Developments in Lease Law 1992-1993

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I. LESSOR'S LIABILITY UNDER CIVIL CODE ARTICLE 2703

A. Importance Of Defining The Leased Premises

Defining the leased premises has taken on an important additional meaning under recent Louisiana Supreme Court jurisprudence. Until recently, it was generally believed that the landlord had no duty to protect a lessee from a disturbance caused by a third person not claiming possession of the leased premises. Article 2703 of the Civil Code was believed to compel this conclusion. However, in Potter v. First Federal Savings & Loan Association, the Court held that the lessor may be liable for injuries to the lessee caused by third persons where those injuries are caused in part by a defect in common areas adjacent to the leased premises. The Louisiana Supreme Court further held that the lessor is protected from liability to the lessee for injuries caused by third persons not claiming possession only in limited circumstances. The court held that:

[a]s a matter of law, article 2703 merely limits the lessor's warranty of peaceful possession, when the lessor is free from fault, excusing him from guaranteeing the lessee against disturbances caused by third persons not claiming any right to the premises. Parenthetically, by implication it applies only to the property leased to lessee and not to common areas or areas to which the lessee has only access, but not a possessory right.

Thus, the court imposed two important limitations on the broad immunity from liability that was previously perceived in earlier interpretations of Article 2703. The first limitation is that the lessor must be free of fault. In Potter, there were questions of fact concerning whether the lessor had knowledge of, among
other things, defective lighting and prior criminal activity in the parking areas where the victim was injured. Secondly, and more importantly, the court imposed the limitation that Article 2703 is not applicable to “common areas or areas to which the lessee has only access, but not a possessory right.”

B. Fate of Recent Pre-Potter Cases

The Potter court stated that Reilly v. Fairway View II Associates Limited Partnership and other cases reaching similar conclusions “overstate[d] the legal consequences of article 2703.” As a result, recent pre-Potter cases, such as Harrison v. Clark, and Foxworth v. Housing Authority, are probably unsound precedent in light of Potter.

II. Judicial Control of Leases

Louisiana courts and recent Civil Code revisions strongly reinforce the principle of freedom of contract. Generally, a contract is the law of the parties. On the other hand, a basic principle of Louisiana civil law is that cancellation of leases is not favored. This latter fundamental principle can come into direct conflict with lease or Civil Code provisions that would otherwise permit cancellation-of-right of a lease upon the occurrence of certain events—for example, non-payment of rent.

The doctrine of judicial control of leases is a judicially created equitable remedy. Its purpose is to ameliorate the sometimes harsh effects of a technically proper cancellation. The doctrine evolved from cases where the lessee made a good-faith error, usually failure to pay rent when due, and acted reasonably to correct the error when discovered. The doctrine of judicial control of lease has been applied to deny cancellation of a lease where: the lessee withheld part of the rent to pay severance tax in good faith; the lessee’s

7. Id.
9. Potter, 615 So. 2d at 325.
11. 590 So. 2d 1347 (La. App. 5th Cir. 1991), writ not considered, 592 So. 2d 1328 (La. 1993).
timely mailed rent was late because of faulty mail delivery;\textsuperscript{21} rent was eight days late and the lease provided no place for payment;\textsuperscript{22} rent was late due to failure of bank transmission;\textsuperscript{23} timely rent was paid by third-party check which was subsequently not honored;\textsuperscript{24} and rent was fifteen days late because the husband assumed his wife had paid rent.\textsuperscript{25}

In a recent affirmation of the continued existence of the doctrine of judicial control of lease, a divided second circuit panel held that “Louisiana courts are vested with discretion under certain circumstances to decline to grant a lessor cancellation of a lease although such right appears to be otherwise available to him.”\textsuperscript{26} In \textit{Ergon}, the lessee failed to pay rent for ten months but paid promptly, in good faith, upon receipt of a notice to vacate. At the time of the notice to vacate, the lessor did not demand past due rent or give the lessee an opportunity to perform. In urging judicial control of lease to avoid cancellation, the lessee testified that it would incur $7,000,000 in construction costs and other losses if the lease were cancelled. On these facts, the court applied the doctrine of judicial control to deny the lessor’s right to cancel the lease.\textsuperscript{27}

Surprisingly, the \textit{Ergon} lessee had been late before in paying its rent. Yet, inexplicably, it put itself at risk of a potential $7,000,000 loss and disruption of its business. The questionable equities in \textit{Ergon} demonstrate why one judge dissented from application of the jurisprudential doctrine where the Civil Code is otherwise clear.\textsuperscript{28} It is difficult to conceive of the “equity” involved under these circumstances when compared with the earlier cases which involved substantially less egregious circumstances. The \textit{Ergon} majority alluded to the great harm that would occur to third persons if the lease were cancelled as the reason for application of the doctrine. That valid concern does not, however, support the application of the equitable doctrine under the circumstances of \textit{Ergon}.

Although not discussed, it appears that the subject of \textit{Ergon} may have been committed to the Public Service Commission because of Ergon’s status as a pipeline company.\textsuperscript{29} In that latter instance, a ruling on the lease cancellation may have been void for lack of subject matter jurisdiction.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{21} Edwards \textit{v. Standard Oil Co.}, 175 La. 720, 144 So. 430 (1932).
\item \textsuperscript{22} Baham \textit{v. Faust}, 333 So. 2d 261 (La. App. 1st Cir. 1976).
\item \textsuperscript{23} Tullier \textit{v. Tanson Enters., Inc.}, 359 So. 2d 654 (La. App. 1st Cir. 1978), rev’d on other grounds, 367 So. 2d 773 (1979).
\item \textsuperscript{25} Atkinson \textit{v. Richeson}, 393 So. 2d 801 (La. App. 2d Cir. 1981).
\item \textsuperscript{26} Ergon, \textit{Inc. v. Allen}, 593 So. 2d 438 (La. App. 2d Cir. 1992).
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.} at 441.
\end{itemize}
III. VOLUNTARY AND INVOLUNTARY TRANSFER OF LEASE INTERESTS

A. Effect of Judicial Sale on Rights Under Lease

In an area of growing interest, Louisiana courts have begun to explore the nature and effect of how a judicial sale affects rights and obligations in the thing sold. Under traditional civil law, the sale of a thing necessarily includes the accessories and accessorial rights of that thing. The transfer of accessories with the sale of the thing, however, is a principle associated with an act of consensual sale, a conventional obligation.

In *St. Jude Medical Office Building Limited Partnership v. City Glass and Mirror, Inc.*, the Louisiana Supreme Court held that a mortgagee that purchases, at a judicial sale, immovable property that secures a loan obligation does not acquire the rights against persons who may have performed defective workmanship on buildings built on the immovable. Stating the general principle of Louisiana law that a purchaser can not recover from a third party for property damage inflicted prior to sale, the court rejected an earlier contrary decision based on a now-repealed Civil Code article. The court held that under Civil Code article 1765 "damages due to the owner of a thing for its partial destruction belongs to the person who was owner at the time of the destruction. These are personal rights that are not transferred to a [buyer] without a stipulation to that effect." However, in *Travelers Insurance Co. v. Liljeberg Enterprises, Inc.*, a federal district court held that foreclosure and judicial sale to the mortgagee did not extinguish the mortgagee's right to enforce terms of leases which were collaterally assigned as security for the original loan. Thus, the mortgagee had the right to enforce those leases. The conclusion reached in *Travelers* is not in conflict with the holding in *St. Jude* because *Travelers* turned on a specific lease provision that provided for transfer of rights in the event of a judicial sale. The lease provided that any purchaser at a judicial sale becomes legal owner and holder of the lease.

31. See Armstrong, supra note *, § 2.94.
33. 619 So. 2d 529 (La. 1993).
34. Id.
36. *St. Jude*, 619 So. 2d at 531.
38. See Armstrong, supra note *, § 12.31.
39. *Travelers*, 799 F. Supp. 641. The particular lease provision provided that:

- (f) any Institutional Mortgagee or third person purchaser at a foreclosure sale may become the legal owner and holder of this Lease by foreclosure of the Institutional Mortgage or as a result of the assignment of this lease in lieu of foreclosure, whereupon such Institutional Mortgagee or third person purchaser shall immediately become and
In *Junior Money Bags, Ltd. v. Segal*, another case that examines a different aspect of judicial sale of a lease, held that a purchase of a lease at a judicial sale imposes no obligations on the purchaser if the lease was effectively (or could have been) dissolved prior to that purchase. The particular lease contained a provision that imposed the obligations of the lessee on any successor. In passing, the Fifth Circuit noted its doubt as to whether the purchaser at a judicial sale was a “successor.” It appears that the subject of the lease, a gondola structure built over the Mississippi River, had not been used for over three years prior to the purchase of the lease. As a result, the federal district court found, and the United States Fifth Circuit Court of Appeals affirmed the factual determination, that the lessor had acquired the legal right to have the lease dissolved whenever it wished. Thus, the courts concluded that when the purchaser of the lease acquired the lessee’s interests, he acquired those interests subject to the lessor’s already acquired right to judicial dissolution of the lease. The purchaser “had thus in actuality not acquired any rights under the lease because any time [the purchaser] attempted to assert a right, [the lessor] could have the lease dissolved.”

**B. Amendment to Louisiana Statutory Public Records Doctrine**

Finally, in 1992, the Louisiana Legislature amended the statutory public records doctrine by adding paragraph B:

Anyone who acquires immovable property in his state, whether by sale, sheriff’s sale, dation en paiement, or in any other manner, which property is subject to a recorded lease agreement that is not divested by the acquisition, shall take the property subject to all of the provisions of the lease, including any provision for the payment of a commission to a leasing agent or other third party, provided that the lease was recorded remain liable under this lease except that, as to accrued amounts payable by Lessor to Lessee under this Lease as of such date, the Lessee shall have no recourse against the Institutional Mortgagee; and (g) in the event of the termination of this Lease or of any succeeding lease made pursuant to the provisions of this clause prior to the expiration date, Lessee will enter into a new lease of the Leased Premises with the Institutional Mortgagee for the remainder of the term of this Lease, effective as of the date of such termination, at the rent and additional rent and upon the covenants, agreements, terms, provisions and limitations herein contained provided such Institutional Mortgagee makes written request upon the Lessee for such new lease within thirty (30) days from the date of such termination.

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40. *Junior Money Bags, Ltd. v. Segal*, 970 F.2d 1 (5th Cir. 1992); see Armstrong, *supra* note *, § 10.35.

41. *Junior Money Bags*, 970 F.2d at 8.

42. See Armstrong, *supra* note *, § 6.33.
prior to the recordation of the document which establishes the rights of the person who acquires the property. Such document shall include, but is not limited to a mortgage, option to purchase, or other writing.43

IV. INTERPRETATION OF LEASES IN LIGHT OF UNEXPECTED EVENTS44

In Frey v. Amoco Production Co.,45 the Louisiana Supreme Court grappled with a question certified by the United States Fifth Circuit Court of Appeals concerning whether a mineral lessor was entitled to royalties on a take-or-pay payment from a third-party gas contract between the lessee and another where the lease was silent on the question. Although dealing with a mineral lease, the methodology of analysis is informative for questions arising under ordinary leases.

The Frey court affirmed the basic principle that the lease is the law between the parties. As such, the lease defines the relative rights and obligations between the parties. Further, courts are reluctant to rewrite a lease in pursuit of equity. Nevertheless, the Frey court acknowledged that a lease is not intended to, nor capable of, anticipating or providing for every eventuality. Where the parties to the lease have made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose. Where a search for the parties’ specific intent relative to any unexpected circumstance is fruitless because of silence in the lease, a court looks to the parties’ general intent in entering into the particular lease. The lease is then interpreted expansively to fulfill the perceived general intent of the parties vis-a-vis the unexpected circumstance.

Applying these principles, the Louisiana Supreme Court determined that an underlying fundamental principle of mineral exploration and development leases is the principle of shared benefits. The take-or-pay payments to the lessees were a direct result of rights acquired by the lessees under the mineral lease. Thus, in conformance with the fundamental principle of shared benefits, the mineral lessors were owed royalties on those payments.

V. THE CONTRACT OF LEASE

A. Vitiation of Consent by Fraud46

Existence of fraud sufficient to vitiate consent to a lease is a question of fact.47 The evidentiary standard of proof for fraud is preponderance of the

44. See Armstrong, supra note *, § 2.54.
45. 603 So. 2d 166 (La. 1992), answering question certified by 951 F.2d 67 (5th Cir. 1992).
46. See Armstrong, supra note *, § 2.62.
evidence.\textsuperscript{48} \textit{Borne v. Edwards} is a classic example of a proper finding of fraud induced by suppression of knowledge. In \textit{Borne}, the court determined that the landlord and her attorney fraudulently suppressed information concerning the high incidence of crime in the neighborhood of the premises. The court found that they had advertised the premises as “ideal for students” and had told out-of-state lessees and their parents that “many students resided in the neighborhood.”\textsuperscript{49} The landlord urged that the lessees were aware of the “character” of the neighborhood prior to signing the lease because they drove around the neighborhood. Furthermore, a former tenant told them of a recent burglary on the other side of the premises.\textsuperscript{50} The court rejected these assertions, holding that subsequent knowledge by the lessee of matters suppressed by the lessor does not defeat a finding of fraud because fraud arises from the lessor’s initial silence.\textsuperscript{51}

One author recently suggested that fraud as a remedy in the case of a lease is not necessary.\textsuperscript{52} The argument is that the lessor’s obligations to provide peaceable habitation and premises fit for the intended use are adequate remedies. However, that proposition overlooks the fact that an action for fraud, if successful, gives attorney’s fees where none may be available in an action brought under the lease articles.\textsuperscript{53} Further, an action in fraud may be asserted by persons not party to the lease.\textsuperscript{54}

\textbf{B. Detrimental Reliance in Absence of Lease}\textsuperscript{55}

As one court recently observed, the \textit{sine qua non} to an action for breach of a lease is the existence of a lease.\textsuperscript{56} The burden of proving the existence of any obligation is on the party urging its existence.\textsuperscript{57} Where the parties agree that a lease will be reduced to writing, that agreement is an integral part of the contract.\textsuperscript{58} In fact, it is a suspensive condition, the non-occurrence of which prevents the creation of the contemplated lease contract.\textsuperscript{59} Absent the contemplated written lease, the parties are bound only to a month-to-month lease.\textsuperscript{60} A party may,
however, obtain relief on the basis of detrimental reliance in the absence of a lease because of a failure to reduce the lease to writing.  

C. Cancellation of Lease—Adequacy of Grounds

Where the lease required written notice to lessor “of the need for repairs not of an emergency nature,” failure to correct poor drainage or to provide twelve exclusive parking slots was not sufficient grounds for the lessee to cancel the lease where the lessor had not been given written notice.  

D. Option to Renew—Burden of Proof

Where the term of the lease has expired by its own terms, the lessee bears the burden of proof that it exercised any existing option to renew. Whether the lessee exercised an existing option to renew is a question of fact reviewed under the “clearly wrong” or “manifestly erroneous” standard.  

VI. PARTICULAR LEASE PROVISIONS

A. Ambiguity of Term

Where a lease stated that “the term . . . shall be ten (10) years, commencing on the 1st day of May, 1987 (Commencement Date), and ending on the 30th day of April, 1992,” the court held that use of specific dates, particularly an ending date, established a five-year term, despite the expression of a ten-year term.  

B. Release and Indemnity Provisions in Leases

In Home Insurance Co. v. National Tea Co., the Louisiana Supreme Court was required to interpret a provision which provided:

The Lessor hereby covenants and agrees to carry replacement insurance in limits sufficient to rebuild total development including demised premises and does hereby release and discharge the Lessee, its agents,

63. See generally Armstrong, supra note *, §§ 11.21, 11.45.
65. Id. at 724.
66. See Armstrong, supra note *, §§ 5.2, 5.6.
68. See Armstrong, supra note *, § 2.53.
69. 588 So. 2d 361 (La. 1991).
successors and assigns from any and all claims and damages whatsoever from any cause resulting from or arising out of any fire or other casualty on the herein demised premises or on said total development or any part thereof. . . .

At expiration of said terms, Lessee will quit and surrender the premises hereby demised in as good state and condition as received, reasonable wear and tear incident to Lessee’s business and damage by fire or the elements, or from other causes beyond its control excepted.  

The court of appeal rejected the argument that the release provision was an indemnity agreement. The Louisiana Supreme Court concluded that Louisiana courts have characterized such contractual exculpatory agreements as “comparable to an agreement to indemnify one against one’s own negligence.” To be effective, such release-indemnity provisions must be “expressed in unequivocal terms.”

In another case, a lease provision provided:

Lessor and Lessee shall each indemnify, defend, and hold the other harmless from claims, demands, and causes of action asserted against the other by any third party (including, without limitation, Lessor’s and Lessee’s employees) for personal injury or death or for loss of or damage to property and resulting from the negligence or willful misconduct of the indemnifying party. When personal injury, death, or loss of or damage to property is the result of the joint negligence or willful misconduct of Lessor and Lessee, each party’s duty of indemnification shall be in proportion to its allocable share of joint negligence or willful misconduct.

This provision was held to provide no indemnity to lessee by lessor where lessee was completely at fault for having caused a defect to lessor’s property whereon lessor’s employee was injured.

C. Attorney’s Fees

Careful drafting of an attorney’s fees clause in a lease should include treatment of rental income that may be gained by reletting the premises after a breach of the lease. In a recent case, a lease provision provided for contractual attorney’s fees of “15 percent of the total rent due.” The court held that the clause supported an

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70. Id. at 363.
71. Id. at 364.
73. Id.
74. See Armstrong, supra note *, § 4.43.
award of attorney’s fees in the amount of fifteen percent of accelerated rent under the lease less any rentals earned by reletting the premises.  

VII. DEFENSES TO SUIT ON LEASE OBLIGATIONS

A. Mitigation of Damages—Lessor’s Duty to Possess to Relet

The lessor’s option to possess to relet the premises in case of lessee’s unjustifiable abandonment is a narrow exception to the general rule that the lessor may not take or disturb the possession of the lessee during the term of the lease without resort to judicial process. It is a form of mitigation of damages. Exercise of the lessor’s right to relet the premises is measured by the objective standard of reasonableness under the circumstances. However, the lessor may properly refuse to exercise the right to relet the premises where a guarantor of the lease objects to the rental terms of the relet. Such refusal, if justifiable and reasonable, is an excuse to the lessee’s affirmative defense of failure to mitigate damages.

In a related development, in 1993 the Louisiana Legislature enacted Louisiana Revised Statutes 9:3260, which provides:

When a lessee or tenant of commercial, residential, or dwelling premises has been constructively evicted from the premises, and when the premises are rendered uninhabitable through no fault of the lessee or tenant, the landlord shall be required to mitigate his damages.

Section 3260 became effective on August 15, 1993. It is not clear what, if anything, Section 3260 adds that does not already exist under the Civil Code. A lease is a bilateral contract, in which both the lessor and

75. First Downtown Dev. v. Cimochowski, 613 So. 2d 671, 679 (La. App. 2d Cir.), writ denied, 615 So. 2d 340 (1993). The particular lease provision provided:

Should an attorney be employed by either Landlord or Tenant to give special attention to the enforcement or protection of any claim of Landlord or Tenant arising from this Lease, the other party hereto, if such claimant is successful, shall pay as fees and compensation to such attorney, an additional sum of fifteen (15%) percent of the amount of such claim, the minimum fee, however, to be $500,000, or if the claim be not for money, then such sum as will constitute a reasonable fee together with all costs, charges and expenses if such claim is successfully asserted.

76. See Armstrong, supra note *, §§ 5.82-5.83.
78. Id. at 1378.
79. Id.
80. Id. at 1379.
82. La. Const. art. III, § 19.
lessee are obligees. The Civil Code requires that an obligee “must make reasonable efforts to mitigate the damage.” 84 Section 3260 appears to add a superfluous complement to Civil Code article 2699. Article 2699 gives the lessee the right to annul the lease if the premises “cease[] to be fit for the purpose for which it was leased” without any fault of the lessor. Under Section 3260, if the premises “are rendered uninhabitable” without any fault of the lessee or lessor, an obligation to mitigate damages arises. Further, the reference in Section 3260 is redundant because Civil Code article 2699 also protects the lessee against circumstances in which the use of the leased premises “be much impeded.”

B. Lack of Privity in Lessor/Sublessee Suit 85

Generally, the lessor has no right to collect rent from a sublessee. The right to collect rent is derived from the primary lease to which the sublessee is not a party; also, the lessor is not a party to the sublease. 86 The lack of privity may be raised as a defense in a suit for past due rent by the lessor against the sublessee. 87

C. Lessee’s Fault 88

Knowledge by the lessee of a defect left unrepaired by the lessor may result in fault being assessed to the lessee where injuries occur to a third person because of that defect. 89 A tenant’s failure to exercise his right to repair and deduct may provide a basis for reduction of the lessor’s fault under comparative fault principles. 90 Further, there is no doubt that a third person may recover damages for injuries caused to him by activities of the tenant on land adjoining the leased premises. 91

D. Third Party Fault

Several recent cases have found full or partial fault in third persons or the lessee. In Fireman’s Fund Insurance Co. v. New Orleans Public Service, Inc. 92 the court found that the fault of a third party utility company caused a fire that...
damaged the leased premises. In Astredo v. Louisiana Power & Light Co., the court held that the lessee and the third party power company were totally at fault in an accident involving the lessee's injury by electrocution while trimming tree limbs adjacent to a power line.

E. Act of God

In Hughes v. Green, the entire sheetrock ceiling fell on the tenant sleeping in her bed. The tenant put on no proof of a vice in construction or neglect to repair. The court held that collapse of the ceiling did not imply a defect. Furthermore, the court held that the failure to prove a defect precluded a finding of liability on a theory of negligence.

F. Failure to Give Notice of Breach

An affirmative defense of lessor's breach of lease obligations will fail if the lease requires written notice to the lessor and such notice is not given. Other matters that must be pled as affirmative defenses include failure to mitigate damages and lack of fitness for use.

G. Louisiana Revised Statutes 9:3221

A novel claim by an injured employee of a lessee-employer was rejected by the Louisiana Fourth Circuit. The lease contained a provision that shifted the lessor's liability to the lessee under Louisiana Revised Statutes 9:3221. The employee urged that the lease thus created a contractual basis of liability for the injury to the employee. Further, the employee urged that this contractual liability was outside of the employer-lessee's worker's compensation immunity. The employee argued that the lease created a "dual doctrine" basis for liability. The court rejected the argument on the basis that the employer's obligations to provide a safe work place are the same under worker's compensation law or as a lessee who has assumed responsibility under Louisiana Revised Statutes 9:3221.

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93. 612 So. 2d 283 (La. App. 5th Cir. 1992).
94. See Armstrong, supra note *, §§ 8.21, 8.71.
95. 609 So. 2d 991 (La. App. 4th Cir. 1992), writ denied, 612 So. 2d 82 (1993); La. Civ. Code arts. 2317, 2322.
96. Hughes, 609 So. 2d at 993.
97. Id.
98. See generally Armstrong, supra note *, § 11.23.
101. See Armstrong, supra note *, §§ 7.22, 8.52.
103. Id. at 1101.
Alternatively, the employee argued that the shifting of liability to his employer-lessee through Louisiana Revised Statutes 9:3221 violated his due process right to sue. The court rejected this argument because the lease pre-dated the vesting of the employee's cause of action. Nevertheless, summary judgment in favor of the lessor was reversed because it failed to present any evidence of its knowledge of the defect.

H. Interrelationship of the Law of Accessions to Law of Lease

In a recent case, the first circuit narrowly avoided having to reconcile recent revisions in property law and their possible effects on a terminated agricultural lease. In Caballero Planting Co. v. Hymel, the lessor terminated an oral, year-to-year agricultural lease. The lessee's sugar cane crop apparently was not ready for harvest. The lessee vacated the land as demanded by the lessor. Approximately four months later the lessor sent a letter to the lessee which advised that the lessee could remove any plantings located on the lessor's property. The lessee declined to remove the plantings and subsequently sued the lessor for the value of the plant cane and stubble left on the property.

The lessor urged that under Louisiana Civil Code article 493, as revised in 1976, if the lessee does not remove his plantings within ninety days after written demand, the owner of the land acquires ownership and owes nothing to the former owner. The first circuit opined in dicta that "we have doubts as to whether the legislature intended Article 493 to apply to a crop such as sugar cane, planted by a lessee with the lessors' full knowledge and consent, which has a growing season greatly in excess of ninety days." However, by concluding that the lessors' letter was not sufficient to meet the demand requirements of Article 493, the court was not required to decide if Article 493 applied under these circumstances. The result in Caballero Planting is correct even if Article 493 had been applied because Article 7 of the Civil Code forbids application of a law where the results are absurd. Surely, the results would be absurd where it is physically impossible for the planting to be removed prior to their readiness for harvest.

The Caballero Planting problem exists wherever there is an agricultural lease whose term is shorter than the time required to grow a crop. Examples include: sugar cane, Christmas trees, and pulp wood trees. One possible solution is to presume that the agreed term of an agricultural lease is the time required for the agreed crop to be grown and harvested. Such a presumption

104. Id.
105. Id. at 1102.
108. Id. at 37.
109. Id. at 38.
could be based in the general Civil Code provisions governing consent, object, and error. The preferred solution is a statutory closing of this gap.

VIII. EVICTION-RELATED MATTERS

A. Nature of Eviction Proceedings

Eviction is a summary proceeding that is *in rem* in nature. The sole issue in an eviction proceeding is whether the lessee’s right to possess the thing leased was terminated. No personal judgment may be sought or obtained against the lessee in an eviction proceeding. The lessor attempting to evict a sublessee has the burden of proving the dissolution or termination of the primary lease. Whether the primary lease has been dissolved or terminated is a question of fact. Further, as a result of recent legislative action, the application for, or the receipt of, entitlements or funds, under any federal or state rent subsidy program or rent subsidy assistance shall not be considered payment of rent and shall not be a defense to an action to evict the lessee. Finally, the fact that a violation or breach of a lease may have abated by the time the notice to vacate is delivered or served is irrelevant and does not cure the violation or breach.

B. Renotification Rule—Lease of Movables

It is well settled that after accepting some or all of the past due rent, the lessor of an immovable must give a new notice to vacate prior to instituting an eviction proceeding. This “renotification rule” has a long history of consistent application to immovables. However, whether the renotification rule is applicable to the lease of movables has only been recently addressed. After an extensive analysis of legal sources, the United States Fifth Circuit Court of Appeals decided that the renotification rule is inapplicable to a lease of movables.

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110. *See generally* Armstrong, *supra* note *, Ch. 11 and § 11.43.
113. *Id.* at 211.
118. *Id.* at 949.
119. *Id.* at 954.
IX. NOTICE-RELATED ISSUES

A. Waiver of Notice Requirements

Where the lease waives the requirement of notice of default, technical defects in the notice are inadequate defenses as a matter of law to an action for eviction actually given. Further, any pro forma reference in verified statements in an eviction petition, or affidavits in support thereof, which refer "to notice having been given pursuant to the terms of the lease implying that the lease required such notice are deemed meaningless surplusage." Such surplusage can not alter the meaning of an otherwise clear and unambiguous lease.

B. Notice to Vacate—Date

One court has suggested that a prudent notice to vacate will expressly state the date that the lessor will resume possession. The giving of such an express date operates to avoid confusion as to when the lessee's right to possess terminates.

C. Notice to Vacate—Grounds

A notice to vacate which gives as sole grounds, "the owner wants possession," is adequate to terminate a month-to-month lease if timely delivered to the lessee. Further, such notice may be given at any time during the current month prior to ten days before the end of that month. It is unclear whether a lessor may give a notice to vacate which is effective at a time later than the end of the current period in which the notice is given. Arguably, such notice, if acquiesced in by the lessee, might convert a period-to-period, reconducted lease into a lease for a specific term. Regardless, absent evidence of acquiescence, the lessee retains the right to give the lessor a notice of termination which is effective earlier than that date given in the lessor's notice.

In a recent case, the lease provided that all termination notices must specify "the grounds of termination with enough detail for the [t]enant to prepare a

120. See generally Armstrong, supra note *, § 11.42.
121. Poydras Square Ass'n v. Suzette's Artique, 614 So. 2d 131 (La. App. 4th Cir. 1993).
122. Id. at 133.
123. Id. at 134.
125. Id. at 1225.
126. Id.
The court held that a notice that cited failure to abide by the rules in the lease, unauthorized guests staying in the apartment, and excessive noises coming from the apartment as reasons for eviction, failed "to specify the grounds for termination with enough detail to permit the [tenant] to prepare a defense." One can only conclude that the absence of detail concerning time and place of the infractions caused the court to find the mandated notice insufficient to permit the tenant "to prepare a defense.

X. SERVICE OF PROCESS BY TACKING—ADEQUACY

The question of whether service of process by tacking as permitted by Louisiana Code of Civil Procedure article 4703 is adequate to defeat a declinatory exception of insufficiency of service is a question of fact. Tacking is authorized by Article 4703 where the tenant's whereabouts are unknown. Within the meaning of Article 4703, a tenant's whereabouts are unknown when the person attempting service knocks several times on the door of the leasehold and looks for signs of someone present. Article 4703 does not mandate that the person trying to effect service conduct an exhaustive search or make multiple attempts to locate the lessee at home.

The Fairfield court emphasized that this is especially true "where the service by tacking was effective"; in other words, where service of process was in fact received by the lessee. Testimony by the tenant that he received a notice that was served by tacking creates a presumption that the lessee was not home when the notice was tacked or was inside the premises but refused to make his presence known. Either instance meets the prerequisites for tacking under Article 4703.

The Fairfield court declined to decide whether service by certified or registered mail would be preferable. The court simply noted that Article 4703 does not provide for service by those means. Finally, because the lessee did not challenge the constitutionality of Article 4703, the court pretermitted review.

129. Id. a 494-95.
130. Id.
131. See generally Armstrong, supra note * , § 11.42.
134. Id.
135. Id. at 85.
136. Id.
137. Id. (citing Alaimo v. Hepinstall, 377 So. 2d 889 (La. App. 4th Cir. 1979)).
138. Id.
in light of *Green v. Lindsey.* The court did note that Article 4703 had been found to be constitutional by *Ernest Joubert Co. v. Tatum.*

XI. PROCEDURAL ISSUES

A lessee may intervene in a suit by the lessor to evict a sublessee. An intervention is an incidental action that employs the same procedure as the main demand. Thus, failure to file an answer in the summary eviction proceedings does not preclude intervention.

XII. GOVERNMENT SUBSIDIZED HOUSING LEASES

Some federally subsidized housing programs mandate that the lease contain provisions that require a grievance procedure as an adjunct to state law provisions. In some instances, those procedures may include appeal rights from an adverse decision. However, in some instances, the regulations have been amended to specifically exclude eviction proceedings from the grievance/appeal procedure. An example of that is found in *Catahoula Apartments Partnership v. Jones.* In *Catahoula,* the court acknowledged the regulatory mandated grievance/appeal procedure but cited the exclusion of eviction proceedings therefrom. Under that exclusion, “termination of tenancy and eviction [are] handled by a judicial process under State or local law.” Finding that the legislative intent of such exclusions is to reduce the burden of a duplication of effort in the termination of tenancy and eviction, the *Catahoula* court refused to enjoin the eviction proceedings so as to permit an administrative proceeding under the lease and regulations incorporated therein. As noted above, in 1992 the Louisiana Legislature added paragraph B to Louisiana Civil Code article 2712 to provide that the application for, or the receipt of, entitlements or funds, under any federal or state rent subsidy program or rent subsidy assistance shall not be considered payment of rent and shall not be a defense to an action to evict the lessee.

140. 332 So. 2d 553 (La. App. 4th Cir. 1976); compare Friedman v. Hofchar, Inc., 424 So. 2d 496 (La. App. 5th Cir. 1983) and McLellan v. Pearson, 546 So. 2d 817 (La. App. 5th Cir. 1989).
141. Sauer v. Toye, 616 So. 2d 207 (La. App. 5th Cir. 1993).
142. Id. at 210.
143. Id.
144. See Armstrong, supra note *, § 11.46.
146. Id.
147. 590 So. 2d 627 (La. App. 3d Cir. 1991).
148. Id. at 628 (citing 48 Fed. Reg. 56,176 (1983)).
149. Id.
Historically, sequestration has been viewed as a harsh remedy. Thus, Louisiana courts require that its statutory provisions be strictly construed against the party seeking sequestration. As a result, there has been some uncertainty concerning when the right of sequestration—provided in Louisiana Civil Code article 2709 as a right which may be exercised “within 15 days after [the object sought to be sequestered has] been removed by the lessee”—terminates.

The Burton v. Jardell court held that the restrictive nature of the writ of sequestration required that the fifteen-day period commence when the lessee abandons the premises. Further, the court held that a sequestration imposed within fifteen days of when the lessor learned of the abandonment, but which occurred more than fifteen days after actual abandonment, was untimely and supported an award of damages for wrongful seizure.

Because wrongful sequestration is raised by reconventional demand, the lessee bears the burden of proof of showing on what date he vacated the premises. That burden may be met by his testimony with corroboration. Damages for wrongful seizure include actual damages sustained, loss of profit, and loss of use for a movable wrongfully seized. Proof of damages must be clear, definite, and not subject to conjecture. Fair market value is not a measure of actual damages. Also, the lessee must prove actual loss. However, if the lessee fails to prove actual loss with certainty, the court should fix damages as best it can from the record. Attorney’s fees awarded for a claim of wrongful seizure raised as a reconventional demand are limited to the fees associated with the reconventional demand.

Citing Article 5059 of Louisiana Code of Civil Procedure, the Burton court suggested in dicta that if the fifteenth day falls on a legal holiday, the lessor has an additional day to seize the object to be sequestered. Louisiana Code of Civil Procedure article 323 permits the sheriff to serve a writ of sequestration on legal holidays. What the Burton court probably intended to state was that the

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155. *Burton*, 589 So. 2d at 613 (rejecting contrary rule of *Pesson* v. Kleckley, 526 So. 2d 1220 (La. App. 3d Cir. 1988), noting that *Pesson* relied on Edmons v. Totem Stores, 229 La. 467, 86 So. 2d 104 (1956), which was decided in reliance on the 1870 Code of Practice article 288 which was replaced by Article 2709 of the Civil Code).
156. *Id.* at 613-14.
157. *Id.*
158. *Id.* at 614.
161. *Burton*, 589 So. 2d at 615.
162. *Id.* at 614 n.3.
lessor had until the next day which was not a legal holiday to file a rule seeking issuance of a writ of sequestration if the fifteenth day fell on a legal holiday.\(^\text{163}\)

XIV. OTHER SEIZURE-RELATED ISSUES

A. Exemptions—Tool of Trade or Profession

The test of whether an object qualifies as a tool or instrument of the trade or profession is whether or not the tool or instrument is necessary for the exercise of the trade or profession; that is, whether or not the debtor will be prevented from exercising his trade or profession if he is deprived of the tool or instrument. Because the latter question turns upon the former, the debtor cannot be deprived of the tools or instruments if the profession or trade cannot be practiced without them without severe hardship. Whether an object constitutes a “tool or instrument of the trade” is a factual determination with the outcome dependent on the particular facts of each case.\(^\text{164}\) Further, no presumption arises against the owner because he does not immediately seek to recover the seized “tools of the trade.”\(^\text{165}\)

B. Seizure of Lessee’s Property by Lessor’s Judgment Creditor\(^\text{166}\)

A lessor’s judgment creditor may execute upon the lessor’s property in the hands of the lessee. However, the creditor may not seize and sell the lessee’s property. One court recently held that property in possession of the lessee is presumed to be owned by the lessee.\(^\text{167}\) The burden is upon the seizing creditor, at risk for a claim of wrongful seizure, to prove otherwise.\(^\text{168}\)

C. Physical Reach of Lessor’s Privilege—Implications For Wrongful Seizure

It is not uncommon for a lessor to file a suit for back rent and, in that suit, to cause a writ of sequestration to issue on the basis of a lessor’s lien.\(^\text{169}\) Further, it is not unusual for a lessor to cause the seizure of the lessee’s personal automobile, found in the apartment common-area parking lot, typically some distance from the leased apartment, under that writ.

\(^{163}\) La. Code Civ. P. art. 5059.

\(^{164}\) Huber Oil Co. v. Giovingo, 611 So. 2d 137, 138 (La. App. 5th Cir. 1992), writ denied, 610 So. 2d 801 (1993); see Armstrong, supra note *, § 12.231.

\(^{165}\) Huber Oil, 611 So. 2d at 139.

\(^{166}\) See Armstrong, supra note *, §§ 12.32, 12.51.


\(^{168}\) Id.

Article 2705 gives the lessor "a right of pledge on the movable effects of the lessee, which are found on the property leased." The phrase, "property leased," is the measure of the reach of the lessor's lien on the lessee's movables under Article 2705. However, the very narrow definition of Article 2703's phrase "leased premises" given by the Louisiana Supreme Court in Potter, poses the possibility that the meaning and scope of Article 2705's phrase "property leased" should also be reexamined. Viewed in light of the narrow definition of "leased premises" in Potter, an aggressive interpretation of Article 2705's phrase "property leased" may raise the possibility of wrongful seizure.

It is well established that all privileges, including the lessor's lien, are construed stricti juris. Article 2705 grants a lessor the right to sequester all movables located on the "property leased." Construing the lessor's lien stricti juris, the Louisiana first circuit has held that a vehicle is wrongfully seized under a writ of sequestration issued on the basis of a lessor's lien where the property leased does not include the particular parking area on which the vehicle is parked. On the other hand, the same court sustained such a seizure where the property leased is the place of the lessee's business.

The typical residential apartment lease will unambiguously define the leased premises leased as "Apartment ___ of the ____________ Apartments." It is unusual for a residential apartment lease to allocate specific parking places over which the tenant has exclusive rights of occupancy. Therein lies the Potter problem. As Potter implies, where the vehicle is merely parked in a common-area parking lot adjacent or near the leased premises, and the vehicle is unrelated to any business conducted on or from the leased property, it may not be seized under the lessor's lien. That result obtains because a common parking lot is not under exclusive control of the lessee. Potter holds that the common area, such as a parking lot, does not form a part of the leased premises under Article 2703. One must logically infer that the same common-area parking lot does not form a part of the "property leased" under Article 2705.

Thus, Potter reinforces and validates the rationale of Boutte and Moseley—a common parking lot is not the "property leased" within the meaning of Article 2705. Thus, seizure of a lessee's personal vehicle from a common parking area under a writ of sequestration issued on authority of a lessor's privilege under Article 2705 will be a wrongful seizure.

170. Id. (emphasis added).
171. Potter v. First Federal Sav. & Loan Ass'n, 615 So. 2d 318 (La. 1993); see supra discussion at text accompanying notes 1-8.
175. Boutte, 43 So. 2d 79; Moseley, 163 So. 2d 198.
XV. LEASE DEPOSITS

A. Effect of Annulment of Lease on Obligation to Return Deposit

If the lease is annulled because of a vice of consent, such as error, fraud, or duress, the deposit must be returned without reference to Louisiana Lessee Deposit Law. This results from the fact that when a contract is annulled, all performances previously given are returned.

B. Contractual Variation of Louisiana Lease Deposit Law

A lease may impose conditions, including termination notice requirements, which, if violated, permit the lessor to retain some or all of the deposit as damages for that breach. Such a notice provision is not contra bonos mores or violative of public policy as expressed in Louisiana Lessee Deposit Law.

XVI. DEVELOPING AREAS OF POTENTIAL LESSOR LIABILITY

A. State Law

1. Tortious Interference with Lease

The Louisiana Supreme Court has recently recognized a narrowly-drawn cause of action for tortious interference with contractual relations. The court held that such a cause of action would lie where a corporate officer committed an intentional and unjustified interference with contractual relations between his employer and a third person.

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176. See generally Armstrong, supra note *, Ch. 16.
177. See id. § 13.2.
184. See Armstrong, supra note *, §§ 16.1, 16.3.
185. Mays, 599 So. 2d 459.
188. See Armstrong, supra note *, § 2.10.
189. 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989).
190. Id.
In a later case, *First Downtown Development v. Cimochowski*, the lessor claimed that the sole shareholder of the corporate lessee had intentionally and unjustifiably caused a breach of a three-year lease by not informing the lessor that the shareholder was seeking immediate out-of-state employment. Rejecting the claim, the second circuit held that a duty to refrain from an intentional and unjustifiable interference is not the equivalent of a duty to disclose employment plans to the lessor. Thus, the lessor failed to state a cause of action against the sole shareholder lessee under *9 to 5 Fashions, Inc. v. Spurney*.

In *Junior Money Bags, Ltd. v. Segel*, a lessor of land and air space, to be used for the erection of a tower support and landing station for a gondola, sued a purchaser of a lease at a judicial sale, seeking a declaration that the purchaser's right of occupancy under the lease had terminated. The purchaser counterclaimed for tortious interference with business relations and opportunities under section 766B of the Restatement (Second) of Torts. The United States Fifth Circuit Court of Appeals, citing its diversity jurisdiction and reluctance to expand the narrow Louisiana cause of action, concluded that although *9 to 5* had recognized a cause of action for tortious interference with business, "[t]his tort does not appear to be as broad as it is under the Restatement or as [purchaser] urges."  

2. *Lead Paint*

With respect to the specific defect of the presence of lead paint on the premises, the lessor now has specific obligations imposed by state and federal law. Breach of a duty imposed by these statutes may give rise to a claim for injuries to the lessee or a third person under Louisiana Civil Code article 2317.

3. *Slip-And-Fall Statute Not Applicable to Lessor*

In a slip-and-fall case, the court refused to extend Louisiana's codified slip-and-fall law to impose a duty on a landowner-lessee who was not a mer-

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191. 613 So. 2d 671 (La. App. 2d Cir. 1993).
192. Id. at 675.
193. 970 F.2d 1 (5th Cir. 1992).
196. See Armstrong, supra note *, §§ 8.21, 8.51.
200. See Armstrong, supra note *, § 8.5.
201. La. R.S. 9:2800.6.
The court, however, found that the landowner-lessee owed a duty to third persons because of a lease provision in which the landowner assumed a duty to keep the parking lot free of snow and ice. That duty supported a finding of liability under the Civil Code negligence articles. It is important to note that the court found a duty owed to third persons by looking to the lessor-lessee agreement.

4. Obligations of Neighborhood

A recent case examined the implications of an owner-lessee owning a defective building which was adjacent to the leased property in question. A purported defect in the owner's property caused a fire that damaged the leased property. The lessee sought damages from the owner-lessee on theories of breach of the obligation of neighborhood and damage caused by a vice or defect in the premises. The court held that the plaintiffs who were lessees and sublessees of the owner were not neighbors within the meaning of Louisiana Civil Code article 667; thus, it provided no grounds for relief. As for Louisiana Civil Code article 2695, the court stated in dicta that failure to maintain a sprinkler system during renovation did not violate a city code or industry standards; thus, there was no defect. The statement was dicta because the court held that absence of a sprinkler system was not a defect under Louisiana Civil Code article 2695. The concurrence by two judges emphasized that an Article 2695 defect must be in the premises leased, but not in an adjacent property, even if both are owned by the lessor.

B. Federal Law

1. Americans With Disabilities Act

The Americans With Disabilities Act (ADA) may impose affirmative obligations on the lessor to make reasonable accommodations to meet some exceptional needs where a public accommodation is being leased.
2. Sherman Act Violations Caused by Tying of Commercial Lease to Services

The Sherman Act may be violated by a lease that requires an agricultural lessee to market its agricultural product to a particular processor at a particular location. Such an arrangement may violate the anti-tying provisions of the Sherman Act. If so, the lease is illegal because it unreasonably restrains competition. Such a finding may give rise to cancellation of the lease as a contract with an illegal cause or object.

XVII. MISCELLANEOUS ISSUES

A. Irreparable Injury Caused by Potential Environmental Damages

Where the lessee's use of the leased land causes or threatens to cause environmental damage, a lessor may obtain an injunction against further harmful activities if he can demonstrate irreparable harm. Irreparable harm may be proved by expert testimony that the site has become polluted, clean-up costs are substantial, and lessee is selling its assets with plans to go out of business.

B. Expropriation Compensation Rights of Sublessee

The sublessee who exercises his rights through the original lease has a right to compensation for improvements placed on the property by the sublessee.

C. Recordation

In a recent case, an appellate court held that a recorded lease that contains a provision permitting the lessee to sublet, does not place third persons on notice of the possibility of a sublease, and to state that the sublessee is protected thereby "goes beyond the bounds of the public records doctrine embodied in R.S. 9:2721."

212. See Armstrong, supra note *, §§ 3.54, 9.3.
214. Id.
216. See Armstrong, supra note *, § 3.42.
218. Id.
219. See Armstrong, supra note *, § 15.22.
221. Sauer v. Toye, 616 So. 2d 207 (La. App. 5th Cir. 1993).
222. Id.; La. R.S. 9:2721(B) (Supp. 1994), added by 1992 La. Acts No. 974, § 1; see Armstrong,
D. Mineral Leases as Modification of Traditional Ownership Rights

Acknowledging that the principles of Louisiana mineral law modify traditional notions of private property ownership, Louisiana courts have held that a mineral lessee may use the property of adjoining land owners under permit from the Commissioner of Conservation if that adjacent property is part of the properly permitted compulsory exploration unit.

XVIII. BANKRUPTCY-RELATED ISSUES

A. Pre-Petition Incurred/Post-Petition Matured Claims

Claims that are incurred pre-petition, but mature post-petition, are treated as pre-petition claims.

B. Assignment of Lease as Subjective Novation

An acceptance and assignment of a lease constitutes a substitution of the assignee as the debtor in place of the estate. Once the lease is accepted and assigned, state law governs the rights of the parties. If the acceptance and assignment constitutes a novation, and a novation discharges guarantors of the original lease under controlling state law, guarantors are so discharged after acceptance and assignment. However, the debtor must prove by convincing evidence that the creditor intended a novation. However, an assigned lease conveys greater rights than a sublease. In particular, the assignee of a lease may exercise an option to lease in the original lease, while a sublessee may not.

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supra note *, §§ 2.91-2.92.
223. See Armstrong, supra note *, § 3.41.
225. See generally Armstrong, supra note *, Ch. 13.
226. See id. § 13.6.
228. See Armstrong, supra note *, §§ 12.41, 13.5.
230. Wainer, 984 F.2d at 683.
231. Id.
232. Id. at 684.
234. Id.
C. Effect of Rejection of Lease On Lessor-Lessee-Sublessee Relationship

Following rejection of a lease by the tenant-debtor, who has subleased the premises, the tenant-debtor has neither statutory, contractual, nor possessory rights in the leased premises. Therefore, the landlord must proceed against the sublessee to regain possession.

XIX. THE LEASE AND PREDIAL SERVITUDE COMPARED

In an unusual case, a condominium building was built on land that was owned by persons other than the owners of the condominium. The land was burdened with a predial servitude in favor of the condominiums. An annual fee was charged by the servient estate to the condominium-dominant estate to sustain the predial servitude. The issue in the case was whether the owners of the condominiums had a right to a homestead exemption. The Tax Commission argued on appeal that the fee charged created a lease, and, thus, no homestead exemption would be available.

The court rejected that proposition by noting that a lease is a personal obligation running in favor of the lessee whereas the predial servitude is a real obligation that runs with the land. Further, a predial servitude has no term whereas a lease has a term, conventional or legal. Finally, the court noted that a fee is a valid charge on a predial servitude and that fee does not convert a servitude to a lease. Thus, the court concluded that a predial servitude for which an annual fee is charged is not a lease.

The result in One River Place Condominium Association is undoubtedly changed by the 1993 amendment to Article VII, section 20(A)(1) of the Louisiana Constitution. That amendment provides in part that a homestead exemption for a primary residence is available to the owner of the primary residence whether "the homeowner owns the land upon which the home... is built."

235. See generally Armstrong, supra note *, Ch. 13.
237. Id. at 100-01.
238. See Armstrong, supra note *, § 1.32a.
240. Id.
241. Id. at 947-49.
RECENT LEASE LAW SECONDARY SOURCES

George Armstrong, Louisiana Landlord And Tenant Law (5th revision Butterworths 1993).
Marie I. Moore, Selected Issues in Louisiana Real Estate Leasing (National Business Institute, Inc. 1993).
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