Lease Financing in Louisiana

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The Louisiana Civil Code, the Louisiana Revised Statutes, and Louisiana jurisprudence must be considered in any question involving lease financing. This article addresses the leasing of immovable property, including: the rights of the creditors of lessors who obtain a mortgage on the underlying property, a security interest in the rental stream, or a security interest in the lessor’s fixtures; the rights of creditors of lessees who obtain a mortgage on the lessee’s lease or on the lessee’s right of occupancy and possession, as well as creditors who obtain a security interest in the lessee’s movable property; the lessor’s privilege on movables found on the leased premises and the ranking of this right against other legal privileges and security interests; and certain related topics.

I. THE NATURE OF A LEASE

Lease is a contract or, in strictly civilian terminology, a conventional obligation. As in any conventional obligation, the parties must have the capacity to contract, there must be consent by both parties, and the contract must be supported by a lawful cause. Lawyers trained in the common law tend to equate civilian “cause” with common law “consideration.” The two are not the same. “Cause” is a far broader concept and encompasses the “reason why” a party enters into an obligation. Thus, it is not limited to contemporaneous consideration.

In Louisiana, lease is a “nominate contract,” that is, it is subject to special rules in addition to the general ones that apply to all contracts. These special rules are found in three separate locations: in a section of the Louisiana Civil Code entitled “Of Lease”; in provisions of the Civil Code dealing with legal privileges; and in the Louisiana Civil Code ancillaries. The vast majority of the Civil Code provisions are unchanged since 1870, and these provisions, in large part, are substantially identical to the Civil Code of 1825. Thus, most of

1. Lease financing involving movable property is beyond the scope of this article.
2. The tax implications of lease financing are beyond the scope of this article.
7. For a detailed analysis of the meaning of “cause,” see Saul Litvinoff, Still Another Look at Cause, 48 La. L. Rev. 3 (1987); Saul Litvinoff, Obligations, § 196 et seq. at 381 (1969).
the substantive provisions of the lease articles in the Civil Code have been unchanged for over 150 years, although the lease provisions in the Civil Code ancillaries have been updated on a regular basis.

The Civil Code lists three "absolutely necessary" requirements for a valid contract of lease: "the thing, the price, and the consent." 2

The "thing" is the property being leased. While Louisiana law requires strict descriptions of immovable property when a sale or mortgage is involved, even as between the parties, 3 the requirements involving leases are less stringent. The rule that emerges from the cases is that if the parties to the lease know what property is included, and if the issue involves only the parties, a broad description will suffice. 4

The "price" is the amount of rent. If the lease agreement is silent on the rent, then the lease is invalid. 5 Although rent must be agreed upon between the lessor and the lessee for there to be a valid lease, it is not essential that rent be fixed at a specific sum of money per week, month or year. Rather, rent is sufficiently certain as long as it can be readily ascertained or can be calculated from facts or circumstances not within the control of the lessor and lessee. 6 Thus, rent can be based upon a percentage of the lessee's sales or may contain escalator provisions based upon an index rate.

A crucial part of the parties' consent is an agreement upon the term of the lease. Louisiana law does not have any specific provisions on how long a lease may last, and it is not unusual to find recorded documents, particularly dealing

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13. See, e.g., in the sales provisions of the Louisiana Civil Code, the Louisiana Law Institute's Official Revision Comment (b) to Louisiana Civil Code article 2440, amended by 1993 La. Acts No.841, section 1, which requires a "description of immovable property" that is precise. The Revision Comment relies upon Hargrove v. Hodge, 9 La. App. 434, 121 So. 224 (2d Cir. 1928), reh'g refused, writ refused, No. 3281 (Jan. 28, 1929), which noted that "the general rule is that the description must fully appear within the four comers of the instrument itself, or that the deed should refer to some map, plat, or deed as part of the description, so that the same may be clear." Id. at 436, 121 So. At 225. Also see Louisiana Civil Code article 3288, requiring that a "contract of mortgage must state precisely the nature and situation of each of the immovables or other property over which it is granted . . . ." For more on mortgage property descriptions, see Michael H. Rubin and Stephen P. Strohschein, Security Devices, 55 La. L. Rev. 611, 618-19 (1995).
14. See, e.g., Williams v. James, 188 La. 884, 178 So. 384 (La. 1938) (lease of "Lot 2, Block 410" sufficed to lease Lot 2 of Block 192 when the parties knew what was intended and the remainder of the description showed their intent); Wood v. Sala Y Fabrigas, 105 La. 1, 29 So. 367 (La. 1900) (lease of "Zeringue's Landing under Nine-Mile Point" was sufficiently descriptive of the property); Arata v. Louisiana Stadium and Exposition Dist., 254 La. 579, 225 So. 2d 362 (La. 1969), reh'g denied, cert. denied, 90 S. Ct. 569, 396 U.S. 279 (1970) (ability of lessor to substitute other land did not make property description of the thing leased invalid).
with timber lands, that provide a term of 99 years. Cautious practitioners are careful in delineating the length of a lease, however, for Louisiana jurisprudence is clear that perpetual leases violate public policy and are therefore void.

The failure to set forth explicitly a term of the lease is not fatal. Louisiana law provides that if no duration of the lease has been established by the parties, then for houses, apartments, and other "edifice(s)" (which presumably would include commercial establishments) the "lease shall be considered to have been made by the month." In this situation, the lease may be terminated in writing by either party giving written notice to the other "at least ten days before the expiration of the month, which has begun to run." If what is being leased is a farm or predial estate, the presumption changes from a lease on a monthly basis to one by the year.

II. A LEASE DOES NOT HAVE TO BE IN WRITING AND DOES NOT HAVE TO BE RECORDED, BUT IT IS ADVISABLE TO DO SO

As between the parties, there is no requirement that the lease be in writing. An oral lease is just as valid as a written lease, and the parties may enforce it against one another.

The ability of the parties to enforce a lease between themselves is of little help, however, to a creditor who wishes to take a security interest in some aspect of the lessor's or lessee's rights. Lease financing depends upon the assurance of the lender that the security interest will be recognized and enforceable against the world; this requires that the lease itself be effective as to third parties.

To be effective against third parties, a lease must be in writing and must be recorded in the conveyance records of the parish where the immovable property is located. There is no requirement that a written lease be witnessed or notarized for it to be valid; however, if the lease is in authentic form (signed before a Notary Public in the presence of two witnesses), then it is self-

18. Id.
21. La. Civ. Code art. 2687. See also Management One of La., Inc. v. Thibodeaux, 598 So. 2d 1224 (La. App. 4th Cir. 1992); and D'Antonio v. Simone, 653 So. 2d 678 (La. App. 5th Cir. 1995).
23. Fo-Coin Co. v. Drury, 349 So. 2d 382 (La. App. 4th Cir. 1977), reh'g denied; La. R.S. 9:2721 (1991 and Supp. 1999), amended by 1992 La. Acts No. 974, § 1. It is beyond the scope of this article to deal with the intricacies of "filing" versus "recording." Suffice it to note that, historically, in Louisiana conveyances were effective upon filing even if never recorded. Schneidau v. New Orleans Land Co., 132 La. 264, 61 So. 225 (1913), on reh'g. For more on the distinction between filing and recordation, see Rubin and Strohschein, supra note 13, at 614-15.
proving and no extrinsic evidence is required on the identity of the parties who
signed the lease.

Louisiana's Public Record Doctrine, now enshrined in Louisiana Revised
Statutes 9:2721, provides that no lease or other interest affecting immovable
property

shall be binding on or affect third persons or third parties unless and
until filed for registry in the office of the parish recorder of the parish
where the land or immovable is situated. Neither secret claims or
equities nor other matters outside the public records shall be binding on
or affect such third parties.25

The term "third person" is defined in the Civil Code and excludes the parties to
a contract as well as the notary; however, witnesses to the document are "third
persons."26

Despite loose language in some cases that the Louisiana public records
provide "constructive notice" to third persons,27 in fact the Public Records
Doctrine is one of absence28—that is, if a document is never part of the public
records, then third parties may ignore it, even if they have actual knowledge of
its existence.29 The converse is also true; if a document is properly filed for
registry but never indexed,30 or if it has been filed and fraudulently canceled,31
it nonetheless affects third persons.

There are special provisions in the Louisiana Civil Code ancillaries dealing
with leases. In 1986, the Louisiana legislature enacted a provision allowing an
extract of a lease to be recorded rather than the entire lease.32 Of course, this
provision will apply only if the original lease is in writing. If the parties intend
to record an extract of lease, then five requirements must be met. The extract,
at a minimum, must contain: the names and the signatures of both the lessor and
lessee, the "date of execution of the lease," "a brief description of the leased
property," the "term of the lease," and a reference to any renewal or purchase

v. Franklin, 376 So. 2d 991 (La. App. 1st Cir. 1979), writ denied, 381 So. 2d 508 (1980); Hasslocher
v. Pecknagel, 160 So. 2d 421 (La. App. 2d Cir.), reh'g denied, writ denied, 245 La. 964, 162 So.
2d 14 (1964).
28. "Therefore a third person can rely upon absence from the records (non-recording) as
guaranteeing ineffectiveness of an instrument required to be recorded." Gulf S. Bank & Trust Co.
v. Demarest, 354 So. 2d 695, 697 (La. App. 4th Cir. 1978).
29. "This Court has held uniformly, in the interest of security and certainty of titles, that the
records kept by law are conclusive and knowledge acquired dehors the public records is immaterial."
Southern Casualty Co. v. Ross, 179 La. 145, 149, 153 So. 673, 674 (La. 1934).
Cir. 1982).
options contained in the lease. The Louisiana Legislature emphasized the significance of filing extracts of leases by making the 1986 statute remedial and retroactive. It explicitly applies to any pre-1986 extract that is in “substantial compliance with the provisions of this Section and such instrument shall affect third persons and third parties as of the date of recordation.”  

Lenders who rely upon any aspect of a lease as security will want to assure that not only is the lease (or an extract of lease) properly and timely filed, but also that any renewal also is filed. In Avenue Plaza, L.L.C. v. Falgoust, the court held that an unrecorded renewal of lease was not binding on the third-party purchaser of the leased property, and the third-party purchaser could rely on the absence of the unrecorded renewal.

Even the actual knowledge of a purchaser that an unrecorded lease burdens the immovable property being acquired is not sufficient to support a conclusion that the purchaser intended to purchase the property subject to the lease. The lease of property does not affect the purchaser or follow the immovable property into the purchaser’s hand if the lessee has failed to record the lease or if it cannot be shown that the purchaser intended that the purchase would be subject to the lease. When the purchaser assumes an unrecorded lease in the act of sale, however, the purchaser is bound to recognize the lessee’s right. Likewise, if a purchaser expressly assumes the lease obligation of its vendor and acknowledges this assumption by means of an assignment of the lease to its lender, the purchaser cannot contest the validity of the lease. These rules are understandable, for one who assumes an obligation becomes a party to it; thus, the act of assumption vitiates a claim of third party status.

Parties who record extracts of leases should be careful to make sure that the extract is accurate. Likewise, they should avoid “counter letters,” the creation of documents not intended to be filed but which state a purpose or agreement that is at odds with the recorded instrument, for there is a Louisiana criminal statute that makes it a crime to file with public officials “any document containing a false statement or false representation of a material fact.” The existence of a counter letter may be the basis of a claim that the recorded document contains a false representation of a material fact.

38. See, e.g., the distinction between the rights of persons who acquire property and assume indebtedness versus the rights of those who acquire property subject to indebtedness. La. Code Civ. P. arts. 2702, 2703.
39. A discussion of counter letters can be found in Dawsey v. Gruber, 647 So. 2d 1084 (La. 1994).
III. A MORTGAGE ON THE LESSOR’S PROPERTY

The lessor, as owner of the land, may mortgage the land itself. A mortgage, under Louisiana law, is an “indivisible real right that burdens the entirety of the mortgaged property . . . .” The mortgage encumbers not merely the land but also the component parts of the land; “component parts” include buildings and other constructions as well as things that are permanently attached to a building or construction “such as plumbing, heating, cooling, electrical, or other installations . . . .” Louisiana law allows an owner to make certain items of movable property that are not fixtures into immovable property merely by filing in the conveyance records of the parish a declaration making machinery and appliances in commercial establishments “component parts”; this declaration is effective to legally immobilize these items even if they can be easily removed physically. Unlike a lease, which may be oral, a mortgage must be in writing to be valid even as between the parties. Also, unlike a lease which needs to be signed by both the lessor and lessee, a mortgage need be signed only by the mortgagor; the mortgagee’s consent is presumed.

The fact that a lessor has granted a mortgage does not necessarily imply the personal liability of the lessor; a mortgage may secure a “non-recourse” or “in rem” obligation or may secure the personal obligation of another.

It is not unusual for lessors to enter into a long term lease of unimproved property. The contract of lease typically provides that, at the termination of the lease, the building (even if owned by the lessee during the lease as a separate “other construction”) reverts in ownership to the lessor. To finance such construction, lenders typically require not only that the tenant fully secure the loan, but also that the landlord mortgage the lessor’s interest in the real estate. An example of this arrangement can be found in Kavanagh v. Berkett. There, the court found that a requirement in a lease providing for an in rem mortgage against the lessor’s property contemplated a commercially reasonable mortgage.

42. La. Civ. Code art. 3286.
44. La. Civ. Code art. 466.
51. The language of the document provided, in part:
(A) LESSEE shall not place any mortgage, lien, privilege, or encumbrance on or against the leased property or permit any of its creditors to do so without LESSOR’s prior written consent.
(B) Upon request and during the primary term (first twenty years) of this lease, LESSOR agrees to permit LESSEE to mortgage the leased property or a portion thereof for the purpose of providing initial interim or initial permanent financing of the cost of physical
Kavanaugh, a commercial transaction, the court held that the parties must have contemplated a commercially reasonable mortgage that would include the rights of the lessor's mortgagee to obtain Louisiana executory process and to require other standard provisions concerning waivers of certain notices. Because of this case, tenants who are negotiating for long-term ground leases where the landlord will be giving an in rem mortgage on the underlying property often negotiate a clause in the lease requiring the landlord to grant a "commercially reasonable in rem mortgage against the landlord's ownership interest in the land."

Although the mortgage against the lessor's property will encumber all component parts, the definition of what constitutes a component part remains the subject of litigation. For example, a chandelier in an expensive home has been deemed a "component part" even though it could be easily removed\textsuperscript{52} and a transformer containing PCBs has been held to be a component part of a commercial building.\textsuperscript{53} In cases decided in the last few years, a limestone working base in a limestone pit was held to be a component part although the loose limestone in the pit was not,\textsuperscript{54} while a drilling rig skidded on top of and welded to a platform in the Gulf of Mexico was held not to be a component part.\textsuperscript{55} A lender who wants to make sure to obtain all fixtures and component parts on the property will be well advised to do three things: first, take a mortgage on the tenant's right of occupancy and improvements; second, take a mortgage on the lessor's interest in the land and component parts; and third, timely file a "fixture filing" under Louisiana's version of Article 9 of the U.C.C.\textsuperscript{56} Under Louisiana law, lenders may not obtain a valid fixture filing if the property is residential; the property must be retail or commercial and the filing must be accomplished before the fixture is attached.

IV. A Security Interest in the Rental Stream

In addition to mortgaging the rights in the land, a lessor also may encumber the rental income stream of the property. Louisiana has a lengthy statute—Louisiana Revised Statutes 9:4401—that details how lenders are to create and perfect this security interest. It should be noted that perfection occurs only under this statute; there is no way to use Louisiana's version of

\begin{footnotesize}
\begin{enumerate}
\item Improvements placed or to be placed on the property covered by the mortgage, provided the LESSEE first satisfies the following terms and conditions:
\item The mortgage shall involve and shall require no personal or direct obligation on the part of the LESSOR and shall bear only against LESSOR's land and more specifically, against that portion of the leased property specifically mortgaged.
\end{enumerate}
\end{footnotesize}
U.C.C. article 9\textsuperscript{57} to perfect the security interest in rents, for Article 9 does not apply to interests in immovable property.\textsuperscript{58}

Originally, the statute (Louisiana Revised Statutes 9:4401) provided that the document creating the security interest in the lessor’s rental income had to be recorded in the parish conveyance rather than in the mortgage records. This requirement was a trap for the unwary, and there were instances where a mortgagee recorded a separate act of rental assignment in the mortgage records only to find that, while the document was effective between the parties even without recordation, it had no effect on third parties because it was not filed for recordation in the conveyance records.\textsuperscript{59} The reason why recordation originally was required to be in the conveyance rather than mortgage records has to do with the difficulties encountered in translating common law security interests into civilian terms. Typically, in common law, the way to obtain a security interest in a lessor’s rental income stream is through an assignment of that right. The common law “assignment” is intended to be used as a security device. In Louisiana, however, “assignment” refers to a transfer of ownership and is a species of sale.\textsuperscript{60} Louisiana does not have a concept of transferring title to secure a loan.\textsuperscript{61} Yet, even though the statute always contemplated a security interest, because it was originally called an “assignment of rent,” recordation was required to be in the conveyance records.

The statute now provides two ways of perfecting the security interest. First, if all the lender wants is a security interest in the rental stream, then the lender may file an act (denominated either as an act of assignment or pledge) in the conveyance records of the parish where the immovable is located. Second, if the lender intends to take a mortgage on the lessor’s property interest as well as a security interest in the rental stream, then the security interest may be contained in the act of mortgage itself. Prior to 1995 it was necessary to file the act of mortgage in both the mortgage records (to obtain the mortgage)\textsuperscript{62} and in the conveyance records to perfect the security interest in the rents. After September, 1995, however, a lender who has included a right to the rents in the mortgage

\textsuperscript{57} La. R.S. 10:9-101-604 (1993 and Supp. 1999). In Louisiana, the statute is officially entitled the Louisiana Commercial Laws, but for the purposes of this paper, it will be referred to as U.C.C. article 9. Out of state attorneys are cautioned that the Louisiana version is different in many respects from the Model provisions of U.C.C. article 9.


\textsuperscript{59} Prudential Ins. Co. of America v. CC & F Baton Rouge Dev. Co., 647 So. 2d 1131 (La. App. 1st Cir. 1994).

\textsuperscript{60} The Civil Code provisions on assignment are found in Title VII (“Sale”) Chapter 15 (“Assignment of Rights”).

\textsuperscript{61} See, e.g., in the context of mortgages, Miller v. Shotwell, 38 La. Ann. 890 (1886), holding that a purported sale to secure a loan is merely a mortgage and not a transfer of title. This rule is in accordance with the title theory adopted by the American Law Institute’s Restatement of the Law of Property, Mortgage, § 3.2 (1997).

need file the document only in the mortgage records. Because of this change in the law, lenders who contemplate taking a security interest in a landlord's rents must check both the mortgage and conveyance records and carefully read every mortgage to see if it contains a rental assignment.

The rents that may be assigned are not limited to existing lease income. Anticipated and future rents may be the subject of the assignment and no special language is required; it is sufficient if the instrument contains a general description of the leases and rents.

There is a special requirement that the immovable property be carefully described in order that the security interest in rents be effective against third parties; the property description must be one "which, if contained in a mortgage of the immovable, would cause such mortgage to be effective as to third persons if the mortgage were properly filed for record under the laws of this state." The rent assignment also must "state the amount of the obligation secured thereby or the maximum amount of the obligation that may be outstanding at any time from time to time that such assignment secures."

The length of time that the inscription of the rental assignment affects third parties depends upon whether it is contained in a post-September 1995 mortgage. If it is, then the effect continues as long as the mortgage continues to affect third parties. The general rule is that if the obligation the mortgage describes (e.g. the note) is due less than nine years from the date of the document, the effect of inscription lasts ten years from the date of the document (not ten years from inscription in the public records). If the obligation the mortgage describes is due nine years or more from the date of the document, however, then the inscription lasts six years from the maturity date described. A timely reinscription of a mortgage preserves its original rank (it ranks from the date it was filed) and extends the time of inscription ten years from the date of reinscription.

On the other hand, if the security interest in rents occurred prior to September 1995 but after September 1, 1990, the same time frames set forth above for reinscription apply, but now the inscription must be in the conveyance records. For security interests in rents perfected prior to August 31, 1990, the same general rules are applicable.

65. Id.
Reinscription is relatively easy; a written notice of reinscription may be done by the lender and no signature of the lessor is required. Likewise, no notary or witnesses are necessary. The reinscription notice must "state the name of the assignor as it appears in the recorded instrument and recordation number or other appropriate recordation information of the instrument or of a prior notice of reinscription and shall declare that the instrument is reinscribed." If the reinscription is filed too late—after the original inscription has lapsed—it remains valid, but instead of retaining the original ranking date, the lender gets a new ranking date starting with the untimely reinscription.

A Louisiana assignment of rents gives a lender tracing rights in the rental stream equivalent to the rights of a secured lender under U.C.C. article 9. An assignment of rents allows a lender to assert a security interest in "any identifiable proceeds" including collections and cash on hand. Because a rent assignment may be "absolute" or "conditional" or "collateral," a tenant has no obligation to remit rents to the secured party until notified in writing. Louisiana law specifically prohibits any clause in a lease contract that prohibits the assignment of rents or that requires prior notice to the tenant before creating the assignment.

V. THE LESSOR’S PRIVILEGE

A. Ranking a Lessor’s Privilege Against a U.C.C. 9 Security Interest; The U.C.C. 9 Security Interest Always Wins

Louisiana historically has granted lessors legal rights over certain movables found on the leased premises through the lessor’s privilege. There is no requirement that there be a written lease in order for a lessor’s privilege to exist; thus, the privilege will affect movables on the leased premises even though there is nothing in the public records to alert third parties about the existence of the lease. Prior to 1990, this privilege had the capacity to interfere with the security interests that lenders obtained from tenants, for a Louisiana chattel mortgage on the tenant’s movables could be outranked by a pre-existing lessor’s privilege. If the lease had existed prior to the tenant seeking financing, the tenant’s lender’s only option was to attempt to obtain a voluntary subordination from the lessor.

74. Id.
75. Id. R.S. 9:4401(F)(1) (1997).
79. For a discussion of this entire area, see Acadiana Bank v. Foreman, 352 So. 2d 674 (La. 1977), reh'g denied.
With the advent of Louisiana’s version of U.C.C. article 9 in 1990, the secured party’s rights became far easier to obtain and perfect. By statute, a lender who perfects a Louisiana U.C.C. 9 security interest on movables will always outrank the lessor’s privilege, regardless of whether the U.C.C. 9 security interest is perfected before or after the lessor’s privilege comes into existence.

The lessor’s privilege, however, remains a powerful right and lenders need to be aware of the broad powers of a landlord. Under Civil Code provisions that have remained essentially unchanged for almost 130 years, Louisiana law has permitted the lessor of immovable property to exercise a privilege on three different classifications of movables found on the property leased: the property of the tenant; the property of the subtenant; and the property of third persons that is on the premises for an extended period of time rather than transiently.

B. The Lessor’s Privilege on the Tenant’s Property

To protect the payment of rent and other obligations under the lease, Louisiana Civil Code article 2705 grants the lessor a privilege on property of the tenant found on the leased premises. The lessor’s privilege on the property of the tenant is unique in that it is not limited to property located on the leased premises at the time of seizure; the lessor may pursue the tenant’s property for up to fifteen days after the movables leave the premises without the lessor’s consent. If the items have left the premises for more than fifteen days, the lessor’s privilege is lost, although the privilege may reattach if the items are later returned to the premises.

83. The Louisiana Civil Code statutes on lessor’s privileges are found in Louisiana Civil Code articles 2705-2709. Louisiana Civil Code articles 2706 and 2707 have remain unchanged since their enactment in the 1870 Code.

Louisiana Civil Code article 2705 was amended in 1934, at the height of the Depression, to expand the list of items that are exempt from the lessor’s privilege; it was amended again in 1979 to change the word “wife” to “spouse.” Louisiana Civil Code article 2709 was amended in 1960 to legislatively overrule Edmonds v. Totem Stores, 229 La. 467, 86 So. 2d 104 (1956) and thus, after amendment, permitted in the words of the Louisiana Law Institute “a lessor to enforce his privilege on [the tenant’s] movables removed from the leased premises without his consent as long as these are in legal custody.” The article was amended again in 1990 to add a paragraph concerning injunctions for a lessor’s privilege involving rights on crops and government entitlements (La. Civ. Code art. 2709(c)).

85. See Boylston v. Jones, 153 So. 53 (La. App. 2d Cir. 1934).
86. “[T]he earliest time that the lessor’s privilege can affect movables is that time when the lease is in effect and the movables are on the premises.” Acadiana Bank v. Foreman, 352 So. 2d 674, 678 (La. 1977), reh’g denied.
The privilege extends to all of the tenant’s property on any portion of the leased premises, whether outside or inside.

C. The Lessor’s Privilege on the Property of a Sub-Tenant

If a tenant subleases the property, the subtenant’s property likewise is subject to a lessor’s privilege; however, the lessor’s right against the subtenant’s property is much narrower than the right a lessor has against the property of the tenant. First, there is no right to pursue the subtenant’s property if it leaves the leased property. Second, the lessor may collect from the subtenant’s movables only the amount that the subtenant owes the tenant. For example, if the tenant owes the lessor $1000, but the subtenant owes the tenant only $400, only $400 of the subtenant’s property is subject to the lessor’s privilege, regardless of how much property the subtenant has in the leased area.

D. The Lessor’s Privilege on the Property of Third Persons

The right of a lessor against the property of a third person who is not a subtenant is highly circumscribed, and the Civil Code rules narrow significantly the lessor’s privilege when it is sought to be asserted against movables belonging to a third person that are located on the leased premises.

First, the property of the third person is only subject to the lessor’s privilege if it is found in a specific location—essentially, under the roof of a dwelling or commercial establishment. Property of a third person outside on leased premises—such as a boat left in a driveway of a rented house—may not be seized, even if the boat is permanently being parked in the driveway. Thus, the lessor’s privilege against property of a third party is very limited, in contrast to the lessor’s privilege against the property of the lessee. A movable belonging to the lessee might be seized anywhere on the leased property, but a movable owned by a third party can be subject to a lessor’s privilege only if it is “contained in the house or store.” Note that the Code article does not state “garage” or “shed” or even “under a covering”; since privileges are to be strictly and narrowly construed, the express language of the Civil Code controls.

88. See Franek v. Flynt, 132 La. 327, 61 So. 390 (1913), reh’g denied. See also Kenneson v. Bain, 8 So. 2d 722 (La. App. 1st Cir. 1942).
91. La. Civ. Code art. 2707. In Boone v. Brown, 201 La. 917, 10 So. 2d 701 (La. 1942), the Court held that a third party’s automobile trailer located outside on leased property was not subject to a lessor’s privilege.
92. As the title to Louisiana Civil Code article 3185 indicates, “Privileges [are] established only by law, stricti juris.”
Second, even if the property of a third person is “contained in the house or store,” that is not enough to subject it to the lessor's privilege. The other requirement is found in Louisiana Civil Code article 2708 and mandates that the third person’s property not be there “transiently or accidentally.” While the older cases indicate that the burden of proof of demonstrating that the property is only there transiently remains on the third party claiming ownership, the case law is clear that a third person who proves that a lessor acted improperly is entitled to “counsel fees and actual damages.”

In 1984, Article 2707 was amended to allow a third person whose property was seized under a lessor’s privilege to intervene into the proceedings and, “if he fails to do so, the property may be sold as though it belonged to the lessee.” In other words, although Louisiana law provides judicial means for a lessor to seize property of third parties, it provides no mechanism for notice to that third party, no procedure to inform the court ordering sequestration that the property of a third party is on the premises, and no requirement that the petition allege that the third person’s property is “contained in the house or store.” If a third person has no notice of the proceedings, it is obviously impossible for the third person to intervene to claim its rights, including the right to seek and collect attorneys’ fees and actual damages for wrongful seizure; yet, Louisiana Civil Code article 2707 punishes the third party who has no notice by allowing the property to be sold “as though it belonged to the lessee.” These provisions, some argue, may violate basic principles of due process.

E. Exemptions from the Lessor’s Privilege

In 1960 Louisiana enacted a statute exempting from seizure under any writ, mandate, or process whatsoever, certain personal property of any debtor. This statute applies regardless of how the debt arose and is not limited to lessees who owe money to their lessors. It applies, with certain limited exceptions, to all borrowers whose creditors attempt to seize their assets. For over a hundred years, however, the Louisiana Civil Code had exempted certain personal property of a tenant from a lessor's privilege. A comparison of the 1960 general statute with the Civil Code is interesting. For example, a tenant is entitled to retain all “plates, dishes, knives, forks, and spoons,” regardless of from what material they are made, while the general exemption statute only eliminates a creditor’s right to seize “nonsterling silverware.” Thus, only the tenant under

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94. Id.
95. For more on this topic, see infra at Section V.G.
98. Id.
the Civil Code is allowed to retain all silverware, no matter how valuable, whether made of actual silver or otherwise. Both provisions exempt arms and "military accoutrements,"100 bedding, clothing, dining room furniture, cooking utensils, and tools of the trade,101 but only the general statute exempts household pets and certain wedding and engagement rings, certain vehicles, and family portraits.102 Neither exempts television sets, radios, or video or digital recording devices.

The obvious purpose of the exemptions is to prevent creditors from depriving a debtor/lessee of all items necessary to function and to earn a living.

F. The Lessor's Right to Obtain a Writ of Sequestration Without Bond

"Sequestration" is the Louisiana term for a prejudgment seizure to protect a security interest.103 The Louisiana sequestration statutes for the lessor's privilege are different from those allowing sequestration under other privileges and mortgages. If a creditor holds a mortgage on land, then to obtain a writ of sequestration the creditor must allege the existence of the mortgage, must assert that it is within the power of the mortgagee to "conceal, dispose of, or waste the property or the revenues therefrom" during the pendency of the case, and must put up a bond before a writ of sequestration is issued.104 On the other hand, a sequestration based on a lessor's privilege may be obtained before the rent is due "if the lessor has good reason to believe that the lessee will remove the property subject to the lessor's privilege," and the lessor need not put up a bond.105

While Louisiana Civil Code article 2706 provides that the lessor has a privilege for the payment of rent "and other obligations of the lease," the privilege is broader than the right of sequestration. The right of seizure is limited by statute, and it applies to apply only to the lessee's obligation to pay rent as opposed to other obligations under a lease.106 Thus, strong arguments can be

106. La. Civ. Code art. 3218 provides:

The right which the lessor has over the products of the estate, and on the movables which are found on the placed leased, for his rent, is of a higher nature than mere privilege. The latter is only enforced on the price arising from the sale of movables to which it applies. It does not enable the creditor to take or keep the effects specially. The lessor, on the contrary, may take the effects themselves and retain them until he is paid.


This article, when read in pari materia with Article 2706, clearly implies that the right of the lessor to sequester, i.e., "retain," the lessee's movables is limited to the obligation to pay rent, since
made that sequestration is not available if the lessee is in default on portions of
the lease that have nothing to do with payment of rent.

G. Due Process and the Lessor's Right to Obtain a Writ of Sequestration

Beginning with the seminal case of Sniadach v. Family Finance Corp. of
Bay View,107 the United States Supreme Court has held that pre-judgment
seizures of property can violate federal due process rights unless strict standards
are followed. Sniadach involved an attempted garnishment of wages, including
the freezing of the disputed assets. The Court found that "where the taking of
one's property is so obvious, it needs no extended argument to conclude that
absent notice and a prior hearing," such a procedure "violates fundamental
principles of due process."108

In Fuentes v. Shevin,109 Florida and Pennsylvania writs of replevin statutes
were held unconstitutional, for they did not provide for prior notice or an
opportunity to be heard. That case alleged a violation of due process rights and
triggered the provisions of 42 U.S.C. § 1983. The Court found that the require-
ment of a bond by the seizing party is only a "minimal deterrent";110 the most
important protection is "an informed evaluation by a neutral official."111 In
other words, there is a two-fold test: A "neutral official" (which later cases
made clear meant a judge) must be involved in reviewing a seizing creditor's
allegations, and the evaluation must be an "informed one," i.e. the documents and
pleadings must disclose on their face the basis of legal right asserted.

that right is limited by the phrase in Civil Code article 3218 "until he is paid." Likewise, the last
sentence of Louisiana Code of Civil Procedure article 3572, provides: "If the rent is paid when it
becomes due, the costs shall be paid by the plaintiff." This provision requires the lessor to pay the
costs of the sequestration if, after the lessor obtains a sequestration to protect the right to collect the
upcoming rent, the lessee then pays the rent "when it becomes due." Thus, the Civil Code appears
to contemplate that sequestration may only be obtained in connection with claims for rent.

The history of this Code of Civil Procedure article supports this approach. Louisiana Code of
Civil Procedure article 3575 replaced the old Code of Practice rule of "provisional seizure," which
was a method under which the lessor could seize movable property without a bond. Provisional
seizure, however, was extremely limited, and it applied to only "certain enumerated cases of
privilege." Hochfelder v. Russell, 126 So. 219, 220 (La. 1930). In Hochfelder, the Louisiana
Supreme Court expressly rejected a claim that a lessor could enforce an alleged "implied" obligation
of continuous occupancy through "provisional seizure"—that is, a seizure without bond rather than
a sequestration with bond. Thus, the rule under the Code of Practice appeared clear; "provisional
seizure" could not be used to enforce non-monetary lease obligations. That same result is carried
forward in the language of the current Civil Code and Code of Procedure articles.

(M.D. La. March 2, 1999).

108. Id. at 342, 89 S. Ct. at 1823.
110. Id. at 83, 92 S. Ct. at 1995.
111. Id. at 83, 92 S. Ct. at 1996.
While Fuentes reserved for another day the question of the right of a security interest holder to protect that security interest, the Court stressed that such a right could occur only "so long as those creditors have tested their claim to the goods through the process of a fair prior hearing." That hearing must be a real one "aimed at establishing the validity, or at least the probable validity, of the underlying claim" against the one whose property is taken. Thus, the two-fold test was to be applied. The prior hearing must be "fair" and the underlying claim and security interest must be demonstrated at that time.

The Supreme Court continues to emphasize the strict requirements of due process in prejudgment seizures. In Connecticut v. Doe, the Court struck down a statute that allowed prejudgment attachment of real estate without a prior notice and hearing. The Court contrasted the higher degree of scrutiny given to deprivations of movable property with the lesser degree of scrutiny given to attachments of real estate; yet the court emphasized that, even with real estate attachments, due process violations are not to be tolerated. The Court noted that attachment of real estate "is perhaps less" of an impingement on property rights than attachment of movables, but the Court nonetheless held that "even the temporary or partial impairments to [immovable] property rights that attachments . . . and similar encumbrances entail are sufficient to merit due process protection."

In Wyatt v. Cole, the Court again emphasized how serious due process violations are in the realm of prejudgment property deprivations. In Wyatt the issue was a Mississippi writ of replevin under which an ostensible creditor used a state statute to seize cattle, a tractor, and other personal property of his partner. The question before the court was not whether the state statute was constitutional—the lower courts had held that the statute violated due process and that issue was not appealed—rather, the question was whether private parties could be sued under 42 U.S.C. § 1983 for damages. The Court rejected a claim that private parties who invoke unconstitutional statutes are entitled to "qualified immunity" from suit.

The Supreme Court has had an opportunity to address Louisiana's sequestration statutes in Mitchell v. W. T. Grant Co. There, the question was a creditor's right to seize movables to protect its vendor's privilege. The Supreme Court found the sequestration statutes valid insofar as a Louisiana vendor's privileges were concerned. Mitchell appears to settle the question of the validity of prejudgment seizure through a writ of sequestration when the property seized

112. Id. at 96, 92 S. Ct. at 2002.
113. Id. at 97, 95 S. Ct. at 2003 (citing Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 342, 89 S. Ct. 1182, 1183 (1969) (Harlan, J., concurring)).
115. 501 U.S. at 12, 111 S. Ct. at 2113.
116. Id.
belongs to the tenant; however, left unanswered is whether a lessor may constitutionally seek a writ of sequestration of property of a third party. 119

Therefore, while a lessor may seize the property of a tenant without a bond, and while the Louisiana sequestration statutes as applied to the lessee's property seem to meet constitutional requirements, cautious practitioners may want to be sure that the property being seized belongs to the tenant. If it belongs to a third party, the cautious practitioner may want to both: notify the court that the property is not owned by the tenant and explicitly set forth in the pleadings the factual basis for the claimed privilege; and notify the third party of the seizure. These two actions should obviate a due process challenge to the seizure of property of a third person found on the leased premises.

VI. THE LESSEE'S GRANT OF A SECURITY INTEREST IN THE LEASEHOLD ESTATE

A. "Leasehold Estate" Is a Term that Has Significance in Common Law, Not Civil Law

Both the 1808 and 1825 editions of the Louisiana Civil Code of 1825 were printed in both French and English; the French text was the original and translation errors occurred when the English text was being created. In case of conflict between the two versions, Louisiana courts have held uniformly that the

119. It can be argued that there is a question whether Louisiana statutes may be constitutionally applied to allow a lessor to seek to sequester, under a lessor's privilege, property of a third person on the leased premises without a bond and without making any attempt to notify the third person before or after the seizure.

The Supreme Court warned in strong dicta in Connecticut v. Doehr, "Without a bond, at the time of attachment, the danger that these property rights may be wrongfully deprived remains unacceptably high even with such safeguards as a hearing or exigency requirement." 501 U.S. at 19, 111 S. Ct. at 2117. Further, although Louisiana law provides a mechanism for third parties to seek to recoup their seized property (La. Civ. Code art. 2705), it contains no provisions requiring that the seizing lessor give notice to the third person before or after seizure.

Thus, cases involving a lessor who seizes property of a third person seem distinguishable from Mitchell, where the person who bought property on credit and whose property was subject to a vendor's privilege was actually made a defendant in the proceeding and could seek to sue on the bond that is put up by the creditor prior to seizure. As Mitchell noted, when there is a sequestration under Louisiana vendor's privilege, the "system protects the debtor's [property] interest in every conceivable way, except allowing him to have the property to start with, and this is done in pursuit of what we deem an acceptable arrangement pendente lite to put the property in the possession of the party who furnishes protection against loss or damage to the other pending trial on the merits." 416 U.S. at 618, 94 S. Ct. at 1905. Here, however, the system contains no similar protections for third parties whose property is seized by a lessor. The third party is not named a defendant or even mentioned in the petition. The third party is not given notice of any kind. As the Supreme Court noted in Gilbert v. Homar, 520 U.S. 924, 930, 117 S. Ct. 1807, 1812 (1997), even where the state itself must act quickly because of some exigency, "postdeprivation process" is an absolute requirement; here there is none.
French text is controlling. A more difficult translation effort faces Louisiana lawyers today; that is the problem of translating common law terms into civilian ones.

The term "leasehold estate" is unknown in the civil law, which does not recognize estates in land. The term "leasehold estate" describes one of the two categories of "estates" under English law and dates back to feudal times. Although well known in English common law, Justice Story reported that the contract of leasehold estates played little role in America's colonial history.

Notwithstanding the fact that the term "leasehold estate" is meaningless in Civil Law, the term crops up often in contracts cited in reported cases. There even were occasions in the 1920s when the Louisiana Supreme Court,

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120. For a brief overview of the history of the Louisiana Civil Codes, see A.N. Yiannopolous, The Civil Codes of Louisiana, West's Louisiana Civil Code, at XXVII (1999 ed.).

Feudalism as well as English law developed two categories of estates: the freehold estates—consisting of the fee simple, and the fee tail and the life estate—and the non-freehold, or leasehold, estate—consisting of the "term of years."

The leasehold estate did not have social significance in the feudal system; rather, this estate established a relationship between the landlord and the tenant and based that relationship solely on a personal contract. The tenant did not retain rights in the property until the law allowed him to enforce the contract, which thereby secured his promised interest in the property. Nevertheless, the tenant's interest in the property relied as much on contract law as it did on property law.

124. See, e.g., Succession of Becker, 704 So. 2d 825, 826 (La. App. 4th Cir. 1997), reh'g denied, writ denied, 718 So. 2d 482 (1998) ("Decedent left to his two adult daughters his separate property, particularly, a particular legacy of his interest in a leasehold estate in Gonzales, Louisiana . . ."); Moity v. New Iberia Bank, 612 So. 2d 140, 143 (La. App. 3d Cir. 1992) (". . . or the leasehold estate if this mortgage is on a leasehold . . ."); American Bank & Trust Co. of Baton Rouge v. Louisiana Savings Ass'n, 386 So. 2d 96, 116 (La. App. 3d Cir. 1980), reh'g denied (". . . is the owner of the Leasehold Estate on the property shown on Exhibit A . . ."); Bertrand v. Sandoz, 260 La. 239, 275, 255 So. 2d 754, 766 (La. 1971) (". . . the trust proposes to issue bonds secured by the 'leasehold estate' . . ."); Herbert v. Police Jury of West Baton Rouge Parish, 200 So. 2d 877, 896 (La. App. 1st Cir.), reh'g denied, writ refused, 250 La. 1032, 201 So. 2d 520 (1967) ("the parties hereto reserve the right by written mutual consent at any time and from time to time to amend this agreement for the purpose of effecting the release of and removal from this agreement and the leasehold estate created hereby . . ."); Monsanto Chem. Co. v. Southern Natural Gas Co., 234 La. 939, 941, 102 So. 2d 223, 224 (1958) ("[I]n the contract it is stipulated that 'The leasehold estates consisting of said Section 31 . . .'"); Diebert, Bancroft & Ross Co., Ltd v. Marrero, 117 F.3d 160, 165 (5th Cir.), reh'g denied, 123 F.3d 279 (1997) (". . . all of Debtor's leasehold interest in and to 'the land . . .'").
rather than relying upon civilian authority, looked to English common law, an event not likely to occur today, when Louisiana courts conscientiously apply civilian methodology and refer to civilian sources.

B. The Lessee's Granting of a Security Interest in Its Rights Under a Lease

With this background in mind, it was only a matter of time before the Louisiana Supreme Court would have to deal with the interpretation of a lessee's mortgage on its "leasehold estate." The occasion came in Carriere v. Bank of Louisiana. The court had to address whether the granting of a mortgage on a "leasehold estate" constituted a grant of a security interest in less than the entire lease—was it a mortgage on all of the lessee's rights or merely on the lessee's rights of occupancy, use, and enjoyment?

In Carriere, the lessor leased undeveloped property to the lessee and the lessee planned to develop the property. The lessee borrowed money to build a restaurant and granted a collateral mortgage on the lessee's "leasehold estate." Upon default under the lease, the lender filed a petition for executory process, and, at a sheriff's sale, the lender purchased the "leasehold estate" that was the subject of the collateral mortgage, "which included the building, as well as the improvements." Ultimately, the lessor filed a suit against the lender, which had acquired the interest that the lessee had mortgaged, and the lessor sought to hold the bank liable for the rental payments under the lease from the date of the judicial sale, plus property taxes and necessary repairs to the building.

The court found that the lender was not liable and that the lessor was entitled to nothing from the lender, who acquired through foreclosure only the lessee's "leasehold estate." The court noted that the right of use, occupancy and enjoyment possessed by the lessee under a lease may be severed from the lessee's obligation to pay rents under the lease. Applying this precept, the court recognized that a lessee may mortgage its interest in a lease either by (1) mortgaging the entire lease, which includes all of the lessee's rights, duties and

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127. 702 So. 2d 648 (La. 1996), reh'g denied.
128. A collateral mortgage is a Louisiana security device that can be used, if the parties so intend and prepare the documents appropriately, to secure a fluctuating line of credit. For more on collateral mortgages, see Rubin & Strohachain, supra note 13; Michael H. Rubin et al., Is the Collateral Mortgage Obsolete?, 41 La. B.J. 529 (1994); Michael H. Rubin, Recent Developments in the Law: Security Devices, 53 La. L. Rev. 969 (1993); David S. Willenzik, Future Advance Priority Rights of Louisiana Collateral Mortgages: Legislative Revisions, New Rules, and a Modern Alternative, 55 La. L. Rev. 1 (1994).
129. Carriere, 702 So. 2d at 651.
130. Id. at 666.
obligations under the lease, including obligation to pay rent, or (2) mortgaging only its right of occupancy, use and enjoyment. In the first instance, in which a lessee mortgages its entire lease, if the lessee defaults on the mortgage and the mortgage holder forecloses, the purchaser at the sheriff’s sale will become the owner of the entire lease and will acquire all of the lessee’s rights, duties and obligation under the lease. Absent a specific and unambiguous subordination by the lessor of its rights to the rights of the lessee, the purchaser acquires the original lessee’s obligation to pay rents, in addition to the original lessee’s right of occupancy, use and enjoyment, as well as all other rights and obligations. The court noted that, however, if the lessee mortgages only its right of occupancy, use and enjoyment, then the acquirer at the sheriff’s sale becomes the owner of only the original lessee’s right of occupancy, use and enjoyment under the lease, while the original lessee/mortgagor retains the obligation to pay rent to the lessor. In this latter situation, absent a specific and unambiguous subordination in favor of such acquirer from the lessor, the owner of the right of occupancy, use and enjoyment may lose its right to the occupancy, use and enjoyment should the lessor cause the lease to be terminated as a result of the original lessee’s non-payment of rent. In this situation, if the lessee had constructed improvements which had been owned by the original lessee and which are now owned by the purchaser as a result of the sheriff’s sale, the lessor will be free, under Louisiana Civil Code article 493, to demand removal of the improvements within ninety (90) days in addition to the purchaser having to vacate the premises.

The Carriere court found that the lessee’s mortgage of its “leasehold estate” fell into the second category and that no magical words were needed to create a mortgage of only the lessee’s right of occupancy, use and enjoyment. The court held that, in light of the clauses in the lease, the use of the phrase “that leasehold estate” indicated an intent by the lessee to mortgage only its right of occupancy, use and enjoyment, and, therefore, the acquiring party did not acquire the obligation to pay rent, which remained with the original tenant.

The interests of the lessor, lessee and lender differ significantly. The lessor would prefer that the lessee’s mortgage be of the entire lease and not merely the right of occupancy, use and enjoyment, that the lease provide that it will not be subordinated to any leasehold mortgage, and that the lease mandate that any occupancy by a leasehold mortgagee or purchaser of its rights at a sheriff’s sale shall obligate the leasehold mortgagee/purchaser to pay rent. A lessee, on the other hand, would prefer that the lease not restrict its method of mortgaging its rights; lessees believe this should be a matter between the lessee and its lender. Lessees therefore attempt to include language in leases that will allow it to mortgage its leasehold rights in any commercially reasonable fashion. Lessees desire language that would compel the lessor to allow a mortgage on terms that a commercial lender will grant, as opposed to allowing the lessor to restrict the

131. Id. at 666, 667.
132. Id. at 667.
mortgage. Finally, the tenant's lender would prefer for the mortgage to be of the right of occupancy, use and enjoyment only, as opposed to the entire lease, to avoid having the obligation to pay rent in the event of a foreclosure. Alternatively, a tenant's lender may consider taking a mortgage on the entire lease if there is a clear subordination of the lessor's rights.

VII. ASSIGNMENT AND SUBLETTING

Under Louisiana Civil Code article 2725, the lessee has the right to assign the lease or sublet the leased premises without the consent of the lessor, unless expressly prohibited in the lease. An assignment, however, is not a sublease. In an assignment of a lease, the assignor transfers all of its rights and obligations in the lease; in a sublease, the lessee/sublessor retains some control or interest in the lease. In a sublease, there exists no privity of contract between a lessor and a sublessee; a lessor must prove termination of its lease before it may evict a sublessee. The lessor does not have an action for past-due rent directly against the sublessee, but its action instead is against the lessee. In the case of a sublease of leased premises, the sublessor (the original lessee) retains an interest in the lease, the sublessee's rights are governed by the terms of the sublease, and the sublessee assumes no obligations to the original lessor.

By contrast, in an assignment of a lease, the lessee's entire rights and obligations under the lease are conveyed to the assignee. The assignee becomes liable for all of the obligations of the lessee. Because an assignment of a lease involves a transfer of all rights in the lease, it is treated as an ordinary sale of an incorporeal governed by the Louisiana Civil Code articles on sales. Because the assignee acquires the rights of its assignor and becomes a party to that original document, the assignee may enforce the lease directly against the lessor. The lessee/assignor is not released from any of its obligations under the lease, unless the lessor expressly agrees to such a release.

A lease which prohibits sublease of the leased premises without the lessor's consent has been held to prohibit an assignment without the lessor's consent, for the terms in a lease prohibiting sublease or assignment are strictly construed

136. Tomlinson v. Thurmon, 189 La. 959, 181 So. 458 (La. 1938); Pinetree Assocs., 643 So. 2d 1271.
against the lessee. If a lease requires the written consent of the lessor to a sublease or assignment, there is no requirement that the lessor be reasonable in granting or refusing to grant consent to the sublease or assignment, and courts will protect the lessor’s right, unless the lessor is found to have clearly abused that right. Alternatively, if the lease specifically provides that the lessor’s consent may not be unreasonably withheld, then the lessor’s right will be protected, unless the lessor’s refusal is found to be unreasonable. It is for this reason that many lessors put a clause in their leases that the lessor “may refuse to grant permission for assignment or subletting for any reason or for no reason.”

Lenders usually are concerned about the lessee’s right to assign or sublet. If a lessee is seeking financing, its lender may prefer to see a clause in the lease granting the lessee the right to assign or sublease with minimum restrictions from the landlord; if there are restrictions, the lender would like to see that the landlord’s consent cannot be “unreasonably withheld.” On the other hand, if the lender is financing the lessor, the lender may want to be sure that a tenant’s assignment or subleasing does not occur unless the lessor has given its prior consent. The lessor’s lender would tend to agree with its borrower that the lessor should have maximum flexibility to refuse to grant subleases, for part of the lender’s decision to grant the loan may depend upon the creditworthiness of the tenants.

VIII. ATTORNMENT

“Attornment” is a common law term used to describe a contractual arrangement among a lessor, lessee and a third party. An attornment agreement is one in which (a) the lessee agrees to abide by the lease, even though the original lessor may cease to hold rights in the property, and in which (b) third parties and future lessors (including lenders who foreclose on or succeed to the rights of the original lessor) agree to recognize the lease and maintain the tenant in peaceable possession of the premises on the same terms and conditions called for in the lease. While the word “attornment” stems from common law, at

138. Id.
140. Caplan v. Latter & Blum, Inc., 468 So. 2d 1188 (La. 1985), reh'g denied.
141. “Attornment” stems from the term “attorn,” which, in feudal and Old English law, referred to a formal turning over by the lord of the services of his tenant. Under the feudal systems of tenure, the relationship of landlord and tenant created a close, personal relationship, requiring that the landlord not only deliver the property and provide undisturbed possession, but also protect the tenant and his family. Due to the close, personal relationship, the landlord was prohibited from substituting another landlord without the consent of the tenant. Raines v. Hindman, 71 S.E. 738 (Ga. 1911); Purvis v. Shuman, 112 N.E. 679 (Ill. 1916); Knapp v. Guerin, 144 La. 754, 81 So. 302 (1919); and 49 Am. Jur. 2d Landlord and Tenant § 1053 (1995).
least some Louisiana cases have used this term in describing contractual arrangements relating to leases. 143

A lessee typically wants an attornment agreement because then the lessee will continue to enjoy the thing leased on the same terms provided for in the lease agreement whether (1) the lessor sells the thing leased to a third party who becomes the new lessor, 144 (2) the lessor defaults under a mortgage recorded prior to the lease or extract of lease, and either the lender or another third party comes into possession of the leased property through foreclosure or (3) the lessor, who does not own the real property, but is actually a sublessor who possesses the real property pursuant to a ground lease with the owner of the real property, defaults under the ground lease and the ground lessor takes possession of the leased property as a result of the sublessor's default. As a matter of practice, an attornment agreement usually includes provisions on "non-distur-
A non-disturbance agreement provides that the lessee's peaceful possession will not be disturbed as long as lessee is not in default of the lease. Even if a lease is filed in the public records, a foreclosure by the lessor's lender (on a mortgage that primes the lease) or the extinguishment of a ground lease (where the tenant is a lessee of the sublessee) can give the third party a basis to declare the lease extinguished and seek eviction of the tenant. The attornment agreement protects the tenant's investment in the leased premises and assures that the lease will continue unabated for its entire contractual term.

No formal language is needed in an attornment agreement, and in Louisiana these agreements typically are not recorded but remain simply agreements among the affected parties. If a tenant requests an attornment and non-disturbance agreement, the lender and lessor often will insist upon a subordination agreement in exchange. The subordination agreement typically provides that the lessee subordinates its interest in the thing leased to the lender's mortgage, as well as to all future mortgages. Usually, in a single document the lessee and lessor enter into a "Subordination, Non-Disturbance, and Attornment Agreement" that combines all of these provisions. The lessor wants the agreement in order to obtain current and future financing. The lessee wants the agreement to protect its rights in the lease. The landlord's lender wants the agreement so that, regardless of whether the mortgage on the lessor's property is superior to or inferior to the lease, the lessee must comply with the lease provisions and pay the lender the rent upon foreclosure in exchange for the lessee remaining in possession of the leased premises while the lender retains the option to extinguish the lease upon foreclosure. The lender typically wants notice from both lessor and lessee of defaults of the other party and an option (but not a requirement) to cure defaults to keep the lease in effect.

Merely stating that "lender shall attorn unto lessee" may not be self-explanatory in Louisiana, and, because there are no statutory provisions on these types of clauses in Louisiana, cautious practitioners will avoid common law phrases or will, at the very least, describe in detail the rights and obligations of each party to an attornment, subordination, and non-disturbance agreement.

IX. CONCLUSION

While Louisiana is a civilian and not a common law state, the types of financing typically done throughout the United States can be done in Louisiana, although the terminology and documentation may differ somewhat from the other forty-nine states. Louisiana statutes and jurisprudence permit the kind of efficacious commercial financing that borrowers and lenders expect when the security interest relates to rights of either a lessor or tenant under a lease. The creation of the financing documents provides an opportunity for a balancing of interests. Often, four parties are involved: the tenant, the
landlord, and lenders who are extending credit to each. Knowledgeable counsel who are aware of the intricacies of the Louisiana statutes, as well as the foreclosure rules in this state (which prohibit self-help) will have the upper hand in negotiations.\textsuperscript{145}

\textsuperscript{145} A discussion of the rules of Louisiana executory process and foreclosure is beyond the scope of this article.