



# Ruminations on the Louisiana Law of Pledge

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## Repository Citation

Michael H. Rubin, *Ruminations on the Louisiana Law of Pledge*, 75 La. L. Rev. (2015)  
Available at: <http://digitalcommons.law.lsu.edu/lalrev/vol75/iss3/7>

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## Ruminations on the Louisiana Law of Pledge

*Michael H. Rubin\**

On January 1, 2015, Act 281 of the 2014 Louisiana legislative session took effect.<sup>1</sup> Drafted by the Louisiana State Law Institute,<sup>2</sup> the Act amends, revises, and reworks not only the Civil Code articles concerning the rules on pledge as a form of real security, but also the articles setting forth the basic principles of personal liability and security for loans. It also deals, in part, with judicial mortgages.

Practitioners will find that, although many basic pledge concepts remain the same, there are a number of new rules, new procedures, and, in some cases, new prohibitions.

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The author extends his thanks to L. David Cromwell, Christopher Odinet, Dian Tooley-Knoblett, and Gabriel A. Crowson for their many helpful comments and suggestions about this Article and the examples contained in it. Their advice is sincerely appreciated, and any errors that remain are purely those of the author.

1. Act No. 281, 2014 La. Acts. The *Louisiana Law Review* deviates from *The Bluebook* for Louisiana source material when citing to session laws in the Acts of the Louisiana Legislature. In addition to providing the year and page number for the particular session law, the *Louisiana Law Review* also provides the Act number. The Acts of the Louisiana Legislature can be found on HeinOnline (under “Session Laws Library”) or in the Paul M. Hebert Law Center Library.

2. The Louisiana State Law Institute was created by the Legislature in 1938 and serves as “an official advisory law revision commission, law reform agency and legal research agency.” LA. REV. STAT. ANN. § 24:201 (2007). Note, references to Louisiana Revised Statutes contained within are to the West Louisiana Revised Statutes Annotated. The date appended to each statutory reference is the publication date of each section. *See also* Act No. 166, 1938 La. Acts 430. The Law Institute works not only on the “continuous revision, clarification and co-ordination of the Louisiana Revised Statutes,” but also on revisions to the Louisiana Civil Code. *See* LA. REV. STAT. ANN. § 24:251 (2007).

## I. THE BACKGROUND OF THE LOUISIANA LAW OF PLEDGE

There are numerous historical antecedents for the Louisiana law of pledge, including an Egyptian tradition of pledging a mummy to secure a loan,<sup>3</sup> Greek<sup>4</sup> and Roman<sup>5</sup> law, and the Bible.<sup>6</sup>

Although there is an ongoing scholarly debate about whether Louisiana owes more of its civilian tradition<sup>7</sup> to France or Spain,<sup>8</sup> there is no dispute that, at the time the entire Civil Code was revised in 1870 following the Civil War,<sup>9</sup> only 19 of its more than

3. See Valerie Seals Meiners, Comment, *Formal Requirements Of Pledge Under Louisiana Civil Code Article 3158 and Related Articles*, 48 LA. L. REV. 129, 129 (1987).

4. See John H. Wigmore, *The Pledge-Idea: A Study in Comparative Legal Ideas*, 10 HARV. L. REV. 321, 322–23 (1897). This article notes that [I]n at least four important bodies of law and language the primitive word for the ideas of “pledge,” “bet” (or “forfeit”), and “promise,” was substantially the same. In the Scandinavian we have *vaed*, *ved*. In the Germanic we have *wetti*, *wette*, *wedde*, *vadi-um*, *guadi-um*, and (by sliding the *di* into *ji*) *wage*, *guage*, *gage*. In the Latin we have *pignus* in the first two meanings, and from the same root (Πηγνυμι) *pango*, *pag*, *pactum*, in the third meaning. In the Greek, the verb-stem *οετ* (put) has all three meanings.

*Id.* (citations omitted). See also John H. Wigmore, *The Pledge-Idea: A Study in Comparative Legal Ideas. III*, 11 HARV. L. REV. 18 (1897).

5. See Donald E. Phillipson, *Development of the Roman Law of Debt Security*, 20 STAN. L. REV. 1230, 1237 (1968) (“Although *pignus* had apparently arisen before the fifth century B.C., it was not included in the Twelve Tables. *Pignus* was a form of security far less formal and restrictive than *fiducia cum creditore*, because it did not involve a transfer of civil ownership.”); Cf. Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana*, 56 LA. L. REV. 257 (1995).

6. See, e.g., *Genesis* 38:18 (The Soncino Chumash) (“And he said, ‘What pledge shall I give thee?’ And she said, ‘Thy signet, and thy bracelets, and thy staff that is in thy hand.’”); *Deuteronomy* 24:6 (The Soncino Chumash) (“No man shall take the mill or the upper millstone to pledge, for he taketh a man’s life to pledge.”).

7. For a discussion of Louisiana’s civilian tradition, see Alvin B. Rubin, *Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad*, 48 LA. L. REV. 1369 (1988).

8. See Vernon V. Palmer, *The French Connection and the Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 LA. L. REV. 1067 (2003); see also Alain Levasseur & Vicenç Feliú, *The English Fox in the Louisiana Civil Law Chausse-Trappe: Civil Law Concepts in the English Language; Comparativists Beware!*, 69 LA. L. REV. 715 (2009).

9. For an overview of the revisions to the Civil Code, see A.N. Yiannopoulos, *The Civil Codes of Louisiana*, in LA. CIVIL CODE, at XLI (Vol. 1 2014). For a more detailed discussion of this issue, see A.N. Yiannopoulos, *Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913*, 53 LA. L. REV. 5 (1992) [Yiannopoulos, *Two Critical Years*].

40 articles on pledge were either direct translations of provisions of the *Code Napoléon* or dealt with the same subject matter.<sup>10</sup> Nonetheless, because the previous Louisiana Civil Code of 1825 was written in both French and English (with French being the original language and English being the translation),<sup>11</sup> and because French law at the time influenced the redactors of the 1825 Civil Code,<sup>12</sup> many Louisiana courts have looked to the works of French commentators to aid in understanding the pledge provisions.<sup>13</sup> Once the 1870 Civil Code articles on pledge were enacted, they remained almost completely unchanged until the 2014 legislative session.<sup>14</sup>

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10. See LA. STATE LAW INST., 3 LOUISIANA LEGAL ARCHIVES: COMPILED EDITIONS OF THE CIVIL CODES OF LOUISIANA, pt. 2 (1942) (containing a word-for-word comparison of the 1804 Code Napoleon, and the Louisiana Civil Codes of 1808, 1825, and 1870). The following 1870 Civil Code articles are the subject of Act 281 and are traceable directly back to the Code Napoleon: 3133–3135, 3141, 3157, 3160, 3162, 3164–3167, 3169, 3171, and 3176–3181.

11. *Id.*

12. See Yiannopoulos, *The Civil Codes of Louisiana*, *supra* note 9, at XLVII, XLIX (“The redactors of the 1825 Code followed the French Civil Code closely and relied heavily on French doctrine and jurisprudence. . . . The 1808 and 1825 Louisiana Civil Codes were drawn up in French and translated into English. . . . [C]ourts taking cognizance of the fact that the French text was the original version, and being aware of the poor quality of the [English] translation, developed the view that the French text was controlling.”); see also Yiannopoulos, *Two Critical Years*, *supra* note 9, at 22.

13. See, e.g., *Scott v. Corkern*, 91 So. 2d 569, 573 n.4 (La. 1956) (“The reason for this rule is founded on the writings of the French commentators, particularly Marcade, Troplong and Duranton who voice the opinion that it is not the contract of pledge that interrupts prescription but the continuous possession of the thing pledged with the debtor’s consent to such possession that serves as a constant acknowledgment of the debt.” (citation omitted)); see also *Casey v. Cavaroc*, 96 U.S. 467, 484 (1877); *Citizens’ Bank v. Janin*, 15 So. 471, 473 (La. 1894) (citing Troplong and Dalloz).

14. Of the 48 articles on pledge contained in the 1870 Civil Code (articles 3133–3181), 42 remained unchanged until the 2014 legislation. Two of the 1870 articles were repealed (articles 3160 and 3161). Four other articles were amended between 1870 and 2014. The first is article 3133.1, amended by Act No. 137, § 16, 1989 La. Acts 527, effective September 1, 1989, and Act No. 1079, § 7, 1990 La. Acts 2735, effective September 1, 1990, to deal with Louisiana’s adoption of Louisiana Revised Statutes section 10:9-101, Louisiana’s version of UCC article 9. The second is article 3158, amended by Act No. 157, § 1, 1900 La. Acts 239, Act No. 290, § 1, 1952 La. Acts 489, and Act No. 137, § 17, 1989 La. Acts 527, which had the effect of reworking the statute concerning the requirements of the pledge of movables and the effects of pledge on third parties. Third, article 3159, amended by Act No. 157, § 2, 1900 La. Acts 239 dealt with pledges in favor of banks and last, article 3165, amended by Act No. 9, 1872 La. Acts 36, concerning the rights of a pledgee upon the debtor’s default. See Ralph Slovenko, *Of Pledge*, 33 TUL. L. REV. 59

When Louisiana adopted its version of UCC 9 in 1990,<sup>15</sup> many of the security interests that previously had been controlled by the Civil Code pledge articles were superseded by the UCC provisions. The 1870 Civil Code pledge articles remained in effect, however, because there were some real security assets not covered by Louisiana's version of UCC 9.<sup>16</sup>

In the quarter of a century since Louisiana adopted UCC 9, there has evolved a need to revisit the Civil Code pledge articles. The Legislature enacted the Louisiana State Law Institute's draft proposal in its entirety,<sup>17</sup> and the current revision to the pledge articles completely rewrites this section of the Civil Code.

Some of the changes made by the 2014 legislation alter prior law and introduce new concepts. For example, Act 281 of 2014 allows non-recourse loans secured by a pledge.<sup>18</sup> It abolishes

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(1959) (discussing the pledge rules adopted in 1870 and the jurisprudence that developed in the more than sixty years that followed).

15. Although technically the proper terminology should be "Chapter 9 of the Uniform Commercial Code, LA. REV. STAT. ANN. 10:9-101 *et seq.*," for ease of reference this article will use the phrase "UCC 9."

16. For simplicity, this Ruminator refers to the Louisiana Civil Code in a modified fashion, to highlight the differences between the old and new provisions, which became effective January 1, 2015. The term "Old C.C. art. (2013) (repealed 2014)" will be used to refer to those Civil Code provisions impacted by Act 281 as they existed prior to January 1, 2015, the effective date of Act 281. The term "New C.C. art. (2015)" will be used to refer to the Civil Code provisions as amended by Act 281. *See* Old C.C. art. 3133.1 (2013) (repealed 2014) (*amended by* Act No. 137, 1989 La. Acts 527 & Act No. 1079, 1990 La. Acts 2811).

This Title shall apply to pledges of movables that are delivered prior to the time Chapter 9 of the Louisiana Commercial Laws becomes effective, including without limitation those pledges that may secure future obligations and lines of credit, as well as to pledges entered into on or after the time Chapter 9 of the Louisiana Commercial Laws becomes effective that are exempt or otherwise excluded from coverage thereunder.

Old C.C. art. 3133.1 (2013) (repealed 2014). *See also* LA. REV. STAT. ANN. § 10:9-109(d) (2002) (detailing the types of transactions that are outside the scope of Louisiana's version of UCC 9).

17. L. David Cromwell served as Reporter for the Law Institute's Security Devices Committee and Claire Popovich was the staff attorney. Members of the Committee included: James R. Austin, David J. Boneno, Elizabeth R. Carter, Scott P. Gallinghouse, David W. Gruning, Thomas A. Harrell, Kelly G. Juneau, Peter L. Koerber, Marilyn C. Maloney, Max Nathan, Jr., Christopher Odinet, Ronald J. Scalise, Jr., Emmett C. Sole, James A. Stuckey, Adam J. Swensek, Susan G. Talley, George J. Tate, Robert P. Thibeaux, Dian Tooley-Knoblett, Keith Vetter, and Michael H. Rubin.

18. *See* New C.C. art. 3135 (2015).

antichresis, which is the pledge of immovable property.<sup>19</sup> It alters the rules on how a creditor can obtain a secured position in a landlord's lease or rents as well as the rules regulating the rights of landlord, creditor, and tenant, and it moves these rules from the Revised Statutes to the Civil Code.<sup>20</sup> It affirms the enforceability of a "negative pledge" but prohibits a payment obligor from restricting the right of the payment obligee to encumber the payment stream.<sup>21</sup>

For the remainder of this Ruminations, the term "Old C.C. art." will be used to refer to those Civil Code provisions impacted by Act 281 as they existed prior to January 1, 2015, the effective date of Act 281. The term "New C.C. art." will be used to refer to the Civil Code provisions as amended by Act 281.<sup>22</sup>

## II. THE BASIC PRINCIPLES OF PERSONAL LIABILITY, PERSONAL SECURITY, AND REAL SECURITY

Act 281 did more than amend and change the Civil Code's pledge provisions. It also reworked articles that had been in the "privileges" section of the Civil Code setting forth the general principles of personal liability, personal security, and real security.<sup>23</sup>

### *A. An Obligor's Personal Liability and Creditor Remedies*

Old C.C. arts. 3182 and 3183 have long been considered the starting point for any analysis of security interests. Old C.C. art. 3182 declared that once one had bound "himself personally," his personal obligation was to be satisfied out of all of his "property, movable and immovable, present and future."<sup>24</sup> New C.C. art. 3133 adopts the same rule, and the Comments to the article note that this general provision is subject to state statutory and state constitutional exemptions from seizure.

Old C.C. art. 3183 declared that the property of a debtor "is the common pledge of his creditors and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful causes of preference."<sup>25</sup> When the Civil Code was revised in 1870 following the Civil War, the only lawful

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19. See Old C.C. arts. 3176–3181 (2013) (repealed 2014).

20. See *infra* Part IX.

21. See *infra* Part VII.

22. See *supra* note 16.

23. Act No. 281, 2014 La. Acts.

24. See Old C.C. art. 3182 (2013) (repealed 2014).

25. See Old C.C. art. 3183 (2013) (repealed 2014).

causes of preference were privileges and mortgages.<sup>26</sup> New C.C. art. 3134 employs the same general concept as Old C.C. art. 3183 but notes that the ratable sale rule is subject to “a preference authorized or established by legislation.”<sup>27</sup>

The Comments to new C.C. art. 3134 point out that not all of an obligor’s creditors are entitled to an “immediate right to share in the proceeds of each sale of the obligor’s property,” noting, for example, that in a voluntary sale, the obligor retains the proceeds, but these then form part of the obligor’s patrimony that creditors can pursue.

### *B. Contractual Limitations on What Property a Creditor May Seize*

Louisiana law creates constitutional and statutory exemptions from seizure and sale,<sup>28</sup> but nothing in Louisiana law has prohibited parties from contracting for additional limitations. Further, since 1992 the Civil Code has permitted non-recourse mortgages—mortgages in which the obligor has no personal liability on the principal obligation that the mortgage secures and where the creditor’s only right to collect funds is through a seizure and sale of the mortgaged property.<sup>29</sup>

Until Act 281 was adopted, the Civil Code had never expressly dealt with the converse of this rule—the possibility of a personal obligation where the creditor agrees to limit recovery to only “particular property or to a specified class of property.”<sup>30</sup> New C.C. art. 3135 expressly authorizes this type of contractual provision.<sup>31</sup>

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26. See Old C.C. art. 3184 (2013) (repealed 2014).

27. See New C.C. art. 3134 (2015).

28. See, e.g., LA. CONST. art. 12, § 9 (1970); LA. REV. STAT. ANN. § 13:3881 (2006).

29. Old C.C. art. 3297 (2013) (repealed 2014) (*amended by* Act No. 652, 1991 La. Acts 302). Prior to the adoption of this article, debtors and creditors often created a non-recourse mortgage contractually. They would put a clause in the mortgage requiring the creditor, prior to suing the debtor personally, to foreclose on the mortgage by executory process *without* appraisal. Once a foreclosure without appraisal occurred, the Louisiana Deficiency Judgment Act prohibited the creditor from pursuing the debtor personally if the proceeds of the sale were not sufficient to satisfy the obligation. See LA. REV. STAT. ANN. §§ 13:4106–4108.3 (2006). Thus, the parties were able to contractually create a mortgage package where the debtor effectively had no personal liability on the principal obligation secured by the mortgage.

30. New C.C. art. 3135 (2015).

31. In *Shell Offshore, Inc. v. M.H. Marr*, 916 F.2d 1040 (5th Cir. 1990), the Fifth Circuit reversed “the district court’s determination that a provision in the subject agreement to the effect that Marr’s indebtedness to Shell ‘shall be paid’ from a share of Marr’s working interest in certain gas wells constitutes an

The language of New C.C. art. 3135 appears to permit contract provisions to trump a creditor's right to obtain a judicial mortgage<sup>32</sup> on all of a debtor's current and future property following a judgment and to obtain a writ of *feri facias*<sup>33</sup> on all of the judgment-debtor's non-exempt property. Under New C.C. art. 3135, a debtor may have a basis to assert that, despite having lost a lawsuit concerning a debt and despite the creditor having obtained a judicial mortgage through the proper procedures,<sup>34</sup> the specific provisions of a creditor's contract with the judgment debtor prohibit the creditor from exercising the judicial mortgage on immovable property described in the contract or from obtaining a writ of *feri facias* on other assets described in the contract.

It is anticipated that jurisprudence will develop on the interpretation of the contractual limitations permitted by New C.C. art. 3135.

### C. What Is "Security"

Although the UCC uses the term "security interest,"<sup>35</sup> and although courses in Louisiana law schools that teach privileges, pledge, suretyship, and mortgage are called "Security Devices," the term "security" had not been defined in the Civil Code until the 2014 amendments.

New C.C. art. 3136 defines security as "an accessory right established by legislation or contract" as well as "an obligation undertaken by a person other than the principal obligor."<sup>36</sup> Thus, the definition includes privileges as well as such concepts as pledge, mortgage, and suretyship, but the list given is only illustrative.<sup>37</sup> The amendments, however, state that a Civil Code

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exclusive method for extinguishing the balance of that debt." *Id.* at 1041. To the extent that *Shell Offshore* might be seen as granting credence to an assertion that one cannot limit recovery to certain assets absent a security interest in those assets, it appears that the 2014 amendment to article 3135 overrules this contention.

32. A judicial mortgage arises by operation of law from a judgment recorded in the parish mortgage records. *See* C.C. art. 3300 (2015). It is a general mortgage over all of the judgment debtor's current and future owned immovable property in that parish. C.C. arts. 3302–3303 (2015).

33. Writs of *feri facias* are dealt with in Louisiana Code of Civil Procedure articles 2292–2299. *See* LA. CODE CIV. PROC. arts. 2292–2299 (2015).

34. *See* C.C. arts. 3285, 3299–3306 (2015). For more discussion on judicial mortgages, *see infra* Part X.

35. LA. REV. STAT. ANN. § 10:1-201(35) (2003).

36. *See* New C.C. art. 3136 (2015).

37. New C.C. art. 3138, Comment (c), provides:



“security” is not the same as a UCC security interest.<sup>38</sup> To help avoid problems in the future, and because “it remains a common practice”<sup>39</sup> for UCC 9 security interests to be “styled as a ‘pledge,’”<sup>40</sup> the 2014 amendments make it clear that calling a UCC 9 security interest a “pledge” does not subject it to the provisions of the Civil Code pledge articles, but nonetheless the document “may be effective to create a [UCC 9] security interest in the thing.”<sup>41</sup>

New C.C. art. 3137 defines personal and real security. The quintessential personal security is suretyship.<sup>42</sup> The specific rules concerning the “real security” of pledge, mortgage, and privilege are governed by the appropriate sections and articles of the Civil Code and Revised Statutes.

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The list contained in this Article is merely illustrative. Other forms of security exist, such as a pignorative contract in the form of a sale with a right of redemption in favor of a seller who remains in possession. New C.C. art. 3138 (2015) (citations omitted).

38. See New C.C. art. 3139 (2015).

39. New C.C. art. 3143 cmt. (2015). For example, since its effective date in 1990, UCC 9 has governed the perfection of a security interest in a collateral mortgage note. See LA. REV. STAT. ANN. §§ 10:9-310(b)(6), 10:9-313(a) (Supp. 2015); see also *id.* § 9:5551 (2007). Despite the fact that the old Civil Code pledge articles do not control post-1990 “pledges” of collateral mortgage notes, some courts continue to cite the old pledge articles, apparently assuming that they still apply to post-1990 collateral mortgage notes. See Old C.C. art. 3133.1 (2013) (repealed 2014); see also *supra* note 16 (quoting old article 3133.1); see, e.g., *CadleRock Joint Ventures Co. v. J. Graves Scaffolding Co.*, 152 So. 3d 1079 (La. Ct. App. 2014).

40. New C.C. art. 3143 cmt. (2015).

41. *Id.* Note that the bracketed “UCC 9” does not appear in the text of New C.C. art. 3143 because New C.C. art. 3139 makes it clear that the term “security interest” refers to UCC 9. Nonetheless, the bracketed language has been added in the text above for emphasis.

42. The Comments to revised article 3137 note that this article “is new but it is not intended to change the law.” See New C.C. art. 3137 cmt. a (2015) (citing Slovenko, *supra* note 14). For more on suretyship, see Michael H. Rubin, *Ruminations on Suretyship*, 57 LA. L. REV. 565 (1997); MICHAEL H. RUBIN, LOUISIANA SECURITY DEVICES, A PRÉCIS, ch. 2–8 (LexisNexis 2011) [hereinafter RUBIN, A PRÉCIS]. It is possible that Louisiana law may contain personal security other than suretyship. See, e.g., LA. REV. STAT. ANN. § 9:4802 cmt. b (Supp. 2015) (located in the Louisiana Private Works Act). Section 9:4802 cmt. b states:

Although the personal liability imposed upon the owner and the personal liability imposed upon the contractor are not those of sureties the claims are clearly obligations of security and are accessory to the primary contractual obligations of the claimants.

*D. No Ownership by the Creditor upon Default*

New C.C. art. 3140 enshrines “a longstanding civilian concept”<sup>43</sup> prohibiting contracts that permit a creditor to become the owner of the real security upon the debtor’s default. This rule, which has existed “since the edict of Constantine,”<sup>44</sup> is designed to prevent creditors from inserting this clause into every contract, thereby allowing a creditor to get a windfall if the value of the real security far exceeds the debt, either at the time the debt is incurred or at the time a default occurs.

Although New C.C. art. 3140 prohibits such pre-default agreements, nothing prevents a creditor and debtor, after default, from entering into a contract by which the debtor transfers an asset, including real security, to pay off all or a portion of a debt. This type of post-default contract is permitted both by the Civil Code’s “giving in payment” provisions<sup>45</sup> as well as by the Deficiency Judgment Act.<sup>46</sup>

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43. See New C.C. art. 3140 cmt. a (2015).

44. *Alcolea v. Smith*, 90 So. 769, 771 (1922). The quotation from the case is powerful and is worth reiterating in full:

Since the edict of Constantine annulling and prohibiting what was known as the *lex commissoria* and the stipulation in the contract of pledge which it authorized, whereby, in default of payment by the pledgor, the thing pledged became the property of the pledgee without further action on his part, such stipulations have been prohibited in all countries where the civil law prevails, and the prohibition has long since become part of the common law, the commentators on both systems agreeing that they are *contra bonos mores* and oppressive; that they involve the abuse of the power of the strong over the weak, represent odious speculations by those who have money, at the expense of those who need it, and are unconscionable.

*Id.* at 771 (citations omitted).

45. See Old C.C. arts. 2655–2659 (2013) (repealed 2014) (*amended by Act No. 841, § 1, 1933 La. Acts 1037*). This concept is often referred to in Louisiana as a *dation en paiement*. See, e.g., *Succession of Dupre*, 51 So. 2d 317, 318 (La. 1950) (“A giving in payment or *dation en paiement* is an act by which a debtor gives a thing to a creditor, who is willing to receive it, in payment of a sum which is due.”); *Farmers-Merchants Bank & Trust Co. v. CIT Group/Equipment Fin., Inc.*, 888 F.2d 1524 (5th Cir. 1989).

46. See LA. REV. STAT. ANN. §§ 13:4108.1–13:4108.3 (2006). For example, Louisiana Revised Statutes section 13:4108.1(A) provides:

As an exception to R.S. 13:4106 and 4107, if a mortgagee or other creditor holds a mortgage, pledge, security interest, or privilege which secures an obligation in a commercial transaction, the mortgagee or other creditor may collect from or pursue any debtor, guarantor, or surety for a deficiency judgment on the secured obligation whether or not the mortgagee or other creditor has foreclosed on all or any of the property and sold such property at a judicial, public, or private sale, with or without appraisal, regardless of the minimum bid, and whether

### III. THE LIMITED SCOPE OF ASSETS THAT CAN BE PLEDGED

Prior to 1990, the Civil Code pledge provisions were extremely broad and applied to “every corporeal thing, which is susceptible of alienation,”<sup>47</sup> items classified as “incorporeal movables,”<sup>48</sup> and “a claim on another person.”<sup>49</sup> With the advent of Louisiana’s adoption of UCC 9 in 1990, however, creditors who wanted to secure loans with the vast majority of items that formerly could be pledged had to employ the UCC’s rules and procedures.<sup>50</sup>

The changes made by Act 281 of 2014 include an exclusive listing of assets subject to pledge. Under New C.C. art. 3142, the “only things” that can be pledged are movables “not susceptible of encumbrance by security interest,” a “lessor’s rights in the lease of an immovable and its rents,”<sup>51</sup> and “things made susceptible of pledge by law.”

Among the things “made susceptible of pledge by law” are property insurance on immovables<sup>52</sup> and certain mineral payments.<sup>53</sup>

#### A. A Pledge of Property Insurance on Immovables

The 2014 amendments changed portions of the Civil Code Ancillaries<sup>54</sup> to make it clear that a pledge is the proper mechanism

or not the mortgagee or other creditor has acquired such property from any debtor, guarantor, or surety pursuant to a complete or partial giving in payment. However, other than with regard to a secured transaction subject to Chapter 9 of the Louisiana Commercial Laws, a mortgagee or other creditor may not pursue any debtor, guarantor, or surety for more than the secured obligation, minus the reasonably equivalent value of the property sold.

*Id.* § 13:4801.1 (2006) (emphasis added).

47. Old C.C. art. 3154 (2013) (repealed 2014).

48. Old C.C. art. 3155 (2013) (repealed 2014).

49. Old C.C. art. 3156 (2013) (repealed 2014).

50. Old C.C. art. 3133.1 (2013) (repealed 2014); *see supra* note 16 (quoting old article 3133.1 in full).

51. *See infra* Part IX (concerning a lessor’s encumbering the rental income stream of immovable property).

52. *See infra* Part III.A.

53. *See infra* Part III.B.

54. *See* Gen. Elec. Capital Corp. v. Se. Health Care, 950 F.2d 944, 952–53 (5th Cir. 1991) (“Title 9 of the Louisiana Revised Statutes of 1950 contains the so-called Civil Code Ancillaries, particular statutes that supplement the Code.”); *see also* Guillory Real Estate, Inc. v. Ward, 296 So. 2d 853, 858 (La. Ct. App. 1974) (“[T]he whole of Revised Statutes Title 9 which are known as the Civil Code Ancillaries [sic], and are auxilliary [sic] to the Civil Code.”). When the Louisiana State Law Institute drafted the bill that became Louisiana Revised

to grant a mortgage creditor a real security right in insurance on immovable property.<sup>55</sup> Thus, property insurance is one of the assets New C.C. art. 3142 makes “susceptible of pledge by law.”

*B. A Pledge of Mineral Payments by an Owner of Land or a Holder of a Mineral Servitude*

New C.C. art. 3172 clarifies the law on how to encumber mineral lease bonus payments payable to a landowner or holder of a mineral servitude. This article specifies the only kind of mineral payments susceptible of pledge. These are pledges by “the owner of land or holder of a mineral servitude” on “bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases, as well as other payments that are classified as rent under the Mineral Code.”<sup>56</sup>

The contract of pledge must specifically describe the mineral interests being pledged. As the Comments to this article note, a “mere statement that all leases and rents of the immovable are pledged will not suffice for the pledge to encumber mineral payments.”<sup>57</sup>

Note that New C.C. art. 3172 does not apply to mineral payments owing to those who are neither a landowner nor a holder of a mineral servitude.<sup>58</sup>

#### IV. THE ACCESSORY NATURE OF PLEDGE

It has been a basic civil law principle that security is an accessory obligation.<sup>59</sup> There must always be a principal obligation, even if that principal obligation is non-recourse.<sup>60</sup>

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Statutes section 9, it anticipated that these provisions would be called the “ancillaries.” See Harriet Daggett, *1950 Comments, reprinted in 2B WEST’S LSA REVISED STATUTES 3* (West):

As indicated by the word Ancillaries, Title 9 of the Revised Statutes of 1950 is auxiliary to the Civil Code of Louisiana. All of the sections are correlated with the books and titles of the Code and hence are very easily followed in pursuing a problem basically dependent upon the articles of the Code. . . .

55. See LA. REV. STAT. ANN. § 9:5386 (2007).

56. The Louisiana Mineral Code is Louisiana Revised Statutes sections 31:1–31:217.

57. New C.C. art. 3172 cmt. b (2015).

58. See New C.C. art. 3172 cmt. f (2015) (“Mineral payments owing to a person other than a landowner or holder of a mineral servitude are not susceptible of pledge under this Title.”).

Unlike the laws of some states,<sup>61</sup> in Louisiana the accessory obligation is not severable from the principal obligation. If the principal obligation becomes unenforceable, the accessory obligation is likewise unenforceable unless novation is involved.<sup>62</sup> The converse, however, is not true. The extinguishment of an accessory obligation does not necessarily impact the enforceability of the principal obligation.<sup>63</sup>

The principal obligation that a pledge secures may be for the performance of an act,<sup>64</sup> for a debt of the pledgor, or for the debt of another.<sup>65</sup> When the debt of a third party is secured by a pledge, the 2014 amendments to New C.C. art. 3148 adopt a rule applicable to suretyship<sup>66</sup> and similar to a rule applicable to

59. The 2014 version of article 3136 described pledge as an “auxiliary obligation.” Article 3278 states that mortgages “secure the performance of an obligation,” and article 3282 states that “mortgage is accessory to the obligation it secures.” C.C. arts. 3278, 3282 (2015). *See, e.g.*, *Chapman v. Citizens’ Bank of La.*, 31 La. Ann. 395, 396 (1879):

The mortgage, whether conventional or judicial, is but an accessory right, which can not [sic] exist without the principal right or obligation which it secures; and it is elementary in our law that the mortgage falls with the principal obligation to which it is accessory.

60. *See supra* note 29 (discussing non-recourse loans); Old C.C. art. 3135 (2013) (repealed 2014).

61. *See, e.g.*, *Wiley v. Deutsch Bank Nat’l Trust Co.*, 539 F. App’x 533, 536 (5th Cir. 2013) (citations omitted).

Texas courts have explained on multiple occasions that a note and a deed of trust constitute separate actions. “It is so well settled as not to be controverted that the right to recover a personal judgment for a debt secured by a lien on land and the right to have a foreclosure of lien are severable, and a plaintiff may elect to seek a personal judgment without foreclosing the lien, and even without a waiver of the lien.” Where a debt is “secured by a note, which is, in turn, secured by a lien, the note and lien constitute separate obligations.” The duality of the lien and the note means that the beneficiary of the lien can be different from the holder of the note.

62. *See, e.g.*, *Tex. Bank of Beaumont v. Bozorg*, 457 So. 2d 667, 671 n.4 (La. 1984) (“Pledge is an accessory contract . . . .”); *Auguste v. Renard*, 3 Rob. 389, 390 (La. 1843) (“It is clear that a mortgage can exist only as an accessory to a principal obligation . . . .”). There are special rules on novation. Security for a novated obligation, “with the agreement of the parties,” may be transferred to a new obligation. *See* C.C. art. 1884 (2015).

63. Under Louisiana Civil Code article 1891, release of real security “does not give rise to a presumption of remission of debt.” There are special rules, however, for remission involving sureties. *See* C.C. art. 1892 (2015); *see also* *Rubin, supra* note 42, at 583–86; *RUBIN, A PRÉCIS, supra* note 42, at 45–47.

64. *See* New C.C. art. 3147 (2015).

65. *See* New C.C. art. 3148 (2015).

66. *See* C.C. art. 3046 (2015) (entitled “Defenses available to surety”).

mortgages.<sup>67</sup> Under New C.C. art. 3148, the pledgor “may assert against the pledgee any defense that the obligor could assert except lack of capacity or discharge in bankruptcy of the obligor”<sup>68</sup> or any “other defenses available to a surety.”<sup>69</sup>

#### V. MAKING A PLEDGE EFFECTIVE BETWEEN THE PARTIES AND AS TO THIRD PARTIES

The 2014 amendments made several important changes in the procedure by which pledges become effective between the parties and affect third parties.

##### *A. The Pledge of Corporeal Movables*

In contrast to the lengthy provisions of Old C.C. art. 3158,<sup>70</sup> there are now but three simple rules for the pledge of corporeal movables.

First, all that is needed for a pledge of corporeal movables to be effective between the parties is the pledgor’s delivery of the object to either the pledgee or to “a third person who has agreed to hold the thing for the benefit of the pledgee.”<sup>71</sup> Although no written agreement is required between the parties in such instances,<sup>72</sup> there may need to be some type of agreement that the purpose of delivery is a pledge to secure a principal obligation, for there are other contracts that arise in connection with a delivery of corporeal movables from an owner to another, including loan for use,<sup>73</sup> loan for consumption,<sup>74</sup> and deposit.<sup>75</sup>

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67. See C.C. art. 3295 (2015) (entitled “Mortgage securing another’s obligation”); C.C. art. 3296 (2015) (entitled “Right of mortgagor to raise defenses”).

68. New C.C. art. 3148 (2015).

69. *Id.*

70. Old C.C. art. 3158 (2013) (repealed 2014) (*amended by* Act No. 157, §1, 1900 La. Acts 239–40; Act No. 290, §1, 1952 La. Acts 748–50; Act No. 137, 1989 La. Acts 527, 589–92). This article, as amended through 1989, consisted of 985 words with six parts and ten subparts.

71. New C.C. art. 3149 (2015).

72. Note, however, that as Comment (e) to revised article 3149 cautions, if delivery of the corporeal movable is to someone other than either the pledgee or “a third person who has agreed to hold the thing for the benefit of the pledgee,” then even as between the parties a written agreement is required to make effective the pledge of the corporeal movable. For example, apparently a written agreement would be required even as between the parties if the delivery of the corporeal movable was to someone other than the pledgee who, at the time of the delivery, had not yet agreed to “hold the thing for the benefit of the pledgee.” New C.C. art. 3149 cmt. e (2015).

73. See C.C. arts. 2891–2903 (2015).

Second, making the pledge of corporeal movables effective to third parties requires a written contract in addition to the delivery requirement.<sup>76</sup> There is no requirement that the written contract be notarized, witnessed, or recorded in any public record.

Third, only the pledgee need sign the written contract. The pledgor's acceptance "is presumed"<sup>77</sup> and "may be tacit."<sup>78</sup>

The apparent simplicity of the rules involving corporeal movables masks a deeper issue. As the Comments to New C.C. art. 3149 note, "there may actually be no corporeal movables to which [this] rule would presently apply, for Chapter 9 of the Uniform Commercial Code may cover all corporeal movables without exception."<sup>79</sup> As explained by the Comment this provision "is not intended to apply to a corporeal movable that is susceptible of encumbrance" under UCC 9. Therefore, the rules concerning corporeal movables only apply to those that now or in the future may be outside the scope of UCC 9.<sup>80</sup>

*B. The Pledge of Things that Are Not Corporeal Movables and Do Not Involve a Landlord's Right in a Lease or Rental Income*

Under the 2014 revisions, a written instrument is the only way to pledge items that are not corporeal movables<sup>81</sup> and that do not involve a landlord's rights in a lease or rental income arising from immovable property.<sup>82</sup> The written instrument is required to make such a pledge effective both between the parties<sup>83</sup> and to third parties.<sup>84</sup> No delivery is required, and the former distinction between "incorporeals evidenced in writing" and "incorporeals not evidenced in writing" has not been applicable since July 1, 2001.<sup>85</sup>

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74. See C.C. arts. 2904–2912 (2015).

75. See C.C. arts. 2926–2940 (2015).

76. See New C.C. art. 3153 (2015).

77. New C.C. art. 3150 (2015).

78. *Id.*

79. New C.C. art. 3149 cmt. c (2015).

80. *Id.*

81. New C.C. art. 3149 (2015).

82. The special rules concerning landlords are located in Chapter 2 of the Pledge provisions. See generally New C.C. arts. 3168–3175 (2015).

83. New C.C. art. 3149 (2015).

84. See New C.C. art. 3153 (2015).

85. See Paul M. Hebert & Carlos E. Lazarus, *Louisiana Legislation of 1938*, 1 LA. L. REV. 80, 108–10 (1938) (discussing the meaning and distinction between incorporeals that are "evidenced in writing" and those that are not). The statutes that previously dealt with these concepts were Louisiana Revised

Like the rules applicable to those written instruments required for the pledge of corporeal movables, only the pledgor's signature is required on the written instrument concerning the pledge of things that are not corporeal movables.<sup>86</sup> Unlike the pledge of corporeal movables, however, recordation of the written instrument may be required if the pledge involves a lease of immovable property,<sup>87</sup> the rents from such property,<sup>88</sup> or certain mineral interests or rights.<sup>89</sup>

If what has been pledged is not a lessee's obligation to pay rent but rather some other obligation outside the scope of UCC 9, then the pledge "is effective against third persons only from the time that the obligor has actual knowledge of the pledge or has been given notice of it."<sup>90</sup> Because pledge is a form of real security,<sup>91</sup> and because it is important to ascertain the ranking order among creditors who may have a preference to the proceeds of a sale of real security, creditors may want to consider giving notice to third-party obligors to assure the earliest possible date of the effectiveness of the pledge "against third persons" under New C.C. art. 3155.

Moreover, notice to the third-party obligor is important because, until notice is given in writing directing the third-party obligor to make payments to the pledgee,<sup>92</sup> the third-party obligor may continue to make payments to the pledgor. If the third-party obligor "renders performance"<sup>93</sup> that "extinguishes the pledged obligation"<sup>94</sup> before receiving written notice to render performance to the pledgee, then the pledgee has no right to demand anything of the third-party obligor.

New C.C. art. 3162 sets forth defenses that the third-party obligor may assert. Absent an agreement to the contrary by the third-party obligor,<sup>95</sup> those defenses include "any defense arising out of the transaction that gave rise to the pledged obligation" as

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Statutes sections 9:4321–9:4323, repealed by Act No. 128, §18, 2001 La. Acts 206, 378, effective July 1, 2001.

86. The pledgee's acceptance is presumed. New C.C. art. 3150 (2015).

87. *See infra* Part IX.

88. *Id.*

89. *See supra* Part III.B.

90. New C.C. art. 3155 (2015).

91. New C.C. arts. 3137–3138 (2015).

92. New C.C. art. 3161 (2015).

93. *Id.*

94. *Id.*

95. New C.C. art. 3162 (2015).



well as “any other defense that arises against the pledgor before the obligor has been given written notice of the pledge.”<sup>96</sup>

### *C. Pledging Items Not Owned*

New C.C. art. 3152 continues the concept contained in Old C.C. art. 3144 and akin to the after-acquired-title doctrine.<sup>97</sup> Even if a pledgor does not presently own an asset, a pledge is “established when the thing is acquired by the pledgor and the other requirements for the establishment of the pledge have been satisfied.”<sup>98</sup>

## VI. RIGHTS OF THE PLEDGEE

A pledgee has a number of rights, including the right of retention as against the pledgor, the right to collect fruits, and either the right to exercise a privilege on the proceeds of the sale of the pledged item (if the item can be sold) or the right to performance (if the pledged item consists of performance by a third person).

### *A. The Right of Retention*

Because a “contract of pledge is indivisible, notwithstanding the divisibility of the secured obligations,”<sup>99</sup> a pledgee may refuse to return the pledged item to the pledgor until the extinguishment of the entirety of the obligations that the pledge secures.<sup>100</sup> Therefore, if a pledgor pledges three corporeal movables (not covered by UCC 9), each worth \$100, to secure a \$300 debt, the pledgor may not pay \$200 to the pledgee and demand return of two of the three items.<sup>101</sup> The creditor may retain possession of all the pledged items until the entire debt is completely extinguished. Of course, the pledgor and pledgee may contractually agree otherwise,<sup>102</sup> but absent such an agreement, the pledgor’s remedy to regain the pledged items is to pay off the debt.

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96. *Id.*

97. For a discussion of the after-acquired-title doctrine, see *Lyons v. Fisher*, 847 F.2d 1158 (5th Cir. 1988).

98. New C.C. art. 3152 (2015).

99. New C.C. art. 3157 (2015).

100. New C.C. arts. 3156–3157 (2015).

101. New C.C. art. 3157 (2015).

102. A similar type of contractual agreement exists in the mortgage arena. When a subdivision is developed, a construction mortgage in favor of a lender is usually placed on the entire tract. Because mortgages, like pledges, are indivisible,

It should be noted that the pledgee's right of retention is only against the pledgor. As Comment (b) to New C.C. art. 3156 states, this article "does not alter the longstanding rule that a pledgee may not resist seizure under judicial process, even if instituted by a creditor holding an inferior security right." If judicial seizure occurs, the remedy for the pledgee is to intervene in the lawsuit and assert its real security rights.<sup>103</sup>

### *B. The Pledgee's Rights to Collect Fruits*

New C.C. art. 3159 permits a pledgee to "receive the fruits of the thing pledged," to retain the fruits as security, and to "apply them to the secured obligation, even if not yet due." New C.C. art. 3159 is a one-sentence "simplification"<sup>104</sup> of the pledgee's right to collect fruits, "a common feature of the law of pledge in civilian jurisdictions."<sup>105</sup>

The Comments to New C.C. art. 3159 note that it is based on Old C.C. art. 3168. A brief discussion of the historical importance of the pledgee's right to collect fruits may help in understanding the evolution of the rule.

After the Civil War, when the Civil Code was completely revised in 1870, there were two ways to grant a security interest on immovables. The first was a mortgage—a non-possessory right that gave the creditor only the option of seizing and selling the property upon default.<sup>106</sup> Under the mortgage articles, there was no way for a creditor to have any rights to crops ("fruits") or rents ("civil fruits")<sup>107</sup> prior to default. The concept of a "crop pledge"

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the developer cannot unilaterally demand that the lender release the mortgage on each lot as it is sold. *See* C.C. art. 3280 (2015). Therefore, a developer and its lender typically enter into a contract stipulating a release price on each lot. As the lot is sold, the lender executes an act of partial release pursuant to the contractual provision. *See, e.g.,* Schexnayder v. Capital Riverside Acres, 129 So. 139 (La. 1930) (involving a partial release clause in a mortgage).

103. *See* LA. CODE CIV. PROC. art. 1092 (2015) (discussing the procedural rules of intervention).

104. New C.C. art. 3159 cmt. (2015).

105. *Id.*

106. Louisiana Civil Code article 3278 (1870) provided: "Mortgage is a right granted to the creditor over the property of the debtor for the security of his debt, and gives him the power of having the property seized and sold in default of payment." That concept was carried forward in current Louisiana Civil Code articles 3278 and 3279, amended by Act No. 652, 1991 La. Acts 2068, 2081–97.

107. Louisiana Civil Code article 551 provides in pertinent part: "Civil fruits are revenues derived from a thing by operation of law or by reason of a juridical act, such as *rentals*, interest, and certain corporate distributions." *See* C.C. art.

did not arise until 1874,<sup>108</sup> four years after the enactment of the 1870 Civil Code.<sup>109</sup>

In addition to mortgage, however, the Civil Code drafters allowed creditors to obtain a real security right to collect crops and rents through antichresis, a concept that appears in the *Code Napoléon*.<sup>110</sup> Under Louisiana law, a creditor could hold a mortgage, an antichresis, or both.<sup>111</sup> Because immovable property is capable of generating crops and rents, the antichresis articles specifically allowed the creditor to use “fruits” as they came due, to apply them to both principal and interest as they came due,<sup>112</sup> as well as to use the “fruits” to pay taxes and make repairs on the property.<sup>113</sup>

551 (2015) (emphasis added) (*amended by Act No. 103, 1976 La. Acts 321–430*); *see also Cooper v. Cappel*, 29 La. Ann. 213 (1877) (stating that “rents are civil fruits”).

108. The crop pledge act was originally enacted by Act No. 66, 1874 La. Acts 114–15.

109. For a detailed discussion of the Louisiana crop pledge, see L. David Cromwell, *Secured Interests in Louisiana Crops: The 2010 Legislative Revision*, 71 LA. L. REV. 1176, 1180 (2011).

110. *See Joseph Dainow, 1972 Compiled Edition of the Civil Codes of Louisiana, in 16–17 WEST’S LA. STAT. ANN.* (West 1973) (demonstrating that all of the antichresis articles had direct parallels to the Code Napoleon).

111. The old version Louisiana Civil Code article 3181 provided:

Every provision, which is contained in the present title with respect to the antichresis, can not [*sic*] prejudice the rights which third persons may have on the immovable, given in pledge by way of antichresis, such as a privilege *or mortgage*. The creditor, who is in possession by way of antichresis can not [*sic*] have any right of preference on the other creditors; *but if he has by any other title, some privilege or mortgage lawfully established or preserved thereon, he will come in his rank as any other creditor.*

Old C.C. art. 3181 (2013) (repealed 2014) (emphasis added). *See also Pickersgill v. Brown*, 7 La. Ann. 297, 314 (1852):

A mortgage in favor of one creditor, not put into action by *feri facias* or writ of seizure, may coexist with an antichresis in favor of another creditor. The antichresis operates upon the fruits, which the creditor, holding it, is thereby authorized, by his debtor, to gather. A mortgage affects the land. If the holder of the antichresis gathers the fruits before the mortgage creditor seizes, he can apply them to his debt. Just as the owner himself would have held the gathered fruits free from the mortgage, had he granted no antichresis [*sic*]. The creditor in antichresis, when he has gathered the fruits, owes his account to the owner, and not to the inactive mortgagee.

*Pickersgill*, 7 La. Ann. at 314 (emphasis added).

112. Old C.C. art. 3176 provided, in pertinent part:

The creditor acquires by this contract the right of reaping the fruits or other revenues of the immovables to him given in pledge, *on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt.*

Thus, in 1870, if one wanted to pledge rent income or crops as security for a debt, it could be done as a “pledge,” for that word encompassed *antichresis*.<sup>114</sup> These articles remained unchanged from 1870 until 2014. Under the 2014 amendments, *antichresis* has been abolished.<sup>115</sup>

### *C. Sale of a Pledged Corporeal Movable*

New C.C. art. 3158 permits the pledgor and pledgee of a corporeal movable to enter into a contract allowing the pledgee to “dispose of the thing pledged at public auction or by private sale.”<sup>116</sup> This is in addition to the pledgee’s right to proceed by ordinary process, or executory process if the documents are in the proper form.<sup>117</sup>

New C.C. art. 3158 cautions that, at the public auction or private sale, the pledgee “shall act reasonably in disposing of the thing and shall account to the pledgor for any proceeds of the disposition in excess of the amount needed to satisfy the secured obligation.”<sup>118</sup> The Comments to this article state that the rule is derived from Old C.C. arts. 3165 and 3172.<sup>119</sup> There are cases under the pre-2014 articles in which courts have carefully scrutinized private sales of pledged items and have overturned private sales where the pledgee did not act “fairly and in good faith.”<sup>120</sup>

Old C.C. art. 3176 (2013) (repealed 2014) (emphasis added).

113. Old C.C. art. 3177 (2013) (repealed 2014).

114. The former Civil Code articles used the term *pledge* to encompass both the *pledge of corporeal movables*, which it called “*pawn*” (Old C.C. arts. 3154–3174), and *antichresis* (Old C.C. arts. 3176–3181).

115. New C.C. art. 3141 cmt. d (2015).

116. *See supra* Part V.A (evaluating whether any corporeal movables currently can be pledged). Note that an agreement to dispose of the pledged item at a public or private auction can be entered into as part of the pledge agreement; it does not have to be an agreement entered into after the pledgor is in default. The reason that this can be done in the pledge agreement and is not prohibited by the *Alcolea* case and its progeny is that this is merely an agreement on how to sell the collateral; it is not an agreement to give the pledgee automatic ownership of the collateral upon default. *See supra* note 44; *see generally* *Alcolea v. Smith*, 90 So. 769, 771 (1922).

117. *See* LA. CODE CIV. PROC. art. 2635 (2015).

118. New C.C. art. 3158 (2015).

119. New C.C. art. 3158 cmt. (2015).

120. *See, e.g.,* *Elmer v. Elmer*, 203 So. 2d 391, 394 (La. Ct. App. 1967). The court stated:

In our opinion the ‘sale’ of the stock for the price and in the manner and for the purpose it was made shows a ‘dealing with the property

Pledges who wish to utilize a contractual right to a non-judicial “public auction”<sup>121</sup> or private sale under New C.C. art. 3158, however, need to take the Deficiency Judgment Act<sup>122</sup> into account. This is because—absent a private agreement that meets the requirements of the statutory exceptions to a Deficiency Judgment Act involving consumer or commercial loans<sup>123</sup>—the “public auction” or private sale will result in the creditor not being able to collect any deficiency if the sale proceeds do not satisfy the obligation the pledge secures. The 2014 amendments to the Civil Code do not contain the same rules as UCC 9, which permit a creditor to maintain a deficiency after a private sale held in a “commercially reasonable” manner.<sup>124</sup>

#### VII. THE PERMISSIBLE “NEGATIVE PLEDGE” AND A NEW PROHIBITION

New C.C. art. 3163 changes Louisiana law. It invalidates clauses that restrict the rights of a payment recipient to encumber the payment obligation.<sup>125</sup> Yet, it permits the continued enforcement of the traditional “negative pledge.”<sup>126</sup>

incompatible with the pledgee’s fiduciary character.’ The pretended sale amounted to no more than an appropriation by the pledgee of the subject of the pledge to serve his own personal ends and should be set aside. We note parenthetically that Oscar B. Elmer not only took possession of the pledged stock but also retained and still has in his possession Mr. and Mrs. Joseph C. Elmer’s uncanceled note.

*Id.* at 397.

121. See New C.C. art. 3158 (2015).

122. See LA. REV. STAT. ANN. §§ 13:4106–4108.3 (2006).

123. See LA. REV. STAT. ANN. §§ 13:4108.1–4108.2 (2006).

124. See LA. REV. STAT. ANN. §§ 10:9-607 to 10:9-616 (Supp. 2015). Louisiana Revised Statutes section 10:9-610(b) states:

(b) Commercially reasonable disposition. Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms. A disclaimer or modification of warranties in a secured party’s disposition of collateral is commercially reasonable.

LA. REV. STAT. ANN. § 10:9-610(b) (Supp. 2015). For a more detailed discussion of this issue, see Michael H. Rubin & Jamie Seymour, *Deficiency Judgments: A Louisiana Overview*, 69 LA. L. REV. 785 (2009).

125. New C.C. art. 3163 states:

A clause in a contract restricting the pledge of the rights of a party to payments that are or will become due under the contract, making the pledge or its enforcement a default under the contract, or providing that

A “negative pledge” is a contractual provision that does not grant a creditor any security in an asset but which allows the creditor to demand immediate repayment of a loan if one or more described assets are encumbered by the debtor. “Negative pledges” are routinely used in loan documentation, not only in Louisiana but also throughout the country.<sup>127</sup> It is one of the many non-payment default clauses lenders use to assure that borrowers maintain sufficient assets to repay the loan.<sup>128</sup>

Two examples based on the Comments to New C.C. art. 3163 may be helpful in explaining the distinction that the article draws between permissible “negative pledges” and impermissible restrictions.<sup>129</sup>

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the other party is excused from performance or may terminate the contract on account of the pledge, is without effect.

126. As stated in Comment (d) to New C.C. art. 3163, the amendment to this article is not intended to “invalidate the arrangement commonly known as a ‘negative pledge.’” *See infra* note 129 (quoting article 3163 comment (d) in full).

127. *See, e.g.*, Carl S. Bjerre, *Secured Transactions Inside Out: Negative Pledge Covenants, Property and Perfection*, 84 CORNELL L. REV. 305 (1999); Peter F. Coogan et al., *The Outer Fringes of Article 9: Subordination Agreements, Security Interests in Money and Deposits, Negative Pledge Clauses, and Participation Agreements*, 79 HARV. L. REV. 229 (1965). The United States Supreme Court and federal circuit courts have decided cases that involve or refer to negative pledge provisions in contracts. *See, e.g.*, Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999); Metro. Life Ins. Co. v. RJR Nabisco, Inc., 906 F.2d 884, 889 (2d Cir. 1990); Atlantic Tele–Network Co. v. Pub. Servs. Comm’n of the Virgin Is., 841 F.2d 70 (3d Cir. 1988); Whitfield v. Pennington, 832 F.2d 909 (5th Cir. 1987); *In re Cont’l Res. Corp.*, 799 F.2d 622, 626 (10th Cir. 1986); Chase Manhattan Bank, N.A. v. Gems-by-Gordon, Inc., 649 F.2d 710 (9th Cir. 1981). In addition, at least one Louisiana case has used the phrase “negative pledge” in an opinion. *See McClanahan v. McClanahan*, 868 So. 2d 844, 860 (La. Ct. App. 2004).

128. *See, e.g.*, Robert M. Lloyd, *Financial Covenants in Commercial Loan Documentation: Uses and Limitations*, 58 TENN. L. REV. 335 (1991). One Louisiana federal court has enforced an arrangement similar to a negative pledge provision when a clause in an employment contract prohibited a financial services employee from signing certain suretyship agreements. *See Flanner v. Chase Inv. Servs., Corp.*, No. 3:11-0940, 2013 WL 5533569 (W.D. La. Oct. 4, 2013), *aff’d in part, rev’d in part*, No. 13-31132, 2015 WL 408602 (5th Cir. Feb. 2, 2015).

129. Comment (d) to New C.C. art. 3163 states:

(d) This Article does not invalidate the arrangement commonly known as a “negative pledge” by which an obligor agrees with one of his creditors that he will not encumber one or more of his assets in favor of another creditor. Thus, a lessor may validly agree with one of his creditors that he will not pledge to another creditor his rights to rents arising under a lease of an immovable. The reason that this Article does

Example #1. Landlord owns immovable property leased to Tenant. Landlord enters into a contract with Creditor that does not grant Creditor any pledge of the rental income arising from the property; however, Landlord agrees in the loan documents that it will not pledge rights to the rental income to any person or entity and, if it does so, such an action will violate the loan agreement allowing Creditor to declare a default and immediately demand the full amount of the loan.

This type of clause is a “negative pledge” permitted by New C.C. art. 3163. The reason that this provision is permitted and not prohibited by New C.C. art. 3163 is that the provision is extraneous to the lease, which is the contract under which payments “are or will become due”;<sup>130</sup> further, Creditor is not a party to the lease.

Example #2. The facts are the same as in Example #1, but Tenant has insisted on inserting into the lease a provision prohibiting Landlord from pledging the Tenant’s rents.

New C.C. art. 3163 prohibits the enforcement of this provision because it is contained in the lease, which is the contract under which the payments “are or will become due”;<sup>131</sup> moreover, Tenant is “a party” to the lease.<sup>132</sup>

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not apply to such an agreement is that the contract restricting the pledge is not the contract under which the pledged payments will become due. In the example given, the payments arise under the lease between the lessor and lessee, while the prohibition against pledging those payments arises under the contract between the lessor and his creditor. On the other hand, this Article invalidates a stipulation in a lease whereby the lessor agrees with the lessee that the rents under the lease may not be pledged to the lessor’s creditors. Such a stipulation, if it were permitted under this Article, would in effect make the rents under the lease insusceptible of pledge. There is no similar consequence with a negative pledge, which is a mere contractual covenant that does not have the effect of nullifying a pledge made in violation of its terms.

New C.C. art. 3163 cmt. d (2015).

130. New C.C. art. 3163 (2015).

131. *Id.*

132. New C.C. art. 3163 cmts. b, c (2015). Those Comments state:

(b) Under Article 2653 (Rev. 1993), a right cannot be assigned when the contract from which it arises prohibits the assignment of that right. Interpreting that Article, the Supreme Court has held that there is no public policy precluding a clause prohibiting assignment of rights under an insurance contract. By its terms, however, Article 2653 (Rev. 1993) applies to sales and does not necessarily apply to a mere pledge or the granting of a security interest. Chapter 9 of the Uniform Commercial Code generally voids anti-assignment clauses that prohibit a security

Another distinction between this type of prohibited clause and a permitted “negative pledge” is that the latter does not encumber any property and does not invalidate the pledge; it merely operates to define a non-monetary default allowing a loan to be accelerated.

The public policy distinctions between a permitted “negative pledge” and a clause prohibited by New C.C. art. 3163 are understandable. Allowing enforcement of a contract by which Tenant has sought to prohibit Landlord from pledging rent would relieve Tenant of any rent obligation to anyone other than Landlord and would lessen the value of the rental income stream, which is a primary source of collateral that lenders use to secure loans on commercial properties.<sup>133</sup>

The prohibition in New C.C. art. 3163 applies to more than just agreements between a landlord and tenant. It applies to all payment obligations outside the scope of UCC 9 where an obligee is ostensibly prevented by contract from pledging the obligor’s contractual payments to the obligee.

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interest and specifically provides this rule prevails over Article 2653 (Rev. 1993). Similarly, former R.S. 9:4401(G)(4) provided that any term in a lease was ineffective if it prohibited assignment of rent, prohibited creation of a security right in rent or required the lessee’s consent to the assignment or security right.

(c) This Article applies to all pledges of an obligation of a third person to make payment, including both pledges of movables that are outside the scope of Chapter 9 of the Uniform Commercial Code and pledges of the lessor’s interest in the lease of an immovable and its rents. The effect of this Article is, however, limited to the pledge of payments that are or will become due under a contract. This Article does not apply to the encumbrance of other rights that the pledgor may have under the contract.

133. In commercial transactions, the rental income stream not only is the source of income for the Landlord, it also often forms a primary security sought by creditors who provide financing to landlords. As one law review article states: “Rents are a significant part of the security for loans secured by income-producing properties such as office buildings, shopping centers, and apartments.” Julia Patterson Forrester, *Still Crazy After all These Years: The Absolute Assignment of Rents in Mortgage Loan Transactions*, 59 FLA. L. REV. 487, 487 (2007). Another law review article asserts: “An assignment of leases and rents can serve a number of practical purposes, but its most significant purpose is to provide a mortgage lender with the ability to collect rents that accrue from the mortgaged real property between the mortgagor’s default and a completed foreclosure.” R. Wilson Freyermuth, *Modernizing Security in Rents: the New Uniform Assignment of Rents Act*, 71 MO. L. REV. 1, 5 (2006).



VIII. MODIFICATIONS, TERMINATIONS, AND SUBSTITUTIONS  
OF PLEDGED OBLIGATIONS

New C.C. arts. 3164 through 3167 create a series of related principles governing the effect of an amendment, modification, or substitution of pledged obligations. The source of these rules is found not in prior Civil Code articles but rather in UCC 9 and in the superseded statute<sup>134</sup> governing the assignment of rents.<sup>135</sup>

Under the amended Civil Code articles, if a pledged obligation is modified or terminated, or if a new obligation is substituted, then the “agreement is effective against the pledgee without his consent”<sup>136</sup> if this is done prior to the obligor having been given notice of the pledge. On the other hand, if the obligor of the pledged obligation has been given written notice of the pledge, a subsequent “agreement modifying or extinguishing the pledged obligation is without effect against the pledgee unless made with his consent.”<sup>137</sup> The 2014 amendments also permit the pledgor and pledgee to agree that an event of default occurs if there is a modification, termination, or substitution of the pledged obligation.<sup>138</sup>

Although Part IX of this Ruminator covers leases in more detail, a series of examples involving modification, termination, and substitution of a lease illustrates the rules these amended articles articulate. Each of these examples assumes (unless otherwise stated) that the rights of Landlord (the pledgor) in the lease had been “fully earned.”<sup>139</sup>

Example #3: Landlord and Tenant entered into a written lease dated February 1, 2015; the lease was properly recorded in the parish public records. The lease is for five years and requires monthly rental payments of \$5,000.

Landlord owed Creditor \$1 million on a line-of-credit loan. To secure the loan, Landlord pledged to Creditor the

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134. The pre-2014 version of the assignment of rents statute was Louisiana Revised Statutes section 9:4401 and the rent assignment provisions moved into the Civil Code’s pledge articles. *See* LA. REV. STAT. ANN. § 9:4401 (2009 & Supp. 2015) (*amended by* Act No. 281, 2014 La. Acts). *See infra* Part IX.

135. *See* New C.C. arts. 3165–3167 (2015).

136. New C.C. art. 3164 (2015).

137. *Id.*

138. New C.C. art. 3166 (2015).

139. New C.C. art. 3164 (2015). The reason that the Landlord should have “fully earned” the rights in these examples is because the modification involves past rent that is clearly due and no question has been raised concerning whether Tenant had a defense against Landlord’s right to the past-due rent. For a further discussion on the “fully earned” concept, see *infra* Example 6.

Landlord's rights to collect rent under the lease. The pledge was made March 1, 2015, and recorded in the appropriate public records,<sup>140</sup> but Tenant was not notified of the pledge. It turns out that Tenant had not made any rental payments to Landlord in February or March. On April 1, 2015, Landlord and Tenant modified the lease. In exchange for Landlord forgiving the two missed rental payments, the Lease was shorted by two months.

Under C.C. art. 3164, because Tenant had not been notified of the pledge by either Creditor or Landlord, the modification was effective against Creditor. On the other hand, if Creditor had an agreement with Landlord that any modification of the lease would be an event of default, then under New C.C. art. 3166, Creditor may declare a default in the \$1 million loan the pledge secures.

Example #4. The facts are the same as in Example #3, above, except that rather than modifying the lease on April 1, 2015, Landlord and Tenant agreed in good faith to terminate it because Tenant was suffering cash-flow issues.

In this instance, the result is the same as in Example #3. Because Tenant had not received notice of the pledge prior to the termination, the termination was effective against Creditor. Nonetheless, if Creditor had an agreement with Landlord that termination of the lease would be an event of default, Creditor may declare a default in the \$1 million loan the pledge secures.

Example #5. The facts are the same as in Example #4, above, except that rather than just terminating the lease on April 1, 2015, Landlord and Tenant agreed in good faith to cancel the five-year \$5,000/month lease because not only did Tenant have cash flow difficulties but also because Tenant had found Retailer who agreed to sign a new lease with Landlord on the same space, with the new lease extending for five years for a rent of \$4,800/month (\$200 less per month than Tenant had agreed to pay under its lease). On April 1, 2015, Landlord and Tenant canceled Tenant's lease, and Landlord and Retailer entered into the new lease.

Under New C.C. art. 3164, the substitution of a "new contract"<sup>141</sup> is effective against Creditor because Tenant had not

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140. See *infra* Part IX.B for a discussion of the differences between making a pledge of rents effective against the lessee and effective to third parties.

141. New C.C. art. 3164 does not expressly require that the "new contract" be between the original parties (here Landlord and Tenant). It just requires that

been notified in writing of the Landlord's pledge.<sup>142</sup> The pledge continues on the rent under the lease between Landlord and Retailer. As in the prior examples, Creditor may declare a default in the \$1 million loan if the loan documents prevented substitution of a new lease.

Note, however, that this example may not occur in the real world, because typically a pledge of rents would encompass all the rents arising from the building. In such instances, Retailer's lease would be subject to the pledge by contract regardless of whether the termination of Tenant's lease was effective against Creditor.

Example #6. The facts are the same as in Examples #3 and #4, involving a modification or termination on April 1, 2015, of the February 1, 2015 lease between Landlord and Tenant. In this Example #6, however, Creditor notified Tenant in writing on March 25, 2015, of the pledge to Creditor. Thus, Tenant had notice of the pledge prior to the April 1, 2015 modification or termination dealt with in the prior examples.

Under New C.C. art. 3169, the "pledge of the lessor's rights in the lease of an immovable and its rents" is "effective as to the lessee from the time that he is given written notice of the pledge."<sup>143</sup> Because the Landlord's rights had been "fully earned"<sup>144</sup> and because Tenant had received written notice, New C.C. art. 3164 requires that unless Creditor consents, the modification or termination "is without effect" against Creditor. Because Creditor had not been asked about the modification or termination and had not consented, Creditor may seek to require Tenant to pay Creditor \$5,000/month for the full five years under the original lease provisions.<sup>145</sup>

The rule of New C.C. art. 3164 applies only if both written notice to Tenant had occurred and the lease obligations had "been

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"[t]he parties to a contract from which a pledged obligation arises may agree to . . . substitute a new contract." An example of a "new contract" between only Landlord and Tenant would be where, in exchange for forgiveness of past-due rent, Landlord and Tenant agree that Tenant will move to new, smaller space in Landlord's building.

142. New C.C. art. 3169 (2015).

143. *Id.*

144. New C.C. art. 3164 (2015). *See also supra* note 139 (discussing why Landlord's rights are "fully earned" in cases involving past-due rent).

145. The only right Creditor has in this instance is to seek to collect the lease payments. *See infra* Part IX.E. Under New C.C. art. 3174, Creditor may not invoke judicial process "to cause the rights of the lessor to be sold."

fully earned by the pledgor's performance." It is anticipated that there may be litigation requiring interpretation of the phrase "fully earned." The Comments to New C.C. art. 3164 appear to invite courts to consider by analogy the jurisprudence dealing with similar provisions of UCC 9.<sup>146</sup>

To illustrate the issues that may arise, assume in this Example #6 that Creditor claims that the modification or termination had no effect because Landlord was not in default in his obligations under the lease with Tenant. On the other hand, assume Tenant asserts as a defense that Landlord's rights were not "fully earned" because the heating and cooling equipment had failed on March 23, 2015 (two days before the notice from Creditor to Tenant was given), because the equipment had not worked properly since then, and because Landlord had failed to remedy the situation despite repeated requests from Tenant. Tenant's assertion is that, because Landlord's performance under its lease obligations was in default and Landlord's rights were "not fully earned," the written notice Creditor had given came too late under New C.C. art. 3164.

Tenant may not seek to have Creditor correct the heating and cooling deficiencies because, under New C.C. art. 3167, in the absence of Creditor's "assumption" of these obligations in a contract with Landlord, "the existence of a pledge does not impose upon the pledgee [here, Creditor] liability for the pledgor's acts or omissions, nor does it bind the pledgee to perform the pledgor's obligations."

Assume further that Creditor seeks to counter Tenant's assertion concerning Landlord's failure to fully perform by pointing to a

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146. New C.C. art. 3164, Comment (b), notes that its rules are derived from provisions of Louisiana Revised Statutes sections 10:9-405(a) and 10:9-405(b). These provisions read:

§9-405. Modification of assigned contract

(a) Effect of modification on assignee. A modification of or substitution for an assigned contract is effective against an assignee if made in good faith. The assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that the modification or substitution is a breach of contract by the assignor. This Subsection is subject to Subsections (b) through (d).

(b) Applicability of Subsection (a). Subsection (a) applies to the extent that:

(1) the right to payment or a part thereof under an assigned contract has not been fully earned by performance; or

(2) the right to payment or a part thereof has been fully earned by performance and the account debtor has not received notification of the assignment under R.S. 10:9-406(a).

*See, e.g., In Re Sycom Enter., L.P.*, 310 B.R. 669 (Bankr. D.N.J. 2004) (analyzing UCC art. 9-405); *cf.* 9B WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES § 9-405 (2006 & Supp. 2012).

provision in the lease purporting to obligate Tenant to pay rent every month, regardless of Landlord's failure to maintain the systems that provide electricity, heating, and cooling to the premises.<sup>147</sup>

As can be seen, this may become an area where Louisiana courts will have to adjudicate what the phrase "fully earned" means.<sup>148</sup>

Example #7. The facts are the same as in Example #6 with one alteration. Creditor gave written notice of the pledge to Tenant on March 25, 2015, but the failure of the heating and cooling equipment occurred one day later, on March 26, 2015.

Now, Creditor may claim that because, at the time of the notice, the heating and cooling equipment was working properly, Landlord's rights had been "fully earned" for past-due rent at the time notice to Tenant was given. Thus, Creditor may argue that the modification or termination was not enforceable against Creditor.<sup>149</sup>

#### IX. THE PLEDGE OF A LESSOR'S RIGHTS IN A LEASE OF AN IMMOVABLE AND ITS RENTS

In connection with leases, the 2014 pledge amendments apply only to the lease of immovables. The Louisiana Lease of Movables Act deals with movables.<sup>150</sup> Movables that are leased can be encumbered by a security interest under UCC 9,<sup>151</sup> and the rents

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147. Whether such a clause would be enforceable is beyond the scope of this Ruminatiion. For more discussion of this issue, see Frana M. Powell, *Unconscionability in the Lease of Commercial Real Estate*, 35 REAL PROP. PROB. & TR. J. 197 (2000), and Sidney G. Saltz, *Allocation of Insurable Risks in Commercial Leases*, 37 REAL PROP. PROB. & TR. J. 479 (2002).

148. It is beyond the scope of this Ruminatiion to address whether a Landlord has "fully earned" the right to future rents such that an amendment to a lease, reducing *future* rents, would be within the scope of these new articles. This is in contrast to the examples above, where the term of the lease is being reduced or cancelled because of Tenant's non-payment of past-due rent.

149. One can envision further litigation on whether the Tenant has a valid claim that it was Landlord's failure to properly maintain the heating and cooling equipment prior to the March 25, 2014, notice that led to the equipment failure, thus bolstering Tenant's argument that Landlord's rights to collect rent had not been "fully earned."

150. See LA. REV. STAT. ANN. §§ 9:3301–9:3342 (2009 & Supp. 2015).

151. Corporeal movables that are being leased typically fit UCC 9's definition of "equipment" or "consumer goods." See LA. REV. STAT. ANN. § 10:9-102(a)(23), (33) (2002 & Supp. 2015); see also *id.* § 9:3342(B) (2009) (dealing with the relationship between the Lease of Movables Act and UCC 9).

from such movables can be subjected to a UCC 9 security interest.<sup>152</sup>

Prior to the 2014 amendments, a creditor who wished to obtain security on a lease of an immovable or its rents had to use the provisions of former Louisiana Revised Statutes section 9:4401, a complex and much-amended provision<sup>153</sup> entitled “conditional or collateral assignment of leases and rents.” These statutory rules have been moved to the Civil Code and are now dealt with by New C.C. arts. 3168–3175 as well as by amendments to the registry articles of the Civil Code.<sup>154</sup>

The 2014 amendments apply not only to the pledge of rents by a lessor, but also to the pledge of rents by a sublessor.<sup>155</sup> Although the 2014 amendments track the former provisions of section 9:4401 in a number of respects, they change the prior law by requiring all pledges of leases of immovables and of the rentals of such leases to be recorded in the mortgage records.<sup>156</sup> The amendments change the law to permit an inferior pledgee to collect rent without accounting to a superior pledgee.<sup>157</sup> The amendments prohibit a judicial sale of a pledged lease or of pledged rents.<sup>158</sup>

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152. *See id.* § 10:9-102(a)(2) (2002 & Supp. 2015) (stating that “‘Account,’ . . . means a *right to payment* of a monetary obligation, whether or not earned by performance, (i) *for property that has been or is to be sold, leased, licensed, assigned*” (emphasis added)).

153. Revised Statutes section 9:4401 (added by Act No. 321, § 1, 1980 La. Acts 824–25, and amended by Act No. 592, § 5, 1985 La. Acts 1070–90, effective July 13, 1985; Act No. 130, § 1, 1987 La. Acts 423, 424–25, effective June 18, 1987; Act No. 137, § 4, 1989 La. Acts 527, 532–49, effective Sept. 1, 1989; Act No. 1079, § 3, 1990 La. Acts 2735, 2738–50, effective Sept. 1, 1990; Act No. 1087, § 3, 1995 La. Acts 2941, 2943–54; Act No. 281, § 2, 2014 La. Acts, effective Jan. 1, 2015).

154. *See* New C.C. arts. 3346, 3354–3368 (2015). A discussion of the transitional rules concerning the pre-2014 law and the post-2014 amendments are beyond the scope of this Ruminations. The transitional rules are contained in the newly enacted Louisiana Revised Statutes section 9:4403.

155. LA. REV. STAT. ANN. § 9:4401 (2009 & Supp. 2015). As Comment (b) to this provision states:

(b) This Section expressly provides that a pledge may be created by either a lessor or a sublessor. In the case of a pledge created by a sublessor, the pledge encumbers his rights under the sublease, but not his rights under the underlying lease from his own lessor. The rights of a lessee under a lease, as well as the rights of a sublessee under a sublease, are not susceptible of pledge but instead are encumbered by a mortgage.

*Id.* § 9:4401 cmt. b (2009 & Supp. 2015) (citations omitted).

156. New C.C. art. 3346 (2015).

157. New C.C. art. 3173 (2015).

158. New C.C. art. 3174 (2015). The Comments to New C.C. art. 3174 state that this article is “new and has no counterpart in either the Louisiana Civil Code

The amendments also clarify the law concerning a pledge of items classified as “rent” under the Louisiana Mineral Code.<sup>159</sup>

*A. What Can Be Pledged in a Lease of Immovables*

The landlord of immovables may mortgage the immovable.<sup>160</sup> The landlord may grant a lease of an immovable and obtain by operation of law a lessor’s privilege<sup>161</sup> on the property of tenants and subtenants on the leased premises,<sup>162</sup> as well as a limited right to pursue these items when they have been removed from the premises.<sup>163</sup> The tenant may mortgage the lease.<sup>164</sup>

If a creditor, however, wants to obtain a security interest in the landlord’s lease or in the rental stream, the only way to do so is through a pledge.

New C.C. art. 3168 permits a landlord to pledge the entirety of a single lease, all the leases on a specified immovable, all the rents under one or more leases, or just some of the rents under one or more leases. As the Comments to this article note, the “scope of what is pledged is a matter of contract between the parties.”<sup>165</sup>

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of 1870 or former R.S. 9:4401.” New C.C. art. 3174 cmt. a (2015). The 2014 amendments did not continue the language of former R.S. 9:4401(a) that a real security right in rents becomes “*absolute* upon assignor’s default.” LA. REV. STAT. ANN. § 9:4401 (added by Act No. 321, § 1, 1980 La. Acts 824) (repealed 2014) (emphasis added).

159. See discussion *supra* Part III.B.

160. Civil Code articles 3278–3298 govern conventional mortgages on immovables.

161. Louisiana Civil Code article 2707 defines a lessor’s privilege. For more discussion on this, see Michael H. Rubin and S. Jess Sperry, *Lease Financing in Louisiana*, 59 LA. L. REV. 846, 855–61 (1999).

162. Louisiana Civil Code article 2708 governs the scope of lessor’s privilege over property of subtenants and states that the “privilege extends to the movables of the sublessee but only to the extent that the sublessee is indebted to his sublessor at the time the lessor exercises his right.”

163. C.C. art. 2710 (2015).

164. Louisiana Civil Code article 3286 allows a lessee to mortgage his “rights in a lease of an immovable with his rights in the buildings and other constructions on the immovable.” This is sometimes referred to by the common-law term “leasehold mortgage.” See *Carriere v. Bank of La.*, 702 So. 2d 648, 665–67 (La. 1996); Rubin & Sperry, *supra* note 161, at 862–64 (discussing the origin of the term “leasehold”); see also LA. REV. STAT. ANN. § 9:4401 cmt. b (2009 & Supp. 2015) (quoted in *supra* note 155).

165. New C.C. art. 3168 cmt. b (2015).

*B. How the Pledge Is Made Effective Between the Parties, to the Tenant, and to Third Parties*

A pledge of a lease of an immovable or its rents is made effective only by execution of a written contract between the pledgor and pledgee.<sup>166</sup> An act of pledge may be a separate document or it may be contained in a mortgage.<sup>167</sup> An act of pledge does not need to be witnessed or notarized, and the pledgee does not have to sign it.<sup>168</sup> It should be noted, however, that if an act of pledge is not in authentic form, it is not “self-proving.”<sup>169</sup> Many attorneys prefer to use authentic acts<sup>170</sup> for documents that are to be recorded in the public records.

The written contract “must state precisely the nature and situation of the immovable and must state the amount of the secured obligation or the maximum amount of secured obligations that may be outstanding from time to time.”<sup>171</sup> The Comments to New C.C. art. 3168 note that description requirements are “identical” to those required for describing immovables subject to a mortgage.<sup>172</sup>

A pledge of a lease or its rents is effective against third parties only if it is recorded in the mortgage records of the parish where the immovable is located.<sup>173</sup> This rule applies regardless of whether the pledge is contained in a mortgage or a separate act of

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166. New C.C. art. 3149 (2015).

167. New C.C. art. 3170 (2015).

168. See discussion *supra* Part V.B.

169. An act that is self-proving can be introduced into evidence without proof that parties whose signatures appear on the document in fact are the persons they purport to be. See, e.g., Succession of Ruppert, 602 So. 2d 157, 159 (La. Ct. App. 1992) (stating that an authentic act is “self-proving under LSA-C.C. art. 1835”).

170. The requirements of an authentic act are set forth in Louisiana Civil Code article 1833.

171. New C.C. art. 3168 (2015).

172. New C.C. art. 3168 cmt. c (2015). The description requirements for mortgages are contained in Civil Code article 3288. C.C. art. 3288 (2015).

173. New C.C. arts. 3346, 3169–3170 (2015). Note, however, that Act 281 did not alter Louisiana Civil Code article 3347, which provides: “The effect of recordation arises when an instrument is filed with the recorder and is unaffected by subsequent errors or omissions of the recorder. An instrument is filed with a recorder when he accepts it for recordation in his office.” The Louisiana Supreme Court in *Wede v. Niche Marketing USA, LLC*, 52 So. 3d 60 (La. 2010), dealt with the distinction between filing and recordation in connection with a judicial mortgage. It appears possible that, under article 3347, if the pledge is filed and is timely recorded, the effect of recordation may affect third parties from the time of the filing. See, e.g., *Kinnebrew v. Tri-Con Prod. Corp.*, 154 So. 2d 433 (La. 1963); *Opelousas Fin. Co. v. Reddell*, 119 So. 770 (La. 1929) (illustrating the approach of older cases on recordation and filing).



pledge.<sup>174</sup> This is a change from the pre-2014-amendment law, where acts of “assignment” of leases were recorded only in the conveyance records, but acts of assignment of leases contained in a mortgage were recorded only in the mortgage records.<sup>175</sup> The 2014 amendments continue to recognize that a pledge of leases may be contained in a mortgage.<sup>176</sup>

Regardless of whether or when the pledge is made effective against third parties, however, a lessee is affected only from the point of time it receives a written notice of the pledge.<sup>177</sup>

### *C. The Length of the Effect on Third Parties of a Pledge of Leases or Rents*

The 2014 amendments incorporated the rules of a pledge of leases or rents into the rules concerning how long mortgages affect third parties.<sup>178</sup> This is appropriate, considering the fact that such pledges are often contained in mortgages<sup>179</sup> and because all such pledges are now recorded in the mortgage records.<sup>180</sup>

If the act of pledge reflects that the obligation it secures is due in less than nine years, or if it cannot be ascertained from the act of pledge when the obligation it secures is due, the effect of recordation continues for ten years from the date of the document.<sup>181</sup> If the act of pledge reflects that the obligation it secures is due nine years or more from the date of the document, the effect of recordation is six years from the maturity date of the obligation.<sup>182</sup> Acts of timely reinscription preserve the original effective date for an additional ten years from the date of reinscription.<sup>183</sup>

Example #8. Landlord and Tenant entered into a lease of an immovable on June 1, 2015. On June 15, 2015, Landlord and Creditor entered into a loan agreement; Landlord signed a negotiable note payable in three annual installments, the first installment due July 15, 2016, and the last installment due July 15, 2018. On June 15, 2015, Landlord and Creditor

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174. New C.C. arts. 3346, 3169–3170 (2015).

175. See LA. REV. STAT. ANN. § 9:4401(A)(1) (added by Act No. 321, § 1, 1980 La. Acts 824) (repealed 2014).

176. New C.C. art. 3170 (2015).

177. New C.C. art. 3169 (2015). See *supra* Part VIII (Example #7).

178. See New C.C. arts. 3357–3365 (2015).

179. See, e.g., C.C. art. 3170 (2015).

180. See discussion *supra* Part IX.B.

181. New C.C. arts. 3357–3358 (2015).

182. *Id.*

183. New C.C. art. 3364 (2015).

also entered into a written act of pledge of the lease and all rents under the lease. The act of pledge contained all the necessary terms and conditions<sup>184</sup> and described the note it secured as well as the payment provisions of the note. Creditor, however, did not record the act of pledge in the appropriate parish mortgage records until August 1, 2015.

The result is that the pledge did not begin to affect third parties until it was recorded on August 1, 2015.<sup>185</sup> It will cease affecting third parties on June 15, 2025. The reason is because the note is due in less than nine years from its date,<sup>186</sup> and third parties are affected for ten years “from the date” of the contract of pledge,<sup>187</sup> not ten years from the date of the lease, and not ten years from the date of recordation of the act of pledge.

Even though the effect of recordation of the pledge continues until June 15, 2025, the note itself may prescribe in 2023 (five years from its due date)<sup>188</sup> unless acknowledged or unless prescription has been interrupted. A pledge may interrupt prescription under the “constant acknowledgment rule.”<sup>189</sup>

What third parties can and cannot ascertain from the public records is essentially the same as the rule applicable to mortgages. Third parties cannot ascertain from the public records how much, if anything, has been paid on the note the pledge secures and cannot ascertain whether prescription has been interrupted<sup>190</sup> or whether the note has prescribed because of non-payment. Thus, third parties examining the public records must assume the worst-case scenario, which is that the note has not prescribed.<sup>191</sup> Under the Louisiana public records doctrine, third parties are entitled to rely upon the absence of a timely reinscription of the pledge.<sup>192</sup>

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184. See New C.C. art. 3168 (2015).

185. See New C.C. art. 3169 (2015). *But see supra* note 173 (concerning the effect on third persons of filing of the act of pledge if it is later timely recorded).

186. See New C.C. arts. 3357–3358 (2015).

187. New C.C. art. 3357 (2015).

188. C.C. art. 3498 (2015). *But see infra* note 194 (discussing installment notes).

189. See discussion *infra* Part XI.

190. Interruption could occur by payment, by acknowledgment, or by the constant acknowledgement rule. See *infra* Part XI.

191. For a series of examples of these rules involving mortgages and a further explanation, see RUBIN, A PRÉCIS, *supra* note 42, at 20.2.

192. As the Louisiana Supreme Court stated in *London Towne Condominium Homeowner's Ass'n v. London Towne Co.*, 939 So. 2d 1227, 1232–33 (La. 2006), “the law of registry does not create rights in a positive sense, but rather has the negative effect of denying the effectiveness of certain rights unless they are recorded. . . . [T]he public records doctrine allows the parties to rely on the absence of documents in the public records . . . .” (quoting *Phillips v. Parker*,

Example #9. The facts are the same as in Example #8, except that the June 15, 2015, note is due in eleven years, not three years, with the last installment due July 15, 2026, and the act of pledge recites these provisions of the note.

As in Example #8, the act of pledge will affect third parties from the date it was recorded in the parish mortgage records (August 1, 2015)<sup>193</sup> but now, under New C.C. art. 3358, the pledge will continue to affect third parties until July 15, 2032, “six years after the latest maturity date described in the instrument.”<sup>194</sup>

Example #10. The facts are the same as in Example #9, except that on December 1, 2031, Creditor reinscribes the act of pledge in the parish mortgage records.

Assuming that the act of reinscription contains the information required by New C.C. art. 3362,<sup>195</sup> the reinscription is timely because it is made prior to July 15, 2032,<sup>196</sup> and the effects of recordation will continue until December 1, 2041, ten years from the date of the timely reinscription.<sup>197</sup>

#### *D. What Happens When a Landlord Pledges the Same Lease or Rents to Multiple Creditors*

The 2014 amendments recognize that a landlord of immovables may pledge the same lease or rents to multiple creditors. New C.C. art. 3173 deals with the rights of superior and inferior pledgees.

New C.C. art. 3173 “changes the law by generally permitting an inferior pledgee to collect rent from the lessee without a duty to

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483 So. 2d 972 (La. 1986); *Parish Nat’l Bank v. Wilks*, 923 So. 2d 8, 15 (La. Ct. App. 2005)).

193. See *supra* note 173 (discussing filing and recordation).

194. New C.C. art. 3358 (2015). Although prescription might run on each installment of a note that is not secured by a pledge, the “constant acknowledgment” rule may keep the entire note and its unpaid installments from prescribing. Compare the “constant acknowledgement” rule, discussed *infra* Part XI, with cases involving prescription of installments on a note. See, e.g., *Johnston v. Johnston*, 568 So. 2d 567, 568 (La. Ct. App. 1990); *Home Fin. Corp. v. Fisher*, 361 So. 2d 463, 465 (La. Ct. App. 1978).

195. Note that under New C.C. art. 3363, the method of reinscription under New C.C. art. 3362 is the only acceptable method of reinscription.

196. New C.C. art. 3358 (2015).

197. New C.C. art. 3364 (2015).

account to a superior pledgee for the rent collected.”<sup>198</sup> Analogous rules are found in UCC 9.<sup>199</sup>

Two examples may help explain some of these new pledge rules.<sup>200</sup>

Example #11. The facts are similar to those in Example #8, above: June 1, 2015, lease of immovable between Landlord and Tenant, and June 15, 2015, loan agreement between Landlord and Creditor and act of pledge.

Unlike Example #8, however, the act of pledge between Landlord and Creditor was recorded in the appropriate parish mortgage records on June 15, 2015. A few weeks later, on July 1, 2015, Landlord and Bank, a new lender, entered into another act of pledge of the same lease, and Bank recorded the act of pledge on that same date in the parish mortgage records. Bank is an inferior pledgee because the pledge to it was recorded after the recordation of the pledge to Creditor.

In this Example #11, Creditor, the superior pledgee, did not notify Tenant of its June 15, 2015, act of pledge. On July 2, 2015, however, the inferior pledgee, Bank, notified Tenant of its act of pledge. Pursuant to the notification Tenant received, Tenant sent the monthly payments for August, September, and October 2015 to Bank as each payment became due.

It is not until October 2015 that Creditor became aware of Bank’s act of pledge and of Tenant’s payments to Bank.

Under New C.C. art. 3173, Bank “is not bound to account” to Creditor for the rent collected because Creditor had not notified Tenant of Creditor’s pledge and directed Tenant to make payment to Creditor. Thus, Bank is not liable to Creditor to repay any of the amounts Bank collected from Tenant. This is a change in the prior law.<sup>201</sup>

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198. New C.C. art. 3173 cmt. a (2015).

199. New C.C. art. 3173 cmt. c (2015).

200. These examples do not cover the provisions of New C.C. art. 3173 dealing with “written directions given to the lessee to pay rent to the holder of the superior pledge” or the obligations of an inferior pledgee who collects rent after the extinguishment of all secured obligations owed to it.

201. New C.C. art. 3173, Comment (b), states in pertinent part:

(b) Former R.S. 9:4401(G)(2) provided that, if a pledgee had not notified the lessee to make direct payment to him, the lessee was

Moreover, if Bank had taken the rental payments and put them in a deposit account, Creditor's claims to such amounts would be trumped by Bank's rights, because in this example Bank had no duty to account to Creditor for the monthly rent collected as it accrued.<sup>202</sup>

Example #12. The facts are the same as in Example #11, above, except that, on July 2, 2015, when inferior pledgee Bank notified Tenant of its act of pledge, Bank convinced Tenant to pre-pay the rent for August, September, and October 2015.

Pursuant to New C.C. art. 3173, while Bank may keep the August 2015 rent, Bank must account to Creditor (the superior pledgee) for rent Bank "collects more than one month before it is due." Thus, Bank would be liable to Creditor for the pre-paid rent for September and October.<sup>203</sup>

#### *E. What a Pledgee of Rents or Leases May Do*

A pledgee of leases or rents may give written notice to the tenant to pay directly to the pledgee.<sup>204</sup> There is no statutory prohibition preventing the pledgee doing this even before the pledgor is in default on the obligation the pledge secures, and New C.C. art. 3160 expressly authorizes such actions. Often, creditors like to receive and control the rent stream in what is sometimes

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exonerated of liability for rent paid to the lessor or a subsequent assignee; however, the person to whom payment was remitted was nevertheless liable to the pledgee for the sums received. Thus, an inferior pledgee who collected rent was exposed to liability to a superior pledgee for any rent he might collect. This Article now permits the inferior pledgee to retain rent he collects as it falls due, unless a superior pledgee has notified the lessee to make payment to him and the inferior pledgee has knowledge of these instructions.

202. See LA. REV. STAT. ANN. § 9:4402(C) (Supp. 2015):

Notwithstanding Subsection B of this Section, the right of a pledgee to collections of rent deposited into a deposit account maintained by him or for his benefit is superior to the right of another pledgee to those collections, unless the pledgee who collected the rent has an obligation to account for the collections to the other pledgee under Civil Code Article 3173.

203. New C.C. art. 3173 cmt. d (2015) ("Without a rule limiting the ability of an inferior pledgee to collect future rents, a superior pledgee might have discovered that all future rents for the balance of the term of the lease had been paid in advance to an inferior pledgee.").

204. New C.C. arts. 3161, 3169 (2015).

referred to as a “lock-box” arrangement,<sup>205</sup> although if the “lock-box” consists of a deposit account with a financial institution, there may be others with claims on the account.<sup>206</sup>

Merely recording an act of pledge of leases or rents in the mortgage records, however, does not obligate the tenant to do anything unless and until the tenant receives a written notice from the pledgee directing the tenant to render performance to the pledgee.

New C.C. art. 3174 prevents a pledgee from filing suit to sell the pledged lease or rents. It prevents a judicial sale of the pledged lease or rents. It prohibits a pledgor and pledgee from agreeing to a judicial sale.

The only things the pledgee can do under the 2014 amendments are to (a) give notice to the tenant to make the rental payments to the pledgee and, if tenant fails to do so, seize the rents in the hands of the lessee;<sup>207</sup> (b) pursue identifiable cash proceeds

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205. For cases involving a creditor’s lockbox concerning rents, see *In re Castleton Plaza, LP*, 707 F.3d 821, 822 (7th Cir. 2013) (“The note carries interest of 8.37% and has several features, such as lockboxes for tenants’ rents and approval rights for major leases, designed for additional security.”). See also *Am. Bank & Trust Co. v. Bond Int’l Ltd.*, 464 F. Supp. 2d 1123, 1125 (N.D. Okla. 2006) (“As part of the agreement, Bond agreed that proceeds from the identified leases would be deposited in a bank account at American, which the parties refer to as the ‘lockbox.’ This ensured that American could access funds for repayment of the loan and keep track of the overall condition of Bond BVI, Bond US, and Bond UK.”); 301 E. 69th St. Corp. v. Bassler, 461 N.Y.S.2d 932, 932 (Civ. Ct. 1982) (articulating witness testimony that “he works for the managing agent; that he maintains lease files; that he does not see rent payments because they are mailed to a lock box; that only if there is a problem does the rent payment go to his desk”). Cf. Jeffrey A. Usow, *The Return of Seller Financing for Commercial Real Estate?*, 24 PROB. & PROP. 51, 53 (2010) (stating that a lender “also may want to insist that all operating revenues be placed in a lockbox subject to a deposit control agreement to give it a security interest in the rents and profits from the property”); Donald R. Cassling, *Banking Briefs*, 120 BANKING L.J. 537, 554 (2003).

206. See LA. REV. STAT. ANN. § 9:4402(B) (Supp. 2015).

207. New C.C. art. 3174 cmts. a–b (2015) (citations omitted) provides as follows:

(a) This Article, which is new and has no counterpart in either the Louisiana Civil Code of 1870 or former R.S. 9:4401, highlights a fundamental distinction between the enforcement of the pledge of a movable and the enforcement of the pledge of the lessor’s rights under the lease of an immovable. In the case of the pledge of a movable, Article 3158 (Rev. 2014) permits an extra-judicial disposition by the pledgee, if authorized in the contract of pledge, as well as seizure and sale by judicial process of the thing pledged. This Article precludes the pledgee of the lessor’s rights in the lease of an immovable and its rents from proceeding with either kind of disposition. Allowing the pledgee to sell the lessor’s rights under the lease, whether by private or judicial

of rent;<sup>208</sup> and (c) demand an accounting from an inferior pledgee who either has collected pre-paid rent or who has collected rents with the knowledge that this payment “violated written directions given to the lessee to pay rent to the holder of the superior pledge.”<sup>209</sup>

*F. Right of Pursuit of Identifiable Cash Proceeds of Rent*

The 2014 amendments continue the prior rule permitting a pledgee of rent of an immovable to pursue the identifiable cash proceeds of the rental payments in the absence of an agreement to the contrary between pledgor and pledgee.<sup>210</sup> The term “identifiable cash proceeds of rent”<sup>211</sup> is more limited than the prior provisions of old Louisiana Revised Statutes section 9:4401(F);<sup>212</sup> however, the phrase does encompass “money, checks, deposit accounts, or the like.”<sup>213</sup>

If there are multiple pledges of rent, a superior pledgee may pursue the identifiable cash proceeds that the inferior pledgee has placed into its deposit account if the inferior pledgee has “an obligation to account for the collections” under New C.C. art. 3173.<sup>214</sup>

sale, would, in a sense, effect an undesirable dismemberment of ownership of the immovable.

(b) The pledge of lessor’s rights in the lease of an immovable and its rents is enforced only by collection of rents and enforcement of other obligations of the lessee under the lease. The pledgee is given the right to collect rents by Article 3160 (Rev. 2014) and, to effectuate this right, is permitted by Article 3161 (Rev. 2014) to direct the lessee to pay rent to him. If necessary, the pledgee may enforce his rights by bringing suit directly against the lessee. He may also employ remedies available under the Code of Civil Procedure to seize the rents in the hands of the lessee, but he cannot cause the lessor’s rights under the lease to be sold by judicial process.

208. See LA. REV. STAT. ANN. § 9:4402 (2015); see also *supra* Part IX.F.

209. New C.C. art. 3173 (2015).

210. LA. REV. STAT. ANN. § 9:4402 (Supp. 2015).

211. *Id.*

212. *Id.* § 9:4402 cmt. (a) (emphasis supplied).

Former R.S. 9:4401(F) provided that the assignee’s interest in leases and rents continued in any identifiable proceeds, including collections. Subsection A of this section *limits the reach of the pledge of a lessor’s interest* in the rents of an immovable to identifiable cash proceeds, such as money, checks, deposit accounts, or the like.

*Id.*

213. *Id.* § 9:4402(A).

214. *Id.* § 9:4402(C) (quoted in full at *supra* note 202). See also *supra* Part IX.D (concerning multiple pledges).

New Louisiana Revised Statutes section 9:4402(b) also clarifies the respective rights of the pledgee and the depository institution into which the identifiable proceeds are placed.<sup>215</sup>

#### X. CLARIFICATION OF RULES INVOLVING JUDICIAL MORTGAGES

Act 281 of 2014 adds a Comment to Civil Code article 3359 without altering the text of this article, which deals with the duration of a judicial mortgage.<sup>216</sup> Act 281 also amends Civil Code article 3368 concerning cancellation of a prescribed judicial mortgage.

##### A. *The Comments Added to C.C. arts. 3359 and 3364*

When C.C. arts. 3359 and 3364 were added in 2005,<sup>217</sup> there were no corresponding Louisiana State Law Institute Comments; however, this was because the 2005 revisions were “part of a larger legislative reworking of the law of registry,”<sup>218</sup> and the Louisiana Supreme Court has looked to the Louisiana State Law Institute Comments from 1992, when the registry articles previously had been reworked,<sup>219</sup> in connection with interpreting the 2005 revisions.<sup>220</sup>

C.C. art. 3359 provides that the “effect of recordation of a judgment creating a judicial mortgage ceases ten years after the

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215. *Id.* § 9:4402 cmt. (B):

When proceeds of rent are deposited into a deposit account maintained with a financial institution, Subsection B provides that the rights of the pledgee are subject to the rights of the depository bank, the rights of a secured party who holds a security interest perfected by control of the deposit account, and the rights of a transferee of funds from the deposit account who does not act in collusion with the pledgor in violating the rights of the pledgee. Except as otherwise provided in Subsection C, the rights of a pledgee to proceeds held in the deposit account are also subject to the rights of another pledgee holding a superior pledge of the rent. Thus, if a lessor who has granted pledges in favor of two or more pledgees deposits rent he has collected into a deposit account, the ranking of the rights of the competing pledgees to the deposited rent is preserved.

216. *See* Act No. 281, 2014 La. Acts.

217. *See* Act No. 169, §1, 2005 La. Acts 1383.

218. *Wede v. Niche Mktg. USA, LLC*, 52 So. 3d 60, 66 (La. 2010).

219. *See* Act No. 1132, §1, 1992 La. Acts 3123.

220. *Wede*, 52 So. 2d at 66:

Thus, because the legislature left intact Article 3320 and the principles espoused in these revision comments when recently revising the law of recordation, we are bound to continue to recognize these principles.

*Id.*



date of the judgment.” Civil Code article 3364 states that “a notice of reinscription that is recorded before the effect of recordation ceases continues that effect for ten years from the date the notice is recorded.”

Act 281 added Comments to both C.C. arts. 3359 and 3364 but did not change the text of the articles. The new Comments<sup>221</sup> point out that if a judgment is not timely revived,<sup>222</sup> the judgment prescribes and becomes unenforceable. Thus, judgment creditors will want to be sure to file the revival suit timely.<sup>223</sup>

Both the 2014 Comment to C.C. art. 3359 and the Comment to New C.C. art. 3362<sup>224</sup> point out that the only way to reinscribe a

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221. These Comments were, in part, a reworking of the 1992 comments contained in Act No. 1132, 1992 La. Acts 3123. The 2014 Comment (b) added to Civil Code article 3359 stated the following:

(b) The failure to reinscribe a judicial mortgage within ten years of its date causes the effect of recordation to cease. As the courts have observed, there is a common misunderstanding as to the relationship between reinscribing a judicial mortgage and obtaining a judgment of revival under C.C.P. Art. 3334. Under Article 3300 (Rev. 2014), a judicial mortgage is created by the filing of a money judgment in the mortgage records. This Article provides that the effect of recordation of a judgment creating a judicial mortgage ceases ten years after the date of the judgment. A notice of reinscription filed in accordance with Article 3362 (Rev. 2014) continues the effect of recordation of a judicial mortgage, without the necessity of filing a judgment reviving the original judgment. The judgment itself prescribes, however, if a suit to revive it is not filed within ten years of its date and a judgment reviving it obtained in due course. If the judicial mortgage is not reinscribed, the effect of recordation ceases whether or not prescription on the underlying judgment is interrupted by a suit for revival. If the judicial mortgage is reinscribed, it nevertheless becomes unenforceable when the underlying judgment prescribes. Accordingly, Article 3368 (Rev. 2014) permits the recorder to cancel the inscription from his records upon the request of any person if the request is accompanied by a certificate from the clerk of the court rendering the judgment that no suit has been filed for its revival within the time required by Article 3501 (Rev. 1983) or is accompanied by a final and definitive judgment of that court rejecting the demands of the plaintiff in a suit to revive it.

The 2014 Comment to Civil Code article 3364 states:

Under this Article, reinscription is effective when a notice of reinscription is filed. The effect of the original recordation is extended ten years from that time.

222. A money judgment prescribes “ten years from the time the judgment becomes final.” C.C. art. 3501 (2015).

223. A “filing of the motion to revive interrupts the prescriptive period applicable to the judgment.” LA. CODE CIV. PROC. art. 2031(a) (2015).

224. The comment to New C.C. art. 3362 states:

The method of reinscription provided for in this Article, which has been the exclusive means of reinscription since January 1, 1993, is much simpler than the method that was previously required.

judgment and continue its effect for an additional ten years is via an act of reinscription filed in the mortgage records. Filing the revival judgment in the mortgage records may not suffice to allow the judicial mortgage to continue to affect third parties and to maintain its original ranking date from the time it was first inscribed in the parish mortgage records.

*B. The Change in New C.C. art. 3368 Concerning Cancellation of Judicial Mortgages*

The 2014 amendments to New C.C. art. 3368 are designed to allow for the cancellation of the inscription of a judicial mortgage. A judicial mortgage may be cancelled if a revival suit has not been timely instituted, even if a timely act of reinscription has been filed. As the Comment to New C.C. art. 3368 notes, “reinscription of a judicial mortgage and revival of the underlying judgment are entirely different concepts.”<sup>225</sup> The suit for revival must be filed within ten years from the date “the judgment becomes final.”<sup>226</sup>

Even though, under New C.C. art. 3368,<sup>227</sup> a reinscribed judicial mortgage cannot be cancelled without a “certificate from

New C.C. art. 3362 cmt. (2015).

225. The entire comment to the New C.C. art. 3368 states:

As Comment (b) to Article 3359 (Rev. 2014) explains, reinscription of a judicial mortgage and revival of the underlying judgment are entirely different concepts. Both timely reinscription and a timely suit for revival are necessary for a judicial mortgage to continue to have effect. Under this Article, even if a judicial mortgage is reinscribed, the recorder must cancel the inscription of the judicial mortgage from his records upon any person’s request accompanied by a certificate from the clerk of the court rendering the underlying judgment that no suit was filed for its revival within the time required by Article 3501 (Rev. 1983) or by a final and definitive judgment of that court rejecting the demands of the plaintiff in a suit to revive it.

New C.C. art. 3368 cmt. (2015).

226. C.C. art. 3501 (2015).

227. The amendments to Civil Code article 3368 are as follows, with deleted text shown with bracketed strike-throughs:

Notwithstanding the reinscription of a judicial mortgage created by the filing of a judgment of a court of this state, ~~[The]~~ the recorder shall cancel the judicial mortgage ~~[a judicial mortgage created by the filing of a judgment of a court of this state that has been reinscribed]~~ from his records upon ~~[the written request]~~ any person's written request to which is attached a certificate from the clerk of the court rendering the judgment that no suit or motion ~~[has been]~~ was filed for its revival within the time required by Article 3501 or of a certified copy of a final and definitive judgment of the court rejecting the demands of the plaintiff in a suit or motion to revive the judgment.

the clerk of the court rendering the judgment” concerning the lack of a timely revival suit, cautious creditors also may consider filing a notice of *lis pendens* in every parish where the judicial mortgage had been recorded to show that the revival suit was timely.<sup>228</sup>

Prior to 2005, a Louisiana statute provided that if the revival suit was timely and if the judgment creditor filed a notice of *lis pendens*, the judgment creditor then had up to three years to get the new revival judgment.<sup>229</sup> That statute was repealed in 2005.<sup>230</sup> Thus it appears that as long as the revival suit is filed timely,<sup>231</sup> there apparently is no statutory limit (other than the abandonment rules)<sup>232</sup> on obtaining the revival judgment.

#### XI. THE CONSTANT ACKNOWLEDGMENT RULE

The 2014 amendments make no mention of the constant acknowledgment rule—the Louisiana doctrine holding that a pledge constantly interrupts prescription on the principal obligation it secures, which results in the principal obligation never prescribing as long as the pledge exists.<sup>233</sup> The constant acknowledgement rule

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Act No. 281, 2014 La. Acts.

228. Usually, revival judgments occur quickly because they are brought *ex parte* and “[n]o citation or service of process of the motion to revive shall be required.” LA. CODE CIV. PROC. art. 2031 (2015).

229. The prior, now-repealed process under former Revised Statutes section 9:5502 was described in an earlier article. See Michael H. Rubin & R. Marshall Grodner, *Recent Developments in Security Devices*, 53 LA. L. REV. 969, 1008 (1993) (“A judgment prescribes ten years from its date. An action to revive the judgment must be begun prior to the expiration of the ten years. If the action to revive the judgment is brought timely, and if a notice of *lis pendens* is timely filed, then the judgment creditor has three years in which to obtain a new judgment reviving the older one; upon the timely recordation of the new judgment within the ten year period, the original judgment is reinscribed for an additional ten years from the date of the timely *lis pendens* notice.”).

230. See Act No. 169, §8, 2005 La. Acts 1383 (repealing former Louisiana Revised Statutes section 9:5502).

231. See LA. CODE CIV. PROC. art. 2031 (2015) (noting that a timely suit interrupts prescription on the original judgment).

232. See LA. CODE CIV. PROC. art. 561 (2015). For a case applying the abandonment rules to a suit to revive a judgment, see *Evans v. Hamner*, 24 So. 2d 814 (La. 1946). See also *Goldsby v. Dr. R.E. Goldsby, Ltd.*, 2010-1218, 2011 WL 3806281, at \*3 (La. Ct. App. Aug. 9, 2011) (citing *Evans* stating, “[b]ecause the lawsuit to revive the money judgment was abandoned, the interruption of La. C.C. art. 3501’s ten-year prescriptive period by the timely filing of the lawsuit to revive the judgment is considered to never have occurred.”).

233. See generally *Succession of Picard*, 115 So. 2d 817 (La. 1959); *Scott v. Corkern*, 91 So. 2d 569 (La. 1956). For more discussion on the constant acknowledgement rule, see RUBIN, A PRÉCIS, *supra* note 42, at 13.5–13.6.

has been applied in the context of collateral mortgages both before and after the 1990 adoption of UCC 9,<sup>234</sup> and because the 2014 amendments are silent on this, it must be assumed that the 2014 amendments make no change in the law concerning constant acknowledgment for any item that can be pledged via delivery.

#### CONCLUSION

The extensive changes, clarifications, and alterations made by the 2014 amendments reflect the efforts of the Louisiana State Law Institute both to bring the law of pledge into the 21st Century and to take into account analogous rules under UCC 9. Counsel for creditors, debtors, landlords, tenants, and other obligors whose rights are subject to pledge under the 2014 amendments will benefit from the clarity of these new rules and from the information provided in the Law Institute's Comments.

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234. See, e.g., *Kaplan v. Univ. Lake Corp.*, 381 So. 2d 385 (La. 1980); *Gulf Nat'l, L.L.C. v. Alfortish, Inc.*, 926 So. 2d 676 (La. Ct. App. 2006). *But see* *CadleRock Joint Ventures Co. v. J. Graves Scaffolding Co., Inc.*, 152 So. 3d 1079 (La. Ct. App. 2014) (relying on pre-1990 old pledge articles rather than UCC 9 in referring to how real security in a post-1990 collateral mortgage note is obtained). See *supra* note 39.

