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Security Devices

Michael H. Rubin

R. Marshall Grodner

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*Michael H. Rubin**
*R. Marshall Grodner***

I. Title, Foreclosure and Due Process

Every lawyer who deals in real estate must have not only a detailed grasp of the rules relating to Louisiana security devices but also of: the Civil Code provisions on obligations, corporate authority, family law, and successions and donations; of local and state environmental rules; and of special local rules relating to zoning. In addition, the lawyer dealing with Louisiana real estate also must have an understanding of certain federal laws, such as those relating to environmental liability,[1] bankruptcy,[2] and special rules relating to residential financing.[3] There is no area of federal law, however, that has had a more pervasive effect on Louisiana lenders' handling of foreclosures than the federal constitutional rules relating to procedural due process. Any foreclosure in the chain of title requires title examiners to master this area of law, and both creditors' and debtors' counsel should be aware of the implications, rights, and responsibilities raised by due process concerns.

While it is now well-settled that those who buy property (either with assumption of or subject to a mortgage) are entitled to notice upon

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* Co-founder and President of Rubin, Curry, Colvin & Joseph, A Professional Law Corporation, Baton Rouge, Louisiana; Adjunct Professor, LSU Law School; Fellow, American Law Institute, and American College of Real Estate Lawyers.

** Associate, Rubin, Curry, Colvin & Joseph, A Professional Law Corporation, Baton Rouge, Louisiana; Member, Order of the Coif, Phi Kappa Phi, and Executive Committee of Banking Law Section of American Bar Association, YLD.

1. For example, Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9657 (1983 and Supp. 1991); Superfund Amendment and Reauthorization Act of 1986 ("SARA"), 100 Stat. 1613 (1989); Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6992 (1983 and Supp. 1992); the "Safe Harbor" provisions of the Regulations Interpreting Lender Liability, 40 C.F.R. §§ 300.1100-.1105 (1992).

2. Matters such as potential preferential transfers, 11 U.S.C. § 547 (1979 and Supp. 1992), fraudulent transfers, 11 U.S.C. § 548 (1979 and Supp. 1992), and equitable subordination, 11 U.S.C. § 510(c) (1979), must always be considered.

3. These special rules include, for example, such matters as the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-2617 (1989 and Supp. 1992); the Truth in Lending Act, 15 U.S.C. §§ 1601-1667 (1982 and Supp. 1992); the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1720, Form 1099 (1982 and Supp. 1992).

foreclosure,[4] that co-owners are entitled to notice upon foreclosure,[5] and that inferior creditors who hold mortgages or liens are entitled to notice as well,[6] these concepts were not always so clear cut or obvious. When the legislature enacted the Code of Civil Procedure in 1960, it included no provisions for giving notice to inferior creditors, to those who bought property with assumption of the debt, or to third possessors (those who bought property without assuming the debt).[7] It was not, however, because the redactors of the Code of Civil Procedure did not think of these issues; rather, it was because the redactors felt that giving notice to such persons was unnecessary. The Official Comments (written in 1960) to Code of Civil Procedure article 2721 are explicit:

> In the great majority of cases the third possessor will be informed of the seizure by the mortgagor on whom the sheriff has served notice thereof, yet occasionally the information may not be received in this manner. However, any requirement of service of seizure by the sheriff upon the person in possession of the property would destroy the efficacy of executory process.

If third possessors, who were owners of the property, need not be notified because the requirement of service of seizure "would destroy the efficacy of executory process," then implicitly notice to inferior creditors did not have to be given because they had the capacity to know, at the time of taking a security interest, of the existence of the prior mortgage and of the fact that, upon foreclosure, their mortgage would be extinguished. Federal courts, however, have found this line of reasoning unpersuasive in the face of mandates of constitutional due process.[8]

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4. Small Engine Shop v. Cascio, 878 F.2d 883 (5th Cir. 1989); Bonner v. B.W. Utilities, 452 F. Supp. 1295 (W.D. La. 1978).

5. Magee v. Amiss, 502 So. 2d 568 (La. 1987).

6. *Cf.* Davis Oil Co. v. Mills, 873 F.2d 774 (5th Cir. 1989); Sterling v. Block, 953 F.2d 198 (5th Cir. 1992).

7. A "third possessor" is defined in Code of Civil Procedure art. 2703; the term had long been used in the jurisprudence. *Cf.* Duncan v. Elam, 1 Rob. 135 (La. 1841); Twichel v. Andry, 6 Rob. 407 (La. 1844); Federal Land Bank v. Cook, 179 La. 857, 155 So. 249 (1934).

8. *Davis Oil Co.*, 873 F.2d 774. In *Davis*, the court stated:

> [T]he gravaman of Davis' complaint is that the Louisiana procedure allows foreclosure . . . without providing constitutionally adequate notice to other parties whose interests in the property will be extinguished along with the debtor's by the seizure and sale of the property.

Id. at 780-81. *Cf.* a discussion of this issue in Michael H. Rubin & E. Keith Carter, *Notice of Seizure in Mortgage Foreclosures and Tax Sale Proceedings: The Ramifications of Mennonite*, 47 La. L. Rev. 535 (1988).

Although Louisiana statutes relating to executory process focus on the notice of seizure, which is non-waivable,[9] the federal due process question looks instead to whether there has been a prior notice of sale. In the absence of this kind of notice (which alerts the affected party to come and bid and thereby protect property rights), the sale arguably does not affect the rights of the non-noticed party.[10] The remedy for a violation of the procedural due process requirements can range from a suit for wrongful seizure[11] to a declaration that the affected party's rights have not been altered by the sale. For example, in *Magee v. Amiss*,[12] a spouse, who did not get notice of a sale of community property by a creditor who held a mortgage signed by the husband as head and master of the community, was held to have been unaffected by the sale. Her one-half interest did not pass through the sheriff's sale although all statutory requirements had been met.

While the results of the due process "notice" cases have had an efficacious effect on parties whose rights had been adversely affected by the foreclosure sale when no notice had been given, it has had a deleterious effect on title, particularly because it often is difficult to ascertain from the public records if sufficient notice had been given.

In addition to the type of notice required, many lawyers had been unsure when they examined titles of when the notice requirement began. This is an important question, for if the required procedures (euphemistically referred to as the "Mennonite notice") were not followed, a serious question arises about the merchantability of title. It was certainly clear to all Louisiana lawyers, from at least 1989,[13] that notice had to be given, and even though some lawyers had been giving notice since 1984,[14] there was no explicit state court guidance on how far back requirements of notice reached beyond these dates. The only Louisiana

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9. La. Code Civ. P. art. 2721; Buckner v. Carmack, 272 So. 2d 326 (La. 1973), *appeal dismissed*, 417 U.S. 901, 942 S. Ct. 2594 (1974).

10. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 103 S. Ct. 2706, (1983); Sterling v. Block, 953 F.2d 198 (5th Cir. 1992); Small Engine Shop v. Cascio, 878 F.2d 883 (5th Cir. 1989); Magee v. Amiss, 502 So. 2d 568 (La. 1987).

11. La. Code Civ. P. arts. 2298, 2751; La. R.S. 10:9-507(1) (Supp. 1992).

12. 502 So. 2d 568 (La. 1987).

13. That was the date of the decision in Davis Oil Co. v. Mills, 873 F.2d 774 (5th Cir. 1989). It is interesting to note that *Davis* did not involve an inferior mortgage but rather an inferior mineral lease. It is further interesting to note that although *Davis* is often cited for the proposition that inferior creditors must be given notice in foreclosure proceedings, the actual result of *Davis* was that the failure to give notice to an inferior mineral lessee did *not* affect the validity of the sale and the inferior mineral lease was extinguished by the sale, even though no notice was given to the lessee.

14. Some lawyers felt that Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 103 S. Ct. 2706 (1983), raised this possibility. *Mennonite* did not involve an inferior mortgage but rather a superior purchase money lien that was allegedly extinguished by a tax sale.

Supreme Court case on point, *Magee v. Amiss*,[15] involved a sale that occurred in 1980, three years before the *Mennonite* case[16] was decided and nine years before *Davis*.[17] *Magee* held, without discussion, that the requirements of *Mennonite* applied to a 1980 sale, thereby implicitly recognizing that the requirements of *Mennonite* might apply retroactively to sales that occurred before the *Mennonite* decision.[18] In the last two years, three developments have occurred that impact on this problem: the holding of *Sterling v. Block*,[19] Act 662 of the 1991 Louisiana Legislature,[20] and a recent United States Supreme Court interpretation of a federal statute, 42 U.S.C. § 1983.[21]

A. Retroactivity of "Mennonite Notice"

The Fifth Circuit has held that the requirement of notice to inferior creditors applies to foreclosures that occurred before 1989, when its decision in *Davis Oil Co. v. Mills*[22] was rendered. In *Sterling v. Block*,[23] the Fifth Circuit held that because the *Davis* court itself applied the notice requirement to the parties, the holding applies retroactively to all other parties. *Sterling* paraphrased the *Davis* holding: "[T]he Louisiana request-notice provision, does not relieve a creditor of its constitutional duty to provide notice to an interested party where 'the creditor has reasonable means at its disposal to identify' the party who will be adversely affected by the seizure of the property."[24]

Sterling, unfortunately, does not provide any clear guidance on how far back retroactivity might reach. Clearly, foreclosure sales before 1989 are impacted, for that was the holding in *Sterling*. Does "retroactivity" apply to sales before 1983, the date of the *Mennonite* decision?[25] The court's opinion is silent. Is "retroactivity" applicable to sales before 1980, the date of the sale at issue in *Magee v. Amiss*?[26] The court's opinion provides no guidance. Might "retroactivity" apply (to the chagrin of title examiners) all the way back to 1950, the date of the U.S.

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15. 502 So. 2d 568 (La. 1987).
16. *Mennonite*, 462 U.S. 791, 103 S. Ct. 2706.
17. *Davis*, 873 F.2d 774.
18. For a discussion of the retroactivity of *Mennonite*, see Rubin & Carter, *supra* note 8, at 588-92.
19. 953 F.2d 198 (5th Cir. 1992).
20. La. R.S. 13:3886.1 (Supp. 1992).
21. *See* the discussion of Wyatt v. Cole, 112 S. Ct. 1827 (1992), *infra* notes 43-47.
22. 873 F.2d 774 (5th Cir. 1989).
23. 953 F.2d 198 (5th Cir. 1992).
24. *Sterling*, 953 F.2d at 199. The request-notice provision is found in La. R.S. 13:3886 (1991).
25. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 103 S. Ct. 2706 (1983).
26. 502 So. 2d 568 (La. 1987).

Supreme Court opinion in *Mullane v. Central Hanover Bank & Trust Company*?[27] While the Fifth Circuit's opinion is silent on this point, the lower court implied that 1950 might be an appropriate date: "Consequently, because the court finds that the principles enunciated in *Davis* are derived from *Mullane* and *Mennonite*, the court further concludes that this decision was sufficiently foreshadowed so that retroactive application is appropriate."[28]

The inability to ascertain which foreclosures might be subject to due process attack is obviously a concern for title examiners. The authors are unaware of any Louisiana title examiners who even suspected, prior to the *Mennonite* decision in 1983, that notice would have to be given to inferior creditors or to those who did not expressly sign the mortgage documents, absent some statutory requirement to do so.[29] It is hoped that, for the stability of titles, courts will hold that June, 1983, the date of *Mennonite*, is the earliest date that notice had to be given.

B. Act 662 of 1991—A Cure for the "Mennonite Notice" Problem?

In a response to the concern caused by these issues, in 1991 the Louisiana Legislature enacted Act 662. This Act,[30] which affected a number of Louisiana statutes,[31] was designed to provide protection for those whose property rights were adversely impacted by an improperly conducted foreclosure sale while at the same time quieting title statewide. It is a carefully drawn Act which attempts to balance the interests of all concerned. While it is beyond the scope of this article to examine the Act in detail, there are two main concepts that run throughout the Act. First, on any foreclosure sale conducted after July 17, 1991, the exclusive remedy (other than for the named mortgagor) for those who failed to receive a proper notice of sale, either under Louisiana law or under constitutional due process, is to bring an action within one year of the sale date. The adversely affected party has the burden of proving that there was equity in the property so that, if the affected party had been given notice properly, there would have been money coming out of the sheriff's sale for the adversely affected party's interest.[32] The

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27. 339 U.S. 306, 70 S. Ct. 652 (1950).

28. Sterling v. Block, 953 F.2d 198 (5th Cir.), *rehearing denied*, 958 F.2d 1080 (5th Cir. 1992).

29. *See* the discussion of La. Code Civ. P. art. 2703, *supra* note 7.

30. Sections 1 and 2 of the Act became effective on January 1, 1992; Sections 3 and 4 became effective on July 17, 1991.

31. The statutes amended were La. Code Civ. P. arts. 2293, 2724, La. R.S. 13:3882, :3886 (1991). Newly enacted were La. R.S. 13:3886.1 and 13:3888 (1992).

32. There are a number of requirements of proof in La. R.S. 13:3886.1 in this regard. Even if the adversely affected party can show that there should have been equity in the

Act, which specifically is to be applied "retrospectively and prospectively,"[33] also provides a time limit for those whose rights were adversely affected prior to July 31, 1991, the effective date of the Act. Those persons had until July 31, 1992 to bring a claim under the Act.[34] This one year time limitation is the same duration as that which was given to illegitimates to claim their rights following the holding of the unconstitutionality of Louisiana's laws relating to the rights of illegitimates.[35]

The second theme that runs through Act 662 is how notice is to be given. A form is provided for the sheriff to give the notice[36] and any interested person may ask that the sheriff give a written notice of seizure "to any other person or persons."[37] Thus, cautious creditors' counsel who conduct a title examination pursuant to their foreclosure sale can request that the sheriff give a notice to anyone that the foreclosing creditor feels might be appropriate, even though the sheriff ordinarily might not give such a notice.[38] The requirements of notice are not limited to those whose interests are revealed on the face of the mortgage records; in *Magee v. Amiss*,[39] notice was required to be given to a co-owner, and in *Bonner v. B.W. Utilities*,[40] a pre-Mennonite decision, notice was required to be given to one who bought property subject to a mortgage. In both cases, the name of the co-owner or of the third possessor was not in the mortgage records but rather was found in the conveyance records. It remains to be seen whether Act 662 cures the problems that plague title examiners, bedevil creditors' attorneys, and cheer debtors' lawyers. Even without Act 662 of 1991, however, the title problems may not be as severe as they seem. Creditors who do not reinscribe their security interest timely to keep it effective against third parties will lose their security as to third persons even

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property, and that the bid price was therefore theoretically too low, the adversely affected party must show that had he received notice at that time, he would have had the "ability and capacity to have obtained funds to purchase the property at the foreclosure sale had the required notice been given." La. R.S. 13:3886.1(A)(7) (1992).

33. La. R.S. 13:3886.1(C) (1992).

34. *Id.*

35. Reed v. Campbell, 476 U.S. 852, 106 S. Ct. 2234 (1986). The Court's decision on Texas law regarding illegitimates directly impacted Louisiana law.

36. La. R.S. 13:3852 (1992).

37. La. R.S. 13:3886(B)(1) (1992). The fee for this notice is $7.50 for each person to be notified by mail and $15.00 for each person notified by service.

38. For example, although Davis Oil Co. v. Mills, 873 F.2d 774 (5th Cir. 1989), held that a mineral lessee did not need to be given "Mennonite-notice" because the lessee's identity was not "reasonably ascertainable," a foreclosing creditor in a major case may well want to have notice going to all types of lessees and all servitude holders. *Id.* at 789, citing Bender v. City of Rochester, 765 F.2d 7, 12 (2d Cir. 1985).

39. 502 So. 2d 568 (La. 1987).

40. 452 F. Supp. 1295 (W.D. La. 1978).

after notice.[41] Co-owners' rights also may be cut off by applicable prescriptive periods.[42]

C. *Section 1983 Liability and Wrongful Seizure*

The third due process development is the possibility that creditors who institute a foreclosure proceeding or other "taking" may be liable for damages under 42 U.S.C. § 1983, which provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ."

In *Wyatt v. Cole*,[43] the United States Supreme Court reviewed the scope of § 1983 to determine if private parties could be liable for using state statutes later found to be unconstitutional. The case involved a creditor who used the Mississippi replevin statute in a dispute that arose "out of a soured cattle partnership."[44] The creditor, relying upon the Mississippi statute, ordered the County Sheriff to seize twenty-four head of cattle, a tractor, and other items. The state court dismissed the creditor's replevin action; when the creditor refused to return the items, the debtor brought suit in the federal district court, not only challenging the constitutionality of the statute and seeking injunctive relief, but also claiming damages from the sheriff, the deputies, and the creditor. Lower courts found the Mississippi statute unconstitutional, and the crucial issue before the Supreme Court was whether the creditor, who had acted in good faith reliance upon a statute that never before had been held invalid, was entitled to qualified immunity from a § 1983 action. Stating that the purpose of § 1983 is to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails,"[45] the court held that a private party who takes advantage of a statute that is later found unconstitutional has no immunity from suit under § 1983. The Court rejected the theory of qualified immunity that applies

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41. La. Civ. Code art. 3369; after January 1, 1993, the rules of reinscription are contained in La. Civ. Code arts. 3333 and 3334 (1993), 1992 La. Acts No. 1132. The rules of reinscription apply only to third parties; as between mortgagor and mortgagee, there is no requirement of inscription and the rules of Civil Code article 3369 do not apply. *See, e.g.*, La. Civ. Code arts. 3342, 3344 (1870); Schutzman v. Dobrowolski, 191 La. 791, 186 So. 338 (1939); Commercial Nat'l Bank of Shreveport v. McDaniel, 156 So. 43 (La. App. 2d Cir. 1934).

42. For immovables there are both the ten year acquisitive prescription rules and the thirty year acquisitive prescription rules of La. Civ. Code arts. 3475 and 3486.

43. 112 S. Ct. 1827 (1992).

44. *Id.* at 1829.

45. *Id.* at 1830.

to governmental officials and rejected the claim that a good faith reliance upon a presumptively valid statute is sufficient, stating:

> Although principles of equality and fairness may suggest, as respondents argue, that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability, as do their government counterparts, such interests are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion.[46]

Although the Court refused to grant qualified immunity to the creditor, the court did indicate, in dicta, that private defendants might raise both "an affirmative defense" based on good faith and/or probable cause and the claim that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens.[47]

The creditor was liable in *Wyatt* under § 1983 because he was a "state actor." The *Wyatt* Court, relying on *Lugar v. Edmondson Oil Co., Inc.*,[48] noted that "state actors" are any private defendants who invoke state-created statutes and who act together with or obtain significant aid from state officials. There would seem to be little question that Louisiana creditors who invoke executory process, which requires seizure by the sheriff and a sale conducted by a state official, are "state actors" under § 1983.[49]

Traditionally, Louisiana courts usually have awarded only nominal damages for wrongful seizure.[50] Damages under § 1983, however, may be substantial.[51] The problem that *Wyatt v. Cole* poses for foreclosing

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46. *Id.* at 1833.

47. *Id.* at 1834. Justice Kennedy, joined by Justice Scalia, put a gloss on this dicta in his concurring opinion:

> The distinction I draw is important because there is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law; and therefore under the circumstances of this case, lack of probable cause can *only* be shown through proof of subjective bad faith. . . . Thus the subjective element dismissed as exceptional by the dissent may be the rule rather than the exception.

Id. at 1837 (emphasis in original).

48. 457 U.S. 922, 102 S. Ct. 2744 (1982).

49. *Cf.* Govene v. Salt River Project, 869 F.2d 503 (9th Cir. 1989); Shipley v. First Fed. Savings & Loan Ass'n of Del., 703 F. Supp. 1122 (D. Del. 1988), *aff'd*, 877 F.2d 57 (3d Cir. 1989).

50. Wrongful seizure cases in Louisiana have tended to award only nominal damages. *See, e.g.*, Ogg v. Ferguson, 521 So. 2d 525 (La. App. 4th Cir. 1988); Moses v. American Security Bank of Ville Platte, 222 So. 2d 899 (La. App. 4th Cir. 1969).

51. *See generally* Ruiz v. Gonzalez Caraballo, 929 F.2d 31 (1st Cir. 1991); O'Neill v. Krzyminski, 839 F.2d 9 (2d Cir. 1988).

creditors is how to select a remedy to collect debts without using a statute which, when challenged, may be found unconstitutional, thus exposing the creditor to § 1983 liability. While Louisiana executory process statutes have been explicitly held to be constitutional,[52] no similar holding of constitutionality has yet been rendered for Act 662 of 1991 or for Louisiana's new "quick taking" statute, Act 235 of 1992.[53] Resolution of these questions will determine the efficacy of creditor's rights under Louisiana laws that allow for the taking of property to secure a debt, may alter the rights of debtors and third parties, and may spawn a new type of litigation that will test these issues. The cautious practitioner who wishes to take advantage of statutes whose constitutionality has not yet been fully tested may be well advised to file, prior to the writ of seizure, a rule to show cause against the debtor

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52. Buckner v. Carmack, 263 La. 627, 272 So. 2d 326 (1972), *appeal dismissed*, 417 U.S. 901, 94 S. Ct. 2594 (1974).

53. 1992 La. Acts No. 235 enacted La. R.S. 6:965-967 (effective January 1, 1993). This Act is basically a quick taking statute for various financial institution lenders and motor vehicle lenders for some movable property. Upon default, which is defined as a failure to make two payments on their due date, the creditor must send a notice by certified mail that demands payment of the delinquent amount within ten (10) business days after the notice is sent and which notifies the debtor that if the arrearages are not paid, the collateral may be seized and sold. If the debtor does not pay according to the demand, the creditor can institute a summary proceeding through a rule to show cause which is served upon the debtor. The rule is to be returnable within ten (10) days after the service of the rule on the debtor. Thereafter, the creditor on submitting the listed proof will be able to obtain a judgment. The proof required includes an affidavit in which the creditor sets forth the facts regarding the default, the amount secured including any advances made. Attached to the affidavit as an exhibit is the note, contract or other obligation to be secured by a chattel mortgage or security interest, and a certified copy of the chattel mortgage or the security agreement itself. A certificate is required indicating the date notice was sent and the type and date of service of the rule on the defendant. The creditor is to submit an original and one copy of a proposed judgment.

The debtor can answer the petition under oath (a verified answer may be sufficient, *cf.* Governor Claibourne Apts. v. Attaldo, 227 La. 39, 78 So. 2d 502 (1955)), pleading either the debt is extinguished or unenforceable.

If the rule is not successfully opposed, the clerk issues a writ to the Sheriff to seize the collateral and deliver it to the secured party within two days. If the Sheriff cannot seize the collateral in two days, the secured party or its agent can seize the collateral. It is important to note that any agent for the secured party will need a repossession license as defined in the Act.

If a creditor utilizes the quick taking statute, the creditor can obtain no deficiency judgment. The debtor can suspensively appeal from the judgment on the rule, if the debtor answered the rule under oath pleading that the debt is either unenforceable or extinguished. The suspensive appeal must be taken within twenty-four hours, and the appeal bond must be filed within twenty-four hours.

This statute raises some interesting issues. For example, the statute allows challenges because the debt is extinguished or unenforceable, but not if the security device is unenforceable, has been preempted, or has prescribed under the Chattel Mortgage Act, La. R.S. 9:5356(E) or under the U.C.C., La. R.S. 10:9-403.

and third parties to have the court issue a ruling on the constitutionality of the procedure.

D. The Interrelationship Among Due Process, Statutory Requirements, Jurisprudential Requirements, and Deficiency Judgments

As if the interrelationship between due process and Louisiana foreclosure statutes were not complex enough, a new layer of complexity is added when one considers the role these concepts play when the Deficiency Judgment Act is invoked.[54]

The Deficiency Judgment Act, passed at the height of the Depression,[55] reflects an inherent suspicion of sheriff's sales that occur in foreclosure proceedings. When read in conjunction with the Code of Civil Procedure,[56] the Deficiency Judgment Act, as originally enacted, required that a creditor proceed by a judicial sale and that the sale be conducted with the bid price to be the greater of two-thirds of the appraised value or the value of superior liens and encumbrances.[57] The artificial two-thirds appraisal floor built into the Deficiency Judgment Act scheme indicates that legislators feared that although the sale was public and advertised, there would not always be the kind of spirited public bidding sufficient to bring a fair market price. Thus, an artificial, legislatively-imposed price was enacted in recognition of the fact that perhaps the vast majority of foreclosure sales occur with no adverse bidding, the only bidder present being the seizing creditor. Construed strictly for years,[58] the Deficiency Judgment Act prevented a creditor from obtaining a deficiency against a debtor even if the debtor agreed to a private sale[59] and had a chilling effect on out-of-court negotiations. Over the years, a number of jurisprudential exceptions to the Act were created, including certain bankruptcy sales,[60] sales by the Small Business

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54. La. R.S. 13:4106-:4108.3 (1991).

55. 1934 La. Acts No. 28, § 1.

56. La. Code Civ. P. art. 2336. This rule itself was based on Louisiana Code of Practice articles 680, 682.

57. La. Code Civ. P. arts. 2336-2337.

58. The Deficiency Judgment Act contains language requiring its strict construction. La. R.S. 13:4107 states: "R.S. 13:4106 declares a public policy and the provisions thereof can not, and shall not be waived by a debtor, but it shall only apply to mortgages, contracts, debts or other obligations made, or arising on or after August 1, 1934."

Many older cases used the "strict construction" terminology. *See, e.g.*, First Nat'l Bank of West Monroe v. Pickens, 465 So. 2d 874 (La. App. 2d Cir. 1985); Ford Motor Credit Co. v. Samic, 227 So. 2d 164 (La. App. 2d Cir. 1969).

59. *See, e.g.*, Farmerville Bank v. Scheen, 76 So. 2d 581 (La. App. 2d Cir. 1955); Futch v. Gregory, 40 So. 2d 830 (La. App. 2d Cir. 1949).

60. Exchange Nat'l Bank of Chicago v. Spallita, 321 So. 2d 338 (La. 1975), *cert. denied sub nom.* 425 U.S. 904, 96 S. Ct. 1494 (1976).

Administration,[61] "set off" rights against pledged cash or cash equivalents,[62] and sales of stock on national exchanges.[63]

Over the years the legislature has amended the Deficiency Judgment Act to provide two broad types of exceptions. The first are for certain types of transactions where there is no reasonable fear that the creditor will take the property for less than its reasonable, fair market value. Thus, now exempt from the Deficiency Judgment Act requirements are such matters as:

1. A sale of stocks, bonds and options on the NYSE, AMEX or NASDQ;
2. A sale of commodity options on the Chicago Commodity Exchange;
3. A sale pursuant to an order of United States Bankruptcy Court;
4. A sale of collateral located outside Louisiana when the creditor proceeds under the laws of the jurisdiction where the collateral is located;
5. The collection of:
   a. proceeds of pleged negotiable or non-negotiable instruments;
   b. funds through offset of pledged cash or certificate of deposit;
   c. proceeds of a pledge or assignment of accounts receivable;
   d. proceeds of pledge or assignment of income or rent from leases;
6. The collection of insurance proceeds under a simple or standard loss payee clause; and
7. The collection of the return of unearned premiums of any insurance policy.[64]

Second, to encourage creditors and debtors to try to negotiate matters rather than litigate them, the legislature has enacted provisions allowing both commercial and consumer creditors and debtors to negotiate a "reasonably equivalent value" of the property and to agree to any type of sale with the debtor liable for an agreed upon deficiency.[65] The

61. United States v. Harvey, 602 F.2d 740 (5th Cir. 1974).

62. La. R.S. 13:4108(5)(b) (1991).

63. International City Bank & Trust Co. v. Zander, 378 So. 2d 506 (La. App. 4th Cir. 1979).

64. La. R.S. 13:4108 (1991).

65. La. R.S. 13:4108.1 and :4108.2 (1991). It should be noted that the statutes clearly require prior agreement between creditor and debtor as to the "reasonably equivalent value" of the property; absent such an agreement, the Deficiency Judgment Act will apply to cut off the creditor's right to any further personal liability of the debtor. *See, e.g.*, Teche Bank & Trust Co. v. Albert, 579 So. 2d 1231 (La. App. 3d Cir.), *writ denied*, 585 So. 2d 568 (1991).

Deficiency Judgment Act does not apply to creditors who conduct their seizures and sales under Article 9 of the Uniform Commercial Code.[66]

For years the Louisiana Supreme Court held that defects in the executory process proceeding would bar a subsequent deficiency judgment;[67] this holding was overturned in 1988 when, in *First Guaranty Bank v. Baton Rouge Petroleum, Inc.*,[68] the court held that if the appraisal process was conducted validly, other procedural deficiencies could not bar a deficiency judgment. There is a continuing tension, however, between the due process requirements, which in some cases seem to require strict compliance with procedural niceties, and Louisiana state court interpretations of the Deficiency Judgment Act. The trend of the Louisiana jurisprudence seems to be that if the appraisal process is valid, then other problems with the foreclosure will not bar a deficiency judgment action, although the debtor still may raise substantive defenses.[69]

Two important cases, one from the Louisiana Supreme Court and one from the United States Fifth Circuit Court of Appeals, illustrate the problem.[70] In *Security Homestead Association v. Fuselier*,[71] Louisiana statutory procedures were followed, but the court held that the requirements mandate "diligent efforts" by the creditor. Security Homestead had filed three separate petitions by executory proceedings involving three separate loans. The loans were secured by three separate tracts of land. The mortgagor (who had sold one of the properties and had leased the other two) was no longer at the address indicated on the mortgage. When the sheriff's returns came back reflecting that service could not be made on the mortgagor at the address given, the creditor filed a motion to appoint a curator, alleging that the mortgagor was a domiciliary whose address was "unavailing."[72] After a sheriff's sale of the properties with appraisal, the creditor sought a deficiency judgment, and the mortgagor was served at his then-current address. The mortgagor responded by filing an answer and reconventional demand, claiming abuse of process and wrongful seizure and contending that he was not

66. La. R.S. 10:9-101-:9-604 (1983 and Supp. 1992). Louisiana calls its version of the Uniform Commercial Code the "Louisiana Commercial Laws," but the provisions are, in most cases, identical to the Uniform Commercial Code.

67. The leading case was League Central Credit Union v. Montgomery, 251 La. 971, 207 So. 2d 762 (1968).

68. 529 So. 2d 834 (La. 1988) (on rehearing).

69. *See, e.g.*, Commercial Nat'l Bank v. Steele, 542 So. 2d 1154 (La. App. 2d Cir. 1989); Ford Motor Credit Co. v. Savote, 532 So. 2d 820 (La. App. 4th Cir. 1988); Staton v. Romero, 532 So. 2d 363 (La. App. 3d Cir. 1988).

70. FSLIC v. Tri-Parish Ventures, Ltd., 881 F.2d 181 (5th Cir. 1989); Security Homestead Associates v. Fusilier, 591 So. 2d 335 (La. 1991).

71. 591 So. 2d 335 (La. 1991).

72. *Id.* at 337.

an absentee. The Louisiana Supreme Court held that if the mortgagor receives actual notice, then the failure to raise the defense in the executory proceedings precludes the mortgagor from using it as a defense in the deficiency judgment. In this case, the court found that the mortgagor had received actual notice of the foreclosure on at least one of the tracts. On the other hand, when there is no actual notice (in this case, there was no actual notice for the other two tracts), the court held that a Louisiana creditor must conduct a diligent search to locate a defendant whose whereabouts are alleged to be unknown before seeking to have a curator appointed. A creditor who fails to provide proper notice of seizure in executory proceedings because of a failure to conduct a "diligent search" prior to a curator's appointment is barred from obtaining a deficiency judgment.

The court's rationale in *Fuselier* was that the failure to give notice to the debtor is equivalent to a defective appraisal, and a defective appraisal is a bar to a deficiency judgment[73] (although here there was no claim that the appraisals themselves were not reflective of fair market value). It was the mere lack of notice that apparently made the appraisals invalid, not whether the appraisals were accurate.[74]

The *Fuselier* court indicated that the requirement that a diligent search be conducted before a curator can be appointed was "especially warranted in light of *Mennonite*. . . . A creditor must make a reasonable and diligent effort to determine the whereabouts of a defendant domiciled in Louisiana to support an allegation that the defendant's whereabouts are unknown and to support the appointment of a curator."[75] Thus, in *Fuselier* it was the failure to observe procedural due process requirements (a "diligent search") that created the basis to bar the deficiency judgment, although a curator was appointed. The dicta in *Fuselier* indicates, however, that if there is actual notice of the sale and of the right to appoint an appraiser, then there is no due process violation.

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73. The court relied here upon First Guar. Bank of Hammond v. Baton Rouge Petroleum Ctr., Inc., 529 So. 2d 834 (La. 1988) (on rehearing).

74. The court stated:

> The statutory requirements of service of notice of seizure and notice to appoint appraisers are designed to afford the debtor with the right and a meaningful opportunity to participate in the appraisal process. Failure to comply with these requirements deprives the creditor of a "significant right, not a mere procedural nicety." . . . These requirements go to the heart of an effective appraisal process, the absence of which precludes a deficiency judgment.
>
> . . . [W]hen due to the improper appointment of a curator a defendant receives neither actual nor constructive notice of seizure or notice of the right to appoint an appraiser, the creditor will not be entitled to a deficiency, as the seizure was wrongful, the appraisal was defective and the defendant's due process rights were violated.

591 So. 2d at 341.

75. *Id.* at 338, 339.

The *Fuselier* holding should be compared with the Fifth Circuit's ruling in *FSLIC v. Tri-Parish Ventures, Ltd.*[76] There the court held that it was the procedural requirements that were crucial, not actual notice. If the mortgagor did not get all of the notices required by statute, in the form and manner prescribed by statute, then no deficiency could be obtained despite the allegation of actual notice: "The debtor must have the right . . . to participate in the appraisal of the property; actual notice of the seizure is not enough."[77]

There appears to be a dichotomy of views developing between Louisiana courts and federal courts. If *Tri-Parish* is taken at its face value, the result in a federal court seems to be that strict compliance with Louisiana procedural statutes is to be mandated; otherwise, federal courts will hold the deficiency judgment unavailable. This is particularly crucial because the *Tri-Parish* rule is binding on all bankruptcy courts, and a significant amount of litigation involving security rights occurs in bankruptcy courts. This result seems to harken back to the pre-*Baton Rouge Petroleum*[78] holdings that required strict compliance with executory process rules. On the other hand, Louisiana state courts, as exemplified in *Fuselier*, look to the substance of the transaction rather than to the form. If actual notice is received by the debtor, then Louisiana courts seem to require that the debtor assert the rights timely or lose them; a failure to raise timely claims after actual notice will not bar a later deficiency judgment. How these disparate views will be reconciled remains to be seen. To foreclose possible liability, the cautious creditor may wish to ask the court handling the foreclosure proceedings to make an explicit finding either that the mortgagor had actual notice or that the creditor had "diligently complied with the procedural requirements." On the other hand, aggressive debtor's counsel may wish to proceed directly to federal court for an adjudication of the debtor's rights relying upon 42 U.S.C. § 1983.[79]

II. Deficiency Judgment Act and Liability of Guarantors, Sureties and Endorsers

Although both the suretyship articles and the Deficiency Judgment Act have been significantly amended in recent years,[80] neither legislation nor jurisprudence has settled the relationship between the two.

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76. 881 F.2d 181 (5th Cir. 1989).

77. *Id.* at 184.

78. First Guar. Bank of Hammond v. Baton Rouge Petroleum Ctr., Inc., 524 So. 2d 834 (La. 1988) (on rehearing).

79. *See* the discussion of § 1983 issues in the text *supra* notes 43-53.

80. The suretyship articles of the Civil Code were amended by 1987 La. Acts No. 409, § 1, effective January 1, 1988; the Deficiency Judgment Act has been amended and

The crucial unanswered question is whether a creditor, who cannot collect a deficiency judgment from the debtor, is barred from collecting a deficiency from the surety.[81] The answer to this question requires analysis of a number of issues, including the types of defenses that sureties can raise, the nature of the bar to collection that creditors face under the Deficiency Judgment Act, the purpose and function of the Deficiency Judgment Act, and public policy considerations.

A surety who is called upon to pay the principal obligation[82] can raise a number of defenses to the enforcement of the principal obligation, including prescription,[83] usury,[84] remission of the obligation,[85] and payment.[86] A surety, however, may not raise defenses that are personal to the debtor.[87] Personal defenses include, but are not limited to, the minority of the debtor.

If a minor borrows money from a creditor, the creditor cannot compel the minor to pay; the minor has a defense that prohibits the creditor from obtaining a judgment against the minor or executing on the minor's property.[88] On the other hand, even though the creditor cannot proceed against the minor, the creditor can proceed against one

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altered since 1934; *see, e.g.*, 1952 La. Acts No. 20, § 1 (amending La. R.S. 13:4106); 1960 La. Acts No. 32, § 1 (amending La. R.S. 13:4106); 1986 La. Acts No. 489, § 2 (adding La. R.S. 13:4108 and 4108.1); and 1988 La. Acts No. 675, § 1 (adding La. R.S. 13:4108.2).

81. For the purposes of this portion of this article, the word "debtor" will be substituted for the term "principal obligor." The term "debtor," while not corresponding to the Civil Code articles (La. Civ. Code art. 3037 uses the term "principal obligor" when referring to the primary debtor, as distinguished from a surety), is the common parlance for "principal obligor" in financial transactions. Further, using "debtor" does *not* mean a surety or guarantor under standard Louisiana usage. *See, e.g.*, the Louisiana version of the Uniform Commercial Code, Louisiana Commercial Laws, La. R.S. 10:9-105(d) (Supp. 1992).

82. A suretyship contract consists of at least three separate relationships. A relationship exists between the creditor and the debtor—the principal obligation—which is governed by the rules of general obligations (La. Civ. Code arts. 1756-1903) or the rules of conventional obligations (La. Civ. Code arts. 1906-2045). A relationship exists between the creditor and the surety, the contract for which must be in writing and must be express (La. Civ. Code arts. 3038, 3045-3046; *also see* La. Civ. Code art. 1804). Finally, a relationship exists between the debtor and the surety, an agreement that may (but need not) be in writing, and, this agreement can vary the legal rules. This relationship is regulated by the provisions of La. Civ. Code arts. 3047-3054.

83. La. Civ. Code art. 3060.

84. Meadow Brook Nat'l Bank v. Recile, 302 F. Supp. 62 (E.D. La. 1969); Huntington v. Westerfield, 2 Orl. App. 405 (La. App. 1905).

85. La. Civ. Code art. 1803.

86. La. Civ. Code arts. 1854-1863, 3058-3059. *See, e.g.*, Stewart v. Levis, 42 La. Ann. 37, 6 So. 898 (1890).

87. La. Civ. Code art. 3046.

88. La. Civ. Code arts. 1918-1924; D.H. Holmes Co. v. Rena, 34 So. 2d 813 (La. App. Orl. 1948).

who is a surety for a minor.[89] The reason that the creditor cannot pursue the minor is because the contract of the minor is a relative nullity.[90] The reason the creditor can pursue the surety is because the minor's contract is not absolutely invalid; the defense the minor has is one that is personal to the minor and cannot be used by the surety. The implicit rationale is that the surety, whose contract can be gratuitous,[91] is in a better position to know of the age of the minor than the creditor. Presumably, the surety had some prior relationship with the minor, either through family or friendship, while the creditor had no necessary prior relationship with the minor debtor.

Likewise, a creditor cannot bring an action against a debtor who is bankrupt; the Bankruptcy Code creates a bar to all actions[92] and requires that the creditor be treated as an "unsecured creditor" in bankruptcy if there is a principal obligation secured only by a contract of suretyship.[93] The bankruptcy of the debtor, however, does not bar a creditor's action against the surety.[94] Likewise, the fact that the debtor is bankrupt does not prohibit the creditor from being a "secured creditor" and executing against other real security, such as mortgaged property.[95] The creditor can proceed against other collateral because the defense that the bankrupt has does not extinguish the principal obligation; it is merely a bar to enforcement of it as a personal obligation of the bankrupt. Because the bankrupt has a personal defense to enforcement, and because the Civil Code prohibits sureties from raising personal defenses, the surety cannot prevent a creditor from collecting money from the surety even though the debtor is bankrupt.[96]

Therefore, in cases of both minority and bankruptcy, the creditor is able to collect from the surety, and the surety is not entitled to obtain money from the debtor through subrogation; the surety bears the financial risk in these instances and may be unable to obtain any type of reimbursement. Subrogation is not available to the surety because

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89. La. Civ. Code art. 3046; this rule is unchanged from the previous revisions of the Civil Code. The pre-1988 version of the Civil Code also prohibited a surety from raising minority as a defense. La. Civ. Code art. 3036 (1870); Federal Schs., Inc. v. Kuntz, 134 So. 118 (La. App. Orl. 1931).

90. La. Civ. Code art. 1919.

91. 2 Marcel Planiol, Traite Elementaire de Droit Civil § 2324 (La. Law Institute trans. 1959).

92. 11 U.S.C. § 362 (1979 and Supp. 1992).

93. 11 U.S.C. § 506 (Supp. 1992); Doehler Die Casting Co. v. Holmes, 52 N.Y.S. 2d 321 (1944); Bickley v. Armour & Co., 178 N.E. 590 (Ohio 1931).

94. J.R. Watkins Co. v. J.C. Brumfield, 86 So. 2d 263 (La. App. 1st Cir. 1956); *cf.* Gumina v. Dupas, 178 So. 2d 291 (La. App. 4th Cir. 1965); La. Civ. Code art. 3046.

95. 11 U.S.C. § 506 (1978). *See generally* United States v. Gargill, 218 F.2d 556 (1st Cir. 1955); *In re* Everrett, 48 B.R. 618 (Bkrtcy. E.D. Penn. 1985).

96. *J.R. Watkins Co.*, 86 So. 2d 263.

the essence of subrogation is that the surety is able to "stand in the creditor's shoes" and enforce those rights which the creditor could enforce.[97] Since the creditor cannot collect from a minor at all, and is merely an unsecured creditor as against the bankrupt, the surety has no greater rights through subrogation.

A surety who pays a creditor has a right against the debtor in addition to subrogation; that right is called reimbursement.[98] The Civil Code is silent on the issue of whether a debtor, who has a personal defense against the creditor that would prevent enforcement by either the creditor or surety through subrogation, also can assert this defense against the surety if a right of reimbursement is sought. It would appear that the debtor does have a right to prevent such enforcement through reimbursement. For example, a surety would not have a right of reimbursement against the minor, because any contract with a minor is a relative nullity and is not enforceable unless and until the minor confirms it after achieving the age of majority.[99] Likewise, if the debtor is bankrupt, the absolute bar in bankruptcy proceedings prohibits any personal cause of action against the debtor, although the surety always can file a proof of claim as an unsecured creditor.[100]

Therefore, in the cases of both minority and bankruptcy, the surety is left to pay the creditor although there may be no ability to collect anything from the debtor by either the creditor or the surety.

The interpretation of whether a surety can raise the Deficiency Judgment Act bar as a defense depends upon whether the rights of a debtor under the Deficiency Judgment Act constitute a personal defense. The language of the Deficiency Judgment Act would seem to lend support to the proposition that it is merely a personal defense, for the Deficiency Judgment Act states:

> Unless otherwise provided by law, if a mortgagee or other creditor takes advantage of a waiver of appraisement of his property, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a *personal obligation* of the debtor. The mortgagee or other creditor shall not have a right thereafter to proceed against the debtor or any of his other property for such deficiency, except as otherwise provided by law or as provided in the next subsection.[101]

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97. La. Civ. Code arts. 1825-1830, 3047-3048.
98. La. Civ. Code arts. 3049-3050.
99. La. Civ. Code arts. 1842, 1919.
100. 11 U.S.C. § 501 (1978).
101. La. R.S. 13:4106(A) (1991) (emphasis added).

No court has defined clearly what is meant by the term "personal obligation." The only case that discusses this wording is *Rushing v. Dairyland Insurance, Co.*,[102] a case that does not involve sureties but rather interpretation of an insurance provision. In *Rushing* a creditor foreclosed without appraisal on an automobile and then sought to collect the insurance proceeds from a collision that occurred prior to the foreclosure. The court found that the creditor could not collect the insurance because of the bar created by the Deficiency Judgment Act, reasoning that the creditor could get to the insurance only through the debtor, and since the creditor could not reach the debtor because of the bar to a "personal obligation" suit, the creditor could not reach the insurance.[103] *Rushing* was legislatively overruled in 1986 with an amendment to the Deficiency Judgment Act.[104] *Rushing*, therefore, does not authoritatively resolve this issue and, given the fact that insurance is *sui generis*,[105] even the language of the case may provide little guide to interpreting the term "personal obligation" in relation to suretyship.

The cases that have allowed a surety to escape liability under the Deficiency Judgment Act have reasoned that it is unfair and inequitable to prevent the creditor from pursuing the claim against the debtor while allowing the creditor to pursue a claim against the surety.[106] Some cases have even raised the concern that to allow a creditor to pursue the surety would lead to an evasion of the Deficiency Judgment Act, because the surety could then collect money from the debtor.[107] While the desire of courts to avoid results that seem "inequitable" or "unfair" is understandable, it is hard to reconcile these notions with the clear provisions of the suretyship law that render a surety liable even if the debtor is not, for example in the case of minority of the debtor or of the bankruptcy of the debtor. The fact that the surety may have to pay and be unable to collect from the debtor is implicit in the concept of suretyship and is neither unfair nor inequitable per se.

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102. 456 So. 2d 599 (La. 1984).

103. *Id.* at 601.

104. 1986 La. Acts No. 489, § 2; La. R.S. 13:4108 (1991).

105. T.L. James Co., Inc. v. Montgomery, 332 So. 2d 834, 845 (La. 1975); Connell v. Connell, 331 So. 2d 4, 7 (La. 1978); Sizeler v. Sizeler, 170 La. 128, 127 So. 388, 388-89 (1930).

106. Simmons v. Clark, 64 So. 2d 520 (La. App. 1st Cir. 1953). *See also* J. Bennett Johnson, Jr., Note, *Suretyship-Deficiency Judgment Act*, 15 La. L. Rev. 865 (1955); Fredrick T. Kolb, Comment, *Deficiency Judgments in Louisiana*, 49 Tul. L. Rev. 1094 (1975).

107. Domingues Motors, Inc. v. Lalonde, 417 So. 2d 900 (La. App. 3d Cir. 1982); General Motors Acceptance Corp. v. Smith, 399 So. 2d 1285 (La. App. 4th Cir. 1981). *Cf.* Colonial Bank v. Pier Five, Inc., 469 So. 2d 1029 (La. App. 4th Cir.), *writ denied*, 475 So. 2d 363 (1985).

These cases also rely, in part, upon the language of the Deficiency Judgment Act that state that it embodies "public policy" and that its benefits cannot be waived.[108] Implicit in this argument, however, is apparently the fear that the surety would have a greater right to collect from the debtor than would the creditor. It is questionable whether this assumption is correct. If the creditor is barred from collecting under the Deficiency Judgment Act from the debtor, then the surety cannot collect through subrogation, because the defenses that the debtor would have against the creditor are assertable against anyone who is claiming through subrogation.[109] The surety's right of reimbursement may be subject to a defense by the debtor that the surety cannot evade the Deficiency Judgment Act by collecting from the debtor; however, the fact that the debtor may or may not have this defense should have no relationship to the creditor's rights against the surety. Indeed, the Deficiency Judgment Act contemplates that the debtor may well suffer a loss despite the fact that there is a Deficiency Judgment Act bar. For example, if the debtor gave a mortgage on two tracts of land to secure the loan, a creditor who is prevented from enforcing the claim under the Deficiency Judgment Act because of a private sale on the first tract is nevertheless entitled to foreclose on the remaining property. The personal obligation bar that the debtor has does not extinguish the mortgage.[110]

The cases that have allowed a surety to be liable notwithstanding the existence of a Deficiency Judgment Act as a defense by a debtor stem back to the *Southland* decision.[111] *Southland* held that the word "debtor" in the Deficiency Judgment Act means only the mortgagor/owner of the property that was sold in violation of the deficiency judgment. Reasoning that the term "debtor" does not refer to sureties, these cases hold that sureties are not entitled to the protection of the Deficiency Judgment Act.[112]

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108. La. R.S. 13:4107 (1991); *Domingues Motors*, 417 So. 2d 900; *General Motors*, 399 So. 2d 1285; *Simmons*, 64 So. 2d 520.

109. Cox v. W.M. Heroman & Co., 298 So. 2d 848, 857 (La. 1974).

110. La. R.S. 13:4106(B) (1991) provides: "If a mortgage or pledge affects two or more properties, movable, immovable, or both, the judicial sale of any property so affected without appraisement shall not prevent the enforcement of the mortgage or pledge in rem against any other property affected thereby." *See* Associates Inv. Co. v. J.D. Alewine, 84 So. 2d 214 (La. App. 2d Cir. 1955). *But cf.* Jones v. Jones, 523 So. 2d 874, 874 (La. App. 4th Cir. 1988). Whether *Jones* can be relied on is questionable. *See* Michael H. Rubin, *Security Devices, Developments in the Law, 1987-1988*, 49 La. L. Rev. 495, 503 (1988).

111. Southland Inv. Co. v. Motor Sales Co., 198 La. 1028, 5 So. 2d 324 (1941).

112. Commercial Credit Equip. Corp. v. Larry Parrott of Gueydan, Inc., 212 So. 2d 860 (La. App. 3d Cir. 1968); Farmerville Bank v. Scheen, 76 So. 2d 581 (La. App. 2d Cir. 1954).

Other cases on foreclosure have held that sureties are not entitled to notice of the foreclosure sale or of the right to appoint an appraiser;[113] the reasoning of these cases is obviously correct, because the surety is not an owner of these properties and has no real property rights under Louisiana law (as distinguished from "personal rights"). The term "real rights" refers to a claim against an asset (rather than a person); real rights relate to movables or immovables, tangibles, or intangibles. It is distinguishable from suretyship, which is a personal right.[114] The result of these cases also seems correct, for even though the creditor's use of other real collateral may ultimately affect the surety's liability for a debt, the surety does not have any "property rights" in property mortgaged by the debtor merely because there exists a potential right of subrogation.[115]

The ability of a surety to assert a Deficiency Act defense remains unresolved by the Louisiana Supreme Court. It remains to be seen what the ultimate resolution will be, and whether that resolution will occur through a reconciliation of the jurisprudence or through new legislation. In the meantime, the following is suggested as a potential resolution:

1. The Deficiency Judgment Act's definition of "debtor" applies only to the owner of the property and to the mortgagor of the property (if different than the principal obligor).[116] The term "debtor" does not mean surety or guarantor.
2. A "debtor" is entitled to a personal defense under the Deficiency Judgment Act; however, that personal defense cannot be asserted by a surety or a guarantor.[117] Likewise, a surety or a guarantor is not entitled to notice of the foreclosure sale and

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113. Cameron Brown South, Inc. v. East Glen Oaks, Inc., 341 So. 2d 450 (La. App. 1st Cir. 1976); Gumina v. Dupas, 178 So. 2d 291 (La. App. 4th Cir. 1965).

114. 1 Marcel Planiol, Traite Elementaire de Droit Civil §§ 2158-2162 (La. Law Institute trans. 1959); *Id.*, 2 Planiol at § 2721; A.N. Yiannopoulos, *Property* §§ 106-113, in 2 Louisiana Civil Law Treatise (3d ed. 1991).

115. "Property rights" as defined by the U.S. Supreme Court under the Fifth Amendment relate to an ownership or lien interest in property that affects third parties.

116. *Cf.* Southland Inv. Co. v. Motor Sales Co., 198 La. 1028, 5 So. 2d 324 (1941); Louisiana Commercial Laws, La. R.S. 10:9-105(d) (1992).

117. *Cf.* Commercial Credit Equip. Corp. v. Larry Parrott of Gueydan, Inc., 212 So. 2d 860 (La. App. 3d Cir.), *writ denied*, 214 So. 2d 719 (1968); Farmerville Bank v. Sheen, 76 So. 2d 581 (La. App. 2d Cir. 1955). *Cf.* First Acadiana Bank v. Aachen Const., Inc., 544 So. 2d 136 (La. App. 3d Cir.), *writ denied*, 550 So. 2d 136 (1989) (Deficiency Judgment Act only applies where executory process used; therefore, guarantors sued for deficiency after sale of mortgaged property at private sale are not protected by Deficiency Judgment Act); Guaranty Bank of Mamou v. Community Rice Mill, Inc., 502 So. 2d 1067 (La. 1987) (Deficiency Judgment Act only applies where executory process used; therefore, guarantors sued for deficiency after seizure and sale of mortgaged property by ordinary process are not protected by Deficiency Judgment Act).

does not have the right to appoint an appraiser.[118]

3. A creditor who violates the Deficiency Judgment Act and cannot collect from the debtor still can collect not only from other secured property,[119] but also from the surety; however, the creditor who obtains ownership of the property (directly or indirectly) must give the surety the benefit of 100% of the fair market value of the property, even if it was acquired for less than that.

The rationale for this proposed rule is that it preserves the purposes of the Deficiency Judgment Act. If the creditor buys the property at a sale that violates the Deficiency Judgment Act, and if this rule is not applied, then the creditor achieves a windfall. The creditor gets not only the full value of the property, but also the ability to credit the debt for only a portion of the value of the property while still being able to collect the balance from the surety.[120] Since the public policy behind the Deficiency Judgment Act is to prevent the creditor from achieving a windfall, the creditor should be made to bear the burden of invoking a sale that does not comply with the Deficiency Judgment Act.

The result the proposed rule achieves not only is in accord with the public policy of the Deficiency Judgment Act to prevent a creditor from obtaining a windfall, it is also in accord with the policy reasons behind the suretyship articles. If there are multiple sureties on a debt and a creditor releases one of them, the creditor is deemed to have released that virile share of the obligation as to the surety.[121]

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118. Cameron Brown South, Inc. v. East Glen Oaks, Inc., 341 So. 2d 450 (La. App. 1st Cir. 1976); Gumina v. Dupas, 178 So. 2d 291 (La. App. 4th Cir. 1965).

119. La. R.S. 13:4106(B) (1991).

120. For a detailed explanation of how this works and the potential windfall that a creditor might receive, *see* Rubin, *supra* note 110, at 500-03.

121. For example, assume that there is a creditor, a debtor, and three sureties. The principal obligation is for $120,000. Assume that the virile share of each surety is one-third (La. Civ. Code art. 3055). If a creditor accepted $1,000 from Surety No. 1 and released Surety No. 1, it would appear under the current Civil Code articles that the impact would be as follows:

A. The debtor would be liable for $119,000 (the $1,000 payment would be applied to the outstanding obligation). Release of a surety does not release a debtor. La. Civ. Code art. 1892.

B. The release of Surety No. 1 is a release of Surety No. 1's virile share. Since Surety No. 1's virile share is one-third, as to the *other* sureties (not to the debtor) the result of the $1,000 payment would be a release of Surety No. 1's virile share of one-third of $120,000, or $40,000. La. Civ. Code arts. 1892, 3055-3057.

The result of the proposed rule also is in accordance with another provision of the Deficiency Judgment Act which allows the creditor and the debtor to agree that the debtor can be liable for the debt minus the "reasonably equivalent value" of the property if there is an agreed upon transaction.[122] This particular statute allows the debtor and creditor to make the debtor liable for a deficiency even if the sale violates the Deficiency Judgment Act; however, the debtor must get credit for 100% of the "reasonably equivalent value"—the price that both creditor and debtor agree the property is worth. The agreement is crucial and must be completed in advance of the transaction.[123] There is no provision that allows the creditor to receive more than the difference between the debt and the full "reasonably equivalent" value of the property. Therefore, the basis of the concept is that 100% of the agreed upon value of the property must be attributed to the debt. The surety should be entitled to no less when the creditor forecloses under a transaction that violates the Deficiency Judgment Act.

4. Finally, if the sale which violates the Deficiency Judgment Act results in the property being transferred to a third person (not the creditor and not one acting in collusion with the creditor),[124] the debtor should get the benefit of a reduction in the debt by at least two-thirds of the value of the property transferred (regardless of a lower actual transfer price). This is in accordance with the Deficiency Judgment Act, which creates an artificial "two-thirds" floor for all sales.[125]

The distinction to be drawn between a sale that violates the Deficiency Judgment Act when the creditor becomes the purchaser and when a third party becomes the purchaser is that if the creditor owns the property, the creditor would receive an undue windfall by having both the property and the ability to collect the deficiency. On the other hand, if a third party acquires ownership of the property, then the creditor receives the cash from the sale; if the sale had been

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C. Therefore, Surety Nos. 2 and 3 each would be liable for two-thirds of the whole debt (*i.e.*, the creditor bears the risk of the release of Surety No. 1's virile share). Surety Nos. 2 and 3 would each be potentially liable for $80,000 (two-thirds of the $120,000 debt).

122. La. R.S. 13:4108.1 (1991).

123. Teche Bank & Trust Co. v. Albert, 579 So. 2d 1231 (La. App. 3d Cir.), *writ denied*, 585 So. 2d 568 (1991).

124. *Cf.* Pease v. Gatti, 202 La. 698, 12 So. 2d 684 (1943).

125. La. R.S. 13:4106 (1991); La. Code Civ. P. art. 2336.

> conducted in accordance with the Deficiency Judgment Act, the minimum two-thirds rule would apply, and the surety would still be liable for the difference between the debt and two-thirds of the fair market value of the property. The surety should be no worse off when the creditor has violated the Deficiency Judgment Act by selling to a third party than when the transaction has been properly conducted in accordance with the Deficiency Judgment Act.

If a creditor invokes a sale that otherwise complies with the Deficiency Judgment Act, but there is no bidder and a second sale is required, the current case law requires no minimum two-thirds bid; the debtor and surety remain liable for 100% of the balance.[126] Whether a court would hold that a creditor who consistently goes to a second sale is attempting to evade the purposes of the Deficiency Judgment Act remains to be seen.

Finally, it is anticipated that creditors may try to contract around the provisions of the Deficiency Judgment Act.[127] Given the "public policy" language of the Act, it is unlikely that those efforts will be successful.[128]

III. Overview of the New Mortgage Law

In 1991, the Louisiana Legislature revised Louisiana Civil Code articles 3278 through 3298 and 3314 which deal with mortgages in general and conventional mortgages effective January 1, 1992; the legislature repealed Civil Code articles 3310 through 3329.[129] In 1992, the Legislature also repealed Civil Code articles 3311 through 3370 and articles 3397 through 3411 and enacted Civil Code articles 3306 through 3318 effective January 1, 1993.[130] These 1991 and 1992 revisions structured the mortgage articles into the following chapters:

Chapter 1—General Provisions
Chapter 2—Conventional Mortgages
Chapter 3—Judicial and Legal Mortgages
Chapter 4—The Effect and Rank of Mortgages

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126. *Teche Bank*, 579 So. 2d 1231; Louisiana Nat'l Bank of Baton Rouge v. Heroman, 280 So. 2d 362 (La. App. 1st Cir.), *writ denied*, 281 So. 2d 755 (1973).

127. *Cf.* First Nat'l Bank of Crowley v. Green Garden Processing Co., 387 So. 2d 1070 (La. 1980).

128. La. R.S. 13:4107 (1991).

129. 1991 La. Acts No. 652. This Act deals with general provisions for all mortgages, conventional mortgages and extinction of mortgages.

130. 1992 La. Acts No. 1132. This Act deals with judicial and legal mortgages, the effect and rank of mortgages, third possessors and recordation of mortgages and privileges.

Chapter 5—Third Possessors
Chapter 6—Extinction of Mortgages
Chapter 7—Recordation of Mortgages and Privileges

A. Mortgages in General

Under the revision, a mortgage is defined as "a nonpossessory right created over property to secure the performance of an obligation."[131] As with the old articles, a mortgage gives the mortgagee only the right to seize and sell the property through judicial proceedings and to have the proceeds applied to the obligations secured in preference over others.[132] There still is no right to self-help as a method of execution.[133] It is an indivisible real right that follows the property upon its transfer.[134] A mortgage is accessory to the obligation it secures; thus, a mortgage is enforceable only to the extent that the mortgagee may enforce the obligation for which the mortgage is given as security.[135] As with the 1870 Code, mortgages can be conventional, judicial and legal, and they can be special or general.[136]

There is an important clarification and revision to the types of property susceptible to mortgage.[137] For the most part, this revision codifies the former Louisiana Revised Statutes 9:5102, and adopts the terminology and categories of the 1976 property code article revisions. Property susceptible to mortgage is classified as follows:

(1) A corporeal immovable and its component parts.
(2) A usufruct of a corporeal immovable.
(3) A servitude of right of use with the rights that the holder of the servitude may have in the buildings and other constructions on the land.[138]

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131. La. Civ. Code art. 3278. The citations to the new revised mortgage code articles will be indicated by a (1993) following the cite.

132. La. Civ. Code art. 3279.

133. Self-help has been long-abhorred in Louisiana. *See generally* Alcolea v. Smith, 150 La. 482, 90 So. 769 (1921). Although small inroads have been made in this area, see new quick taking statute 6:965-967, discussed *supra* at note 53, for the most part Louisiana adheres to this principle. *See, e.g.*, Chapter 9, Louisiana Commercial Laws, La. R.S. 10:9-101 to 9:605 (Supp. 1992).

134. La. Civ. Code art. 3280. This indivisibility allows a mortgagee to execute on the whole of the property; the mortgagee cannot be forced to execute on only part of the property. La. Code Civ. P. arts. 2295-2296.

135. La. Civ. Code art. 3282.

136. La. Civ. Code arts. 3284-3285.

137. La. Civ. Code art. 3286.

138. 1992 La. Acts No. 649 amends La. Civ. Code art. 3286(3) and (4), effective July 1, 1992 to eliminate "other construction" from La. Civ. Code art. 3286(3) and (4). Apparently, where an other construction is a component part of a tract of land and is

(4) A lessee's rights in a lease of an immovable with his rights in the buildings and other constructions on the immovable.[139]
(5) Property made susceptible of conventional mortgage by special law.[140]

This list contains three important revisions. Now the law clearly provides that a mortgage can include the component parts of an immovable.[141] Civil Code article 3286 also codifies the right to mortgage a lessee's right in and to a lease on immovable property. Prior to this revision, a mortgage of these rights was covered by Louisiana Revised Statutes 9:5102. Moreover, Comment (f) to Civil Code article 3286 makes clear that the term lessee includes a sublessee or an assignee of the lease. The article clarifies the law to assure the mortgagee that the mortgage of a right of use includes the mortgagor's rights in buildings and other constructions regardless of whether they are classified as distinct immovables or separate movables.[142]

B. Conventional Mortgages

There also are important revisions to Section 2 of the Mortgage Chapter (after 1993 Chapter 2) dealing with conventional mortgages. As before, a mortgage contract must be in writing, although it is now clear

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owned by the owner of the land, it is a component part of a corporeal immovable and can be mortgaged under La. Civ. Code art. 3286(1). However, such an "other construction" when owned by the owner of the land also can be a "fixture" under La. R.S. 10:9-313 in which the creation of a security interest could be governed under the statute governing the creation of a security interest by filing a "fixture filing" under La. R.S. 10:9-402(5). Since the fixture filing must be made prior to attachment of the fixture, this "fixture filing" can create a security interest in fixtures that ranks differently from a mortgage on the real estate. Furthermore, if the "other construction" is owned by someone other than the owner of the land, then the "other construction" may be a separate "movable" under La. Civ. Code art. 475, and therefore, a security interest in such a movable would be governed by the Louisiana Commercial Laws, La. R.S. 10:9-101-:9-605. This act also eliminates "buildings" from La. Civ. Code art. 3286(3) and (4). Buildings, however, seem to be included as a "corporeal immovable" or "component part" in La. Civ. Code art. 3286(1) as those terms are defined in La. Civ. Code arts. 462-470; therefore, buildings are still subject to a mortgage. For a detailed discussion *see* Thomas A. Harrell, *Security Devices, Developments in the Law, 1988-1989*, 50 La. L. Rev. 363, 369-74 (1989).

139. *See* 1992 La. Acts No. 649 and text accompanying *supra* note 138.

140. La. Civ. Code arts. 3289(3) and 3305 dealing with ship mortgages have not been retained by the revision. The Ship Mortgage Law, La. R.S. 9:5521-5538, still in effect, previously rendered these articles obsolete. For ship mortgages, *see also* 46 U.S.C. §§ 31301-31343 (Supp. 1992). This Louisiana revised statute and these provisions of federal law are examples of such "special" laws.

141. It might be necessary, however, to make a fixture filing under La. R.S. 10:9-314 in order to be sure that the mortgage covers any future additions to the property that might become component parts of the property.

142. *But see* 1992 La. Acts No. 649, *supra* note 138.

that no "grant" language is necessary to create a mortgage.[143] As a reminder, however, a mortgage must be in authentic form to use executory process, to be self-proving and, prior to January 1, 1993, possibly for recordation.[144]

The specific requirements of a mortgage contract in Articles 3306 and 3309 of 1870 are combined in revised Article 3288. The contract must "state precisely the nature and situation of each of the immovables or other property over which the mortgage is granted."[145] It also must state the "amount of the obligation or the maximum amount of the obligations" secured.[146] The contract must be signed by the mortgagor, but the code is now clear that the mortgagee need not sign because acceptance is presumed.[147] From other recent statutory changes outside the mortgage revision act, the conventional mortgage, when in notarial form, should include the mortgagor's and mortgagee's taxpayer identification numbers or their employer identification numbers, although the failure to include such "does not affect the validity of the act."[148] New Civil Code article 3298 specifically modifies the old Civil Code article 3309 of 1870 to allow a maximum amount when the mortgage secures a fluctuating line of credit or other running balance of the mortgagor's obligations. This change is consistent with the elimination of the necessity for a collateral mortgage described below.[149]

In another clarification, the new articles eliminate an apparent conflict between Civil Code articles 3304 and 3308 of 1870 dealing with mortgages over future property. Under revised Civil Code article 3292, it is clear that one may mortgage property to be acquired in the future if the property is specifically described. There still can be no general mortgage over future property.

A mortgage may secure any obligation. This includes not only obligations for the payment of money, but also other obligations, such as performance of an act.[150] If the mortgage secures an obligation other than for the payment of money, then the mortgage secures the claim for damages resulting from the breach of that obligation.[151] In this case,

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143. La. Civ. Code art. 3287.

144. La. Code Civ. P. art. 2635; La. Civ. Code arts. 3348, 3367 (1870). Note that effective in 1993, a mortgage need not be authenticated for recordation. *See* discussion *infra* at notes 209-211.

145. La. Civ. Code art. 3288.

146. *Id.*

147. La. Civ. Code art. 3289. Since acceptance is presumed, there is no need to include the "any future holder" language usually contained in mortgages.

148. La. R.S. 9:5141(C) (Supp. 1992) and 35:17 (Supp. 1992) (effective January 1, 1992).

149. *See infra* text at notes 156-160.

150. La. Civ. Code art. 3293.

151. La. Civ. Code art. 3294.

the maximum amount contained in the mortgage is not a liquidated damages clause by which the mortgagee is limited only to this stated amount in damages. The maximum amount only limits the amount the mortgagee can claim as proceeds from the execution on the property mortgaged.[152] Thus, if the amount of damages granted for a breach of a non-monetary obligation is in excess of the maximum amount listed in the mortgage, the mortgagee has a personal right for the excess against the mortgagor, but no right to claim that this amount is secured by the mortgage.

A third person may mortgage property to secure the debts of another, and this third person can raise any defense on the obligation secured that the principal obligor could raise, except lack of capacity and discharge in bankruptcy.[153] In dicta, some cases prior to the revision indicated that a mortgagee or other third persons are allowed to raise defenses that the obligor could not because the principal obligation is, for instance, in the hands of a holder in due course.[154] New Civil Code article 3296 legislatively overrules the dicta in these cases by providing that mortgagees or third parties cannot raise the defense that the principal obligation is extinguished or unenforceable where the mortgagor or principal obligor cannot assert these defenses. Furthermore, in more positive manner, the new revisions provide clearly for an *in rem* mortgage.[155]

New Civil Code article 3298 makes a significant change in the law; it now makes it clear that a mortgage can secure a fluctuating line of credit. This article, while not eliminating the collateral mortgage, renders the need for a collateral mortgage obsolete since it does what the collateral mortgage used to do; it allows a mortgage to secure fluctuating obligations that arise in the future. The ranking of a conventional mortgage is stated as follows:

> As to all obligations, present and future, secured by the mortgage, notwithstanding the nature of such obligations or the date they arise, the mortgage has effect between the parties from the time the mortgage is established and as to third persons from the time the contract of mortgage is filed for registry.[156]

Thus, one can secure a fluctuating line of credit as long as the *maximum amount* of the line of credit is contained in the mortgage merely by filing a mortgage, and the mortgage will rank as to third persons from

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152. *See* comment to La. Civ. Code art. 3294.
153. La. Civ. Code art. 3295.
154. La. Civ. Code art. 3296, comment (a).
155. La. Civ. Code art. 3296. *See also* La. Civ. Code arts. 3296-3297 (1870).
156. La. Civ. Code art. 3298(B).

the filing date assuming acceptance of the contract by the mortgagee.[157] There is no longer a need for a "ne varietur" note (such as a collateral mortgage note) which the mortgage secures. There is no longer a need for a pledge of a collateral mortgage note paraphed to and secured by a collateral mortgage, or for a collateral mortgage note in which a security interest is obtained.[158] There are no longer any arguments about whether the mortgage ranks from the date of the pledge[159] if there had been no advance of funds or a binding commitment to lend.[160] All that is required is the filing of a mortgage; the rank is from the date of filing even if the mortgage secures a fluctuating line of credit.

For purposes of executory process, Louisiana Revised Statutes 9:5555[161] has been amended to state that the existence, terms, amount and maturity

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157. *See also* La. Civ. Code arts. 3320-3337 (1993) discussed *infra* at note 208.

158. *See* La. R.S. 9:5550-5557 (1991 and Supp. 1992); the pledge of collateral mortgage notes prior to January 1, 1990 was controlled by La. Civ. Code art. 3158.

159. New Orleans Silversmiths, Inc. v. Toups, 261 So. 2d 252 (La. App. 4th Cir.), *writ denied*, 263 So. 2d 252 (1972); American Bank & Trust Co. v. F. & W. Constr., Inc., 357 So. 2d 1226 (La. App. 2d Cir. 1978).

160. La. R.S. 9:5550-5557, as amended by 1991 La. Acts Nos. 377 and 652. *See* Langfill v. Brown, 5 La. Ann. 231 (1850); Meeker v. Clinton and Port Hudson R.R. Co., 2 La. Ann. 971 (1847); *cf.* New Orleans Fed. Sav. and Loan Ass'n v. Lee, 449 So. 2d 1099 (La. App. 5th Cir.), *writ denied*, 456 So. 2d 167 (1984). *Note*: After January 1, 1990, there still must be a security interest in the collateral mortgage note (La. R.S. 9:5551), and that requires a giving of value (La. R.S. 10:9-203). Value is defined as:

> Except as otherwise provided with respect to negotiable instruments and bank collections [Sections 3-303, 4-208 and 4-209] a person gives "value" for rights if he acquires them
>
> (a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection;
>
> (b) as security for or in total or partial satisfaction of a pre-existing claim;
>
> (c) by accepting delivery pursuant to a pre-existing contract for purchase; or
>
> (d) generally, in return for any consideration sufficient to support a simple contract.

La. R.S. 10:1-201(44) (Supp. 1992).

161. La. R.S. 9:5555 (Supp. 1992) provides:

> A. For purposes of executory process, the existence, amount, terms and maturity of an obligation not evidenced by an instrument paraphed for identification with the act of mortgage or privilege may be proven by affidavit or verified petition.
>
> B. The affidavit or verified petition may be based upon personal knowledge or upon information and belief derived from the records kept in the ordinary course of business of the mortgagee, the creditor whose claim is secured by the privilege, or any other person. The affidavit or verified petition need not particularize or specifically identify the records or date upon which such knowledge, information or belief is based.

of an obligation can be proved by affidavit or verified petition where no note is paraphed for identification with the mortgage. The affidavit or the verified petition may be based on personal knowledge or on information derived from the mortgagee's business records. To make executory process simpler, this affidavit or verified petition need not particularize or specifically identify the records or data upon which the information is based.

C. *Legal and Judicial Mortgages*

The 1992 revisions of the mortgage articles combine legal and judicial mortgages into one chapter. Most code provisions regarding legal mortgages are eliminated; the revision only states that legal mortgages are regulated by the law which created the legal mortgage.[162]

A judicial mortgage is created by filing a judgment for the payment of money with the recorder of mortgages.[163] The judicial mortgage affects all property susceptible to mortgage under Civil Code article 3286 owned by the debtor or the after-acquired property of the debtor, including predial leases.[164]

The revision is intended to overrule *Goldking Properties v. Primeaux*[165] which held that a suspensive appeal can be the basis to extinguish a judicial mortgage and permitted the appellee to instruct the recorder to erase the judicial mortgage. Under the revision, a judicial mortgage "is not affected or suspended by a suspensive appeal or stay of execution of the judgment."[166] Rather than the judgment debtor acting unilaterally, now Louisiana Revised Statutes 13:4436.1 through 13:4436.4 provide that the debtor who has taken a suspensive appeal must provoke a rule against the creditor to apply for an order terminating the judicial mortgage and directing its erasure. To protect the creditor, the creditor has the right to challenge the appeal and test the appeal bond before the mortgage is erased. If the creditor's mortgage is not erased, the creditor's right to execute on the judgment is still suspended during the pendency of the suspensive appeal.[167]

Unchanged is the rule that judgments of foreign jurisdictions are only effective if a Louisiana court makes the judgment executory in Louisiana, and the Louisiana court's judgment is filed.[168] There are

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162. La. Civ. Code arts. 3299, 3301 (1993). For examples of special laws creating and governing legal mortgages, *see* La. R.S. 47:187 and 1906.

163. La. Civ. Code art. 3300 (1993). Note that the judgment must be certified by the clerk of the court that rendered the judgment. La. Civ. Code art. 3321 (1993).

164. La. Civ. Code art. 3303 (1993).

165. 477 So. 2d 76 (La. 1985).

166. La. Civ. Code art. 3304 (1993).

167. *Id.*

168. La. Civ. Code art. 3305 (1993).

exceptions to these rules where special legislation provides otherwise.[169]

D. *The Effect and Rank of Mortgages*

For the most part the effects of mortgages remain unchanged. The mortgagee, after default of the mortgagor, has the right to seize and sell the mortgaged property as provided by law and have the proceeds applied to satisfy the mortgagor's obligations in preference to unsecured and inferior creditors.[170] The revision carries forward the rule, found in former Article 3397 of 1987, that the debtor could not sell, alienate or encumber the property to the prejudice of the mortgagor. As an extension of this rule, any sale, alienation or encumbrance after the mortgage becomes effective is subordinate to that mortgage unless the mortgagee agrees to a subordination.[171]

A mortgage is effective as to third persons only from the time it is filed.[172] Taking into account the "public records doctrine,"[173] third persons are defined as those persons who are neither parties to the contract of mortgage, nor to the judgment creating a judicial mortgage, nor either of these parties' universal successor,[174] nor those who are contractually bound to recognize a mortgage.[175] In a change from former Article 3344 of 1870, it is now clear that a witness to a mortgage is not a party to it.[176] The revision assumes that the notary is not a third person.[177]

When a mortgage secures several obligations, the proceeds realized from the enforcement of such a mortgage are applied to each obligation in the proportion to the amount owed on each obligation,[178] unless there

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169. *See, e.g.*, La. R.S. 13:4204 which permits a judgment of original jurisdiction of a United States court in Louisiana to be filed and have the same effect as a judgment rendered by a Louisiana state court.

170. La. Civ. Code art. 3307 (1993).

171. Although all agreements affecting immovable property must be in writing to affect third parties (La. Civ. Code art. 1839), there is some unfortunate dicta in at least one recent case which might be read as indicating that, as between the creditors, there can be a verbal subordination. *See* Louisiana Nat'l Bank of Baton Rouge v. Bellelo, 577 So. 2d 1099 (La. App. 1st Cir. 1991).

172. La. Civ. Code art. 3308 (1993).

173. La. R.S. 9:2721-2728 (1991).

174. Universal successor is defined in La. Civ. Code art. 3506(28).

175. La. Civ. Code art. 3309 (1993).

176. La. Civ. Code art. 3310 (1993).

177. *Id.* comment (b).

178. La. Civ. Code art. 3311 (1993). This article seems to change the law. Older cases noted that although the mortgage secured all obligations equally, the proceeds remaining after satisfaction of one obligation were then applied to the next obligation and to the next until the proceeds were exhausted, unless transfers for value were involved, in which case the transferee was preferred over the transferor. Leonard v. Brooks, 158 La. 1032,

is an agreement to the contrary. For example, a mortgage secures three obligations: one for $100,000, one for $75,000, and the last for $25,000. The property is sold at a foreclosure sale for $100,000. Of these proceeds, $50,000 would be applied to the first obligation, $37,500 to the second obligation, and $12,500 would be applied to the third.

Particularly important are the new articles dealing with the transfer of the principal obligation. Although prior to the revision, under the sales code articles, it was clear that the transfer of the principal obligation included the transfer of any accessory obligation, including a mortgage,[179] this rule is now included specifically in the mortgage articles.[180] The new revision clarifies the prior law when the principal obligation is transferred; under the new articles, the transferor only warrants the existence, validity and enforceability of the mortgage only to the extent the validity, existence or the enforceability of the principal obligation is warranted.[181]

Some prior case law held that if a mortgagee transferred only a part of the principal obligation to another, then the original mortgagee impliedly subordinated to the transferor.[182] The revision overrules these cases and provides that the original mortgagor does not automatically subordinate, absent an agreement to the contrary;[183] the transferee and transferor are equally secured.

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105 So. 54 (1925); Jacobs v. Calderwood, 4 La. Ann. 509 (1849). Arguably, the payments, after 1985, were governed by the rules of imputation of payments, La. Civ. Code arts. 1864-1868.

179. La. Civ. Code art. 2645. *See generally* L.H. Gardner & Co. v. Maxwell, 27 La. Ann. 561 (1875); Frost v. McLeod, 19 La. Ann. 80 (1867). Note, however, a creditor to whom a note secured by a mortgage is transferred should record evidence of the assignment or transfer in order that the creditor becomes a "successor" and the debtor cannot receive a cancellation from the new creditor's transferor. *See* La. R.S. 9:5550-5557, discussed *supra* at notes 158-161.

180. La. Civ. Code art. 3312 (1993).

181. Under prior law, courts applied the obligations imposed by La. Civ. Code art. 2646, which required a transferor of a note "without recourse" to warrant not only the existence of the principal obligation, but also the existence of the accessory obligation, and if the accessory obligation did not exist, the transferor was required to return the purchase price. Citizens' Bank & Trust Co. v. Cook, 121 So. 306 (La. App. 2d Cir. 1928). La. Civ. Code art. 3312 (1993) seems to change the law by providing that warranties given by a "without recourse" transferor of a note secured by a mortgage are the same given as to the note under La. R.S. 10:3-417. But under the comment to La. R.S. 10:3-416 revised by 1992 La. Acts No. 1133 effective July 1, 1993, the warranties given on the transfer of a negotiable instrument are in addition to the warranty rights under La. Civ. Code art. 2646.

182. Leonard v. Brooks, 158 La. 1032, 105 So. 54 (1925); Butler v. Clarke, 44 La. Ann. 148, 10 So. 499 (1892); Barkdull v. Herwig, 30 La. Ann. 618 (1878). These cases based their holding on the rationale that the transferor was equitably estopped from competing with the transferee as to the proceeds of a sale.

183. This article apparently does not keep parties from contracting to the contrary. *See* La. Civ. Code art. 7.

The revision states that a transferee of an obligation secured by a mortgage does not take the mortgage subject to any unrecorded releases, modifications or amendments to the mortgage if the transferee is a third person.[184] Some prior cases, relying on the principle that one cannot transfer greater rights to a transferee than the transferror possessed, had held that a transferor was bound by such unrecorded amendments, modifications or releases.[185] The revision overrules these cases.[186]

E. Third Possessors

The revisions of the Civil Code restate but do not change the prior law regarding third possessors. The revision reiterates the established rule[187] that a third possessor is one who acquires property subject to a mortgage but is not personally bound for the obligation the mortgage secures.[188] The third possessor remains liable to creditors holding a mortgage or privilege on the property for deterioration of the property caused by the third possessor's actions or neglect.[189]

If the third possessor pays the debt of the mortgagor, the mortgage is not extinguished by confusion;[190] in this instance, the third possessor is entitled to legal subrogation to the creditor's rights.[191] Because there is no confusion, the rights of creditors inferior to the original mortgagee remain inferior to the rights of the third possessor where the third

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184. These unrecorded modifications, amendments or releases, however, may be effective as to a transferee who assumes a mortgage or who, for some other reason, is not a third person under La. Civ. Code art. 3309 (1993).

185. *See generally* Bell v. Canal Bank & Trust, 190 So. 359 (La. 1939); Brian v. The Jock Shop, Inc., 479 So. 2d 398 (La. App. 1st Cir. 1985), *writ denied*, 481 So. 2d 1349 (1986). *But see* Smith v. Deano, 154 So. 452 (La. 1934); Davis v. Welch, 128 La. 785, 55 So. 372 (1911); Thomas A. Harrell, *Security Devices, Developments in the Law, 1985-1986*, 47 La. L. Rev. 452, 463-66 (1986).

186. A mortgagee of record has the right to grant modifications, amendments and releases under La. R.S. 9:5556. Thus, if there is an assignment that is not recorded, the original mortgagee can still grant effective modifications, amendments or release to the prejudice of the transferee if these modifications and amendments are recorded. In order to avoid any such problems, the transferee should immediately record the assignment making the transferee the mortgagee of record.

187. La. Code Civ. P. arts. 2703, 3743, 5154; La. Civ. Code arts. 3399-3410 (1870).

188. La. Civ. Code art. 3315 (1993).

189. La. Civ. Code art. 3316 (1993). Although the creditor may have the right of injunction to prevent such a deterioration, Fulton v. Oertling, 60 So. 238 (La. 1912), and the right to sequester the property because of the third possessor's power to waste the property under La. Code Civ. P. art. 3571, the creditor has no right to the fruits of the property until it is seized. Ittman v. Kracke & Flanders Co., 12 La. App. 672, 127 So. 106 (La. App. Orl. 1930).

190. La. Civ. Code art. 3317 (1993).

191. La. Civ. Code art. 1829.

possessor pays the mortgage debt.[192] Furthermore, because the third possessor's rights are affected adversely by the mortgagor's default, the third possessor has an action in warranty against the original mortgagor.[193] Out of the proceeds of the enforcement of a mortgage, the third possessor has a right to the enhanced value of the property caused by third possessor improvements up to the costs of the improvements, but only after the mortgagee has received the unenhanced value of the property.[194]

F. Extinction of Mortgages

Extinction of a mortgage is governed by revised Civil Code article 3319.[195] This new article reproduces the substance of the old Civil Code article 3411 of 1870 with some minor change in language. A mortgage is extinguished by destruction of the thing mortgaged, by confusion when the mortgagee acquires the thing mortgaged, by prescription of the obligation secured, by foreclosure or other judicial order, by consent of the mortgagee, or "when all the obligations, present and future, for which the mortgage is established have been incurred and are extinguished."[196]

In accordance with the change in Civil Code article 3298 confirming that a mortgage can secure a fluctuating line of credit, a new method of extinction has been added. A mortgage that secures fluctuating future obligations may be terminated by the mortgagor or his successor by notice to the mortgagee when there is no more owed on the line of credit and neither mortgagor nor mortgagee are bound to each other or a third person to advance any more on the line of credit.[197] The recorder of mortgages must accept a direction or receipt from the mortgagee evidencing the extinction of the obligation secured.[198] In order to protect the mortgagor from a mortgagee who does not voluntarily cancel the mortgage, the mortgagor can request a written release from the mortgagee directing the recorder to cancel the mortgage. If the mortgagee does not provide this written release within sixty days, the

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192. Pugh v. Sample, 123 La. 791, 49 So. 526 (1909). To take advantage of this rule, the third possessor must intervene prior to the sale and demand a separate appraisal of the unimproved value of the property.

193. La. Civ. Code art. 2501; Long v. Grisham, 11 La. App. 436, 123 So. 492 (La. App. 2d Cir. 1929).

194. La. Civ. Code art. 3318 (1993); La. Civ. Code art. 3407 (1870).

195. This article was originally enacted in the 1991 mortgage revisions as La. Civ. Code art. 3411, but the 1992 mortgage revision redesignated it as La. Civ. Code art. 3319.

196. La. Civ. Code art. 3319 (1993).

197. La. R.S. 9:5556 (Supp. 1992).

198. La. R.S. 9:5556(A) (Supp. 1992). *See also* La. Civ. Code art. 3337 (1993).

mortgagor, through summary proceedings, can obtain a judgment ordering the mortgage to be canceled.[199] If the mortgagor is forced to use summary proceedings, the court may provide for attorney's fees and damages to the mortgagor.

Because the code and ancillaries look to the named mortgagee for direction on cancellation, special care is needed in the event of a mortgage transfer. If the original mortgagee transfers the principal obligation and the accessory security of the mortgage to a second creditor, it is in the interests of both creditors to obtain a written assignment of the mortgage and to record the assignment in the mortgage records. Now, the second creditor is the mortgagee identified in the public records and can grant or order cancellation of the mortgage. If there is no recorded assignment, then the second creditor cannot satisfy the mortgagor's demand for cancellation,[200] and the original mortgagee must be asked to grant the cancellation.[201] Yet, the original mortgagee may not feel comfortable in ordering a cancellation, for the original mortgagee may have no further contact with the new mortgagee and be unaware of whether there is any debt existing or contemplated between the transferee and mortgagor.

G. Inscription of Mortgages and Privileges

Historically, there has been a substantial difference between the effect of the filing of conveyances and mortgages. Conveyances have long been held effective upon filing for registry, even if registry never occurs.[202] On the other hand, mortgages constitutionally were required to be recorded.[203] In an effort to deal with some of the discrepancy between filing and recordation, the legislature enacted Revised Statutes 9:5141 to provide that a filing date had to be inscribed upon the mortgage. If the intent was to make mortgages effective upon filing, the intent was not recognized by the jurisprudence; the cases gave effect to mortgages upon filing *if* the mortgage was "timely" recorded. This led to holdings that recordation within three days of filing was timely,[204] while recordation eighteen months after filing was untimely.[205]

The provisions of the Louisiana Constitution of 1921 that had required recordation of mortgages were carried forward as an unnum-

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199. La. R.S. 9:5557 (Supp. 1992).

200. La. R.S. 9:5556 (Supp. 1992).

201. Only the named mortgagee can order cancellation. La. R.S. 9:5556 (Supp. 1992).

202. *See* Schneidau v. New Orleans Land Co., 132 La. 264, 61 So. 225 (1912); Payne v. Pavey, 29 La. Ann. 116 (1877); La. Civ. Code art. 1839.

203. La. Const. art. 19, § 19 (1921); La. Const. art. 186 (1913); La. Const. art. 186 (1898); La. Const. art. 176 (1879).

204. Kennibrew v. Tri-Con Prod. Corp., 244 La. 879, 154 So. 2d 433 (1963).

205. Opelousas Finance Co. v. Reddell, 9 La. App. 720, 119 So. 770 (La. App. 1st Cir. 1929).

bered statute by the 1974 Constitution,[206] and pre-1992 amendments to the Civil Code intermittently attempted to tie the effective date of mortgages to filing; however, these amendments were not comprehensive.[207] The new Civil Code revisions attempt to remedy the problem by looking at the point of filing as the operative point.[208]

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206. La. Const. art. XIV § 16 (1974).

207. For example, the following code articles and statutes provide:

La. Civ. Code art. 3342: "But these mortgages are only allowed to prejudice third persons when they have been publicly *inscribed* on the records kept for that purpose."

La. Civ. Code art. 3344: "Consequently, neither the contracting parties nor their heirs, nor those who were witnesses to the act by which the mortgage was stipulated, can take advantage of the *non-inscription* of the mortgage."

La. Civ. Code art. 3345: "All mortgages, whether conventional, legal or judicial, are required to be *recorded in the manner* hereafter provided."

La. Civ. Code art. 3346: "The *inscription* of the mortgage only binds the property of the debtor when it has been made in the Office of the Mortgages for the parish where the property lies."

La. Civ. Code art. 3347: "No mortgage or privilege shall hereafter affect third parties, unless *recorded* in the parish where the property to be affected is situated."

La. Civ. Code art. 3348: "Any person entitled to a mortgage or privilege on the property of another person, must cause the evidence of such mortgage or privilege *to be recorded* in the mortgage book of the parish where the property is situated."

La. Civ. Code art. 3358: "Mortgages shall be effective against all persons from the time of their *filing* with the recorder of mortgages in the place where the inscription is to be made." [amended by Acts 1979, No. 213, § 1].

La. Civ. Code art. 3369 (which refers to reinscription) refers to "recordation."

La. Civ. Code art. 3370: "It shall be the duty of notaries public, and other public officers acting as such, to cause *to be recorded* without delay all acts creating mortgages . . . ."

La. R.S. 9:2721: "No . . . mortgage . . . or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until *filed for registry*."

La. R.S. 9:2722: "Third persons or third parties so protected by and entitled to rely upon the *registry laws* of Louisiana . . . include any third person or third party . . . ."

La. R.S. 9:2724: "This Chapter shall not derogate from or otherwise affect the existence of priority of any lien or privilege which, under existing law, is not dependent upon *recordation* for its existence or priority."

La. R.S. 9:2744: "It shall be the duty of the recorder to indorse on the back of each act deposited within the time it was received by him and to *record the same without delay* in the order which they were received; and such acts shall have effect against third persons *only from the date of their being deposited in the office of the parish recorders*."

La. R.S. 9:2754: "No notarial act concerning immovable property shall have any effect against third persons, until the same shall have been deposited in the office of the parish recorder, or the register of conveyances of the parish where such immovable property is situated."

Under the old law, although an unauthenticated mortgage affected third parties, theoretically the recorder of mortgages could refuse to record it unless it was in authentic form. The revisions make it clear that a recorder of mortgages cannot refuse a non-authentic act; a conventional mortgage no longer has to be in authentic form or authenticated to be recorded.[209] Of course, a non-authentic mortgage is not self-proving. In order for a judicial mortgage to be effective, a copy of a judgment must be certified by the court that rendered it.[210] For legal mortgages and other privileges or encumbrances, the document must be in the form required by law establishing the encumbrance.[211]

If an original document is filed in the wrong parish, the revisions allow one to obtain a certified copy of that mistakenly recorded document and record it in the correct parish; this second recordation will have the same effect as recording an original document in the correct parish.[212] This rule, however, should not be interpreted to allow a notary before whom the original act was passed to make a "certified" copy that would be effective when recorded; the original must be recorded somewhere. Duplicate originals of mortgages or documents evidencing a privilege affecting property in different parishes can be filed in the different parishes, and such duplicate originals need only describe the property located in the parish in which it is recorded to be effective.[213]

For every document recorded, the clerk must note on the document the date and time of filing, and the recorder must provide certified copies of any recorded document upon request.[214] Although not required to do so without a request, a notary before whom an act is passed must, upon request, paraph any written obligation with the act evidencing a mortgage or a privilege.[215] It should be noted that no paraph is required on mortgages securing notes to be given in the future.

La. R.S. 9:5142 allows certain extracts of mortgages to be recorded, and requires "the following clause shall be inserted in the inscription of the act by the recorder 'For the balance of this act see original (*recorded* as Original ____ Bundle ____.)'" (emphasis added).

208. La. Civ. Code art. 3320(A) (1993) and Comment (b) to La. Civ. Code art. 3320 (1993).

209. La. Civ. Code art. 3321 (1993). Although former La. Civ. Code arts. 3348 and 3367 (1870) authorized the recorder to refuse to accept unauthentic acts, it had become accepted practice for a mortgage to be effective if the clerk accepted it for recordation regardless of the form of the act. As a reminder, however, a document must be authentic to be self-proving, La. Civ. Code art. 1835, and to be used in executory process. La. Code Civ. P. art. 2631.

210. La. Civ. Code art. 3321 (1993).

211. *Id.*

212. La. Civ. Code art. 3322 (1993).

213. La. Civ. Code art. 3323 (1993).

214. La. Civ. Code art. 3324 (1993).

215. La. Civ. Code art. 3325 (1993). The paraph must state the date of the act and

A conventional or judicial mortgage filed more than twenty days after the mortgagor dies does not create a priority for the mortgagee over the other creditors of the deceased's estate if the estate is not sufficient to satisfy all of the estate's creditors.[216] If the mortgage is filed within the twenty days, however, it will only rank from the date of filing.

The revision has rules for mortgage certificates.[217] Upon request of any person, under the names provided by the person requesting the certificate, the clerk must prepare a mortgage certificate listing all uneraised mortgages and documents evidencing privileges except those created by filing the ad valorem tax rolls. The recorder is liable for the loss caused by the failure to list a mortgage or privilege or by including a mortgage or privilege that has been erased unless the error is caused by mistakes or lack of exactness in the descriptions of the obligor or the property by the person requesting the certificate.

Former Civil Code article 3369 controlled the rules regulating the effects of inscription of mortgages and privileges, the effects of amendments to the maturity date of the principal obligation, and the methods and effects of reinscription. The revision deals with these areas in a number of articles starting with Article 3328.

Unchanged are the general rules:

- If the principal obligation is due in less than nine years, inscription preserves the effect of the document for ten years, measured from the date of the document.[218]

  For example, if a mortgage securing a demand negotiable note[219] is created on January 1, 1985 and is filed for recordation on March 1, 1985,[220] the note will prescribe

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be signed by the notary. In the act itself there must also be a statement that the obligation is paraphed. There are some advantages to use of the paraph, for the paraph is often treated as prima facie evidence that the obligation paraphed is the one described in the act. Because some secured obligations are not evidenced in writing, the revision has eliminated any necessity of paraphing the obligation.

216. La. Civ. Code art. 3326 (1993).

217. La. Civ. Code art. 3327 (1993).

218. La. Civ. Code art. 3328 (1993).

219. It should be remembered in all of these examples that there is no requirement that a mortgage secure one or more described notes. La. Civ. Code art. 3298. A mortgage, for example, is perfectly valid if it secures "any and all obligations, past, present or future, that the Mortgagor now owes or may owe in the future to the Mortgagee." La. Civ. Code art. 3298.

A second caveat is also appropriate—creditors who use a cross-collateralization clause in a mortgage on personal residences may have to give Truth In Lending Disclosures and perhaps rescission notices. *See* 15 U.S.C. §§ 1601-1667(e) (1982 and Supp. 1992).

220. In this and in the subsequent examples, it should be noted that while third parties are not affected by a mortgage or privilege until it has been inscribed—in this case, March 1, 1985, (La. R.S. 9:2721 (1991))—the date as to which the effects of registry cease are measured is the date of the document, not the date of inscription.

five years from its date, January 1, 1990, unless prescription is interrupted by acknowledgement of the note.[221] However, third parties cannot tell from the face of the public records if the note has been paid or if prescription has been interrupted. The mortgage, unless canceled, affects third parties for ten years from its date—or until January 1, 1995.[222] It should also be noted that if the maturity date cannot be ascertained from the face of the mortgage, as might be the case with mortgages created under Civil Code article 3298, the mortgage will cease to affect third parties ten years from its date.[223]

- If the principal obligation is due in nine years or more from the date of the document, the effects of recordation last for six years after the date of maturity.[224]

For example, if a mortgage securing a thirty year negotiable note due April 1, 1995, is created on April 1, 1965, and if the mortgage is filed for recordation on May 1, 1965, the note will prescribe five years from its maturity date, April 1, 2000. However, third parties cannot tell from the face of the public records if the note has been paid or if prescription has been interrupted. The mortgage, unless canceled, affects third parties for six years from its maturity date—or until April 1, 2001.

- If the maturity date of the principal obligation is altered so that it extends nine years or more from the date the mortgage

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221. A negotiable or non-negotiable note prior to July 1, 1993, prescribes in five years. La. Civ. Code art. 3498 (Supp. 1992). After July 1, 1993, however, a negotiable note prescribes five years from its maturity date and a non-negotiable note prescribes six years from its maturity date. 1992 La. Acts No. 1133. Acknowledgement may occur either through an oral or written act of acknowledgement, (La. Civ. Code art. 3464) or through payment of principal or interest (La. R.S. 9:5807). Because a collateral mortgage package typically consists of a demand instrument paraphed for identification with an act of collateral mortgage (*see, e.g.*, Max Nathan, Jr. & H. Gayle Marshall, *The Collateral Mortgage*, 33 La. L. Rev. 497 (1973)), this example would apply to both an ordinary mortgage and a collateral mortgage. In a collateral mortgage package, the pledge of the collateral mortgage note (under La. Civ. Code art. 3158, for packages created prior to 1990) or a security interest in the collateral mortgage note (under La. R.S. 9:5550 for packages created after January 1, 1990) interrupts prescription on the principal obligation—the handnote never prescribes. Kaplan v. University Lake Corp., 381 So. 2d 385 (La. 1980).

222. Of course, if the note has prescribed, the mortgage, being an accessory obligation, would be ineffective. La. Civ. Code art. 3282; *see, e.g.*, State v. Broussard, 177 So. 403 (La. App. 1st Cir. 1937). The burden of proof of showing that the principal obligation is still valid should be on the creditor asserting the mortgage.

223. La. Civ. Code art. 3328 (1993).

224. La. Civ. Code art. 3329 (1993)..

was created, the effects as to third parties continue for six years after the maturity date.[225]

> For example, if a mortgage securing a seven year negotiable note due July 1, 1997 is created on July 1, 1990, and if the mortgage is filed for recordation on August 1, 1990, the note would prescribe five years after its maturity date, July 1, 2002; however, since the note is due in less than nine years from its date, the mortgage will cease to affect third parties ten years from its date, or July 1, 2000.
> If, on September 1, 1995, the parties to the mortgage agree to extend the maturity date of the note from July 1, 1997, until July 1, 2007, and if this modification is recorded in the mortgage records, then the note will prescribe five years from its new maturity date, July 1, 2012, but because third parties cannot tell if the note has been paid or acknowledged, the mortgage will continue to affect third parties for six years after its maturity, until July 1, 2013.

- A judicial mortgage affects third parties for ten years from the date of the judgment, not the date of recordation.[226]

Although these rules remain unchanged, the revisions did alter some other areas formerly covered by Civil Code article 3369.

Reinscription is the term used for extending the effects of recordation without altering the principal obligation. How reinscription was to be accomplished was never clear under the original version of Article 3369, which provided that reinscriptions were to be accomplished "in the manner in which they were first made." The jurisprudence had held that an act of correction or act of assumption could constitute a reinscription.[227]

In 1988, the legislature amended and restated Civil Code article 3369.[228] It added a provision expressly allowing the filing of "a notice of reinscription of mortgage or a written request for reinscription by the mortgagee or any interested person, together with a copy of the original act of mortgage." The 1988 amendment, however, did not alter the prior rules, so either a notice of reinscription or an act of correction could constitute a reinscription.

The 1992 revisions change the prior law; now, the only document that will accomplish a reinscription is a notice of reinscription.[229] The

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225. La. Civ. Code art. 3332 (1993).
226. La. Civ. Code art. 3330 (1993).
227. Life Ins. Co. of Va. v. Nolan, 181 La. 357, 159 So. 583 (1935).
228. 1988 La. Acts No. 986, § 1.
229. La. Civ. Code art. 3333 (1993).

notice need not be signed by the mortgagor. The notice must state the name of the mortgagor or obligor in the recorded document, contain the pertinent recordation data on the original document, and state that the document is reinscribed.[230] The act of reinscription is recorded in the mortgage records. The act of reinscription extends the effects of recordation for ten years from the date of filing of the act of reinscription.[231]

For example:

> If a mortgage securing a demand negotiable note is created on January 1, 1985, and is filed for recordation on March 1, 1985, the note will prescribe five years from its date, January 1, 1990, unless prescription is interrupted by acknowledgement of the note, and the effects of registry will cease January 1, 1995. If a notice of reinscription is created by the mortgagee on December 1, 1994, and filed for registry on December 20, 1994, the effects of registry of the mortgage are extended from January 1, 1995, until December 20, 2004, (ten years after the filing of the notice), despite the fact that the demand note has not been altered or extended.[232]

The revisions also clarify the effect of an untimely reinscription. If a reinscription is untimely but the principal obligation is still enforceable, the reinscription creates a new ranking date for the mortgage or privilege.[233] There is no "relating back" to the original filing date.

No change has been made regarding the reinscriptions of judicial mortgages. A judgment prescribes ten years from its date.[234] An action to revive the judgment must be begun prior to the expiration of the ten years.[235] If the action to revive the judgment is brought timely, and if a notice of *lis pendens* is timely filed, then the judgment creditor has three years in which to obtain a new judgment reviving the older one; upon the timely recordation of the new judgment within the ten year period, the original judgment is reinscribed for an additional ten years from the date of the timely *lis pendens* notice.[236]

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230. *Id.* It will no longer be necessary to file a certified copy of the original document along with a request for reinscription.

231. La. Civ. Code art. 3334 (1993).

232. Obviously, in this hypothetical situation, for the mortgagee to enforce the mortgage, the demand note must have been acknowledged to prevent it from prescribing, for if it prescribed, the mortgage, an accessory obligation, would cease to have effect. State v. Broussard, 177 So. 403 (La. App. 1st Cir. 1937); La. Civ. Code art. 3282.

233. La. Civ. Code art. 3335 (1993).

234. La. Civ. Code art. 3330 (1993).

235. La. Code Civ. P. art. 2031.

236. La. R.S. 9:5502 (Supp. 1992).

Although the reinscription articles have been reworked, no attempt was made in the 1992 legislation to change the rules relating to first rights of refusal, which, under the jurisprudence, are arguably imprescriptible.[237] Likewise, no attempt was made to alter the rules relating to resolutory conditions, which affect third parties until ten years after the maturity date of the obligation.

For example:

> - *X* sells property to *Y* by an act of credit sale with mortgage created on January 1, 1985. The credit portion is represented by a six year negotiable note (due January 1, 1991) paraphed for identification with the act of mortgage and the mortgage is filed for recordation on March 1, 1985. The note will prescribe five years from its due date, on January 1, 1996, unless prescription is interrupted by acknowledgement of the note, and the effects of registry for both the mortgage and vendor's privilege will cease ten years from the date of the act, January 1, 1995. However, although the note may have prescribed and the effects of registry have ceased, nonetheless the seller may enforce the resolutory condition until January 1, 2001, ten years from the maturity date of the note.[238]

Prior to the 1992 legislative session, Revised Statutes 14:133 made it a crime to file forged, wrongfully altered, or false documents in connection with the Louisiana Medical Assistance Program. By Acts 1992, No. 539, §1, the legislature changed the statute significantly. The revision eliminates reference to the Louisiana Medical Assistance Program. It is now a felony (punishable by imprisonment for not more than five years and/or a fine of not more than $5000, or both) to file "in any public office or with any public officer" any document "containing a false statement or false representation of a material fact."[239]

This change, which broadens the criminal statute to include any public filing, has important adverse implications for a number of different areas, including but not limited to the use of counter letters. Under the language of the statute, it could be argued that any document in which there is a counter letter must by necessity contain a "false statement or false representation," although it can be argued whether the falsity is "material." It is unknown whether the statute will be applied to real estate transactions, but if it is, the following are examples of the kinds of problems that might arise; each situation raises the question of whether there is a "false statement or false representation,"

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237. Travis v. Heirs of Felker, 482 So. 2d 5 (La. App. 1st Cir. 1985).

238. La. Civ. Code art. 2561; Robertson v. Buoni, 504 So. 2d 860 (La. 1987); Louis Werner Saw Mill Co. v. White, 205 La. 242, 17 So. 2d 264 (1944).

239. 1992 La. Acts No. 539, § 1.

and, if so, is it of a "material fact?" If the answer to that question is yes, to whom is it material? Does it make a difference who might consider it material? For example:

- Developers of subdivisions often grant discounts to commercial builders who buy several lots. The developer does not want the "discount price" on the public records, so the sales price listed in the recorded document is not the actual price—a counter letter is executed showing the true price.
- Often, several investors in property, rather than forming a partnership, have one of the members hold title for all the others, the others executing counter letters detailing their true interests.
- Despite the fact that the law now clearly allows donations of property to be recorded without creating title problems,[240] many practitioners still use the old practice of having an act of cash sale with a counter letter.

It remains to be seen whether the statute will be interpreted to reach real estate transactions and whether prosecutions will occur under the statute; however, until this issue is resolved, cautious practitioners may wish to carefully review this statute before concluding any transaction involving a counter letter.

At best, the descriptions above are only cursory overviews of the new mortgage provisions. As Law Institute bills, the new provisions contain extensive official Comments. The careful attorney will want to read the notations and the cases indicated, as well as compare the new articles with the old ones, to better appreciate the impact of the new legislation.

Although there were many other changes made during the 1991 and 1992 legislative sessions that impacted security rights, a complete review of each statute is beyond the scope of this article.

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240. *See* La. Civ. Code arts. 1516, 1517, and 1554.