fire caused by defective fuse box); Stuckey v. Riverstone Residential SC, LP, 2008-1770 (La. App. 1 Cir. 8/5/09); 21 So. 3d 970 (upholding waiver of warranty with respect to toxigenic mold); Greely v. OAG Props., LLC, 44,240 (La. App. 2 Cir. 5/13/09); 12 So. 3d 490 (finding waiver precluded personal injury claim); *see also* Biggs v. Cancienne, 2012-0187 (La. App. 1 Cir. 9/21/12); 111 So. 3d 6 (reversing summary judgment on question of whether defendant-landlord lacked a "reasonable time" to make repairs to property and was therefore relieved of liability for tenant's injuries under RS 9:3221). *But see* Stone v. Pelican Pointe-NE Ltd. P'ship, 2012-0091 (La. App. 1 Cir. 9/24/12); 2012 WL 4354745 (denying application for supervisory writs and reversal of trial court's finding on motion for summary judgment that Louisiana Civil Code articles 2696 through 2699 and article 2004 governed lessee's personal injury claim, not RS 9:3221).

316. *See* 2 TITLE, *supra* note 271, § 18:116 (form for assumption of liability clause); *id.* § 18:117 (form for assumption of responsibility for repairs, vices, and defects in residential lease); *id.* § 18:119 (form for assumption of responsibility for defects in commercial lease).

their enforceability, must be specifically brought to the attention of the lessee at the time of the formation of the lease or whether their mere inclusion in a signed standard form contract is sufficient.³¹⁷ It is uncertain whether the parties to a lease may agree that the lessor will bear no responsibility for defects in the premises as long as he remains in good faith, or whether a lessor retains the responsibility to timely repair defects that become known even after the lessee has agreed to accept responsibility for maintenance.³¹⁸ It is unclear whether a waiver, if otherwise enforceable, will shield a lessor from liability for his tenant's personal injuries or from other damage caused by a defect that poses a serious risk to the tenant's health and safety.³¹⁹ One cannot predict with confidence whether a waiver's enforceability will vary if the lessee seeks damages versus other forms of relief, or if the action is based in tort or contract.³²⁰ In fact, there is little about the legal regime governing waivers of the lessor's warranty that is clear other than the fact that this narrow area of the law is highly unsettled.

The predictability and certainty of lessor liability are essential to ensure a functioning rental market in this state. Louisiana property owners are potentially exposed to tremendous liability for latent defects, and fear of high damage awards may drive up the price of space and liability insurance, or dissuade the risk averse from entering the market at all. At the same time, important public policy concerns militate against the absolute enforceability of exculpatory clauses, particularly in residential leases, even if the end result is a marginal inflation of the cost of leased property. Moreover, litigation involving the lessor's obligation to maintain property free of vices and defects is plentiful.³²¹ Because of the clear need to balance the concerns of lessors and lessees, one would expect the rules governing lessor liability to be clearly and thoughtfully articulated, leaving little to no question regarding whether and to what extent that liability can be contractually altered by the parties to a lease. Why, then, is this not the case?

317. *See supra* Part IV.C.4(a).

318. *See supra* Part IV.C.4(b).

319. *See supra* Part IV.C.4(c).

320. *See supra* Part IV.C.3-4.

321. In the last decade, over fifty such cases were litigated at the appellate level. This figure does not include cases that were tried but not appealed, or those that settled out of court. The total number of actionable claims is therefore likely much higher. In any event, the number of reported decisions dealing with lessor liability serves as one indication of its social significance.

The answer to this question is not a simple one. The problem is not necessarily one of legislative inaction. The Civil Code has long contained provisions that delineate the standards by which parties can contractually alter obligations implied by law.³²² But those articles and the principles contained within them have been forced to compete with legislation existing outside of the framework of the Code—a special interest statute enacted over eighty years ago to solve a problem that today no longer exists. For decades, R.S. 9:3221 has been interpreted broadly and dynamically, contrary to established principles of interpretation applicable to statutory law, and as a result has been allowed to directly contradict Civil Code directives governing the power of lessor and lessee to allocate between themselves responsibility for leased premises. Even worse, the full reach of the statute has been misunderstood repeatedly by the redactors of the rolling revision, resulting in a jumbled body of law that is today nearly impossible to apply sensibly.

The best course of action to rectify the confusion wrought by the interaction between R.S. 9:3221 and the Civil Code is the complete repeal of the statutory provision. In its absence, Louisiana Civil Code article 2699 would properly govern the enforceability and effects of warranty waivers executed between lessors and lessees. Thus, the Code would require that waivers be drawn in clear and unambiguous language and brought to the attention of the lessee.³²³ The Code would preclude waivers of defects of which the lessor knew or should have known, and of which the lessee was unaware, at the time of the lease, but would not prevent the parties from waiving liability for defects of which the parties later became aware.³²⁴ Finally, the Code would prevent the enforceability of a waiver to insulate lessors from liability for personal injuries or, in the case of residential or consumer leases, defects posing a threat to health or safety.³²⁵ Significantly, although repeal of the statute would work to significantly improve the law governing a lessor's contractual responsibility to his tenant, it would present little substantive change in the law of torts, where a lessor's responsibility is today predicated solely on his

322. See, e.g., LA. CIV. CODE ANN. art. 7 & cmt. (c) (2013); *id.* art. 2004 (2012); LA. CIV. CODE arts. 11, 1764 (1870).

323. LA. CIV. CODE ANN. art. 2699 (2013).

324. *Id.* art. 2699(1)-(2).

325. *Id.* art. 2699(2)-(3).

negligence, even in cases involving attempted waivers.³²⁶ And yet, repeal of the statute would bring clarity to this area of the law as well, by removing the source of courts' confusion regarding the effect of waivers on tort claims.

Without the statute's repeal, courts are hindered in their power to bring sense to law governing warranty waivers. Courts could theoretically rectify the conflict between Code and statute by applying R.S. 9:3221 only to a lessor's tort responsibilities according to its original purpose and the direction of comment (h) to article 2699. This approach admits a number of weaknesses, however. *Tassin* and its progeny—a line of cases that now amounts to *jurisprudence constante*—must be abruptly renounced. Furthermore, although courts are free to find that laws have been impliedly repealed in appropriate cases,³²⁷ courts may be reluctant to find the statute repealed by implication, particularly in light of the fact that it was reenacted in 2005. To restrict R.S. 9:3221 to tort claims between lessors and third parties would be to read the statute into obsolescence; as discussed above, the statute no longer has any practical effect when applied to tort claims of that type.³²⁸

The enactment, interpretation, application, and revision of R.S. 9:3221 reveal just one example of the methodological difficulties posed by statutory law in Louisiana. As the Civil Code Ancillaries continue to be used as a “dumping place” for special interest legislation,³²⁹ and as the rolling revision continues to undertake repeated and piecemeal reform of isolated areas of private law, conflict between Code and statute is bound to occur, likely with increasing frequency. The interaction between R.S. 9:3221 and the Civil Code may be anomalous, but it should not be mistaken for an isolated occurrence. Rather, there are a great many lessons to be learned from this cautionary tale about the drafting and interpretation of statutory law, its placement within the hierarchy of the sources of law in this state, the proper placement within code and statute of legislative rules and standards, and the attention that must be given to statutory law throughout the revision process. This Article has sought to elicit those

326. See *infra* notes 252-255 and accompanying text. Of course, repeal of R.S. 9:3221 would have the beneficial effect of aligning the parties' ability to waive the lessor's negligence with the rules set forth in article 2004.

327. See LA. CIV. CODE ANN. art. 8.

328. See *infra* notes 254-255 and accompanying text.

329. Yiannopoulos, *supra* note 61, at 837.

lessons from this story and, in so doing, begin a productive dialogue regarding the proper role of statutory law in modern-day Louisiana.