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# Introduction

## The Concept of Security Devices

* In Theory
  + **Definition**-A security device is some accessory right, either real or personal, accorded to certain obligees, either by will or by law, over and above the ordinary rights that obligees enjoy as a matter of course, the purpose of which is to increase the chance that this obligee will ultimately obtain satisfaction of the obligation owed to him.

## Attributes

* + - *Accessory (Not Principal) Right*-A security device is an "accessory" right. Recall the definition of an "accessory" contract: "A contract is accessory when it is made to provide

security for the performance of an obligation. Suretyship, mortgage, pledge, and other types of security agreements are examples of such a contract. When the secured obligation arises from a contract, either between the same or other parties, that contract is the principal contract." LCC 1913.

* + - * In order for an accessory contract to exist and be enforceable, there must be an underlying contract-the principal contract. If the principal contract (the loan) ceases to exist for any reason (paid, prescribed, etc), then the security right can't be enforceable either. The same isn't true in the converse-the failure of the security is not fatal to the principal obligation.
      * Example 1-Sally borrows $300,000 from Big Bank to purchase a home. This contract is a **loan**. The Big Bank also requires that Sally grant a **mortgage** to the Big Bank over the home. The loan is the principal obligation, and the mortgage is the accessory right/security interest.
    - *Real or Personal Right*-A security device may give the creditor a real right or a personal

right, according to the nature of the security device.

* + - * **Real Right**-A real right is a right in a ***thing*** that confers to the holder of the right direct and immediate authority over the thing and that is good against the world. There are two types of real rights: principal real rights (like ownership and usufruct) and accessory real rights (security devices). The most significant quality of a real right is that it is "good against the world," i.e., it follows the property in to the hands of third persons after being alienated by the debtor-the right is in the **thing**. This is known as the **right of pursuit**.
* Example 1-In the example above (Sally's purchase of home with loan from Big Bank and a mortgage securing the loan), Big Bank's rights in Sally's home are **real rights**. If Sally sells or otherwise alienates her home, Big Bank's rights against the home are unaffected; Bank can foreclose on the property even if it comes to be owned by someone other than Sally.
* **Personal Rights (a.k.a. Credit Rights)**-These are not rights *in things* but rights against *other persons*. This is also the right (as opposed to duty) of an **obligation**. Recall the definition of an obligation: "An obligation is a legal relationship whereby a *person*, called the obligor, is bound to *render a performance* in favor of another, called the obligee. Performance may consist of giving, doing or not doing something." LCC 1756.
  + **Suretyship** is the only kind of **personal security** recognized.
* Example 2-Sally borrows $300,000 from Big Bank to start her new small business. Big Bank requires that Sally's business partner Kamil agrees to a contract of **suretyship**, according to which if Sally fails to repay the loan, Kamil will pay. Big Bank's rights against Kamil are **personal rights**.
* **Accorded by Will or Law**-Most security devices arise by will (i.e., by virtue of a contract between the obligee and obligor). However, as we shall see, some security devices arise between the obligor and obligee as a matter of law (i.e., even

in the absence of a contract between the obligee and obligor). The main security right that arises by law is ***privilege*** and is a policy determination by the legislature that we protect the creditor.

* Example 2-In the suretyship agreement above between the Bank and Kamil, the security device of suretyship arose by **will**.
* Example 3-Sally dies with a substantial amount of debt. Her business partner Kamil pays for her funeral. Kamil is entitled to a "funeral privilege" over Sally's movable and immovable property, permitting him to be repaid for the costs of Sally's internment. According to the Civil Code, Kamil acquires this funeral privilege **without** having entered into any contract between Sally (prior to her death) or Sally's successors. This security device arose by operation of law, and not by will.
* **To Increase the Chance of Satisfaction**-A security device gives rights to the obligee that are greater than those afforded to the obligee by the principal obligation alone.
* In Practice
  + **The Plight of the “Unsecured Creditor”**-Consider the rights of a creditor who is not secured.
    - Illustration-Sally borrows $300,000 from Big Bank to start her new business. Big Bank

does not obtain a security device to secure this loan by contract or by law. Sally buys inventory and enters into a long-term lease for a building to house her wares. Her business ultimately fails and she defaults on her loan. Big Bank discovers that Sally had borrowed a substantial amount of money from other creditors, all of whom she has not paid. She has also failed to pay the rent on her lease. What rights does Big Bank have against Sally and/or her property?

## Enforcement Procedure

* + - * + Suit to Enforce
        + Obtain a Judgment
        + Execute the Judgment (Get a Judicial Mortgage)
        + Writ of FiFa
        + Sheriff seize and sale Sally's property at auction
        + Whatever value is obtained at sale will go to satisfy debts, and may or may not be split among multiple creditors.
      * **LCC 3133**-"Whoever is personally bound for an obligation is obligated to fulfill

it out of all of his property, movable and immovable, present and future."

* + - * **LCC 3134**-"In the absence of a preference authorized or established by legislation, an obligor's property is available to all his creditors for the satisfaction of his obligation, and the proceeds of its sale are distributed ratably among them."
  + **The Solution(s) to this Plight**-Security devices operate as an *exception* to the general principle set forth in LCC 3134. Security devices are precisely the "preference[s] authorized or established by legislation" contemplated by this Article.
    - *Benefits of Personal Security*-The creditor obtains another debtor. There are now more

people to sue/enforce the obligation against. However, other than acquiring a second (or additional) debtors, the creditor's rights remain the same (to execute writs of fieri facias against those additional debtors.

* + - *Benefits of Real Security*
      * **Between the Creditor and the Debtor**-The creditor has rights in identified property and those rights are good against the world (i.e. the right of pursuit). In addition, for some kinds of real security, a streamlined enforcement procedure exists (i.e. executory process for foreclosure proceedings). The secured creditor fares better in ***bankruptcy*** proceedings as well, as security often survives discharge in bankruptcy.
      * **Between the Creditor and Other Creditors**-A real security device gives the creditor the right of *preference*, which gives the creditor **priority** over other unsecured (and sometimes even other secured) creditors.
        + Example 3-Big Bank loans Sally $50,000, and to secure this debt, Sally

grants Big Bank a mortgage in her sole asset, a piece of immovable property worth $60,000. Baby Bank loans Sally $50,000. This debt is unsecured. Sally defaults on both loans and both banks sue Sally and obtain judgments against her in the amounts of their respective loans. What rights, if any, does Baby Bank have to Sally's property? Baby Bank will only get the leftover proceeds from the sale of Sally's immovable after Big Bank's debt is fully satisfied, assuming that the sheriff's sale proceeds are sufficient to cover the secured loan. Had neither loan been secured, the Banks would have shared the proceeds of the sale pro rata (50/50, since the loans were of equal value).

## Classification of Security Devices

* According to the Nature of that Which Supplies Security (Personal vs. Real Security)-- Whereas a ***personal security device*** affords the creditor a right against a person other than the debtor (i.e., suretyship), a ***real security device*** affords the creditor a right in a **thing** (i.e., mortgage).
  + **Personal Security**-A personal security device affords the creditor a right against a person other than the debtor. This right is a right to a **performance**, i.e., payment of the debt.
    - Example: Suretyship-Suretyship is the **only** kind of personal security.
  + **Real Security**-a real security device affords the creditor a right in a thing or things belonging to the debtor.
    - Anything that's not suretyship is a real security device.
    - Examples-UCC Article 9 security rights are generally security rights in movables, as are certain statutory liens and privileges. Mortgage is generally a security right in immovable

property, as are certain statutory liens and privileges. (Note, there are exceptions, i.e., certain mortgages on movables and certain UCC 9 security interests in immovables, but we will discuss those when we come to them.)

* According to Who Controls the Property (Possessory vs. Non-possessory Security)
  + **Possessory Security**-The creditor has possession of the property and is "holding it hostage."
    - Illustrations-Under prior law, the civil law security devices of pawn and antichresis were possessory security devices for movables and immovables, respectively. Today, neither of

these terms appear in the Civil Code. However, some privileges (e.g., the "artisan's"

privilege) are possessory in nature.

* + - These are generally bad for the creditor, because it can take away the debtors ability to pay back the debt, especially when the thing is something used for the creation of income, such as equipment used in a trade or business. As such, these are very uncommon because there isn't much demand for this type of transaction. If you were going to finance a car, but the dealership was going to hold the car until you paid it off, you would find a different solution!
  + **Non-Possessory Security**-The debtor retains possession of the property during the existence of the security right.
    - Illustrations-Most UCC Article 9 security interests are non-possessory security rights in

movable property. The mortgage is a non-possessory security right in immovable property.

* According to the Source of the Security (Consensual vs. Nonconsensual Security)
  + **Consensual Security**-Consensual security is created by acts of will (***contracts***) between creditors, debtors, and/or third persons.
    - Illustrations-All UCC Article 9 security interests and conventional mortgages are

consensual security devices.

* + **Nonconsensual Security (a.k.a. Legal Security)**-Legal security is created by operation of law.
    - Illustrations-Various statutory privileges and judicial mortgages are legal security.
    - Nonconsensual security interests are rarer than consensual security devices.
    - These normally are created by application of public policy.

# Suretyship

## In General

* Definition-"Suretyship is an accessory contract by which a person binds himself to a creditor to fulfill the obligation of another upon the failure of the latter to do so." LCC 3035
* Guaranty/Guarantor-In the common law and in Louisiana practice, suretyship agreements are often called "guaranty agreements" and the surety is often known as the "guarantor." We use this language and the language of "suretyship" and "surety" interchangeably.
  + Parties to a Suretyship are the surety and the creditor-NOT the debtor.
* Nature and Attributes
  + **Personal Security Device**-Recall that suretyship is a *personal security device* (as opposed to a real security device). That said, one can combine suretyship with real security rights in the debtor's property or the surety's property, or both.
  + **Additional Attributes**-Suretyship is (1) an accessory obligation; (2) unilateral; (3) gratuitous;

(4) consensual; and (5) express.

* + - Can be onerous or gratuitous; sometimes even commercial. This is a unilateral obligation-only the surety owes performance to the creditor; the creditor owes nothing to the surety.
    - Unilateral-LCC 1907-Only the surety owes an obligation to the creditor.
    - Most of the time suretyship is gratuitous, but it is also possible to purchase a surety bond in order to secure their transaction
    - Sometimes suretyships can be legal (instead of consensual)-that's mostly in bail bond

stuff that is inapplicable to this class. Most of the time it'll be consensual, either ordinary or commercial.

* + - See below, Kinds of Suretyship, for more on this.
* Scope (i.e. obligations that may be secured by suretyship)-"Suretyship may be established for **any lawful obligation**, which, with respect to the suretyship, is the principal obligation. The principal obligation may be subject to a term or condition, may be presently existing, or may arise in the future." LCC 3036.
  + **Any Lawful Obligation**-ANY obligation can be the principal obligation for purposes of suretyship.
  + **Common Uses of Suretyship**-Usually the obligation will be one to pay money pursuant to a contract of loan or a credit sale (car loans). One of the most common uses of suretyship is to secure *business loans*. Because the law of business associations tends to shield owners from business debts, a lender may require an owner or member to act as surety for the business' debts. Said another way, suretyship is a way for creditors to avoid the limited liability of business associations. Sureties are also frequently used in *contracts to build*. In the construction context, "bonded" contractors are those that enter into a contract with a third party who acts as a surety if the contractor fails to perform. These are called "surety bonds."
  + Suretyships can be for future debts (that don't exist yet at the time of entering the agreement) in

the form of a "continuing guaranty."

* Kinds of Suretyship-LCC 3041 contemplates three kinds of suretyship: commercial suretyship, legal suretyship, and ordinary suretyship.
  + **Commercial Suretyship**-"Commercial suretyship is one in which:
    - (1) The surety is engaged in a surety business;
    - (2) The principal obligor or the surety is a business corporation, partnership, or other business entity;
    - (3) The principal obligation arises out of a commercial transaction of the principal obligor;

or

* + - (4) The suretyship arises out of a commercial transaction of the surety." LCC 3042.
    - We don't interpret these as strictly as we do Ordinary Suretyships, assuming that "they

know what they're doing." This may not be true because the definition is broad and applies to basically anything that involves any type of business, and small business owners aren't always the most sophisticated.

* + **Legal Suretyship**-"A legal suretyship is one given pursuant to legislation, administrative act or regulation, or court order." LCC 3043. Legal suretyship will not be part of our focus in this course, as legal sureties are essentially **bail bondsmen**, whose rights and responsibilities are heavily regulated by other law.
  + **Ordinary Suretyship**-"An ordinary suretyship is one that is neither a commercial suretyship nor a legal suretyship." LCC 3044. The most significant ***effect of the designation*** of suretyship as "ordinary" as opposed to "commercial" is that "an ordinary suretyship must be strictly construed in favor of the surety." LCC 3044. An example of ordinary suretyship is a parent guaranteeing a child's car loan.
    - This is normally consumer and familial loans.
  + **Consequences of Classification**-LCC 3044-"An ordinary suretyship is one that is neither a commercial suretyship nor a legal suretyship. An ordinary suretyship must be **strictly construed in favor of the surety**."

## Formation Requirements

* In General-Suretyship is a contract; thus, the general requirements of **capacity consent, cause, and object** must be satisfied as a prerequisite to enforceability of the suretyship.
* Special Rule for Consent-The usual rules of consent apply, with the exceptions set forth in LCC 3039: "Suretyship is established upon receipt by the creditor of the writing evidencing the surety's obligation. The creditor's **acceptance is presumed** and no notice of acceptance is required."
  + Because the Creditor owes nothing to the surety, and only benefits from the suretyship relationship, we assume they will accept any agreement that is solely for their benefit. That doesn't mean they MUST accept! They can definitely reject a suretyship agreement, but they will have to overtly reject and overcome the presumption of acceptance.
  + The principal obligor doesn't have to agree to anything. The obligor is not a party to this contract, and the contract exists only to help the obligor. It can't hurt the obligor to have a surety as his safety net.
  + The suretyship becomes **effective upon *receipt* of the offer by the creditor**.
* Form for Suretyship-"Suretyship must be ***express and in writing***." LCC 3038.
  + **Writing Requirement**-"The term 'writing' as applied to a contract means either an act under private signature or an authentic act." LCC 303 (cmt. d).
    - Authentic acts are helpful because self-proving, but it's not required.
    - *Louisiana Uniform Electronic Transactions Act (LUETA) R.S. 9:2601 et seq*-LUETA provides that electronic records satisfy any requirement that an instrument be made in

writing. However, this chapter only applies to transactions between the parties "each of which has agreed to conduct transactions by electronic means." R.S. 9:2605(B)(1).

* + - * If the law requires a writing, electronic records will do. If the law requires a signature, electronic signature will do. But you have to **agree in advance** that electronic is sufficient.
      * It's probably okay to do suretyship writings online. However, in practice, most

lenders/insurers want paper and wet-ink signatures to prevent fraud.

* + **Express Language—**"It is sometimes doubtful whether an individual has guaranteed payment of another's debt or has merely given an opinion as to the person's ability and willingness to perform.

In such cases, doubts are resolved ***against*** holding the individual as a surety " LCC 3038 (cmt.

b).

* + - Surety's contract must contain an ***absolute expression of the intent to be bound*** (*Ball*

*Marketing Enterprise v. Rainbow Tomato Co*.). If we don't have indication that the

(alleged) **surety** plans to pay, then it won't be a suretyship agreement.

* + - * Case Summary-Rainbow, the debtor, failed to pay on an open account. Ball seeks enforcement of the debt against the Plant, who Ball claims agreed to be bound as Rainbow's surety for past and future indebtedness. The letter from Plant said, "Plant will take such steps as are necessary to assure payment to you by Rainbow of amounts due for past and future deliveries of fuel oil to Rainbow."
      * **Policy Argument**-we don't want every letter that vouches for a friend or business

associate to be construed as suretyship and bind the writers of such letters to pay.

* + - A purported suretyship agreement basically needs to be as explicit as saying "guaranty" or "surety" and-again-an **absolute expression of intent to pay personally**. (*Blair Rubber Co. v. Altra Coatings Technology, Inc.*)
      * Case Summary-Altra, the debtor, has failed to pay the price for goods purchased from Blair. Blair seeks enforcement of the debt against Whitney Poirrier, who it alleges agreed to be bound as Altra's surety for up to $50,000. The letter said, "I am willing to personally guarantee the account of Altra Coatings Technology, Inc. up to the amount of $50,000." Poirrier also provided his own personal financial information with the letter.
    - Indications and assurances that the **debtor will pay** will not create suretyship agreements.

(*American Bank & Trust Co. of Coushatta v. Boggs & Thompson*).

* + - * Case Summary-The Washburns, the debtors, failed to pay a debt to AB&T. AB&T instituted foreclosure proceeding against the Washburns, and they retained a lawyer, Boggs. Boggs wrote a letter to AB&T in which he asked that AB&T "allow this letter to serve as confirmation that in the event any funds are obtained regarding this litigation [another suit where the Washburns were plaintiff] in the form of settlement and/or judgment, that your institution *will be satisfied* regarding any outstanding loans with Denise and/or Tommy Washburn." Boggs was not personally responsible for the debt because he only indicated that the creditor will be paid, not that Boggs himself would pay.
      * **Issues of Mandate**-Boggs may have been a **mandatary** of the Washburns. Mandataries aren't bound to debts of their principals unless the mandatary doesn't disclose the principal. Here, Boggs said in the letter that his clients were the Washburns. Arguments could be made that the letter formed a new, separate contract between creditor and Boggs, but there wasn't really an offer/acceptance, nor an assumption of the debt by Boggs.
      * **Detrimental Reliance**-There was no detriment to the creditor. He still had the same rights against the same debtor for the same amount.
    - It's possible that a mandate authorizing the mandatary to become a surety on behalf of the

principal can be less express than the actual suretyship agreement. (*Gulf Coast Bank & Trust Co. v. Montoli & Pitre, LLC*).

* + - * **Case Summary**-The Muhs owned Montoli & Pitre, LLC. The LLC obtained a loan from Gulf Coast Bank & Trust for $132,000 and then subsequently failed to pay. MR. Muhs signed the promissory note and some other instruments associated with the note. MR. Muhs assigned the promissory note as a member of the LLC and as an **agent for MRS. Muhs**. He signed a continuing guarantee in which he obligations MRS. Muhs as a surety, again signing as her agent. After making paymnts for two years, the LLC failed to make payments on the loan and the Bank placed the LLC in default. The bank filed suit against the LLC and MR and MRS

Muhs, alleging that all three were liable for the balance of the loan plus interest, late fees, and attorney fees. The defendants argued that MRS Muhs was not liable for the debt because MR Muhs did not have the authority to bind her as a surety.

* + - * **Mandate Crash Course**-"Mandate is a contract by which a person, the principal, confers authority to another person, the mandatary, to transact one or more affairs for the principal." LCC 2989. It is possible for a mandate to give the mandatary the authority to bind the principal as surety. Mandate is technically a contract, requiring offer and acceptance, but we can get the same result through a unilateral juridical act called **procuration** (common law Power of Attorney). The same rules govern both mandate and procuration.
        + Substantive Requirements

LCC 2994: "The principal may confer on the mandatary **general authority** to do whatever is appropriate under the circumstances."

LCC 2997: "Authority must also be given expressly to: . (3)

Contract a loan, acknowledge or make remission of a debt, or

become a surety."

* + - * **Equal Dignities Doctrine of Mandate**-Suretyship must be express, so the mandate authorizing one to become a surety on his behalf must also be express. LCC 2993.
        + The argument is that the mandate from Mrs. Muhs authorizing Mr. Muhs to transact wasn't express enough. It's a good argument, because we normally require surety to be SUPER express, and surety wasn't super express in the act of mandate. It didn't explicitly reference suretyship or the LLC, it just said "any and all documents necessary to consummate the transaction." Article 2997 said we need express authority to "become surety" and "contract a loan" so we assume BOTH need to be express in the mandate, especially suretyship, in order to show "absolute intention to be bound in that capacity." But courts REALLY SUCK at the equal dignities doctrine. The court ultimately says that the act of mandate was express enough, and MRS Muhs was personally bound.
      * Ultimately, we think the court probably made an outcome-driven decision, as we assume/know that MRS Muhs was really considering this type of arrangement, even when it wasn't explicit in the act of mandate. This case is pretty recent, so it's possible this may become a trend-cautionary tale: be careful and be express.
        + Maybe Mrs. Muh caused the court to believe Mr. Muh was his mandatory, so Mr. Muh had "apparent authority." LCC 3021. But Apparent Authority is when the Principal indicates to the Third Person that the putative mandatary had authority.
  + **Parol Evidence Implications**-The parol evidence rules governs the use of "extrinsic evidence" to prove either that a contract exists or the contents of that contract. When the law requires a writing to establish a contract of mandate, parol evidence cannot be used to establish apparent authority.
    - Governed by LCC 1848-1849, parol evidence may **NOT** be used to contradict an otherwise

valid suretyship agreement, ***except***:

* + - * Vice of consent**—**Error, fraud, duress. See LCC 1948-1964.
      * Modification of the Suretyship**—**Only if the extrinsic evidence introduced is **itself**

a *written and express* agreement.

* + - * LCC 1848: "Testimonial or other evidence may not be admitted to vary or negate the contents of an authentic act or an act under private signature. Nevertheless, in the interest of justice, that evidence may be admitted to prove such circumstances **as a vice of consent** or to prove that the written act was **modified** by a subsequent

and valid oral agreement." The subsequent valid oral modification isn't applicable to suretyship because suretyship must be in writing.

* + - **Special Problems of Representation**-Note that Profs. Morris and Holmes' treatise

suggests that if a person appears to contract in his personal capacity, but the creditor **knows** that he is contracting on behalf of another as an agent, then that person should **not** be personally bound. However, from Veterans and American Bank & Trust, we conclude that in determining what capacity in which the person signed as surety, we confine the analysis to the four corners of the document-**no parol evidence.**

* + - * *Veterans Commercial Properties LLC v. Barry's Flooring, Inc.*-Lease to Barry's Flooring; Guaranty is signed "Barry on behalf of Barry's Flooring." Did Barry sign in his personal capacity or as a representative? It's somewhat ambiguous; La. 5th Circuit says parol evidence was **inadmissible**. Followed American Bank & Trust, and said Barry signed in personal capacity. "The notation of a corporate position. is merely a title identification instead of a signature in a representative capacity."
      * *Pelican Plumbing Supply v. JOH Construction Co,*-- Guy is rep/employee of a closely held family business, and the family business is buying things from a supplier on credit. Supplier sends guarantee agreement in the mail saying "sign this to maintain your line of credit." Later, the signor said "whoops I didn't mean to do that, I didn't know that's what I was doing." Cited in Veterans v. Barry. La. 5th Circuit ruled that the vice president of the principal obligor did not intent to sign the credit agreement in his personal capacity. Trial court **did** use parol evidence to ascertain intent**.** But he was alleging error, which is a vice of consent, and we always allow parol evidence to prove vices of consent.
      * *American Bank & Trust Co. of Houma v. Wetland Workover, Inc.*-La. 4th Circuit considered a signature accompanied by his professional title was still a personal guarantee; to rule that it was in a representative capacity would render the guaranty meaningless, since the business was the principal obligor. The only reasonable construction is that the officer signed in personal capacity. *You can't sign as surety on your* ***own*** *loan.*
      * *HYPO:* A signs as surety securing obligation of B. It's unclear whether A signed in personal capacity or as a representative of A, LLC. Here, either construction makes sense.
        + If it's not clear about the capacity in which surety is signing, it's simply not express enough, and the suretyship doesn't exist. The burden is on the creditor to make sure capacity is clear in the agreement.
        + Burden is on the creditor who wants the suretyship arrangement to make sure that the capacity of the surety is clear in the document. If it's not clear, the suretyship fails.

## Note on Relationships other than That Between Surety and Creditor-Although parol

evidence generally may not be admitted to prove the existence or content of a suretyship agreement (governing the rights and obligations of the creditor and surety), there is no *general* limitation on the use of parol evidence to prove the relationship between the creditor and debtor (although specific limitations may be provided by other law), the debtor and the surety, or between the sureties.

## Surety Acting as Ostensible Principal

* Sometimes although the parties to a transaction may understand that a person is acting as a surety rather than a principal obligor, the paperwork appears to indicate that the person is a principal obligor. In such a case, the surety may be protected under LCC 3037.
* LCC 3037-"(A) One who ostensibly binds himself as a principal obligor to satisfy the present obligations of another is nonetheless considered a surety if the principal cause of the contract with the creditor is to

guarantee performance of such obligations.

(B) A creditor in whose favor a surety and principal obligor are bound together as principal obligors in solido may presume that they are equally concerned in the matter until he clearly knows of their true relationship.

* Explanation-Even though a surety is "ostensibly" a principal obligor, he will nevertheless be considered a surety if:
  + (1) The principal cause of the contract is to guarantee performance of the principal's obligation;

and

* + (2) the creditor "clearly knows" of this cause.
* Hypothetical-A and B purchase an automobile from C, agreeing to be solidarily bound for the price. The car is obtained exclusively for A, with B joining in the transaction only to lend his credit to it. C, in ignorance of their relationship accepts half of ht eprice from A and gives him a release. *May he still hold B liable for the other half of the debt?* Release of the principal releases the surety. But if the creditor didn't "clearly know" he was acting as surety, then the principal is still bound as a principal obligor.
* Additional Hypothetical-Son contracts an auto loan. Father agrees with son to serve as surety and comes along to participate in the negotiations. At the signing, Son explains to lender that Father will act as guarantor. Lender prints a single instrument (promissory note) with two blanks for signatures. Father and Son both sign the note. Is Father a principal obligor or surety?
  + Everyone knows what's going on. We need to know 1) lender's knowledge of relationship between the debtors and 2) principal cause of maybe-surety's involvement is to act as a surety. We **must** have extrinsic evidence to show what each person knew or thought.
* This is a big exception to the parol evidence rule, and we allow people to come in and testify

## Effects of Suretyship

* The contract of suretyship creates a number of distinct relationships, including
  + Relationship between the surety and creditor
  + Relationship between the surety and debtor
  + Relationship between the surety and other sureties.

The effects of the contract of suretyship must be explored in the context of each of these relationships. These relationships are all governed by the general law of obligations as well as suretyship (except between creditor�➔ Debtor, which is pure obligations).

* Surety-Obligee Relationship
  + **Nature and extent of surety’s liability**-"A surety, or each surety when there is more than one, is liable to the creditor in accordance with the provisions of this Chapter, for the full performance of the obligation of the principal obligor **without benefit of division or discussion**, even in the absence of an express agreement of solidarity." LCC 3045.
    - ***Under what circumstances must a surety pay the creditor?*** The surety is obligated to pay

the obligee when the principal obligor fails to perform. (The fundamental nature of a security device is that it's accessory.) The obligee is not required to seek performance from the principal obligor as a prerequisite to enforcing the surety's obligation. (No requirement that the creditor drag the debtor through court, or even put in default.)

* + - * When has the debtor failed to perform? Contract between debtor and creditor will apply along with the general rules of obligations.
    - ***What is the extent of the surety's liability?*** As a default rule, the surety is obligated to pay

the entire debt ("full performance of the obligation of the principal obligor"). Of course, the surety is bound only to the extent set forth in the suretyship agreement; if the surety agreed to be bound for less than the entire debt, then the suretyship agreement controls.

* + - * This is solidarity, but it's subject to special provisions of suretyship.
      * "Full performance" is suppletive; surety can limit their liability by limiting to

certain obligations or certain dollar amount.

* Can be "limited" guaranty or a full guaranty, and can also be "continuing"

### Defenses

* + Certain Defenses *NOT* Available-Article 3045 makes clear that the defenses of

"discussion" and "division" are not available to the surety.

* + - **Note on “discussion”—**Discussion is a defense applicable in some contexts (e.g. partnership law) by which an obligor can require that the obligee seek performance from another person or entity before seeking performance from the obligor. This defense is not available to a surety.
    - **Note on “division”—**Division is a defense that allows one of multiple

obligors to require that the obligee divide an obligation among the multiple obligors and seek from each obligor only his or her *share* of the obligation. This defense is not available to a surety because the surety is bound **solidarily** with both the obligor and other sureties.

* + - * REMINDER: Solidarity-multiple obligors owe the same performance (payment), and each is liable for the **whole**. The surety and principal are solidary, BUT with special characteristics in surety, such as the condition that the principal fails to perform.

## Debtor’s Lack of Capacity or Debtors Discharge in Bankruptcy-

Cannot be raised by the surety; doctrinally inconsistent with the nature of an accessory contract, so if it is unenforceable against principal shouldn't be enforceable against surety. BUT this is the whole point of requiring suretyship/security. So we ignore those theoretical problem with the accessory nature.

* + Defenses the Surety *MAY* Assert
    - **Defenses relating to the contract of suretyship--** The surety may assert any defense relating to the contract of suretyship between the surety and the obligee (i.e., lack of capacity, failure of consent, improper form, etc.). The law of suretyship does not contain a special provision articulating this rule, but we know it's true because suretyship is a contract.
    - **Defenses relating to the principal obligation—**"The surety may assert

against the creditor any defense to the principal obligation that the principal obligor could assert except lack of capacity or discharge in bankruptcy of the principal obligor." LCC 3046.

* + - * *General Rule*-The surety can raise against the obligee **any defense** that the principal obligor could assert. Some examples: fraud, violation of consumer protection law, improper form, prescription, vice of consent, improper cause/object, public policy limitations.
      * *Exceptions*-The surety cannot raise the defenses of (1) incapacity of the principal obligor; (2) bankruptcy. The reasons for this are based in the purposes for which the principal obligee may seek a surety: doubts as to principal obligor's capacity or solvency. Still, these defenses being excluded somewhat flies in the face of the accessory nature of suretyship.
* The Surety-Obligor Relationship
  + **Nature of the Relationship with Obligor**-The surety and the principal obligor are *solidarily bound* [kind of] to the obligee. The effects of the suretyship vis-à-vis the surety and obligor relate to that solidarity. The principal obligor is **ultimately** bound for the whole (by nature of the accessory nature).
  + **Rights of the Surety**-"A surety has the right of subrogation, the right of reimbursement, and the

right to require security from the principal obligor." LCC 3047.

* + **“Collection” Rights**-The first two rights of the surety (reimbursement and subrogation) relate to the surety's right to collect from the principal obligor after the surety has performed all or part of the principal obligation. The contract of suretyship always contemplates (as part of the accessory nature of the contract) that the person on whom the law imposes ultimate responsibility is the principal obligor.
    - *Reimbursement*-"A surety who pays the creditor is entitled to reimbursement from the

principal obligor." LCC 3049.

* + - * **Reimbursement in General**-The surety who pays the creditor is entitled to be repaid.
      * **Prerequisites to Reimbursement**-"He may not recover reimbursement *until the principal obligation is* ***due and exigible***."
        + Must become due and demandable. Coming of a term, existence of a

condition. The surety may pay the obligee to get it out of the way, but he can't demand the reimbursement from the principal obligor until the debt would have been due and exigible.

* + - * **Reimbursement for Payment of Obligation Not Owed**-"A surety who in good faith pays the creditor when the principal obligation is extinguished, or when the principal obligor had the means of defeating it, is nevertheless entitled to reimbursement from the principal obligor if the surety made a reasonable effort to notify the principal obligor that the creditor was insisting on payment or if the principal obligor was apprised that the creditor was insisting on payment. The surety's rights against eh creditor are not thereby excluded." LCC 3050.
        + "Good faith" means the surety "honestly believes the debt is due." LCC

3050, cmt.

* + - * + Requirements: (1) surety pays in good faith, and either (2) surety notifies obligor **or** obligor is aware of collection efforts.
        + If the surety pays the debt and there was no debt, he can't get reimbursement

from the debtor because he doesn't meet requirements of 3050, he can get

the money back from the creditor for **payment of a thing not due**.

* + - * **Multiple Solidary Obligors**-"A surety for multiple solidary obligors may recover from any of them reimbursement of the **whole** amount he has paid the creditor." LCC 3049. This is when there are multiple principal obligors that are solidarily bound!
    - *Subrogation*-"The surety who pays the principal obligation is subrogated by operation of

law to the rights of the creditor." LCC 3048.

* + - * The right of subrogation is a **supplement** to the right of reimbursement-both are available to a surety who pays on the creditor's behalf. INSERT CHART FROM PAGE 4 OF OUTLINE-TABBED AT TOP!!!
      * **Subrogation, in General**-Subrogation is the "substitution of one person to the rights of another." LCC 1825. Recall that subrogation may be conventional or legal. Legal subrogation takes effect when (among other times) "an obligor. pays a debt he owes. for others.." LCC 1829.
      * **Legal Subrogation, in General**-Because subrogation occurs by operation of law, no special language is needed to grant subrogation and no contractual act of subrogation is required. Indeed, the surety can get no greater rights through conventional subrogation than he is afforded through legal subrogation. *See* LCC 1830.
        + Even through legal subrogation, the subrogee may only collect up to the

amount of his performance.

* + - * **Effects of Subrogation, in General**-"When subrogation results from a person's

performance of the obligation of another, the obligation subsists in favor of the

person who performed it who may avail himself of the action and security of the original obligee against the obligor, but it is extinguished for the original obligee." LCC 1826.

* + - * + Why do we need subrogation is we have reimbursement? The surety who

performs would, through subrogation, have access to other security of the principal obligor, such as collateral.

* + - * + Why have reimbursement if we have subrogation? Reimbursement gives

the right to collect even if the obligation wasn't due. See above, and below.

* + - * **Defenses**-The surety stands in the shoes of the creditor; thus, if the debtor had a valid defense against the creditor, the debtor may assert that defense against the surety.
    - *Limitations*
      * **Failure to Notify**-"A surety may **not** recover from the principal obligor, by way of subrogation **or** reimbursement, the amount paid the creditor if the principal obligor also pays the creditor for want of being warned by the surety of the previous payment. In these circumstances, the surety may recover from the creditor." LCC 3051.
        + The surety has the obligation to notify the principal that he has paid.
      * **Extent of Recovery**-"A surety may not recover from the principal obligor more than he paid to secure a discharge, but he may recover by subrogation such attorney's fees and interest as are owed with respect to the principal obligation." LCC 3052. Notes that attorney fees and interest are not available in an action for reimbursement. *See* LCC 3052, cmt. c. ("A surety should not profit by his contract at the expense of the debtor.")
        + The surety cannot profit on his bargaining power and reaching a

compromise with the obligee.

* + **Right to Demand Security**-The surety also has the right to demand security from the principal obligor to guarantee his reimbursement.
    - *Circumstances in which security is owed*-"A surety, before making payment, may

demand security from the principal obligor to guarantee his reimbursement

1. The surety is sued by the creditor;
2. The principal obligor is insolvent, unless the principal obligation is such that its performance does not require his solvency [i.e. obligation to do];
3. The principal obligor fails to perform an act promised in return for the suretyship; or
4. The principal obligation is due or would be due but for an extension of the term not

consented to by the surety." LCC 3053.

* + - *Exception*-"The principal obligor may refuse to give security if the principal obligation is extinguished or if he has a defense against it." LCC 3053.
    - *Failure to provide security*-"If, within ten days after the delivery of the written demand

for the security, the principal obligor fails to provide the required security or fails to secure the discharge of the surety, the surety has an action to require the principal obligor to deposit into the registry of the court funds sufficient to satisfy the surety's obligation to the creditor as a pledge for the principal obligor's duty to reimburse the surety." LCC 3054.

## The right to demand security is mostly a hollow right, since the principal obligor is most likely insolvent and probably can’t pay or post security—if he could, we wouldn’t be in this situation.

* The Relationship of Multiple Sureties
  + **Solidary Obligors**-Co-sureties are solidarily bound. Though solidarily has been discussed above in the context of the surety's relationship to the obligor and the creditor, a more thorough look at solidarily is necessary.
    - Solidary Obligors, Definition-"An obligation is solidarily for the obligors when each

obligor is liable for the whole performance. A performance rendered by one or more of the solidary obligors relieves the others of liability toward the obligee." LCC 1794. In other words, each solidary obligor is bound for the whole.

* + - Liability Among Solidary Obligors, Generally-Recall the general rule governing the

relationship between solidary obligors, found in LCC 1804: "Among solidary obligors, each is liable for his **virile portion**. If the obligation arises from a contract or quasi-contract, virile portions are equal in the absence of agreement or judgment to the contrary." "A solidary obligor who has rendered the whole performance, though subrogated to the right of the obligee, may claim from the other obligors **no more than the virile portion of each**."

* + - * This refers to the right of a surety to **contribution** from his co-sureties. In the context of co-sureties, a surety is limited in recovery to the virile portion, despite being subrogated to the rights of the creditor
      * Remember that **contribution** is distinct from what the obligee/creditor is entitled to. Contribution refers to what can be recovered from co-solidary obligors.

"If circumstances giving rise to the solidary obligation concern only one of the obligors, then that obligor is liable for the whole to the other obligors who are then considered only as his sureties."

* + - * The principal obligor is still bound to reimburse the **whole** to any surety who pays on his behalf.
      * **HYPOTHETICAL**-A $24,000 debt is owed by an obligor, who is backed by 4 sureties. The virile portion of each surety is $6,000. If one surety pays the whole

$24,000, that surety may recover up to $6,000 from each co-surety; however, he may recover up to $24,000 from the principal obligor. The creditor may recover up to $24,000 from ANY of the obligors (the principal or any of the sureties).

* + - Insolvency of a Solidary Obligor-"A loss arising from the insolvency of a solidary obligor

must be borne by the other solidary obligors in proportion to their portion." LCC 1806.

* + - Renunciation of Solidary Obligation-"Renunciation of solidarity by the obligee in favor

of one or more of this obligors must be **express**." LCC 1802.

* + - * The next sentence of art. 1802 is true, but not necessarily specific to renunciation.
      * Renunciation is when the creditor renounces HOW that surety (or any solidary obligor) is bound-will still be on the hook, but just for his virile portion as a joint obligor, not solidary. When an obligor's solidary is renounced, his virile portion is removed from the amount that is due solidarily.
      * *HYPO*: A, B, C, and D are co-sureties on a debt of $24,000. A is renounced and is now jointly bound for $6,000. B, C, and D are now solidarily bound for $18,000.
    - Remission of Debt-"Remission of debt by the obligee in favor of one obligor, or a

transaction or compromise between he obligee and one obligor, benefits the other solidary obligors in the **amount of the portion** of that obligor. Surrender to one solidary obligor of the instrument evidencing the obligation gives rise to a presumption that the remission of debt was intended for the benefit of all of the solidary obligors." LCC 1803.

* + - * Remission is a release/forgiveness. Often gratuitous.
      * *HYPO*-A, B, C, and D are sureties on a debt of $24,000. A is remitted, so is no longer bound at all. B, C, and D are on the hook for $18,000 each to the creditor. If B pays the $18,000, he may recover up to $6,000 each from C and D.
  + Liability Among Sureties-"Co-sureties are those who are sureties for the same obligation of the same obligor. They are **presumed** to share the burden of the principal obligation in proportion to their number unless the parties agreed otherwise or contemplated that he who bound himself first would bear the entire burden of the obligation regardless of others who thereafter bind themselves independently of and in reliance upon the obligation of the former." LCC 3055.
    - **Virile Portions**-Generally, multiple sureties are responsible among themselves by head,

unless they agree or clearly contemplated a sub-surety relationship. Parol Evidence is permitted to rebut the presumption of proportionality. There are two circumstances in which the sureties may alter the general rule:

* + - * *Unequal division of burden*-Co-sureties may agree to share the burden of the principal obligation unequally. For example, A, B, and C may all agree to serve as sureties of D, with A bearing 50% of the burden and B and C bearing 25% each.
      * *Sub-sureties*-Multiple sureties may agree that one or more of them are principal sureties and the others are sub-sureties securing the obligations owed by the sureties. In such a case, the surety(ies) who would first bear the entire burden owe reimbursement (not contribution) to the sub-sureties.
    - **Note on Parol Evidence**-Parol evidence *is admissible* to prove that co-sureties agreed

that they would not divide responsibility for the debt by heads. *See* LCC art. cmt. (b). There is, however, a **presumption** of virile share liability, so the burden is on the surety seeking to prove a different arrangement between co-sureties.

* + Right of Contribution-A surety who pays more than his virile share is entitled to seek contribution from his co-sureties, each of whom is liable for his own virile share. REWATCH CLASS FROM 1/28
    - **Right of contribution in general**-"A surety who pays the creditor may proceed **directly**

or by way of subrogation to recover from his co-sureties the share of the principal

obligation each is to bear." LCC 3056.

* + - **Calculation of contribution**-"A surety who pays the creditor more than his share may recover the excess from his co-sureties in proportion to the amount of the obligation each is to bear as to him." LCC 3057.
      * *HYPO*: A, B, and C are co-sureties on a debt owed by D to E in the amount of

$60,000. A pays E $40,000. To what contribution, if any, is A owed from B and C? A can get $10,000 each from B and C; A eats his virile share (20) and can seek contribution pro rata from the others. We redistribute the excess (over virile share) among remaining co-solidary obligors, B & C.

* + - **Insolvency of co-surety—**"If a co-surety becomes insolvent, his share is to be borne by

those who would have borne it in his absence." LCC 3056. This is consistent with the rule of Obligations in General: "A loss arising from the insolvency of a solidary obligor must be borne by the other solidary obligors in proportion to their portion." LCC 1806.

* + - * If one co-surety becomes insolvent, each co-surety is on the hood to pull the dead weight of co-surety's insolvency.
      * *HYPO*: A, B, and C are co-sureties on a debt owed by D to E in the amount of

$60,000. A pays E $60,000, then B becomes insolvent. How much must C pay in contribution? The $20,000 share of B is split between A and C, so A can get

$30,000 from C, and A's "virile share" increased from $20k to $30k when B

became insolvent.

* + - **Remission of a co-surety**-These rules come from code articles on remission and not in suretyship.
      * In General-"Remission of debt granted to one surety releases the other sureties only to the extent of the contribution the other sureties might have recovered from the surety to whom the remission was granted." LCC 1892. *See also* LCC 3057, cmt. and LCC arts. 1802 and 1803.
        + ZONED OUT 1/28/19 from 12:10 to 12:30
        + *LCC 3057, cmt*.-"Ordinarily payments by a surety are first imputed to his

part of the debt vis a vis his co-surety. Thus if one of two sureties (who are to share the debt equally) pays one half of the obligation and secures a release from the creditor it neither affects the obligation of the other (who

remains liable for his half) nor gives rise to a right to reimbursement in favor of the one who pays. ***If however, by paying one half of the debt, the surety is able to secure a release both for himself and his co-surety, the latter benefiting equally from the discount, should reimburse the other one half of what he has paid.***"

* + - * + *LCC 1803—*"Remission of debt by the obligee in favor of one obligor, or a

transaction or compromise between the obligee and one obligor, benefits the other solidary obligors in the amount of the portion of that obligor. Surrender to one solidary obligor of the instrument evidencing the obligation gives rise to a presumption that the remission of debt was intended for the benefit of all the solidary obligors."

* + - * + ***Example 1***-A, B, and C are co-sureties on a debt owed by D to E in the

amount of $60,000. A pays E $20,000 and secures a release for himself. Is A entitled to any contribution from B and C? (I THINK) No, because he didn't get a release that benefitted B and C in excess of A's virile share. How much can E collect from B and C? Up to $40,000 from either.

* + - * + ***Example 2***-Same as above, only A pays E $10,000 and secures a release

for himself. A is still not entitled to any contribution from B or C. **However**, E can still only collect up to $40,000 from either B or C. B & C aren't on the hook for more because A negotiated his way out for less than his virile share.

* + - * Waiver-A creditor may wish to release a surety in return for less than that surety's virile share. Can the creditor do this without reducing the liability of the other sureties beyond the amount paid by the released surety? YES! In *First National Bank v. Green Garden Processing Co.*, the surety agreed to be bound **notwithstanding** the release of other sureties. In such a case, the lender can settle with one surety without losing rights against others.
        + The rule that remission enures to the benefit of co-sureties is not a rule of

public order, and therefore it can be deviated from by agreement of the parties. Co-sureties still get benefit of reduction in principal by virtue of partial payment by the released surety in return for his release, but will not get the benefit of the difference in value from payment and virile portion. The co-sureties won't get the benefit of the amount paid by remitted co- surety if the amount paid is a penalty or other specific consideration that doesn't apply to the principal obligation.

* + - * When Obligee Grants Remission in Return for an Advantage-"If the obligee grants a remission of debt to a surety in return for an advantage, that advantage will be imputed to the debt, unless the surety and the obligee agree otherwise." LCC 1892.
        + ***Example*—**A, B, and C are co-sureties on a debt owed by D to E in the

amount of $60,000. E remits A in consideration for a payment of $1,000.

What are B and C's liability to E? UNSURE

* + - * When One Surety Pays Part but Obtains Release for All-"If a surety obtains the conventional discharge of other co-sureties by paying the creditor, any reduction in the amount owed by those released benefits them proportionately." LCC 3057. *See also cmt.* "If. by paying one half of the debt, the surety is able to secure a release both for himself and his co-surety, the latter benefitting equally from the discount, should reimburse the other half of what he has paid.
        + ***Example***-A, B, and C are co-sureties on a debt that D owes to E in the

amount of $60,000. A pays $30,000 and secures a release for everyone. To what contribution, if any, is A entitled from B and C? Normally, A will eat

$20k (his virile share) and the remaining $10k would be recoverable from B and C as $5k each. However, since A got a full release, he can get $10k each from B and C.

* + - * Remission Plus Insolvency-LCC 1803, cmt. d: "In case of insolvency of a solidary obligor after the obligee has remitted the debt in favor of another, the loss must be borne by the obligee."
        + Remission **first** and then insolvency. This is the same process as

obligations-LCC 1806 says that the loss arising from the insolvency of a solidary obligor must be borne by the other solidary obligors in proportion to their portion.

* + - * + ***Example***-A, B, and C are co-sureties on a debt that D owes to E in the

amount of $60,000. E gratuitously remis A, then B becomes insolvent. How much can E collect from C and to what contribution, if any, is C entitled? Without the remission, B's $20k would be spit between A and C, but since A's remitted, creditor may have to eat that part. So C gets $10 of B's $20, and is on the hook for $30. Essentially, the creditor is subrogated to the risk that the remitted surety was otherwise going to bear (that the other co-surety would be insolvent), so if the insolvency comes after the remission, the obligor will split the loss.

* + - * + When principal obligee remits one solidary obligor and then another

solidary obligor becomes insolvent, the obligee/creditor has to bear the share that the remitted obligee would otherwise have had to bear. This is a policy rule-the creditor made the choice to remit the solidary obligor, and the burden of the other solidary obligors is borne partially by the creditor after remission. We think the obligee may owe contribution to the other solidary obligors (which would really be offset and result in a smaller amount due from sureties to obligee).

* + - **Renunciation of Solidarity**-Renunciation of solidarity occurs when the obligee

renounces the solidarity of a surety, thereby rendering that surety's obligation joint. Renunciation results in reducing the amount of the remaining solidary obligation by the virile share of the renounced obligor. *See* LCC 1802 for an oblique discussion of renunciation.

* + - * Generally, the renounced obligor's portion becomes joint, and the solidary obligors' portion is reduced by the virile portion of the renounced obligor.
      * Example-A, B, and C are co-sureties on a debt D owes to E in the amount of

$60,000. E renounces solidarity as to A. How much can E collect from B?

$40,000. Then B would seek contribution from C in the amount of $20,000.

* + - * Renunciation Plus Insolvency-"A loss arising from the insolvency of a solidary obligor must be borne by the other solidary obligors in proportion to their portion. An obligor in whose favor solidarity has been renounced must nevertheless contribute to make up for the loss." LCC 1806.
        + ***Example***-A, B, and C are co-sureties on a debt that D owes to E in

the amount of $60,000. E renounces solidarity in favor of A, then

B becomes insolvent. How much can E collect from C? $40,000.

C gets contribution from A by calling him back in, according to the second sentence of 1806, see above.

* + - * + ***General Rule***-Each solidary obligor has to bear a chare of the

insolvent obligor's share. If solidarity hadn't been renounced, A and C each would bear $10k of B's virile portion. So if B is insolvent and C pays $40, C can get $10 from A; C can also get all $40 from

D (principal obligor) through reimbursement. A returns to solidarity

only for the purpose of bearing B's insolvent portion.

## COME BACK AND ADD BOOK HYPOS FROM CLASS IF TIME PERMITS—OTHERWISE, SEE LECTURE FROM 1/28 and 1/30.

**Extinction and Termination of Suretyship**

* Extinction of Suretyship or Principal Obligation
  + **Extinction of the Suretyship According to Law of Obligations**-"The obligations of a surety are extinguished by the different manners in which conventional obligations are extinguished, subject to the following modifications." LCC 3058. Conventional obligations may be extinguished in the following ways: performance, impossibility of performance, novation (such drastic modification that it is a whole new contract), remission, compensation, and confusion. The articles on suretyship provide some variations upon those general rules.
  + **Extinction of the Principal Obligations**-"The extinction of the principal obligation

extinguishes the suretyship." LCC 3059.

* + - The reciprocal is not true: the extinction of suretyship has **no effect** on the continuing validity of the principal obligation.
* Modification of the Principal Obligation-"The modification or amendment of the principal obligation, or the impairment of a real security held for it, by the creditor, in any material manner and ***without the consent of the surety***, has the following effects." LCC 3062.
  + The general rule is that modifications don't affect suretyship, unless the criteria in LCC 3062 are met.

*REQUISITES FOR MODIFICATION TO TRIGGER ANALYSIS: Modification is (1) material and*

*(2) without consent of surety!!!*

## Events Affecting Suretyship

* + - *Modification or Amendment*-The most typical modifications contemplated here are an extension or time that results in the accruing of additional interest or an increased interest

rate.

* + - * Abadi v. Markey-Gas station lease was subleased to another tenant. The sublessee doesn't pay, and the sureties get sued. The sureties say they don't owe because the sublease was modified without their consent, and suretyship is extinguished by the modification.
        + Sureties LOSE. The suretyship contract gave consent for modification.
        + Also

The modification didn't change the liability of the surety/principal obligation (rent). The surety's amount of exposure didn't change. Rather, it probably added more security with another layer of payment.

FILL IN FROM LECTURE

* + - * If the principal obligor and the creditor agree to change the underlying debt in such a way that it hurts the surety, questions of fairness arise about whether it's appropriate to modify or scale back the suretyship.
    - *Impairment of Real Security*-For example, if the creditor releases real security that existed

at the time of the suretyship, or permits a mortgage to lapse in the public records. These types of events increase the exposure of the surety, so if they occur without the surety's consent, their liability may be affected. Release of a mortgage would affect the subrogation rights of the surety if they are forced to perform (i.e. if they pay, they can go and foreclose on the real security that also secured that debt).

*EFFECTS OF MODIFICATION: DEPENDS ON TYPE OF SURETYSHIP*

* + **Ordinary Suretyship**-".. an ordinary suretyship is extinguished." LCC 3062
  + **Commercial Suretyship**-"A commercial suretyship is extinguished to the extent that the surety is prejudiced by the action of the creditor, unless the principal obligation is one other than for the payment of money, and the surety should have contemplated that the creditor might take such action in the ordinary course of performance of the obligation. The **creditor has the burden** of proving that the **surety has not been prejudiced** or that the extent of the prejudice is less than the full amount of the surety's obligation." LCC 3062.
    - In short, the commercial surety isn't automatically off the hook, but is released to the extent

of his prejudice.

* + - If the contract isn't for payment of money (i.e. construction bonds) and the surety should have known modifications would happen (like all construction contracts), then they aren't getting off the hook.
    - *Commercial Surety*-Recall the definition of commercial suretyship, LCC 3042: "A

commercial suretyship is one in which: (1) The surety is engaged in a surety business; (2) The principal obligor or the surety is a business corporation, partnership, or other business entity; (3) The principal obligation arises out of a commercial transaction of the principal obligor; or (4) The suretyship arises out of a commercial transaction of the surety.

* + - *“Prejudice"*-In **Robbins Tire & Rubber Co. v. Winnfield Retread**, the modification

didn't prejudice the surety, but actually helped him, because 3 more security interests were added. Surety was in a better position after the modification due to his subrogation rights on the additional security. Therefore, even when one of the new mortgages was released, there wasn't prejudice because when the surety originally signed on, he was the **only** security. Therefore, despite the release, he's still in a better position than he **originally** was.

* Prescription of the Principal Obligation
  + **General Rule of Extinction**-"Prescription of the principal obligation extinguishes the obligation of the surety." LCC 3060. Note that prescription does not actually "extinguish" the obligation, but simply bars an action for its enforcement.
    - *Some relevant prescriptive periods*-Actions for the repayment of money lent, arrearages

of rent, and an open account prescribe **three years** from the date the payment is due. LCC 3494. Actions for the repayment of promissory notes prescribe **five years** from the time the note is due (note distinction between demand note and time instrument-if the payment is over time, its 5 years from the date each payment is due, where if it's immediately due- a demand note-the prescription runs from date of the note). LCC 3498.

* + - *Continuing guaranty*-How does prescription of a principal obligation affect a

"continuing" guaranty, which is open for an indefinite period of time? The principal obligation determines the proper prescription for sureties; this is particularly important for continuing guaranties, and each underlying principal obligation will govern the prescription of the suretyship.

## Other Rules of Prescription

* + - *Prescription of Surety's Action for Reimbursement and Contribution*-"A surety's action

for contribution from his co-sureties and his action for reimbursement from the principal obligor prescribe in **ten years**." LCC 3061. *See also* LCC 3499 (general prescription for personal actions is 10 years).

* + - *Interruption of Prescription against Surety*-"The interruption of prescription against a

surety is effective against the principal obligor and other sureties only when such parties have actually agreed to be bound together with the surety against whom prescription was interrupted." LCC 3061.

* + - * IF several sureties have independent agreements with the creditor, then no simultaneous interruption as to all. BUT if several came together and execute a single agreement with the creditor, then interruption as to one interrupts as to all.
      * **Contrast with Rule of Obligations in General**-"The interruption of prescription against one solidary obligor is effective against all solidary obligors and their heirs." LCC 1799. The suretyship articles recognize that not all occurrences of suretyship involve the parties agreeing to be solidarily bound with one another.
* Termination (Revocation) of Suretyship-"A surety may terminate the suretyship by notice to the creditor. The termination does not affect the surety's liability for obligations incurred by the principal obligor, or obligations the creditor is bound to permit the principal obligor to incur at the time the notice is received, nor may it prejudice the creditor or principal obligor who has changed its position in reliance on the suretyship." LCC 3061.
  + **General Rule**-The surety may terminate the suretyship through ***notice***. This notice need not be in writing by default, although the contract of suretyship may require it to be.
  + **Exception**-The termination cannot (1) affect the surety's liability for obligations incurred before termination or obligations that are bound to be incurred by the time of termination or (2) prejudice the creditor or principal obligor who changed its position in reliance on the suretyship.
    - Termination will not unilaterally and retroactively cut off liability; a termination may only

operate moving forward.

* + This is really only applicable to a continuing guaranty, and doesn't affect a surety on existing

obligations.

* Death of a Surety-"**Knowledge** of the death of a surety has the same effect on a creditor as would a notice of termination received from the surety. A termination resulting from notice of the surety's death does not affect a universal successor of the surety who thereafter **unequivocally affirms** his willingness to continue to be bound thereby. The confirmation need not be in writing to be enforceable." LCC 3061.
  + "Knowledge" probably means "communicated notice."
  + Generally, a contract's rights and obligations are heritable and the duty to pay money isn't

automatically strictly personal.

* + RULE: Death of a surety operates as notice of termination. EXCEPTION: Successor may confirm.

# Mortgage

## In General

* **Introduction:** Switching gears from personal rights in suretyship. Mortgage is all about real rights in things.
* Definition- "Mortgage is a nonpossessory right created over property to secure the performance of an obligation." LCC 3278
  + LCC 3282 is a companion to 3278
* Nature and Attributes
  + **Accessory**- "Mortgage is accessory to the obligation that it secures. Consequently, except as provided by law, the mortgage may enforce the mortgage only to the extent that he may enforce any obligation it secures." LCC 3282.
    - "Although the rights of the mortgagee may not be enforced until the principal obligation is

due and unperformed, the rights of the mortgage may exist before the obligation is incurred or before there has been a default upon it." LCC 3278 (cmt. c). So, we can agree that you will mortgage property to secure debts that you \*will one day\* acquire. (Future indebtedness mortgages).

* + - Enforceable only to the extent that the principal obligation is enforceable.
  + **Real**- Mortgage is a real right (attached to a thing and not a person) and is created over property. LCC 3286 designates the property susceptible of a mortgage:
    - A corporeal immovable with its component parts
    - A usufruct of a corporeal immovable
    - 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
    - The lessee's rights in a lease of an immovable with his rights in the buildings and other

constructions on the immovable (leasehold mortgage)

* + - Property made susceptible of conventional mortgage by special law.
  + **Nonpossessory**-Mortgage is a nonpossessory security right. LCC 3278. Mortgage confers on the mortgagee rights in the thing that is subject to the mortgage, and those rights are good against the world. (Note: LA law at one time recognized a possessory security right in immovable property, called antichresis. This is no longer used in this state.)
    - Creditor doesn't have the right of possession of the property until the debt is paid. This

makes sense because if the debtor does not have possession and use of their property then they are unable to generate the money they need to pay off the debt. Example: If you mow lawns for a living but the creditor is holding your lawn mower as security then you can't make money because you can't mow lawns.

* + **Consensual/ Legal**-Mortgages may be conventional (established by the agreement of parties) or legal or judicial (established by law).
* Rights Created by Mortgage-Mechanics of how the mortgage works. "Mortgage gives the mortgagee, upon failure of the obligor to perform the obligation that the mortgage secures, the right to cause the property to be seized and sold in the manner provided by law and to have the proceeds applied toward the satisfaction of the obligation in preference to claims of others." LCC 3279. *Example:* Sally owes the bank

$250K, bank takes a mortgage on the home of Sally and the home is worth $300K. Sally owes another unsecured creditor $250K. Sally defaults on the loan, when the bank forecloses on her home, the home is seized and sold at a judicial sale and the proceeds of the sale will be applied to the debt of the bank first. What would happen if they were both unsecured? They would have to split them pro rata.

* + **Seizure and Sale**-Upon the default of the debtor, the mortgagee may have the mortgaged property seized and sold and the proceeds applied to the principal obligation. The right of foreclosure must be exercised through judicial process (self-help is prohibited). Notice: under mortgage, in some circumstances the creditor can use the executory process which is more speedy than the regular process.
  + **Preference**-The mortgagee enjoys a preference in the proceeds ahead of the claims of others. They get paid before other creditors get paid.
* Indivisible Real Right - "Mortgage is an indivisible real right that burdens the entirety of the mortgaged property and follows the property into whatever hands the property may pass." LCC 3280.
  + To say a right is indivisible means that it is not susceptible of being divided. This means the mortgage burdens every part of the property susceptible to the mortgage. There are some ways that parties can contract around this, but generally, the entire piece of property is burdened by the mortgage.
  + "Each and every portion of the property mortgaged is liable for each and every portion of the debt." LCC 3280 (cmt. a)
  + The mortgage follows the property into whatever hands it falls, and the third-person is bound by the mortgage.
* When Authorized- Mortgage is to be strictly construed. "Mortgage may be established only as authorized by legislation." LCC 3281.
  + "Our lawgivers have thought it wise to retrain the power of hypothecating property, which is one of the rights of dominion, by the following general and sweeping rule . . . The mortgage then is to be measured, in every case, by the express grant of power in Codes and other statute books."
  + We want to construe this right carefully and strictly because of the specific rights it grants to a creditor.
* Property Susceptible of Mortgage - "The only things susceptible of mortgage" are listed in LCC 3286. This list is exclusive, there are some deviations from this under the law, but parties cannot deviate from this list on their own. Most are immovables, but there are some exceptions:
  + **A corporeal immovable with its component parts**-This includes land and its component parts (LCC 462), buildings and their component parts when on the land of another (LCC 464), and standing timber when it belongs to someone other than the owner of the land (LCC 464). Most mortgages involve corporeal immovables and their component parts.
  + **A usufruct of a corporeal immovable**-has to be specifically listed because this is a personal servitude. This does not fall under the first category because it is not corporeal.
  + **A servitude of right of use with its right that the holder of the servitude may have in the buildings and other constructions on the land**- has to be specifically listed because this is a personal servitude. This includes "other constructions" that are classified as "movables" under property law. (LCC 493).
  + **The lessee’s rights in the lease of an immovable with its rights in the buildings and other constructions on the immovable**-Lessee's rights in property are contract rights (not real/property rights). This type of mortgage is often called a leasehold mortgage. This is incorporeal.
    - *Carriere v. Bank of Louisiana*-Frank Occhipinti obtains a ground lease from the plaintiff

so that he can build a restaurant. He borrows money from Gulf Federal Savings and Loan to finance the venture. The lender requires he mortgage his *leasehold interest* and all improvements he will build on the property. Defendant BOL ultimately acquires the mortgage. Occhipinti defaults on the loan and BOL forecloses and acquires the leasehold interest and improvements in the foreclosure. Occhipinti also defaults on the lease. Is BOL, now the owener of the "leasehold estate" acquired through mortgage foreclosure, required to pay rent to the lessor? NO, "leasehold estate" means "rights" but not duties (notwithstanding language on p. 157 re "duties and obligations"). 3 key takeaways from *Carriere*: (1) When "leasehold estate" is mortgaged, the mortgagee may acquire rights without correlative obligations; (2) If this occurs, to terminate right of mortgagee or subsequent purchaser, lease must be dissolved; (3) Dissolution affects rights to improvements, unless parties agree otherwise (*see* LCC 493, 2695).

* + - * Transferring rights is subrogation. Transferring duties is assumption. The transfer of the rights never has to go hand in hand with the transfer of the duties.
      * Purpose of the *Carriere* case: Lessee can mortgage rights of lease. Leasehold mortgage.
      * Parties can contract around this rule, this is a matter of interpretation.
      * Subordination Agreements (Lemmon Concurrence)

▫ The lessee built improvements

▫ Under the lease, the improvements revert to the lessor free and clear of incumbrances

▫ Under the amended lease the parties agreed that the "improvements would remain subject to the lender's mortgage until the mortgage was fully paid." The lessor subordinated its right to the improvements to the bank.

▫ Although BOL now owns improvements on the land of another, the parties negated LCC 493/2695 and BOL can remain on the land until the mortgage is paid.

* + **Property made susceptible of conventional mortgage by special law** (catchall)--Example: LCC 805 "A co-owner may freely lease, alienate, or encumber his share of the thing held in indivision." Note that an undivided interest in an immovable is conceptualized as an incorporeal immovable. Thus, it is not found under LCC 3286. Special legislation authorizes a co-owner to mortgage his share in co-owned property.
* Types of Mortgages - "Mortgage is conventional, legal or judicial, and with respect to the manner in which it burdens the property, it is general or special" LCC 3283.
  + Classification according to manner of creation-LCC 3284
    - **Conventional**- "A conventional mortgage is established by contract." This is the only form of volitional or consensual mortgage. [This is a special mortgage].
      * *Example*: Barry wishes to buy a house, but he does not have the cash on hand for the loan. He borrows money from Carl for the purchase price. Carl in turn requires Barry to agree to grant Carl a mortgage over his house. Carl is the mortgagee (holder of the right). Barry is the mortgagor (one whose property is mortgaged). In the event that Barry defaults on the loan (I.e, fails to pay when due), Carl can foreclose on the mortgage and have the property seized and sold at judicial sale. Any proceeds from the sale are applied to the loan debt. Any additional sums are paid to Barry. If less than the amount of the loan is obtained at the sale, then Barry is still on the hook for the deficiency.
    - **Legal**- "A legal mortgage is established by operation of law." (Example: minor's legal

mortgage over a tutor's property. Idea is that the mortgage secures the minor's rights

against the tutor in the event the tutor breach's some duty.) [This is a general mortgage].

* + - **Judicial**- "A judicial mortgage is established by law to secure a judgment." A judicial

mortgage must be filed in the public records. [This is a general mortgage].

* + Classification according to the property encumbered-LCC 3285
    - **General**- "A general mortgage burdens all present and future property of the mortgagor."

Legal and judicial mortgages are general mortgages. No property descriptions are necessary; as long as the appropriate document is filed in the public records, the mortgage attaches to all immovable property in that parish. Not a particular piece of property, all of the property.

* + - **Special**- "A special mortgage burdens only certain specified property of the mortgagor."

Conventional mortgages are special mortgages. The property subject to the mortgage must be specifically described.

## Conventional Mortgages

* A conventional mortgage is simply a mortgage created by contract. *See* LCC 3284. The "typical" conventional mortgage involves a buyer of residential immovable property who borrows a loan to finance the purchase price of the home. To secure the debt, the buyer (mortgagor) will grant a mortgage over the

home to the lender (mortgagee). The lender may be a third party (I.e., a bank) or the seller (seller-financed or credit sale).

## Creation/Effectiveness Between the Parties (Mortgagor & Mortgagee)

* + - **Requirements**: No special words are required to create a conventional mortgage, but most

are called "Act of Mortgage" and must meet all four requirements set forth in Articles 3287-3288. Article 3287 provides: "A conventional mortgage may be established only by a written contract. No special words are necessary to establish a conventional mortgage." Article 3288 provides: "A contract of mortgage must state precisely the nature and situation of each of the immovables or other property over which it is granted; state the amount of the obligation, or the maximum amount of the obligations that may be outstanding at any time and form time to time that the mortgage secures; and be signed by the mortgagee."

* + - * Written
      * Signed by the Mortgagor-LCC 3289: "A contract of mortgage need not be signed by the mortgagee, whose consent is presumed and whose acceptance may be tacit." This is great for the mortgagee, so it is presumed that they will accept. *See also* LCC 1837 comment b.
      * Statement of (Maximum) Amount-This can be a precise amount for a specific obligation or a "maximum" amount of indebtedness secured (as when the parties intend that the mortgage will secure multiple, fluctuating lines of credit). We need a dollar figure because we need to know an amount to give at the time of foreclosure.
      * Precise and Specific Description of the Property-LCC 3288 provides that the contract of mortgage must "state precisely . . . the situation of the immovables or other property over which it is granted . . . " Look closely at cmt. (b): A significant body of jurisprudence has weighed in on what this requirement entails.

▫ Metes and Bounds description

▫ U.S. Public Land Survey property descriptions

▫ Descriptions that reference subdivision plats (on the one hand) and the minimum requirements for property descriptions (on the other hand)

▫ *Metcalfe v. Green*: Description should identify property with reasonable certainty and not mislead creditors of mortgagor or other interested persons, or keep them in the dark

▫ LCC 2440 comment (b): description of immovable property is sufficient if it enables a person to locate & identify said property (*Hargrove v. Hodge*)

▫ **Note on leasehold mortgages**-Such a mortgage can refer to the lease by reference number in the conveyance records or it can describe the immovable in detail. (The recorded lease will have to have a valid property description in order to affect third persons.)

* + - Power to Mortgage-*Who may create a mortgage?*
      * General Rule- "A conventional mortgage may be established only by a person having the power to alienate the property mortgaged." LCC 3290. The owner has the power to alienate the property.
      * Representation-Of course, legal representatives of a person having the power to alienate the property may also have the power to alienate the property. In particular, a mandatary can mortgage property on behalf of the principal provided that the act of mandate meets the substantive and formal requirements to confer this authority on the mandatary. *See* LCC 2993 (form) and LCC 2996 (substance).
    - On What Property It May Be Created
      * Already Owned Property-The mortgagor may create a mortgage over property that the mortgagor already owns. This is the usual case.
      * Specifically Identified After-Acquired Property- "A special mortgage given over property the mortgagor does not own is established when the property is acquired by the mortgagor. A general conventional mortgage is permitted only when expressly provided by law.
    - What Obligations It May Secure- "A conventional mortgage may be established to secure

performance of any lawful obligation, even one for the performance of an act. The

obligation may have a term and be subject to a condition." LCC 3293.

* + - * Obligations of the mortgagor

▫ Obligations to Pay Money-An obligation to pay money may of course be secured by a mortgage. This is the usual case.

▫ Other Obligations- "A mortgage that secures an obligation other than one for the payment of money secures the claim of the mortgage for the damages he may suffer from a breach of the obligation, up to the amount stated in the mortgage." LCC 3294

* + - * Obligations of a Third Party- "A person may establish a mortgage over his property to secure obligations of another. In such a case, the mortgagor may assert against the mortgagee any defense to the obligation which the mortgage secures that the obligor could assert except lack of capacity or discharge in bankruptcy of the obligor." LCC 3295. The purpose of the mortgage is to provide a back-up if the obligor cannot pay, this is why defense of bankruptcy cannot be enforced. LCC 3046.

▫ Example: Babette desires to obtain a loan from Larry, but has no property to provide as collateral. Babette's friend, Olivia, is the owner of immovable property that Larry is willing to accept as collateral for the loan. Larry advances the funds to Babette, in connection with the loan Olivia grants a mortgage over her immovable property to secure Babette's obligation to repay the loan to Larry. If Babette defaults, then Larry can foreclose on the property. Importantly, Olivia does not owe any *personal* obligation to Larry. NOTE: Olivia's liability is *in rem* only.

* + - Odds and Ends
      * *In Rem* Mortgages ("Collateral Only Loans")-The mortgagor and mortgagee may agree that in the event of the mortgagor's default on the principal obligation, the mortgagee's only right is to foreclose on the mortgaged property. The mortgagee essentially stipulates that the borrower will have no personal liability on the debt. This is specifically permitted by LCC 3297: "The mortgagee's recourse for the satisfaction of an obligation secured by a mortgage may be limited in whole or in part to the property over which the mortgage is established."
      * Pignorative Contracts-A contract the parties intend to operate as a security device but which, on its face, purports to be a contract of a different kind. Note that these contracts (disguised as secure transactions) are called "pignorative contracts" (from the Latin "pignus" handing something over as security.)

▫ Interpretation According to the Parties' Intent-Per Louisiana jurisprudence, a transaction that is in the nature of a secured transaction will be treated as such, even if it is given another name by the parties. See LCC 3287 cmt. (c). *See also* generally LCC 2025-2028.

* Produces effects intended. LCC 2027.

▫ Variations on the Problem

* Sale with the Right of Redemption-Consider the following hypothetical. Sam wishes to borrow money from Betty, but Betty is afraid that Sam will not repay the loan. Betty agrees to lend Sam the money, but insists that Sam sell his property, Blackacre, to her for

the amount of the loan. Same and Betty agree that when same is ready to repay the loan, the can "redeem" the property by returning the "purchase price." After the parties memorialize their agreement in writing, but before Sam repays the price, who owns Blackacre? *See* LCC 2567-2569.

* + *Latiolas v. Breaux—*Surrounding circumstances that point to

the existence of a pignorative contract rather than a sale with a right of redemption: (1) If the seller retains actual possession probably not a true sale (LCC 2480); (2) low price; (3) seller engaged in some transaction where got possession back-if NOT a sale then why have to lease back.

▫ Conditional Sales (a.k.a. Bond for Deed)--Consider the following hypothetical. Sam wishes to buy Blackacre from Betty, but Sam does not have the cash on hand to purchase Blackacre outright. Betty agrees to "finance" the sale by accepting payment from Same over time, however, she requires that the sale be "conditioned" on Sam's payment of the price in full: although Same will have the right to immediate possession of Blackacre, ownership will not pass unless and until the price is paid. Note that this contact is note enforced as either a mortgage or a sale. Rather, it is characterized as a "bond for deed" which is regulated by La. Rev. Stat. 9:2491-2949*.* These contracts are upheld but are subject to stringent regulations.

* + - * "Resolutory Condition"-LCC 2561. "If the buyer fails to pay the price, the seller may sure for dissolution of the sale." LCC 2561. (Note that although pre-revision law called a "resolutory condition," this article does not describe a condition. This is a dissolution.

▫ *Robertson v. Buoni—*Roberston sold a piece of real estate to the Buonis, who agreed to pay a cash sum and take over her existing mortgage note. The Buonis skipped town and didn't pay. To prevent foreclosure, Robertson paid the mortgage note herself. She sued for dissolution of the sale. The trial court declined to dissolve the sale, and the court of appeal affirmed.

* The vendor's privilege and the right to dissolution are clearly distinguishable and independent of one another. Enforcement of the vendor's privilege is affirmation of the contract where exercising the right to dissolution places the parties in a position as if the obligation never existed.
* LCC 2561 cmt. (a)--changes the law in part by providing that the right to dissolution prescribes with the note or other instrument given for its price.
* The court decides whether to grant dissolution by determining whether the rendering of only partial performance by the obligor, plus the delay attending a possible completion or the failure to perform an accessory obligation warrants a dissolution. LCC 2013 & 2014= court at its discretion can dissolve contracts.
* The factors courts consider are (1) the extent and gravity of the failure to perform alleged by the complaining party; (2) the nature of the obligor's fault; (3) surrounding economic circumstances that may make the dissolution opportune or not (really just asking if this is good from a policy perspective).
* The main takeaway is that the seller has 3 rights: (1) sue for dissolution; (2) vendor's privilege-foreclose on property to have price paid; (3) seller gets mortgage over the property in addition to vendor's privilege.

▫ *Louis Werner Saw Mill Co. v. White*-Buyer purchased property from seller and failed to pay the price. The obligation to pay the price was represented by a promissory note, due in one year and secured by a mortgage and lien (which thus were not enforceable), but less than 10 years after the maturity of the note, the seller sued for dissolution.

* Bad faith LCC 1997 comment (b)
* **As Against Third Persons**-The simple fact of a mortgage's existence and enforceability *between the parties* is not sufficient for a mortgage to have effects against *third persons* to the mortgage. Like other instruments affecting rights in immovable property, a mortgage's effectiveness against third persons is established through recordation of the mortgage in the public records. Unlike a simple transfer of an immovable (for example, a sale), once recorded, a mortgage does not have effects against third persons in perpetuity; instead a mortgage periodically must be reinscribed to maintain its effect against third persons. Finally, effects against third persons may be terminated through cancellation of mortgages from the public records.

## Establishing Effectivity; Recordation

* + - The Law of Registry in General-The law of registry or the "public records doctrine" addresses the effectiveness of instruments affecting immovable property against "third persons." **The public records doctrine is extremely important in practice.**

## ▫ Hypotheticals

* + - * **Effectiveness vis a vis Other Creditors**-Debtor, the owner of Blackacre, grants Creditor 1 a mortgage on Blackacre to secure a debt of $100,000 on Monday. Creditor 1 does not record his mortgage in the public record. On Tuesday, Debt grants creditor 2 a mortgage in Blackacre to secure a debt of $100,000. Creditor 2 records his mortgage. Debtor defaults on both debts; both creditors seek to enforce their mortgages. Creditor 1 can foreclose but the money goes to creditor 2 because creditor 2 is secured.
      * **Effectiveness vis a vis Subsequent Purchasers**-Debtor, the owner of Blackacre, grants Creditor a mortgage on Blackacre to secure a debt of $100,000 on Monday. Creditor does not record his mortgage in public records. On Tuesday, Debtor sells Blackacre to Buyer for $100,000. Debtor thereafter defaults on his debt to Creditor; Creditor seeks to enforce his mortgage.

▫ The Rule-LCC 3338-The rights and obligations established or created by the following written instruments are without effect as to third persons unless the instrument is registered by recording it in the appropriate mortgage or conveyance records pursuant to the provisions of this Title. (1) An instrument that . . . establishes a real right in or over an immovable."

▫ Characteristics of the Public Records Doctrine

* + - * Negative Doctrine-The public records doctrine is a negative doctrine. The recordation of an instrument, such as a mortgage, does not create rights or ensure enforceability of the mortgage. In other words, the recordation of a mortgage does not make it valid. Instead, an instrument such as a mortgage has no effect against third persons unless it is filed for registry and third persons are allowed to rely on

the absence of an instrument, such as mortage from the public records.

* + - * Effect of Third Person's Knowledge/ Pure Race Doctrine-Under Louisiana's public records doctrine, an unrecorded instrument has no effects against third persons, even those with actual knowledge of the unrecorded instrument. *See McDuffie v. Walker.* This aspect of Louisiana's public records doctrine results in its classification as a "pure race" doctrine (as opposed to a "notice" doctrine or a "race- notice" doctrine): among parties with competing rights in an immovable, the first one to record an instrument creating those rights "wins."
    - Who is a Third Person-Third persons may rely on the absence of an unrecorded instrument. *A contrario*, a person who is not a third person may be bound by an unrecorded instrument. LCC 3343 establishes the rule: "A third person is a person who is not a party to or personally bound by an instrument. A witness to an act is a third party with respect to it. A person who, by contract, assumes an obligation or I bound by contract to recognize a right is not a third person with respect to the obligation or right or to the instrument creating or establishing it."

▫ A Party To An Instrument-A party to an instrument is not a "third person" with respect to the instrument. Thus, a mortgage is enforceable between Debtor and Creditor even when it is unrecorded.

▫ Person Personally Bound by an Instrument-A person who is personally bound by an unrecorded instrument, such as the universal successor of the mortgagor, is bound by it. Thus, if Debtor executes a mortgage, then dies, the mortgage is enforceable by Creditor against Debtor's heirs even if unrecorded.

▫ Witness/Notary--Witnesses are third persons to instruments they witness; notaries, on the other hand, are not third persons to their instruments. Thus, if a debtor and creditor execute a mortgage in authentic form, but the mortgage is unrecorded, the mortgage is binding on the notary, but not on the witnesses.

▫ Persons Who Assume or are Personally Bound by an Obligation-A person may, by contract, assume a mortgagor's obligation or by contract become personally bound to recognize the right of a mortgagee. In either case, although the mortgage is not recorded, it has effects against that person. Thus, if debtor grants a mortgage to creditor, then sells the property subject to the mortgage to buyer, if buyer purchases the property "subject to" the rights of the Mortgagee, then the Mortgagee can foreclose on the property upon debtor's default even if the mortgage is unrecorded.

▫ Note on "fair value"-Prior to 2005, some courts held that a third person was protected by the public records doctrine only if that person was a "purchaser for value" or had otherwise given fair value for their rights in the immovable. The revised CC articles on registry do not require that the third-party transferee pay value. Thus, the public records doctrine applies to all "third persons," including subsequent purchasers, mortgagees, and donees.

* + - The Place and Manner of Recordation

▫ What must be filed

* + - * General Rule-In general, the original instrument must be recorded LCC 3344, 3345. The clerk may refuse to accept an instrument that does not bear the original signature of the party. However, if the

clerk does not accept a non-original, if the copy qualifies as a "duplicate" under the Code of Evidence, then it has the same effect as recordation of the original. LCC 3345.

* + - * Mortgage Affecting the Property in Several Parishes-An act of mortgage affecting property in multiple parishes can be executed in multiple original; each original only has to describe the property in the parish where it is filed. LCC 3355.
      * Note on the Contents of the Act of Mortgage-The law states that to be recorded, an instrument must contain various information, including full name, domicile, and mailing address of the parties, the marital status of the parties, the last four digits of the social security number of the mortgagor, etc. See LCC 3352. None of that information is required for the effect of recordation, however. In contrast, LCC 3353 requires that "A recorded instrument is effective with respect to a third person is the name of a party is not indefinite, incomplete, or erroneous as to be misleading and the instrument as a whole reasonably alerts a person examining the records that the instrument may be that of the party." LCC 3353.
    - Where Registry is Made-An instrument creating, establishing, or relating to a mortgage or privilege over an immovable, or the pledge of the lessor's rights in the lease of an immovable and its rents, is recorded in the mortgage records of the parish in which the immovable is located. All other instruments are recorded in the conveyance records of that parish. LCC 3346. [This rule is tested on every single LA bar exam, often across multiple tests.]

▫ Parish Where the Immovable is Situated-The filing must be made in the parish(es) where the immovable is situated. Filing in the improper parish is equivalent to not filing at all.

▫ Mortgage or Conveyance Records-There are two separate "offices" or sets of records. Mortgages and pledges of lessors' leases and rents must be filed in the mortgage records. Everything else must be filed in the conveyance records. Failure to file in the appropriate registry is equivalent to not filing at all.

* + - * *Wede v. Niche Marketing*-A judgment creditor sough to file his judgment in the parish where his judgment debtor owner property (St. John the Baptist Parish) so as to create a judicial mortgage. The clerk recorded the judgment using the court's electronic recordation system, according to which the judgment was scanned and relevant information about the judgment was entered into a computer database. The clerk was to select "CO" or "MO" from a drop-down menu to designate the judgment as being recorded in either the conveyance records or the mortgage records. The clerk improperly selected "CO." Later, the judgment debtor sold a piece of real estate in St. John the Baptist Parish to Buyer. Buyer properly recorded his Act of Sale in the conveyance records. The judgment creditor sought to enforce the judgment through foreclosure on the same property. Buyer excepted on the ground that the judgment was not properly recorded in the mortgage records at the time of his acquisition. The trial court permitted foreclosure proceedings to continue, but the Court of Appeal reversed, and the Louisiana Supreme Court affirmed the holding of the appellate court, holding that the

instrument was improperly filed in the conveyance records, and therefore had no effect against third persons.

* + - "Filing" an Instrument for Recordation

▫ Effect of recordation arises upon filing-The effect of recordation arises when an instrument is filed with the recorded . . . An instrument is filed with the recorder when he accepts it for recordation in his office. LCC 3347. [Note that under prior law, recordation was effective from the time of filing only if the mortgage was "timely" inscribed (copied into the books) thereafter. If not timely, then effect of recordation dated from inscription. This is no longer the law.]

▫ Subsequent errors and omissions of the clerk-The effect of recordation . .

. is unaffected by subsequent errors or omissions of the recorder. LCC 3347.

* *Wede v. Niche Marketing*-The Louisiana Supreme Court held that the statement in this article that the "errors or omissions of the recorder" do not impair the effect of recordation applies to the timing of recordation. Thus, when a clerk, through an error, improperly recorded a judgment in the conveyance records rather than the mortgage records, a judicial mortgage was not created over the debtor's property.

▫ What Happens After the Instrument is Filed-Next, the recorder stamps it with the date and time, assigns a registry number, records it in the appropriate records, and indexes it.

* Date, Time, and Registry Number-Upon acceptance of an instrument the recorder shall immediately write upon or stamp it with the date and time it is filed and the registry number assigned to it. LCC 3348. If this is done improperly or not at all, the law provide some guidance as to how to figure out the time of filing. LCC 3349- 50.
* Inscription in the Record Books-Historically, this was done by hand; increasingly now this is done electronically.
* Indexing-A secondary index is created using the names of the parties to the instrument so that instruments can be located easily.
* Maintaining Effectivity/ Re-Inscription. The effect of recordation of a mortgage is temporary. (Note, this is not true with respect to all instruments recorded in the public records.) To maintain effectiveness against third persons, mortgages must be periodically

reinscribed.

* + Duration of Effectivity: Original Inscription

▫ General Rule: Ten Years from Date of Mortgage-Except as otherwise expressly provided by law, the effect of recordation of an instrument creating a mortgage or pledge or evidencing a privilege ceases ten years after the date of the instrument." LCC 3357

▫ Exception: Six Years from Maturity of Secured Obligation-If an instrument creating a mortgage or a pledge or evidencing a privilege describes the maturity of any obligation secured by the mortgage, pledge, or privilege and if any part of the described obligation matures nine years or more after the date of the instrument, the effect of recordation ceases six years after the latest maturity date described in the instrument. LCC 3358. For this rule to

apply, 2 prerequistites must be met: (1) the mortgage must describe the maturity of the secured obligation; and (2) that secured obligation must mature nine years or more after the date of the instrument.

▫ Effect of the Amendment-If before the effect of recordation ceases an instrument is recorded that amends a recorded mortgage, pledge, or privilege to describe or modify the maturity of a particular obligation that it secures, then the time of cessation of the effect of the recordation is determined by reference to the maturity of the obligation last becoming due described in the mortgage, pledge, or privilege as amended. LCC 3361.

* + Extension of Effectivity: Reinscription

▫ Method of Reinscription- "A person may reinscribe a recorded instrument creating a mortgage or pledge or evidencing a privilege by recording a signed written notice of reinscription. The notice shall state the name of the mortgagor or pledgor, or the name of the obligor of the debt secured by the privilege, as it appears in the recorded instrument, as well as the registry number or other appropriate recordation information of the instrument of a prior notice of reinscription, and shall declare that the instrument is reinscribed." La. Civ. Code art. 3362.

▫ Method of Reinscription Exclusive-"The method of reinscription provided in this Chapter is exclusive. Neither an amendment of an instrument creating a mortgage or pledge, or evidencing a privilege, nor an acknowledgment of the existence of a mortgage, pledge, or privilege by the mortgagor, pledgor, or obligor, constitutes a reinscription of the instrument." La. Civ. Code art. 3363.

▫ Duration of Extension- "A notice of reinscription that is recorded before the effect of recordation ceases continues that effect for ten years from the date the notice is recorded." La. Civ. Code art. 3364.

▫ Reinscription After Lapse- "A notice of reinscription that is recorded after the effect of recordation of the instrument sought to be reinscribed has ceased, again produces the effects of reinscription, but only from the time that the notice of reinscription is recorded. The effect of recordation pursuant to this Article shall continue for ten years from the date on which the notice of reinscription is recorded, and the instrument may be reinscribed thereafter from time to time as provided by Article 3362. Reinscription pursuant to this Article does not require that the mortgage or pledge or evidence of privilege be again recorded, even if the original recordation has been cancelled." La. Civ. Code art. 3365.

* Cancellation
  + In General**—** After a mortgages ceases to affect third persons, the recorder can be directed to cancel the mortgage from the records: "The recorder shall cancel a mortgage or privilege from his records in the manner prescribed by law." La. Civ. Code art. 3337.
  + Form of Cancellation-"A. The recorder of mortgages shall cancel, in whole or in part and in the manner prescribed by law, the mortgage, pledge, or privilege upon receipt of a written request for cancellation in form prescribed by law and that: (1) Identifies the mortgage, pledge, or privilege by reference to the place in the records where it is recorded; and (2) Is signed by the person requesting the cancellation. B.

The effect of recordation of the instrument ceases upon cancellation by the recorder

pursuant to the provisions of this Article." La. Civ. Code art. 3366.

* + Causes for Cancellation-The mortgage should be recorded if (1) the underlying obligation is extinguished or (2) the effect of the mortgage against third persons has lapsed.
* Types of Obligations Secured by Mortgages-One can divide mortgages into three categories based upon the types of obligations that they secure: (1) single-advance mortgage loans; (2) determine future advance mortgage loans; and (3) indeterminate future advance mortgage loans (a.k.a. revolving or fluctuating lines of credit).
  + Single Advance Mortgage Loans-The most common type of mortgage is a mortgage made to

secure a single loan or obligation that is incurred at the time the mortgage is created.

* + - Illustration-Debtor borrows money from Big Bank to buy a home and contemporaneously grants Big Bank a mortgage in the home to secure the debt. The mortgage secures only that debt (plus interest, attorney fees, and other fines and fees indicated in the loan agreement).
  + Determinate Future Advance Mortgage Loans-Mortgages may also be used to secure a debt that will be incurred in the future. A "determinate" future advance mortgage secures a debt in a fixed amount that may be incurred in the future.
    - Illustration-Builder wishes to borrow money from Big Bank to fund a real estate development project. Builder needs $1,000,000 and intends to mortgage the building to secure the debt. Big Bank does not wish to give Builder all of the funds in advance of the construction of its security, so the parties agree that the loan will be made in installments. The parties agree contemporaneously that Builder will mortgage the land and projected building to secure the future loans up to $1,000,000. The loan is then made in installments over time (i.e., $30,000 to complete survey and foundation work, $40,000 for framing, etc.). The original mortgage secures all of the loans up to the stated total.
    - Jurisprudential Illustration: *Thrift Funds Canal, Inc. V. Foy*-Identify the three transactions in this case, taking special care to note the dates on which the principal obligations arose and the dates on which the security for those obligations may have become effective against third persons. *How do these three transactions rank vis-à-vis one another? In particular, was the mortgage securing the transaction a “single advance mortgage loan" or a “determinate future advance mortgage loan"?*
  + Indeterminate Future Advance Mortgage Loans-Mortgages may also be used to secure debts that

*may*be incurred in the future. An "indeterminate" future advance mortgage secures *unspecified*

debt that may be incurred in the future up to a fixed amount.

* + - Illustration-Business Owner wishes to open a "line of credit" with Big Bank that will permit her to borrow money periodically to buy goods and pay expenses associated with her business. She is not sure how much she will borrow over time. Big Bank opens a line of credit for Business Owner permitting her to borrow up to $5,000,000 at any time and, at the same time, Business Owner grants Big Bank a mortgage in her office building and the land on which it sits to secure her possible future indebtedness. Does the original mortgage secures all future loans up to the stated maximum amount?
    - The Problem-Under prior law, payments on loans secured by a mortgage reduced the mortgage. Once the amount stated in the mortgage was lent once and paid down, the mortgage was extinguished. [Old Article 3285 provided in part: "Hence, it happens, that in all cases where the principal debt is extinguished, the mortgage disappears with it.."]
    - The Old Solution: The Collateral Mortgage-To get around the problem described above, lawyers in Louisiana used the law of pledge to create a unique security device called a "collateral mortgage."
    - The Present Solution: The Multiple Indebtedness Mortgage -In 1992, new law became effective that provides for a "substitute" for the collateral mortgage. (Note: irrespective of this substitute, a collateral mortgage is still possible under Louisiana law.) This substitute is called the Multiple Indebtedness Mortgage.
* Transfer of Conventional Mortgages
  + Transfer of the Mortgage
    - Transfer of the Principal Obligation Effectuates Transfer of the Mortgage-According to the law of assignment of rights and the law of mortgage, the transfer of an obligation secured by a mortgage includes the mortgage. Indeed, it is not possible to transfer a mortgage separately from the underlying principal obligation.
    - Effects of the transfer between the parties and against third parties
    - **Partial Transfers—**When the mortgagee transfers only part of the secured obligation, the original mortgagee and the new mortgagee rank equally in the proceeds of the enforcement of the mortgage. *See* La. Civ. Code arts. 3311 and 3313. Unless otherwise provided by law, the proceeds realized from the enforcement of the mortgage are apportioned among multipole obligees on a *pro rata* basis. Under prior law, the original mortgagor subordinated her rights to the transferee.

## Transfer of the Mortgaged Property

* + - **Mortgage follows the property**-"Mortgage is an indivisible real right that burdens the entirety of the mortgaged property and follows the property into whatever hands property may pass." La. Civ. Code art. 3280. *Caveat*: the mortgage follows the property into the hands of third persons to the mortgage only if the mortgage was properly *recorded*.
    - Third Possessors and their Rights and Obligations

▫ **Third Possessor Defined**-"A third possessor is one who acquires mortgaged property and who is not personally bound for the obligation the mortgage secures." La. Civ. Code art. 3315. In general, while a subsequent purchaser of the mortgaged property may be bound by the mortgage according to the law of registry, he or she is not *personally* bound for the obligation secured by the mortgage unless he or she has *assumed*that obligation. Note that one who mortgages his property to secure the debt of another is not a "third possessor." (See La. Civ. Code art. 3315, cmt.)

▫ **Liability of Third Possessor**-"The deteriorations, which proceed from the deed or neglect of the third possessor to the prejudice of the creditors who have a privilege or a mortgage, give rise against the former to an action of indemnification." La. Civ. Code art. 3316.

▫ **Right of Third Possessor to Costs of Improvements**-"A third possessor may recover the cost of any improvements he has made to the property to the extent the improvements have enhanced the value of the property, out of the proceeds realized from the enforcement of the mortgage, after the mortgagee has received the unenhanced value of the property." La. Civ. Code art. 3318.

▫ **Right to Subrogation—**"A third possessor who performs the obligation

secured by the mortgage is subrogated to the rights of the obligee. In such a

case, the mortgage is not extinguished by confusion as to other mortgages, privileges, or charges burdening the mortgaged property when the third person acquired the mortgaged property and for which his is not personally bound." La. Civ. Code art. 3317.

* **Termination of Conventional Mortgages**-According to La. Civ. Code art. 3319: "A mortgage is extinguished: (1) By the extinction or destruction of the thing mortgaged; (2) By confusion as a result of the obligee's acquiring ownership of the thing mortgaged; (3) By prescription of all the obligations that the mortgage secures; (4) By discharge through execution or other judicial proceeding in accordance with the law; (5) By consent of the mortgagee; (6) By termination of the mortgage in the manner provided by Paragraph D of Article 3298; (7) When all the obligations, present and future, for which the mortgage is established have been incurred and extinguished."
  + **Destruction of the Mortgaged Thing**-If the collateral is destroyed, there is no more mortgage.

Note that if the collateral is the lessee's rights in a *lease*, then the termination of the lease extinguishes the mortgage. ]

* + **Confusion—**Confusion, you will recall, is the uniting of obligor and obligee in the same person.

*See*La. Civ. Code art. 1903. When the obligee (creditor) acquires ownership of the mortgaged property, she becomes obligee and obligor with respect to the mortgage, and the mortgage is extinguished. (*But see* CC 3317, third possessor's right to subrogation upon payment of mortgage debt.)

* + **Prescription of the Principal Obligation**-If the principal obligation has prescribed, then the mortgage is extinguished.
  + **Discharge Through Execution**-If the mortgage is foreclosed upon, it is extinguished through execution.
  + **Consent of the Mortgagee**-If the mortgagee consents to the termination of the mortgage, then

the mortgage is extinguished through the parties' agreement.

* + **MIM: Termination Through Notice—**Recall that Multiple Indebtedness Mortgages (CC 3298) are governed by a special rule that involves termination through notice.
  + **Extinction of All Obligations—**When all obligations possibly secured by the mortgage are extinguished, the mortgage is likewise extinguished.
* Defenses to Conventional Mortgages
  + Enumeration of Defenses
    - **The principal obligation is unenforceable**-*See* La. Civ. Code art. 3282. Because a mortgage is an accessory real right, it may be enforced "only to the extent that" the "obligation it secures" may be enforced. Thus, if the principal obligation is absolutely or relatively null, the mortgage is not enforceable.
    - **The mortgage has been terminated**-*See*La. Civ. Code art. 3319 for a list of the causes for termination.

## Conditions for Asserting Defenses

* + - **In General**-"Neither the mortgagor nor a third person may claim that the mortgage is extinguished or is unenforceable because the obligation the mortgage secures is extinguished or is unenforceable unless the obligor may assert against the mortgagee the extinction or unenforceability of the obligation that the mortgage secures." La. Civ. Code art. 3296. Recall that a Holder in Due Course of a promissory note may be able to prevent obligor from raising certain defenses (e.g., vices of consent). In such a case, the mortgage is enforceable by the Holder in Due Course against the mortgagor.
    - **When Mortgage Secures Another’s Obligation**-"A person may establish a mortgage

over his property to secure the obligations of another. In such a case, the mortgagor may

assert against the mortgagee any defense to the obligation which the mortgage secures that

the obligor could assert except lack of capacity or discharge in bankruptcy of the obligor."

La. Civ. Code art. 3295.

## Legal Mortgages

* **Definition**-"A legal mortgage is established by operation of law." La. Civ. Code art. 3284. "A legal mortgage secures an obligation specified by the law that provides for the mortgage." La. Civ. Code art. 3299.
* **Creation of Legal Mortgage**-"A legal mortgage is created by complying with the law providing for it."

La. Civ. Code art. 3301

* + **Example:** Tutorship -La. Code Civ. Proc. art. 4134 provides for the creation of a legal mortgage to secure the obligations of the tutor to the child. The tutor shall record in the mortgage records of

the parish of his domiciled and every other parish in which he owns immovable property a certificate setting forth the date of the birth of the minor, the last four digits of the social security number of the tutor, and the total value of the minor's property. Recording this certificate operates as a legal mortgage for the amount of the certificate in favor of the minor on all the immovable property of the tutor situated in any parish where recorded.

* **Property Burdened by a Legal Mortgage —**"Judicial and legal mortgages burden all the property of the obligor that is made susceptible of mortgage by Paragraphs 1 through 4 of Article 3286 or that is expressly made subject to judicial or legal mortgage by other law." La. Civ. Code art. 3303. "Judicial and legal mortgages are general mortgages. They are established over property that the obligor owns when the mortgage is created and over future property of the obligor when he acquires it." La. Civ. Code art. 3303.
* Duration of Recordation -Dictated by legislation. *See* La. Civ. Code art. 3360: "The effect of recordation of a legal mortgage over the property of a natural tutor.ceases four years after the tutorship.terminates, or, if the tutor.resigns or is removed, four years after the judgment that authorizes the resignation or removal."

## Judicial Mortgages

* Definition -"A judicial mortgage is established by law to secure a judgment." La. Civ. Code art. 3284. "A judicial mortgage secures a judgment for the payment of money." La. Civ. Code art. 3299.
* Creation of Judicial Mortgage -"A judicial mortgage is created by filing a judgment with the recorder of

mortgages." La. Civ. Code art. 3300.

* Property Burdened by Judicial Mortgage -"Judicial and legal mortgages burden all the property of the obligor that is made susceptible of mortgage by Paragraphs 1 through 4 of Article 3286 or that is expressly made subject to judicial or legal mortgage by other law." La. Civ. Code art. 3303. "Judicial and legal mortgages are general mortgages. They are established over property that the obligor owns when the mortgage is created and over future property of the obligor when he acquires it." La. Civ. Code art. 3303.
* Duration of Recordation -Dictated by legislation. *See* La. Civ. Code art. 3360: "The effect of recordation of a legal mortgage over the property of a natural tutor.ceases four years after the tutorship.terminates, or, if the tutor.resigns or is removed, four years after the judgment that authorizes the resignation or removal."
* Effect on Appeal -"A judicial mortgage is not affected or suspended by a suspensive appeal or stay of execution oft eh judgment." La. Civ. Code art. 3304. Note, however, that other law permits a judgment debtor who has taken a suspensive appeal and filed a proper appeal bond to obtain an order terminating the mortgage and erasing the judgment from the records. *See id.*cmt. (b).
* Judgments of Other Jurisdictions **—**Under La. Civ. Code art. 3305, whether filing a foreign judgment creates a judicial mortgage, or whether the creditor is required to obtain and file a judgment of a Louisiana court recognizing or adopting it, is determined by special laws. We will not study those special laws in this course.
* Judgment Against Person Deceased -"A judicial mortgage burdens the property of the judgment debtor only and does not burden other property of his heirs or legatees who have accepted his succession." La. Civ. Code art. 3306; *see also*La. Civ. Code art. 1416.
* Duration of Recordation -"The effect of recordation of a judgment creating a judicial mortgage ceases ten years after the date of the judgment." La. Civ. Code art. 3359. Note that the judgment can be reinscribed in the usual manner.
  + Necessity of Revival -Note that a money judgment prescribes ten years from its signing if no appeal has been taken or, of an appeal has been taken, 10 years from the time it becomes final. La. Civ. Code art. 3501. Thus, to maintain the effectivity of the judicial mortgage, the judgment must

be "revived" before it prescribes. Revival of judgments is governed by the Code of Civil

Procedure.

## Effects and Ranking of Mortgages

* **Between the Parties** -"A mortgage has the following effects: (1) Upon failure of the obligor to perform the obligation secured by the mortgage, the mortgagee may cause the mortgaged property to be seized and sold in the manner provided by law and to have the proceeds applied toward satisfaction of the obligation." La. Civ. Code art. 3307(1).
  + No Self-Help Allowed -Louisiana law generally abhors self-help, and this policy is adhered to in

the context of mortgage. The mortgagee must use judicial process in the enforcement of the mortgage. *See also*La. Civ. Code art. 3140: "Unless expressly permitted by law, a clause in a contract providing in advance that ownership of a thing given as security will transfer upon default in performance of the secured obligation is absolutely null. A clause in a contract obligating the owner of a thing to give it to the obligee in payment of a debt upon a future default in performance of an obligation is absolutely null." Thus, the parties cannot contract around the prohibition against self-help. *See id.*cmts (b) and (d).

* **As to Third Persons (Ranking)**-"A mortgage has the following effects: . (3) The mortgagee is preferred to the unsecured creditors of the mortgagor and to others whose rights become effective after the mortgage becomes effective as to them." La. Civ. Code art. 3307(3). Of course, this depends on proper recordation. Also, as we shall see, privileges may rank ahead of mortgages.
  + In General: Prerequisites for Effects Against Third Persons
    - **Recordation**-Recall that a mortgage must be recorded to have effects against third persons.
    - **Effectivity Between the Parties**-As a general rule, a mortgage cannot have effects against third persons until it is effective between the parties. The prerequisites for the creation of the mortgage must be met and the mortgagor must have rights in the property.
  + Note on Collateral Mortgages (This does not apply to CC 3298)**)**-Per a special revised statute

(RS 9:5551), a collateral mortgage has effects against third persons from the earliest point at which bothof the following occur: (1) recordation of the collateral mortgage and (2) perfection of the UCC security interest in the collateral mortgage note. We'll talk more about perfection of security interests later, but for now be aware that perfection requires that the creditor gives "value"-the advancement of funds or at least a binding obligation to lend in the future.

* + **Practice Note on Duration of Recordation (Old Law)**: Prior to 1993, the law governing the duration of recordation mortgages was different than it is today. The old law provided that if the

mortgage secured a debt maturing less than 9 years from the date of the obligation, then the mortgage, if recorded, was effective against third persons for ten years from the date of the obligation(not the date of the mortgage). If the mortgage secured a debt maturing 9 years or more from the date of the obligation, then the mortgage, if recorded, was effective against third persons for 6 years after the date of the maturity of the obligation. **I will not hold you responsible for the old law on the final exam, but you should be aware that the law has not always been as it is**

**now.** Why should you care? Because if you see a recorded pre-1993 mortgage that does not state the maturity date of the obligation, it may be that the mortgage is still effective after 10 years after the date on the mortgage, as the old law measured from the date of the note-whether maturity was described in the mortgage or not. For example, if a mortgage recorded in 1992 secures a home loan made in the same year that provides for repayment in 30 years, the mortgage will cease to have effects against third persons in 2028 (36 years).

# PRIVILEGES

## In General

* **Definition**- "Privilege is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages." LCC 3186.
  + Nature and Attributes
    - **Accessory—**Like other security devices, a privilege is accessory in nature. It secures a principal obligation.
    - **Real**-A privilege is a form of real security. There is some theoretical debate regarding whether privileges confer "real rights" on the creditor. We will discuss this later in this chapter.
      * *Article 3186* gives the creditor a "preference." Remember that a real right gives the creditor "direct and immediate authority over the thing that is good against the world." For this reason, privilege may not be a fully real right.
    - **Non-Possessory**-Some privileges are nonpossessory; i.e., the debtor retains possession of the thing(s) subject to the privilege. Possessory privileges also exist. We will study both.
    - **Legal**-A distinctive feature of privileges is that they arise *only*by operation of law. "Privilege can be claimed only for those debts to which it is expressly granted in this Code." LCC 3185.

## Ranking of Privileges

* + **Basis for preference among privileges**-"Among creditors who are privileged, the preference is settled by the different nature of their privileges." LCC 3187. The law tells you how privileged it is.
  + **Concurrent privileges**- "The creditors who are in the same rank of privileges, are paid in

concurrence, that is on an equal footing." LCC 3188.

* **Property Affected by Privileges**- "Privileges may exist, either on movables or immovables, or both at once." LCC 3190. *See* CC 3190 (Chapter 3 - of Privileges on Movables), CC 3249 (Chapter 4 - of Privileges on Immovables), CC 3252 (Chapter 5 - of Privileges which Embrace both Movables and Immovables).
* **General v. Special Privileges**- "Privileges are either general, or special on certain movables." LCC 3190. Although the Code doesn't say so explicitly, privileges on immovables are also either special or general.

## Enumeration of Privileges

* + **General Privileges**
    - Funeral Charges
    - Law Charges
    - Expenses of Last Sickness
    - Wages of Servants and Salaries of Clerks
    - Open Account Credit for Retail Provisions
    - Spouse/ Children in Necessitous Circumstances
    - Special Privileges
    - The Lessor's Privilege
    - The Artisan/ Repairman's Privilege
    - Privileges for Expenses of Preservation and Carrier's Charges
    - The Depositor's Privilege
    - The Vendor's Privilege
    - Agricultural Privileges
    - Miscellaneous Privileges
* **Strict Construction**-Privilege law is to be construed restrictively. Only if the exact requirements of the law are met does a privilege arise; and then only in the property specifically identified in the law. *See* LCC 3185. This makes sense because privileges arise by law. Generally, we want to defer strict construction of all security devices.

## Summary of Benefits and Downsides

* + **Benefits**- Some privileges provide a creditor with ranking ahead of prior mortgages and security interests. In addition, for most privileges, third party effectivity is achieved "automatically," although there are some exceptions. Also, these privileges arise without the need for an agreement from the debtor.
    - Non-record right
  + **Downsides—**Privileges cannot be enforced using executory process; creditors must use ordinary process to enforce their rights. Most privileges do not entail a "right of pursuit;" i.e., once the collateral is transferred by the debtor to a third person, the privilege is lost. Indeed, some privileges are possessory, requiring the creditor to retain possession of the property to maintain the privilege.
    - Although privilege cannot be enforced using the executory process, mortgage can. This can make mortgage more advantageous can privilege because absent the option to utilize the executory process, privilege may take a while.
    - The downsides may make it more beneficial for a creditor to utilize a more modern security device.
* **Purposes**-The general purpose of privileges is to give the creditor a way to enforce a debt. Privileges are also beneficial to debtors though because they give the creditor an incentive to extend a line of credit to the debtor that they otherwise probably wouldn't.
* **Illustration of General Principles**-*In Re Green* (pg. 263): Our debtor, who is the owner of a condominium, is in bankruptcy. Under Louisiana law, the condominium association has a privilege on the condominium for all unpaid sums owed to the association. This case involves a claim by the condominium association that is claim cannot be modified or bifurcated in bankruptcy. According to the bankruptcy code, a claim won't be bifurcated if it is a security interest in real property that is the debtor's residence. In the common law, security devices are characterized as "statutory liens," "judicial liens," and "security devices." The condominium association's privilege falls into the category of statutory liens because the authority by which Riverbend acquired a security interest in the condo was the Louisiana Condominium Act. This act gives rise to a privilege through a statute. Not through any judgment, levy, sequestration, or other legal equitable process or proceeding (judicial lien), and not through an agreement between the parties (security interests). The source of this privilege was not the agreement of the parties, but the Act. Further, privileges "can be claimed only for those debts to which it is expressly granted . . ." This privilege is a special privilege because it exists over a certain piece of property. (*See* LCC 3190).

**General Privileges**- The general privileges are all, except for one, privileges on all of the debtor's *movable and immovable* property. (The exception is the privilege for supplies of provisions made by retailers, which applies only to the debtor's movable property.)

## Funeral Charges

* + **Funeral Charges Definition**- "Funeral charges are those which are incurred for the internment of a person deceased." LCC 3192.
  + **Limitation and Reduction**- This privilege secures only the costs of internment, is capped at

$500, and may be reduced if the debtor is insolvent. *See* LCC 3193--94. These articles are not well written. This privilege has never been adjusted for inflation and is rarely used but is actually important.

* + - Privilege covers: casket, headstone, actual burial
    - Privilege does not cover: flowers, widow/widower in limo.
  + **Illustration**- *Alter v. O'Brien (*p. 273) Mrs. O'Brien died, and after her death, Mr. Atler caused a certain piece of her immovable property to be seized and sold in satisfaction of a mortgage debt. The undertaker who buried Mrs. O'Brien and her two children who also died brought suit seeking to be paid by preference out of the proceeds of the sale.
    - *Does the privilege afforded to the undertaker apply to the costs of burying the children?*

Yes, LCC 3257 "with respect to the funeral expenses of the debtor *and his family"*

* + - *How does this privilege rank vis-à-vis the mortgage held by Mr. Alter?* Pursuant to LCC article 3257-Lessor's privilege primed by funeral charges: "The case is the same with respect to the funeral expenses of the debtor and his family: when there is no other source from which they can be paid, they have a preference over the debt for rent or hire, on the price of the movables contained in the house or on the farm."
    - *What is the purpose of the funeral charges privilege?* To encourage people to take on burying people, otherwise dead bodies would be everywhere. This was especially a concern during the plague outbreak when diseased corpses would be lying around.

## Law Charges

* + **Law Charges definition**- "Law charges are such that are occasioned by the prosecution of a suit before the courts. But the name applies more particularly to the costs, which the party cast has to pay to the party gaining the cause. It is in favor of these only that the law grants the privilege." LCC. 3195. In other words, the debt is the cost of the litigation, the debtor is the loser of the litigation, and the creditor is the winner of the litigation.
  + **Costs Which Enjoy Privilege**- "The creditor enjoys this privilege, not with regard to all the

expenses which he is obligated to incur in obtaining judgment against his debtor, but with regard only to such as are taxed according to law, and such as arise from the execution of the judgment." LCC 3196. This only covers a couple thousand dollars.

## Last Sickness

* + **Last Sickness Definition**--The last sickness is considered to be that of which the debtor died; the expenses of this sickness enjoy the privilege." LCC 3199. This privilege extends also to the last illness of the debtor's children. *See* La. Civ. Code art. 3204. Here there is no dollar cap on the privilege. Today, because of insurance, this privilege is not used very much. ( ).
    - *What is the purpose of this privilege? Succession of Barry*, (p. 297). "Humanitarian considerations underlie granting of this privilege of high rank in favor of those to whom claims are due for services rendered in the time of need." The purpose behind this is to make it less likely that one will be deprived of much needed service because of doubtful means of payment. This way a way of providing social insurance before insurance.
  + **Chronic Illnesses/ Maximum Definition**- If the sickness was chronic, then only the expenses

beginning from the time the debtor was confined to his "bed or chamber" are privileged. *See* LCC 3200. Also, the privilege extends only to expenses incurred within the year before the debtor died. *See* LCC 3201.

* + **Expenses Privileged**- The expenses that are privileged include those for physicians and

surgeons, nurses, and apothecary (pharmacy). *See* La. Civ. Code art. 3202.

* + - *Are hospital bills included among the expenses covered by the privilege? See Pelican State Associates, Inc. v. Windsor,* (p. 292). Finding that LCC 3202 is not definitive but illustrative, the Court decided that 3202 was intended to encompass and to include hospital bills. This holding is further supported by LCC 3191 which provides as one of the privileged debts on movables, "charges, *of whatever nature*, occasioned by the last sickness." Although the listing of privileged expenses in LCC 3202 is narrow, "one would hardly think that the framers of the Code intended to cramp the future resources of medical science by the enumeration of items in art. 3202." (p. 296). (Keep in mind La. R.S. 9:4751).

## Wages of Servants and Salaries of Clerks

* + **Wages Servants**
    - **Servants Definition**-"Servants or domestics are those who receive wages, and stay in the home of the person paying and employing them for his services or that of his family; such are valets, footmen, cooks, butlers, and others who reside in the home." LCC. 3205.
    - **Prescription of action; extent of privilege**- This privilege secures claims of servants for the past year. La. Civ. Code art. 3206. Of course, past wages other than these may be

recovered according to the general rules of obligations, but the debt is unsecured. *See* LCC. 3207.

## Clerks and Secretaries

* + - **Privilege for clerks and secretaries**- "Although clerks, secretaries, and other agents of that sort cannot be included under the denomination of servants, yet a privilege is granted them for their salaries for the last year elapsed, and so much as has elapsed of the current year. This privilege, however, cannot be enforced until after that of the furnishers of provisions." LCC 3214.

## Open Account Credit for Retail Provisions

* + **Supplies Furnished by Retail Dealers**- "Such supplies of provisions as confer a privilege, are those which are made by retail dealers; that is, persons keeping an open shop, and selling, by small portions, provisions and liquors." La. Civ. Code art. 3205. This includes "butchers, bakers, and grocers" as well as "keepers of boarding houses and taverns." *See* LCC art. 3191(5); 3211.
  + **Prescription; Extent of Privilege**- This secures unpaid prices for retailers for the last six months

and for innkeepers and taverns for up to one year. *See* La. Civ. Code arts. 3209, 3213.

* + **Movables Only**- Unlike the other general privileges, this privilege is on movable property of the debtor only. *Cf.* La. Civ. Code arts. 3191 and 3252. 3252 covers "general privileges on both movables and immovables" and the privilege for open account credit for retail provisions is not listed.

## Spouse/Children Necessitous Circumstances

* + **Necessitous Circumstances**- Whenever a surviving spouse or minor children of a deceased person shall be left in necessitous circumstances, and not possess in their own rights property in the amount of one thousand dollars, the surviving spouse or the legal representatives of the children, shall be entitled to demand and receive from the succession of the deceased spouse or parent, a sum which added to the amount of the property owned by them, or either of them, in their own right, will make up the sum of one thousand dollars.." La. Civ. Code art. 3252. You must

have collectively less than $1K in assets, and all it gives you is up to $1K collectively (including what you already have).

* + - *At what point in time do we evaluate the circumstances of the spouse and children to determine if they meet the standard articulated in this article? See Succession of White (p. 300)*. "The right of the widow and of the minor children of a decedent . . . vests in them *at the moment of the death of the deceased*, and their condition then, and not at any subsequent time, is the test of the rightfulness of their claim." The idea is to protect from destitution the widow and children "at the moment when the protecting arm of the husband and father was made powerless by death."
    - *Do “minor children" include grandchildren? See Succession of Vives, (*p. 302). Yes, "upon the death of the widow and usufructuary the money 'shall vest in and belong to the children *or other descendants* who are minors.'"
      * LCC art. 3506(8) defines "children" to include not only a person's immediate offspring but also "descendants of them in the direct line." BUT the alternative argument is if the words "minor children" at the beginning of the last paragraph of LCC art. 3252 were intended to include minor grandchildren then why does the last sentence of the paragraph refer to "children and other descendants"? It is unclear whether this is the product of bad drafting or if it provides a basis for interpretation of the meaning of "minor children."
      * Courts have difficulty in answering whether and under what circumstances grandchildren have the right to assert the privilege of the needy surviving spouse.

▫ *Succession of Vives* (1883): Minor grandchildren of a deceased widow could assert the privilege against major heirs of the husband's succession.

▫ *Succession of Watske* (1916): The wife had predeceased the husband, and the court held that minor grandchildren were not permitted to claim the privilege, because the word "children" does not include grandchildren.

* + **Usufruct**-"The surviving spouse shall have and enjoy the usufruct of the amounts so received

from the deceased spouse's succession, until remarriage, which amount shall afterwards vest in and belong to the children or other descendants of the deceased spouse." LCC art. 3252.

* + - *Is security owed for this usufruct? See* 573(A)(1). No. "Security is dispensed with when any of the following occur: (1) A person has a legal usufruct under Article 223 or 3252. LCC art. 573(A)(1).
    - *When the usufruct terminates, who are the “children and other descendants" who are entitled to the $1,000 following the termination of the spouse's usufruct? See Succession of Vives, (*p. 302). See above.
  + **Relation to Martial Portion**- *See* 2432. The surviving spouse is entitled to the marital portion

when her decedent spouse dies "rich in comparison" to her. "Rich in comparison" is a 5:1 ratio (LCC art. 2432 cmt. C). Louisiana courts have held that a spouse can claim either the marital portion or the privilege described in CC 3252, but not both. *See Succession of Tacon*, (p. 305).

* + - *If the spouse cannot claim both, then under what circumstances is she likely to claim one over the other?*

**Special Privileges**- All privileges other than the ones described above are *special* privileges; i.e., they extend only to specific movable or immovable property designated by the statute(s) creating the privilege.

## Overview of Special Privileges

* + **Special Privileges on Immovables**-The Civil Code establishes only two special privileges on immovables: the privilege of the vendor and the privileges of architects, contracts, and others involved in the construction and repair of houses, buildings, and other works. The latter category of special privileges has been entirely supplanted by the Private Works Act, which we will cover later in this course.
  + **Special Privileges on Movables**-The Civil Code establishes several special privileges on

movables, including not only the vendor's privilege but also the lessor's privilege on movables of the lessee located on the lease d premises, and the various privileges of the artisan, depositor, innkeeper, carrier, farm laborer, etc.

* **Miscellaneous Special Privileges**- The law creates thousands of special privileges; some of these miscellaneous privileges are noteworthy in that they are recognized in virtually every state. Others are simply of interest.
  + **Innkeepers for food and lodging expenses**-Article 3217(8) gives the innkeeper a privilege on

all of the personal effects of the traveler "carried into the inn" to secure payment for lodging and provisions. This is of relatively little importance today, but it is a privilege that is recognized in many states. Applicable only when the traveler is still in the inn.

* + **Attorney’s Fees**- To secure the repayment of attorney's fees and advances, R.S. 9:5001 grants a

only *judgments, not settlements*).

special privilege on any money or property an attorney recovers for her client.

(**Note:** this covers

Some states offer a privilege on all of the client's papers deposited with an attorney (a "retaining" lien) but Louisiana limits the privilege on property recovered in litigation (a "charging" lien). This is primarily for plaintiff's attorneys.

* + - In addition, La. R.S. 37:218 allows lawyers to take a contractual interest (via an "assignment") in potential recovery as part of a contingency fee contract. According to the Louisiana Supreme Court, this arrangement creates a special privilege in favor of the attorney on the client's recovery. *Calk v. Highland Const. & Mfg.*, 376 So. 2d 495 (La. 1979). **This covers not only judgments but also *settlements***.
* **Dry Cleaners for Cleaning Charges**-Dry cleaners and others who clean or repair carpets, rugs, clothing and other household goods have a privilege on the things to secure payment of cleaning and storage fees and expenses. R.S. 9:4681-89. **The privilege is only good while the things remain in the cleaner’s possession** and the cleaner can refuse to give up the thing until paid.
* **Medical Providers for charges incurred in treating injuries caused by tortious conduct**-Health care provider, hospitals, and ambulance services have a special privilege on any judgment, settlement, or insurance proceeds arising from injury treated. R.S. 9:4751-55. (Lawyers' fees, however, come first.) To establish the privilege, the health care provider or ambulance service has to send written notice (certified, return receipt) to the injured person, the insurance company, and liable party. Anyone who pays *after* notice to anyone other than the privilege holder is liable to the holder. This is a *paperwork privilege* and requires person seeking the privilege to send notice by certified mail to all interested persons.
* **Even More Miscellaneous**-To get an idea of how varied, obscure, and preferential most special

privileges are, consider the following ("silly privileges"):

* + A privilege on sewing machines and pianos purchased on credit
  + A privilege for debts related to harvesting moss
  + A 6-month privilege for debts for feeding and caring for horses
  + A privilege for repair of jewelry and watched worth less than $10
  + A 30-day privilege for wages in producing manufactured sugar, syrup, or molasses
  + A 90-day privilege associated with logs and lumber
  + Many more!

**The Lessor’s Privilege**- Articles 3217(3) and 2707 give a privilege to owners of immovables who lease them to others to secure the rent and other obligations under the lease. This privilege is frequently tested on the Louisiana bar examination. Note: Louisiana law is super landlord friendly, this arising by law is just another way we protect landlords. The lessor's privilege is declining in utility because of UCC art. 9 which is more powerful in most cases.

## General Provisions

* + **La. Civ. Code art. 3217(3)**-**“**The debts which are privileged on certain movables, are the following: . The rents of immovables and he wages of laborers employed in working the same, on the crops of the year, and on the furniture, which is found in the house let, or on the farm, and on every thing which serves to the working of the farm."
  + **La. Civ. Code art. 2707**- "To secure the payment of rent and other obligations arising from the

lease of an immovable, the lessor has a privilege on the lessee's movables that are found in or upon the leased property. In an agricultural lease, the lessor's privilege also encompasses the fruits produced by the land." This applies to all obligations of the lessee: pay rent, take care of property.

## Property Encumbered

* + In General- Since the immovable belongs to the lessor, no right on the immovable is needed. The privilege extends to movable property found on the leased immovable.
    - Movable Property of the Lessee- The privilege extends to all of the lessee's movables located anywhere on the immovable property. Note that under Article 2710, "The lessor may seize the movables on which he has a privilege **while they are in or upon the leased property, and for fifteen days after they have been removed if they remain the property of the lessee and can be identified.**" In addition, "The lessor may enforce his privilege against movables that have been seized by the sheriff or other officer of the court, without the necessity of a further seizure thereof, as long as the movables or the proceeds therefrom remain in the custody of the officer."
    - **Movable Property of the Sublessee**- "The lessor's privilege extends to the movables of the sublessee but only to the extent that the sublessee is indebted to his sublessor at the time the lessor exercises his right." LCC art. 2708. (One of the lessee's rights unless restricted by contract is to sublease).
      * **Hypothetical**- Lessor leases Blackacre to Lessee, who in turn subleases to Sublessee. Assume Lessee owes $10,000 to Lessor, but Sublessee owes only

$5,000 to Lessee (Sublessor). Sublessee's property is subject to the lessor's privilege only up to $5,000 (not the entire $10,000 owed by Lessee). However, if the Lessee has any property on the premises, then it is subject to the privilege up to the entire $10,000. There are 2 distinct contracts: (1) lessor-lessee; (2) lessee-

sublessee. The sublessee is not contractually bound to lessor. In this hypothetical, the lessor steps into the shoes of the tenant as lessor, so can only recover up to what the sublessor can. *Note: see La. Civ. Code art. 2708 cmt. b for a discussion of this limitation.*

▫ *“The underlying premise of Civil Code Article 2708 is that the lessor is in fact doing more than indirectly exercising the privilege enjoyed by the sublessor (who as a lessor of the sublessee is entitled to a privilege over the sublessee's property). A lessor seldom executes the lease in reliance upon the financial worth of a sublessee and in the rare care that he might do so, other means of security are available if he wishes to use the sublessee's rent as security and protect against a waiver or payment by anticipation in advance of a default by the lessee." LCC art. 2708 cmt. b.*

* + - **Movable Property of Others**- Movables belonging to persons other than the lessee or a sublessee (i.e., residential: overnight guests; commercial: customer's goods or equipment) are not subject to the privilege. However, see LCC art. 2709: "The lessor may lawfully seize a movable that belongs to a third person if it is located in or upon the leased property, unless the lessor knows (actual knowledge) that the movable is not the property of the lessee. The third person may recover the movable by establishing his ownership prior to the judicial sale in the manner provided by Article 1092 of the Code of Civil Procedure. If he fails to do so, the movable maybe sold as though it belonged to the lessee."
      * **Illustration**- *Read Henry Rose Mercantile & Mfg. Co. v. Stearns*.

▫ *Who was the “third person" whose property was seized by the lessor?*

Montgomery Ward & Company under the name of Hummer Plow Works.

▫ *What was the arrangement between the third person and the lessee?* HPW entered in to a contract with Stearns in which it was agreed that HPW would ship Stearns "carload lots of implements, wagons, and other equipment handled by it" and Stearns would "store the goods to be shipped in his place of business." Stearns was to display the items, had the right to sell any of the goods, furnish HPW with a monthly list of goods on hand. HPW also had the right to sell any part of the goods. K did not provide Stearns would receive any $ for storage from HPW. K did provide that Stearns would receive, for his expense and trouble in handling the goods, the difference between the prices fixed by HPW and those to be obtained by him for the goods.

▫ *Was the property of the “third person" subject to the lessor's privilege?* Yes, the property of the third person was subject to the lessor's privilege under art. 2707 because it was "the property of a third person, placed in the leased premises with the consent of such person, and coming within none of the exceptions provided by law." HPW tried to say it was a deposit, however, the court found no deposit was made within the meaning of 3260 as the intention of the parties was for the items to be sold, not preserved and returned in kind to HPW by Stearns. HPW also tried to say not subject to the lessor's privilege because "transiently" on the premises

▫ *How does the new law differ from the law in effect at the time this case was decided?* With the 2004 revision of the lease articles, the movables of a third person who is not a sublessee are not subject to the lessor's privilege, and the third person is thus now treated more favorably than a sublessee. Moreover, under the 2003 revision of the law of deposit, a deposit can now be onerous as well as gratuitous (LCC art. 2928). Formerly, deposit was always gratuitous, thus if the storage was for compensation then could not be a deposit. Now, even those who store stuff for compensation may

contend that they are not sublessee's but rather depositors, and that their goods are now wholly free of any privilege in favor of the lessor of a leased storage facility.

▫ *Would the case have been decided differently today? Why or why not?* No, because the law is different the analysis would be different but the outcome would be the same. The intention for the contract in Henry Rose Mercantile was still not proper because it was to sell the items not to keep them and return them in kind as required to be a deposit under LCC art. 2926.

* **No Right of Pursuit**- The lessor's privilege does not entail any right of "pursuit" other than the limited 15-day window provided for in Article 2710. If the property has been seized by another creditor, the lessor may assert his right against the property, but once the property is sold at judicial sale, if the lessor has failed to assert his privilege then it will be lost.
  + **Illustration**- *Read Desban v. Pickett*. *Here, the lessor attempted to seize household furniture of*

*the lessee after its removal from the leased premises. Was he successful?* No. Generally, the lessor has a right of pledge on movable effects of the lessee, which are found upon the property leased, and may even seize them within 15 days after they are taken away, if they continue to be the property of the lessee, and can be identified for the payment of his rent. (LCC art. 2675, 2679). However, the right of seizure after removal is made to depend on the continued ownership of the lessee. In this case, the furniture ceased to be the property of the lessee before the lessor seized it. The sale and delivery of the furniture to a third person extinguished the lessor's right of privilege.

**The Artisan/Repairman’s Privilege**- Louisiana, like other states, offers a privilege to persons who make and repair goods to secure the payment of the fee for their service. This privilege is provided for both in the Civil Code and several Revised Statutes. The Civil Code and statutory privileges are independent of one another; that is, neither one limits the other.

* **Civil Code Privilege**- "The debt of workman or artisan for the price of his labor, on the movable which he has repaired or made, *if the thing continues still in his possession*." (La. Civ. Code art. 3217(2)). This is supposed to be construed strictly, but courts have been holding that this applies to materials as well as labor. This isn't really a problem anymore because the statutory privilege clearly applies to both material and labor.
  + **Debt Secured**-This privilege protects the workman or artisan for the price of labor. By its own

terms, the privilege does not appear to extend to materials. Louisiana courts have held, however, that the privilege extends to materials. *See, e.g., Cozzo v. Ulrich*, 14 Orl. App. 137 (La. App. Orl. 1916).

* + **Possession of the Repairman**- The privilege is ***possessory*** in that it is lost if the workman or

artisan relinquishes possession of the thing that was made or repaired. If the artisan or workman voluntarily relinquishes the thing, then the privilege is lost (although, apparently, the privilege is not lost if he is involuntarily dispossessed, including by the owner or by judicial sequestration). Louisiana courts have held that when a workman or artisan is sent to the owner's place of business to repair the thing, it remains in his possession as long as he is actually at work making or repairing it. *See, e.g., Cozzo v. Ulrich*, 14 Orl. App. 137 (La. App. Orl. 1916). Courts have also held that a repairman maintains possession when he uses the equipment on another person's property. *See Wooldridge Prod. Co., Ltd. v. Goldstream Corp.*, 827 So. 2d 1211 (La. App. 2 Cir. 2002).

* + - Possession-defined and expanded by jurisprudence: actual/corporeal; possession of debtor but repairman is working on it; possession by third person while repairman using.
  + **Right of Retention**- *Gayarre v. Tunnard*, 9 La. Ann. 254 (1854). This case involved the claim

of a repairman of a wheeled carriage against its owner for the cost of its repair ($2). The repairman refused to relinquish possession of the carriage until the owner paid. The court held that the repairman had the right to retain the property until payment was rendered. Note that the Civil Code provides for a "right of retention" in a number of circumstances *other than* the repairman's privilege. For a list of some examples, see Note 4 on p. 331.

* **The Statutory Privileges**- The statutory privileges appear in Louisiana Revised Statutes §§ 9:4501 & 4502. Much less restrictive than the Civil Code privileges.

## General Statutory Privilege La. R.S. 9:4502

**La. R.S. ß 9:4502. Privilege for making or repairing movable goods, commodities, equipment, merchandise, machinery, and other movable objects**

A. (1) Any person engaged in the making or repairing of movable goods, furniture, upholstery, commodities, equipment, merchandise, machinery, marine vessels, trailers used in transporting marine vessels, equipment or motors used on marine vessels, or movable objects or movable property of any type or description, has a privilege on the thing for the debt due him for **materials furnished or labor performed**. **This privilege is effective for a period of one hundred twenty days from the last day on which materials were furnished or labor was performed, if the thing affected by such privilege is removed from the place of business where such labor was performed or materials furnished**; provided that if the thing affected by such privilege remains in the place of business of the person who furnished such materials or performed such labor, such privilege continues as long as such thing remains in such place of business.

(2) This privilege is effective for a period of twelve months from the last day on which materials were furnished or labor was performed on any farm equipment or machinery, if said thing affected by such privilege is removed from the place of business where such labor was performed or materials furnished; provided, further, that this special farm privilege shall not be effective for more than one hundred twenty days as against third parties who purchase the equipment or machinery, or who lend money secured by the equipment or machinery, in good faith without knowledge of the existence of any privilege.

\* \* \* \*

* **Distinction from the Civil Code privilege**- This statutory privilege differs from the Civil Code privilege in two important respects:
  + **Scope**-While it is uncertain whether the Civil Code privilege covers materials in addition

to labor, the statutory privilege clearly covers "materials furnished or labor performed."

* + **Right of Pursuit**- Unlike the Civil Code privilege, the statutory privilege continues even after possession has been relinquished by the artisan or repairman.
    - **General rule**- The general rule of pursuit here is 120 days from the last day on which materials were furnished or labor was performed *or* whenever the repairman relinquishes possession, whichever is later.

▫ **Example**- Manny hired Rocket Repair to repair certain manufacturing equipment used in his business. On March 1, Rocket Repair completed the work on the equipment and notified Manny that he could retrieve the equipment from the repair shop. On March 10, Manny picked up the equipment. On April 10, Rocket Repair sought to enforce its privilege. *Can the privilege be asserted on the manufacturing equipment? For how long?* YES, 120 days after the service start on the next day (March 2). ***Variation*:** Assume now that Rocket Repair completed the work on March 1. However, by September 1, Manny still had not picked up the equipment. Assume it is now September 1: *Can the privilege be still be asserted on the manufacturing equipment?* YES, still in possession of Rocket Repair.

* + - **Farm Equipment**- The right of pursuit is good for 12 months after the last date on which parts or labor was furnished; however, the 120-day period applies to purchasers or lenders who acquired rights in the equipment without knowledge of the existence of the repair privilege.

## Statutory Privilege for Auto Mechanics and Part Makers, La. R.S. 9:4501 La. R.S. § 9:4501. Repairman's privilege on automobiles and other machinery

A. Any person operating a garage or other place where automobiles or other machinery are repaired, or parts therefor are made or furnished, has a privilege upon the automobile or other machinery for the amount of **the cost**

**of repairs made, parts made or furnished, and labor performed**. If an estimate was given by the repairman for the repairs, then in order for the amount of the privilege to exceed the amount of the estimate, the repairman **must secure authorization to exceed the amount of the estimate**. **This privilege is effective for a period of one hundred twenty days from the last day on which materials were furnished or labor was performedif the thing affected by such privilege is removed from the place of business where such labor was performed or materials were furnished**; provided that if the thing affected by such privilege remains in the place of business of the person who furnished such materials or performed such labor, such privilege continues as long as such thing remains in such place of business. For the purposes of this Section, it is immaterial where the automobile or other machinery may have been located at the time or by whom the parts may have been attached.

\* \* \* \* \*

* **Scope/Special Characteristics**- This privilege is very similar to RS 9:4502 with just a few notable exceptions: (1) it is limited to auto mechanics and part makers;

(2) if an estimate was provided for the repairs, in order for the privilege to exceed the estimate, the repairman must secure authorization to exceed the amount of the estimate.

## Some issues applicable to statutory and civil code privileges

* + **Repairperson v. Vendor**-In *Thompson Chevrolet Co. v. Blanchard* a person who had furnished parts and labor to repair an automobile was prevented from claiming either the Civil Code privilege for repairmen (because he relinquished possession of the automobile to the owner) or the statutory privilege for auto mechanics (because at the time of the decision the privilege extended for only 90 days from the last date on which materials were furnished or labor performed, and that period had expired). He attempted instead to claim the vendor's privilege on the parts.
    - *Was the mechanic able to claim the vendor's privilege? Why or why not?* No. Furnishing parts and materials = incident to and a part of repair and was insufficient to convert a repairman into a vendor. This court used the dictionary definition of the word repair-today we have jurisprudential test.
    - Note that the proper classification of a contract as one "to build or work by the job" vs. a sale is a complex task, and that a rich body of jurisprudence has grown up around this problem in the years since *Blanchard* was decided.
  + **Enforcement of the Privileges**- The privileges are properly enforced using the writ of sequestration. A writ of sequestration often requires the posting of a bond or other security. The statutory privileges do not, however, require the posting of a bond.

## Privileges for Depositary and Depositor’s

* **The Concept of Deposit**- Recall that a contract of "deposit" exists when one party gives a movable thing to someone else to hold. *See* LCC art. 2926. The depositor is the party who gives the thing. The depositary is the person who holds the thing. A common modern example is the warehousing of commodities like grain.

## The Depositary’s Privilege

* + - **Overview**- The law protects the depositary with a privilege in any items stored to secure the depositor's payment of any *expenses* incurred to hold or preserve the thing. *See* La. Civ. Code arts. 3217(6), 3224----26. This privilege secures the depositary's expenses ("money laid out"), *not* the contract price and it includes a right of retention. However, a statutory privilege for "warehouses" secures the payment of charges for storage *or* transportation. [Note that because this covers "transportation" charges, it also supplements the "carrier's" privilege, described below.]

## The Civil Code Privilege

* + - * **La. Civ. Code art. 3217(6))**-The debts which are privileged on certain movables, are the following: . . . (6) the debt due for money laid out in preserving the thing.
      * **La. Civ. Code art. 3224**-"He who, having in his possession the property of another, whether in deposit or on loan or otherwise, has been obliged to incur any expenses for its preservation, acquires on this property two species of rights."
      * **La. Civ. Code art. 3225**-"Against the owner of the thing, his right is in the nature of that of pledge, by virtue of which he may retain the thing until the expenses, which he has incurred, are repaid. He possesses this qualified right of pledge, even against the creditors of the owner, if they seek to have the thing sold. He may refuse to restore it, unless they either refund his advance, or give him security that the thing shall fetch a sufficient price for that purpose."
      * **La. Civ. Code art. 3226**-"Finally, he who has incurred these expenses has a privilege against these same creditors, by virtue of which he has preference over them out of the price of the thing sold, for the amount of such necessary charges as he shall have incurred for its preservation. This is the privilege in question in the present paragraph."
    - **The Statutory Privilege—R.S. 10:7-209**-R.S. 10:7-209 gives a "warehouse" a privilege against a depositor on the goods covered by a warehouse receipt or deposit agreement or the proceeds thereof in its possession *for charges for storage or transportation of the goods*. A "warehouse" is a person engaged in the business of storing goods for hire. R.S. 10:7-102. A "warehouse receipt" is document that indicates what goods are held by the warehouse on behalf of a depositor. [Note that because this covers "transportation" charges, it also supplements the "carrier's" privilege, described below.]

## La. R.S. 10:7-209—expands on Civil Code articles

1. A warehouse has a lien against the bailor on the goods covered by a warehouse receipt or storage agreement or on the proceeds thereof in its possession for charges for storage or transportation, including demurrage and terminal charges, insurance, labor, or other charges, present or future, in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law.

\*\*\*\*\*

* + **The Right of Retention**- In addition to the above privileges, La. Civ. Code art. 2939 gives the depositary the right of retention, i.e., the right to refuse to return the item to the depositor if the depositor doesn't pay the *contract price*: "The depositary may retain the thing deposited until his claims arising from the contract of deposit are paid. He may not retain the thing until payment of a claim unrelated to the contract of deposit or by way of setoff."

## The Depositor’s Privilege

* + - **Overview** -The law protects the depositor's rights in stored items if they are seized by the depositary's creditors or improperly sold by the depositary. The depositor has a privilege on any stored item to secure its return, or on the price of the thing (if the depositary improperly sold the item). *See* La. Civ. Code arts. 3217(5), 3222-3223.
    - Authority
      * **La. Civ. Code art. 3217(5)**-"The debts which are privileged on certain movables, are the following: (5) That of a depositor, on the price of the sale of the thing by him deposited."
      * **La. Civ. Code art. 3222**-"He who deposits a thing in the hands of another still remains the owner of it. Consequently his claim to it is preferred to that of the other creditors of the depositary, and he may demand the restitution of it, if he can prove the deposit, in the same manner as is required in agreements for sums of money, and if the thing reclaimed is identically the same which he deposited."
      * **La. Civ Code art. 3223**-"If the depositary abuses his trust, by alienating the thing confided to his care, or if his heirs sell it, not knowing that it had been given in deposit, the depositor retains his privilege on the price which shall be due."
    - **Requirement that thing be “identically the same which he deposited”**-La. Civ. Code art. 3222 requires that the "thing reclaimed [be] identically the same which he deposited." An understanding of this rule requires an understanding of the distinction between "deposit" and "loan for consumption."
      * **Distinction between deposit and loan for consumption**-According to Article 2932, "[w]hen the thing deposited is a consumable and the depositary has permission to consume or dispose of it, the contract is a loan for consumption rather than a deposit and is governed by the laws applicable to that contract." *See also* La. Civ. Code art. 2904: "The loan for consumption is a contract by which a person, the lender, delivers consumable things to another, the borrower, who binds himself to return to the lender an equal amount of things of the same kind and quality"*and* La. Civ. Code art. 2935, cmt. c: "Money is . consumable."
      * **Commingling**-Even if a deposit is a true "deposit;" i.e., the thing is either not consumable or the depositary does not have permission to consume or dispose of it, if the thing deposited is commingled with other things of the same kind such that the identity of the thing deposited is destroyed, the privilege is lost. Classification as a loan for consumption is not necessary if the item is fungible it will still be considered a loan for consumption and the privilege will not be operable.

## The Carrier’s Privilege

* **Overview** -To encourage transportation companies to haul things, Article 3217(9) and R.S. 9:4601 give a privilege to carriers on the things transported to secure payment of the transport costs (including taxes, storage, customs fees, etc.). The Civil Code privilege extends to the carrier only while the thing is in the carrier's possession, but the revised statute extends the privilege to 180 days after the transport is complete (even in the hands of a third person as long as it is still identifiable). The purpose of this privilege is to encourage transportation companies to haul things.

## The Civil Code Privilege

* + **La. Civ Code art. 3217(9))**-"The debts which are privileged on certain movables, are the following: . . . (9) The carrier's charges and he accessory expenses, on the thing carried, including necessary charges and expenses paid by carriers; such as taxes, storage and privileged claims required to be paid before moving the thing; and in case the thing carried be lost or destroyed without the fault of the carrier, this privilege for money paid by the carrier shall attach to insurance

effected on the thing for the benefit of the owner, provided written notice of the amount so paid by the carrier and for whose account, with a description of the property lost or destroyed, be given to the insurer or his agent within thirty days after the loss, or if it be impracticable to give the notice in that time, it shall be sufficient to give the notice at any time before the money is paid over."

* + - **Debt Secured**-The debt secured here includes the charges for transportation and other

"accessory' expenses paid by the carrier in transporting the thing.

## Property Subject to the Privilege

* + - * **The thing carried** -The thing carried, *while it is in the possession* of the carrier, is subject to the privilege.
      * **Insurance Proceeds —**If the thing has been lost or destroyed without the fault of the carrier, then the privilege attaches to *insurance proceeds* payable to the owner of the goods. To claim insurance proceeds, the carrier must provide notice to the insurer in the manner provided by law.

## The Statutory Privilege—La. R.S. 9:4601 La. R.S. 9:4601

A. Any person engaged in the business of hauling has a privilege on the property hauled for the charges or labor performed in connection therewith for a period of one hundred eighty days from the last day of hauling or performing such labor.

\* \* \* \* \*.

* **Overview/ Distinction from Civil Code Privilege** -Under RS 9:4601, the privilege is extended

for **180 days**from the last day of hauling, even if the thing has been delivered to its destination. **Vendor’s Privilege**-Still largely important unlike deposit/carrier privilege. Might want this in addition other privileges because sometimes outranks even mortgage.

## In General

* + **Overview** -The law provides the vendor of a thing (whether immovable or movable) with a privilege in the thing sold. This privilege secures the vendor's right to the unpaid purchase price. The privilege varies quite a bit depending upon whether the thing sold is immovable or movable.

## Authority (might find UCC 9 more useful because it is more powerful)

* + - **La. Civ Code art. 3217(7)**-The debts which are privileged on certain movables, are the following: (7) The price due on movable effects, if they are yet in the possession of the purchaser."
    - **La. Civ Code art. 3249(1)**-"Creditors who have a privilege on immovables, are: (1) The vendor on the estate by him sold, for the payment of the price or so much of it as is unpaid, whether it was sold on or without a credit."
  + **Explanation and Purpose** -A sale is complete when the parties agree as to the thing and the

price, and even if the price is not yet paid, the contract is enforceable. Moreover, in general, the transfer of ownership of the thing sold occurs at the moment of the parties' *consent*, again, irrespective of whether the price has yet been paid. The vendor's privilege is therefore needed in order to prevent an inequity-the buyer becoming enriched at the vendor's expense. The vendor's privilege also facilitates sales that may not otherwise take place because of a buyer's un- creditworthiness.

* + - **La. Civ Code art. 2439**-"Sale is a contract whereby a person transfers ownership of thing to another for a price in money. The thing, the price, and the consent of the parties are requirements for the perfection of a sale."

delivered nor the price paid."

is agreement on the thing and the price is fixed, even though the thing sold is not yet

**La. Civ Code art. 2456**-"Ownership is transferred between the parties as soon as there

## Meaning of “Price”

* + - **A sum payable to the vendor**-One meaning of the term "price" is a sum payable directly to the vendor. Thus, if Buyer agrees to pay Seller $200,000 for Blackacre, then the privilege secures the price of $200,000.
    - **A pre-existing indebtedness of the vendor**-If the buyer agrees to assume an existing obligation of the vendor, then the vendor's privilege arises in favor of the creditor of the pre-existing debt. *De L'Isle v. Succession of Moss*, 34 La. Ann. 164 (La. 1882) [In text on

p. 361 but not assigned]. (Buyer agrees to assume debt-if the buyer doesn't pay the debt then the vendor's privilege can be exercised).

* **Vendor’s Privilege on Movables** -The most important thing to remember about the vendor's privilege on movables is that it generally exits only as long as the immediate buyer remains ***in possession of the thing sold***. The vendor's privilege on movables is governed by La. Civ. Code art. 3227 and La. R.S. §§ 9:4581-82. Because the vendor's privilege on movables is so limited, a seller of movables today is more likely to take a UCC 9 security interest in the thing(s) sold.
* **Civil Code Privilege** -"He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, **if the property still remains in the possession of the purchaser**." (La. Civ. Code art. 3227).
  + **Possession**-Recall that Louisiana courts interpret "possession" rather broadly in the context of the repairman's privilege. In the context of the vendor's privilege, Louisiana courts have struggled with the appropriate meaning of the term. On this point, read carefully *In re Trahan* (p. 387). This bankruptcy decision turned on whether the vendor's privilege would be enforceable against a "bona fide

purchaser" of the thing sold so long as the buyer remained in possession of the thing. More simply put: If the thing is sold but has not yet been delivered, does the vendor's privilege still exist?

▫ *How did the court rule on this issue? Why?* The court ruled that the vendor's privilege still existed because the resale of property by the vendee does not divest the original vendor of his privilege unless there is *actual physical delivery* to the second vendee. "In holding that the vendor's privilege survived the bankruptcy filing, the *Trahan* court placed great weight upon the argument that, because a sale unaccompanied by delivery is not effective against third persons, and because the seller's creditor's, including presumable his own unpaid vendor, still have the right to seize his assets, the vendor's privilege should remain effective until delivery occurs." (p.393). *See* article 518.

▫ Disputes arise when physical possession is relinquished but ownership is not transferred.

**Immobilization of Movables**-Will a vendor's privilege survive the

immobilization of the movable sold? This vexing question has been addressed by a body of jurisprudence. *Cristina Inv. Corp. v. Gulf Ice Co.* (p. 403). "So long as [(1)] the price is unpaid, and [(2)] the movable has not lost its identity, and [(3)] can be separated from the land, tenement, or building to which it has been attached without injury to the immovable, as to the vendor it remains movable, and he may subject the same to his vendor's privilege."

▫ Following Cristina, the Louisiana Supreme Court seemed to chart an entirely new course in *American Creosote* by stating that "if a thing is immovable by nature then it is immovable to everyone." What *American Creosote* implies with respect to the continued existence of a vendor's privilege following immobilization is not entirely clear. *American* Creosote seems to, in dicta, support the proposition that the vendor's privilege is irretrievably lost upon immobilization regardless of whether the immovable subject to the privilege has retained its identity or can be removed without substantial injury to the immovable.

Following *American Creosote*, *Hyman v. Ross* applied the societal expectations test under art. 466 to find that heating and air conditioning units sold to the owner of a hotel had become its component parts and were encumbered under a mortgage previously granted upon the immovable. The court found that the pre-existing mortgage attached to them and therefore outranked the vendor's privilege. Without citing to *American Creosote* the court appears to have followed its implication that immobilization of a thing subject to a vendor's privilege necessarily implies a loss of privilege. **The question today is whether *Cristina* applies or if the regular rules of immobilization would apply. ON THE EXAM—NOTE**

▫

## UNCERTAINTY!!

* **Statutory Enhancement When Thing Sold is Destroyed by Fire**- If the thing sold is destroyed by fire(but apparently not in any other manner) the privilege holder has a privilege on the claim or money due to the owner under an insurance policy covering the property. To enjoy this extension, however, the vendor must provide written notice to the insurer before the insurance proceeds are disbursed to the policy beneficiary. *See* La. R.S. §§9:4581-82.

## R.S. § 9:4581.Holder of vendor’s privilege on property destroyed by fire, privilege on insurance

The holder of a vendor's privilege on movable property which is destroyed by fire has a privilege to the amount of the unpaid portion of the purchase price on the claim or money due the owner or vendee under policies of

insurance covering that property. This privilege has the rank of a vendor's privilege on the thing sold and is superior in rank to any privilege growing out of the attachment, garnishment, or seizure of the claim or money.

## R.S. § 9:4582. Notice to insurer and to assured; deposit in court

In order to protect the privilege provided in R.S. 9:4581, the vendor, his heirs, or assigns shall give, at any time prior to the payment of the amount due under the policies, written notice to the insurer of the existence of the claim and state under oath the amount thereof. On the receipt of this notice the insurer shall give written notice to the assured of the filing of the vendor's claim, and in the event of a dispute between the vendor and his vendee, or of any one claiming adverse interest under oath, the insurer shall deposit, subject to the right of all parties in interest, the amount due under the policies in the registry of the court having jurisdiction in any suit that may be brought on the policies to recover the amount due thereunder. Having made the deposit, the insurer shall be relieved of further responsibility.

* **Agricultural Products**- For U.S. agricultural products sold on credit, if the buyer immediately

transfers the agricultural product to a third person, the unpaid vendor can still enforce the vendor's privilege against the product for five days after delivery to the original buyer. This rule is provided for in both La. Civ. Code art. 3227 and R.S. § 9:4541. We will discuss this privilege further when we cover privileges on agricultural products, below.

* **Note on Right to Restitution**- La. Civ. Code arts. 3229-3331 describe the seller's right to

"restitution," which is the seller's right to reclaim a movable not sold on credit and to prevent its resale, as long as it is still in the possession of the purchaser, provided that the claim for restitution is made within 8 days of the sale and the identity of the movable has not been lost. These articles have not been applied since 1881, and are of little importance today, especially given the existence of Article 2561 (discussed further below).

* **Vendor’s Privilege on Immovables**- The most important thing to remember about the vendor's privilege on immovables is that in order for the vendor's privilege to be preserved, the act of sale, preferably indicating that the sale was a *credit* sale, must be recorded in the mortgage records. The vendor's privilege on immovables is governed by 3249(1), 3250, and 3251.
  + **Recordation required**-"The vendor of an immovable only preserves his privilege on the

object, when he has caused to be recorded at the office for recording mortgages, his act of sale, in the manner directed hereafter, whatever may be the amount due to him on the sale." La. Civ. Code art. 3271.

* + **Recitations Regarding Payment of Price in Act of Sale** -Under the public records doctrine,

third persons are protected against a claim of one party to an instrument against the other party if that claim is not *evidenced* on the face of the instrument. Thus, if the Act of Sale indicates that the price was paid "in full" or "in cash," then the Seller cannot assert the vendor's privilege on the property against third persons. *See* La. Civ. Code art. 3342.

* + - **Jurisprudential Illustration**-*Pelican Homestead and Savings Association v. Royal Scott Apartments Partnership* (p. 412). *Did the seller properly preserve the vendor's privilege against third persons in this case? Why or why not?* No. 3 reasons
      * No recordation-La. R.S. 9:2721 which is now LCC art. 3338 "The rights and obligations established or created by the following written instruments are without effect as to third persons unless the instrument is registered by recording it in the appropriate mortgage or conveyance records." In this case, to be effective, the privilege would have needed to be recorded in both the conveyance and mortgage records.
      * "Cash price paid"-vendor's privilege secures the principal obligation to pay the price. If the price is paid, then why would the privilege still need to be valid. The instrument said that the price had been paid . . . contradicting the instrument would be using parol evidence. Under art. 1848, in the interest of justice, court might grant an exception to the prohibition on parol evidence. \*NOW after revision-art. 3342 "A party to a recorded instrument may not contradict the terms of the instrument or statements of fact it contains to the prejudice of a third person who after its

recordation acquires an interest over the immovable to which the instrument

relates."

* + - * Waiver-"full acquittance/ discharge"
  + **Waiver**-Louisiana jurisprudence allows a seller to waive a vendor's privilege in the act of sale

or in a later recorded document.

**Distinction from Seller’s Right to Dissolve**-The seller has the right to dissolve the sale on

account of the Buyer's failure to pay the price. *See* La. Civ. Code art. 2561. *How does this right differ from the vendor's privilege? For an example of a case grappling with the distinction between the vendor's lien and the seller's right to dissolve*, *Sliman v. McBee*, 311 So. 2d 248 (p. 418). Vendor's lien and the right to dissolve are separate.

* + - Action to dissolve-is a personal action that returns to the same position as before (want the thing back). Don't refer to a breach as a resolutory condition. The right to dissolve arises from breach of contract not from a resolutory condition.
    - Vendor's lien-you want to enforce the contract (want the $).

**Agricultural Privilege**-The purpose of the agricultural privilege is to encourage the ease of credit for farmers in general. Farming is an uncertain process, security encourages involvement. \*Important in Louisiana because largely agricultural state.

* **In General-** The law gives a privilege to those involved in producing or financing the current year's crop to secure their wages, the prices of their goods or services, or the repayment of their loans. *Consider why the law grants these privileges: what societal purposes do they serve?* Note: several different sources of law govern privileges and security interests in crops, including the Civil Code, the Revised Statutes, and Article 9 of the UCC. This is a rather complex area of security devices law, and we will study it only superficially.

## Debts Secured/ Secured Creditors

* + **For Overseers/ Foremen** -"The debts which are privileged on certain movables, are the following.the appointments or salaries of the overseer for the current year, on the crop of the year and the proceeds thereof." La. Civ. Code art. 3217(1).
  + **For Suppliers and Lenders** -"The debts which are privileged on certain movables, are the

following. debts due for necessary supplies furnished to any farm or planation, and debts due for money actually advanced and used for the purchase of necessary supplies, and the payment of necessary expenses for any farm or plantation, on the crops of the year and the proceeds thereof." La. Civ. Code art. 3217(1).

* + - **Water Furnished**-Special legislation extends this privilege to those who furnish water for the purpose of growing crops. *See* La. R.S. § 9:4522 ("Any person who furnishes water to another for the purpose of assisting him in growing or maturing a crop has a privilege coequal with the privilege for supplies upon the crop to secure the payment of the agreed compensation therefor.").
* **For Laborers —**"The debts which are privileged on certain movables, are the following.the rents of immovables and the wages of laborsemployed in working the same, on the crops of the year, and on the furniture, which is found in the house let, or on the farm, and on every thing which serves the working of the farm." La. Civ. Code art. 3217(3). Note that farm laborers enjoy a "super-privilege" on the crops that ranks prior to any other crop privilege (see last paragraph of La. Civ. Code art. 3217) ("The privileges granted by this article, on the growing crop, in favor of the classes of persons mentioned shall be concurrent, except the privilege in favor of the laborer, which shall be ranked as the first privilege on the crop.").
  + **Individuals, Not Entities**-Louisiana courts have held that only a natural person is entitled to

claim a laborer's privilege; juridical entities that provide labor through their employees are not privileged. *See Bayou Pierre Farms v. Bat Farms Partners, III*, 639 So. 2d 1158 (La. 1997), [in Textbook on p. 430.

* + **Thresherman, Combinemen, and Grain Driers**-Special legislation extends the privilege to

threshermen, combinemen, and grain driers. *See* La. R.S. § 9:4523 ("Threshermen, combinemen

and grain driers have a privilege for services rendered on the crop which they have threshed,

combined or dried.").

* **The Role of Article 9**-UCC Article 9 calls crop privileges "agricultural liens," and it governs agricultural liens as well as security interests. Article 9 requires "perfection" of a security interest in order for that interest to have maximum effectivity against third persons. Perfection under the UCC is usually accomplished by filing a financing statement in a central registry.
  + **Automatic Perfection of Crop Privileges for Laborers** -In general crop privilege of a laborer

is automatically perfected (i.e., no filing required) with respect to "crops and upon their proceeds." *See* La. R.S. § 10:9-309(13). However, automatic perfection does not extend to the laborer's privilege over other movables (i.e., equipment) located on the farm. *Id.*

* + - **Definition of Agricultural Laborer** -LA UCC-9 defines "agricultural laborer" as "an individual holding an agricultural lien securing payment of wages due him for labor he performed as a worker, thresherman, combineman, grain drier, or overseer." *See* La. R.S.

§ 10:9-102(d)(1).

* + **Special Filing Rules for Other Agricultural Liens** -To perfect agricultural liens as well as UCC 9 security interests in farm products, including standing timber, an "effective financing statement" must be filed in a special "central registry" maintained by the Louisiana Secretary of State. *See* La.

R.S. §§ 3:3654, 3:3656. Note that the filing rules for agricultural liens and security interests are

distinct from the "normal" filing rules for UCC 9 security interests.

* **Place of Filing** -Filing may be made in any parish of the state where the crops are located (not necessarily the parish in which the crops are located). The filing officer (i.e., clerk of court) transmits the information to the central agricultural lien registry. *See* La.

R.S. 3:3656.

* **Form of Filing** -An effective financing statement for an agricultural privilege must contain the following: (1) the names and addresses of the debtor and creditor; (2) the debtor's social security number or taxpayer identification number; (3) a description of the farm products subject to the security interest; (4) a description of the immovable farm where the crops are growing (this does not need to be a precise legal description, but it must be a "reasonable" description and must include the parish where the farm is located). *See* La. R.S. 3:3654(E).
* **Right of Pursuit** *Does the holder of an agricultural privilege enjoy the right of pursuit, i.e., the right to follow the property into the hands of a third person who acquires the property from the debtor?*
  + **Jurisprudential Approach —***To answer this question, read Loeb v. Collier, 59 So. 816 (La.*

*1912) ( on p. 426 of your Textbook) and the notes following the case.*

* + **UCC 9**-In 2001, UCC 9 included agricultural liens within the scope of the general/national rule of the UCC that a security interest or agricultural lien continues in collateral notwithstanding the sale, lease, license, exchange, or other disposition of the collateral. This rule was reversed in 2010. The comment to the relevant provision of LA UCC-9 (La. R.S. 10:9-315) addresses the reason for the reversal.

The inclusion of agricultural liens within the rule of this Section was somewhat hollow anyway, because both R.S. 3:3656 and the federal Food Security Act of 1985, 7 U.S.C. § 1631, limit the ability of unfiled interests to survive a sale to a buyer in the ordinary course of business."

## Privileges as Real Rights

* **Real Right, Definition** -A real right involves subjection of a thing, in whole or in part, to the authority of a person by virtue of a direct relationship which can be asserted against the world. Real rights involve both the "right of pursuit" and the "right of preference."
* **Nature of Privileges** -Privileges always entail a right of preference; however, they do not always entail a right of pursuit. It follows that a privilege can be classified as a real right only if it also entails a right of pursuit of the thing sold in the hands of third persons. *Review the detailed outlines on privilege and your notes from class. Which privileges that we have studied can be properly classified as “real*

*rights"? Which privileges are more properly classified as personal rights involving the right of*

*preference?*

* + **Jurisprudential Illustration** -Read *Liquid Carbonic Corp. v. Leger*, 169 So. 170 (La. App. 1 Cir. 1936, on p. 452 of your Textbook). The creditor in this case held a "chattel mortgage" on certain property of the debtor. The property was seized and sold by another creditor and, after the judicial sale, the holder of the chattel mortgage sought to enforce his rights in the property. *Was the chattel mortgage lost by virtue of the seizure and sale of the property? Why or why not?What*

*is the holder of a privilege obliged to do when another creditor has property seized in order that it may be sold in satisfaction of a debt? See Notes and Questions, p. 456.*

## Recordation of Privileges

* + **Immovables** -In general, privileges on immovables must be recorded to be effective against third persons. *Which privileges are exempt from this requirement?* Note that privileges on immovables are subject to the same requirements of re-inscription that apply to mortgages.
  + **Movables** -The law generally excuses the requirement of recordation of privileges on movable

property, except as where otherwise prescribed by law. *Which privileges on movables must be recordedto have effects against third persons?*

# UCC 9 and Pledge

## Historical Overview

* Pledge-Until 1990, the civil law of **pledge** governed security interests in movable property. One of the main features of pledge was that the creditor had to take possession of the property in order for the security interest to be effective.
  + Clearly, this is problematic for reasons already discussed-It's often the case that the debtor needs

possession of the thing to generate income to pay the debt.

* + Pledge as it existed pre-1990 was basically what we consider "pawn."
* Chattel Mortgage Act-In the early 1990s, the "chattel mortgage" was legislatively created. A "chattel mortgage" allowed the debtor to maintain possession of the property in which the security interest was granted.
  + This was a precursor to UCC 9; a nonpossessory "mortgage" in an immovable.
* Accounts Receivables Act-The legislature enacted this act in order to create a mechanism for creditors to take a security interest in the right to collect payment from an account debtor-a type of incorporeal right.
  + This is "pledge" of incorporeals.
* UCC Article 9-In 1990, Louisiana adopted the uniform law governing security interests in movables- Article 9 of the Uniform Commercial Code. Article 9 supplanted the Chattel Mortgage Act **and** the Accounts Receivables Act. Article 9 now governs **nearly all** security interests in movable property.
  + Louisiana is now mostly uniform in our UCC 9 law. However, there are places that we deviate,

either because (1) we saw what didn't work in other states (a benefit to being late to the game), or

(2) the uniform law didn't work with our property or sales law.

## UCC Article 9

* Brief Overview
  + UCC Article 9 creates several categories of "collateral," i.e., property in which a security interest

may be granted. Confection of a security interest involves a two-step process:

* + - (1) Attachment
    - (2) Perfection.
  + The **requirements for creating** security interests differ depending on what type of collateral is involved. The **rules governing the enforcement** of security interests also depend on the type of

collateral involved.

* Categories of Collateral
  + **Corporeal Movables (“Goods”)**-La. R.S. 10:9-102(a)(44) defines "goods." The definition is extensive, but loosely speaking, "goods" are **corporeals**. The definition doesn't neatly coincide

the category of "movable" things under Louisiana law (as, for example, standing timber, growing crops, and fixtures (component parts of immovables)) are all considered "goods" under this provision. Goods are further subdivided into four categories.

* + - *Consumer Goods*-Consumer goods are "goods used or bought for use primarily for personal, family, or household purposes." La. R.S. 10:9-102(a)(23).
    - *Farm Products*-Farm products are unprocessed agricultural goods owned by someone engaged in farming operations. This category includes crops (excluding standing timber, which has its own rules), livestock, supplies used in farming (e.g. manure, fertilizer, herbicides, etc.), and all other imaginable products of farming in their "unmanufactured state." La. R.S. 10:9-102(a)(34)
    - *Inventory*-Goods held for sale or lease (including manufactured agricultural goods, like cheese) are "inventory." Raw materials and other supplies that will be used up in the course of conducting business are also "inventory" (e.g., cleaning supplies, heating oil, industrial lubricants, etc.). La. R.S. 10:9-102(a)(48).
    - *Equipment*-Equipment means "goods other than inventory, farm products, or consumer goods." La. R.S. 10:9-102(a)(33). This includes not only things like farm tractors, bulldozers, cash registers, and computers, but also office furniture and decorations, books, the refrigerator in the staff lounge, and other items not held for sale or lease.
      * Equipment is a residual category. If it doesn't match the other definitions, then it's

equipment.

* + **Documentary Collateral**-This group of collateral involves incorporeals (i.e. rights) that typically involve some kind of documentation that evidences its existence (normally the documentation has legal significance). Four common examples of categories of documentary collateral are the following:
    - *Instruments*-Checks and promissory notes payable to the debtor that qualify as

"negotiable instruments" are "instruments" that can serve as collateral under Article 9. See

R.S. 10:9-102(a)(47).

* + - *Chattel Paper*-Chattel paper is any "record" (including an electronic record) that evidences **both** (1) a payment obligation and (2) a security interest or lease in some "good." An example of this is a car dealer's retain installment sales agreements (evidencing the buyer's obligation to pay the price of the car, and creating a security interest in the car). The car dealer's lender may wish to secure a loan with a security interest in the dealer's right to collect payment from the buyers (and the attendant security interests in those cars).

R.S. 10:9-102(a)(11).

* + - *Documents*-This is a term of art that covers "documents of **title**," which are themselves regulated by UCC Article 7. This includes, among other things, warehouse receipts and bills of lading. These documents acknowledge that someone (a warehouse operator, a shipper) has merchandise that belongs to (is owned by) the person names in or holding the document. R.S. 10:9-102(a)(30).
    - *Investment Property*-This term encompasses "securities" and "commodity contracts" of the kind traded in investment markets. R.S. 10:9-102(a)(49). This category includes stocks, bonds, and brokerage accounts.
  + **Incorporeal/Intangible Movables**-This group of collateral involves incorporeals that have no physical form and no physical representation other than perhaps an informal paper record (the documentation does NOT have legal significance). Four common examples of categories of this

type are the following:

* + - *Accounts*-**Not bank accounts, but more like accounts receivable.** If someone promises to pay later for goods sold or leased or for services, and the promise is not memorialized in a promissory note (i.e., an instrument, described above), the right of the seller/lessor/service provider to collect on the promise to pay is an "account." R.S. 10:9- 102(a)(2).
    - *Deposit Accounts*-THIS is a bank account, in common parlance. A deposit account is a checking, savings, or similar account maintained at a depositary financial institution. R.S. 10:9-102(a)(29).
    - *Tort Claims and Judgments*-Tort claims belonging to both consumers and businesses, as well as all judgments, can be offered as collateral security
      * Notice that the **right to sue** can be collateralized. Louisiana is different (broader)

because we don't limit this to commercial torts.

* + - *General Intangibles*-All intangible property that can be collateralized and that does not fall into another category falls into this **residual** category.
  + **Minerals (a.k.a. “As-extracted collateral”)**-Minerals, while they are in the ground, can be collateral, provided that the debtor has an interest in the movables before extraction that gives him an interest in the minerals once reduced to possession. R.S. 10:9-102(a)(6).
    - The security interest will attach as they are extracted from the ground.
  + **Proceeds**-"Proceeds" include, among other things, "whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral." R.S. 10:9-102(a)(64). Most sophisticated

creditors draft their security agreements specifically to take a security interest in any proceeds of

their original collateral, but you don't **have** to explicitly include proceeds for them to be covered.

* + **After-Acquired Property**-In general, a security agreement may create or provide a security interest in "after-acquired" collateral (i.e., collateral that the debtor does not own at the time the security agreement is executed). Several exceptions exist. La. R.S. 10:9-204(a) and (b).
* Attachment of Security Interests
  + A security interest in effective against the debtor when it becomes enforceable against the debtor with respect to the collateral. A security interest becomes enforceable against the collateral **only**

**if** THREE requirements are satisfied:

* + - (a) value has been given
    - (b) the debtor has rights in the collateral
    - (c) the debtor has agreed to grant a security interest in the identified property. R.S. 10:9- 202(a), (b).
      * When all three of these coincide, then attachment is complete

## Value Has Been Given

* + - *By Whom and To Whom Value is Given*-The **creditor** must give value and value is given to **the debtor** or a **third person** (in which case the "debtor" is the person who has rights in the collateral, but is not the obligor on the principal obligation).
    - *Definition of Value*-Value is defined very broadly in Article 1 of the UCC. R.S. 10:1-

204. Any transfer of value qualifies, past or present.

* A promise to give value in the future qualifies as "value" only if it is a "binding commitment"-i.e., the debtor must be able to sue to recover the value if the creditor refuses to advance it. Thus, attachment generally does not occur with respect to a revolving line of credit until an advance is made.
* Value is anything that would support an onerous transaction-can be **past** value transfer too (new security for existing debt).

## The Debtor Has Rights in the Collateral

* + - *In General*-The maxim "*nemo dat quod non habet"* controls (no one can give what he does not have). In the paradigmatic case, the debtor is **owner** of the collateral. However, the debtor may have lesser rights (usufructuary, lessee) that may serve as collateral.
    - *After-Acquired Property*-Recall that after-acquired property may serve as collateral. Attachment does not occur **until the debtor actually acquires rights in the property.**
  + **Security Agreement**-Security interests are consensual, so the debtor must **agree** to grant a security interest. The form or evidentiary requirements for the security agreement depend upon

whether the security interest at issue is "possessory" or "nonpossessory."

* + - *Possessory Security Interests*-If the security interest is possessory, the creditor may take and retain "possession" of the collateral pursuant to the debtor's agreement (which can be **oral** or **written**). If the collateral cannot be "possessed," but is subject to the legal concept of "control" (i.e. investment property, life insurance policies, deposit accounts) then attachment occurs once the collateral is under the creditor's "control" pursuant to the debtor's agreement (which may be **oral** or **written**).
      * If perfection doesn't require a writing, then the security agreement doesn't need a writing.
    - *Non-Possessory Security Interests (“Authenticated Security Agreement")*-The obligor must (a) authenticate a (b) security agreement that (c) provides a description of the collateral.
      * **“Authenticate”**-This term's definition includes both signing a paper instrument and electronically signing an electronic record. R.S. 10:9-102(a)(7).

▫ FORM. Could potentially include voicemail?

* + - * **Security Agreement**-The term "security agreement" is defined as "an agreement

that creates or provides for a security interest." R.S. 10:9-102(a)(74).

▫ This is just the CONTRACT that shows consent and meeting of the minds.

* + - * **Provides a Description of the Collateral**-The description must "reasonably identify" the collateral. Description by type of collateral defined in Article 9 is often permitted (doesn't have to be the most precise), although this is not allowed for some types of collateral, particularly in consumer transactions. (Certain property needs very particular description to avoid confusion or protect customers.)

▫ No "Supergeneric" Descriptions-A description of collateral as "all of the debtor's assets" or "all of the debtor's personal property" is too generic an does not "reasonably identify" the debtor's property.

▫ After**-**Acquired Property

* + - * + **Express Coverage**-The security agreement may expressly cover after-acquired property ("presently owned or after-acquired").

These clauses only apply to **consumer** goods acquired **within 10 days** after the secured **value** has been given. R.S. 10:9-204.

This avoids the creditor scooping up everything the consumer gets his hands on, but also contemplates the fact that the creditor needs to have collateral on things that are anticipated to be bought with (because of) the advanced funds.

* + - * + **No Express Coverage**-If the security agreement does not

expressly cover after-acquired property, then whether the security interest attaches to after-acquired depends upon which of the two approaches a particular jurisdiction takes.

*Conservative Approach*- No after-acquired property unless it is expressly stated in the agreement.

This protects the debtor, but doesn't make a lot of

commercial sense.

*Moderate Approach*-With respect to certain categories of goods (i.e., inventory and accounts, but not equipment) a security interest automatically attaches to after-acquired property, unless the parties say otherwise.

If it fits the description of collateral and normally and frequently turns over in the course of doing business, the courts will allow it to attach to after-acquired.

▫ Proceeds-As to proceeds, a security interest attaches **automatically** to any **identifiable** proceeds of properly described collateral. R.S. 10:9-315(a)(2). Note that Article 9 generally also preserves the creditor's security interest in the original collateral in the hands of the person who acquired it from the debtor. R.S. 10:9-315(a)(1). While some exceptions to this rule exist, the general rule is that the creditor now has a security interest in **both** the original collateral and the proceeds.

* + - * + This rule supplements the after-acquired property conservative approach. May allow the creditor to follow the proceeds of proceeds, as long as they are identifiable.. Proceeds may come in any form (sale, exchange, lease, license, insurance).
        + Proceeds don't include "replacement" items, which were acquired

without using the collateral. So if the collateral is destroyed and the debtor just buys a whole new one (without trading in, using insurance money, etc) then the new property isn't proceeds.

## Farmer Brown Hypo

* + - Category: crops growing on debtor's farm. Does this apply to the current crop? Under the conservative approach, no attachment. Under the moderate approach, it depends on whether you consider the crop "regularly turned over"-but crops aren't really as frequent as inventory in other contexts. We may look at the intent of the parties-if the value of the crop existing at the time of the agreement was small in comparison to the debt, then they probably intended all future crops to be included, but if the debt was at or below the value of the debt, then it may not attach to future crops.

## Bank/Polly Hypo

* + - No mention of proceeds, but still applies. Proceeds are automatically attached. The parrot is proceeds. Computer probably not proceeds, unless it was exchanged or if cash from sale of inventory was used to purchase (proceeds of proceeds). Could be after-acquired property, but would need to be expressly included in the security agreement, since computers aren't frequently turned over.
* Perfection of Security Interests
  + **Overview**-In general, whoever is first to "perfect" a security interest has priority (preference) vis-à-vis others.
    - Perfection is how to make the security agreement maximally effective against everyone else.
  + **General Rule**-"Except as otherwise provided. A security interest is perfected if it has attached and all of the applicable requirements for perfection. have been satisfied. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest

attaches." R.S. 10:9-308.

* + - *Attachment Required*-Attachment of the security interest is a prerequisite to perfection.
    - *Perfection Upon Attachment*-A security interest may be perfected upon attachment IF the applicable requirements are satisfied when the security interest attaches. This may mean

(1) the requirements for perfection have been previously satisfied; or (2) perfection is automatic upon attachment (such as a laborer's agricultural lien).

* + - * Basically, perfection occurs on the **later** of attachment or prerequisites for perfection being met. The order in which those occur doesn't matter, as long as they both get done.
    - *Methods of Perfection*-There are several methods of perfection: (1) filing a financing statement; (2) possession; (3) control; (4) automatic perfection.
  + **Filing a Financing Statement**-In general, a financing statement must be filed in order to perfect all security interests and agricultural liens. R.S. 10:9-310(a).
    - *What is Filed*-A UCC-1 Financing Statement.
      * Note that not just anyone can file. Whoever files must be authorized to so do. The creditor may have a separate signed authorization or the agreement may be in the financing statement itself.
    - *Place of Filing*-UCC-1 Financing Statements are filed with (a) the clerk of court of any parish, (b) the Department of Public Safety and corrections, office of motor vehicles, if the collateral is a titled motor vehicle not held as inventory for sale or lease; (c) the Department of Wildlife and Fisheries, if the collateral is a titled vessel, if not held as inventory for sale or lease. R.S. 10:9-501.
    - *Maintenance and Indexing of Filings*-The filing office shall assign a unique number to the filed record and electronically transmit it to the secretary of state. The secretary of state shall maintain a master index of information and shlal index an initial financing statement **according to the name of the debtor**.
    - *Information in the Financing Statement*-The financing statement shall contain the following (see R.S. 10:9-502):
      * **BIG TIME REQUIREMENTS**-If you screw these up, it won't be effective and

no perfection.

▫ **Name of the Debtor**-The financing statement must provide the name of the debtor. R.S. 10:9-503 provides **detailed rules** regarding the sufficiency of a debtor's name.

* + - * + (1) If the debtor is a registered organization, the name must be that indicated in the public record for the organization.
        + (2) If the debtor is an individual, then the name must be that

indicated on the debtor's driver's license.

* + - * + (3) If there are minor errors, then they do not render the security interest ineffective unless they are "seriously misleading." R.S. 10:9-506(a).

*Error is not seriously misleading if you can type in the wrong name, as found on the financing statement, and the right name pops up. This is a super sucky rule, because it's wholly dependent on how good the search function is on the secretary of state's website, which can vary immensely across states.*

* + - * + The "debtor" is the person with rights in the collateral, not

necessarily the principle obligor.

▫ **Name of the Secured Party**-The financing statement must provide the name of the secured party or a representative of the secured party.

* + - * + We don't care as much about this name because it's not the one that's indexed/searched by.

▫ **Indicates Collateral Covered by the Financing Statement**-The collateral must be "indicated." The relevant statute (R.S. 10:9-504) provides 2 options.

* + - * + Description Requires for Security Agreement-The description required in the security agreement may be used here; OR
        + Omnibus Description-The collateral may be indicated as "all assets or all personal property" of the debtor.

We allow this here, unlike the prohibition on supergeneric descriptions for attachment, because of notice. It's not practical to describe this way because it won't attach, and may create more work later to determine what is and is not covered by the security agreement.

* + - * **LOW KEY REQUIREMENTS**-Additional Requirements that, if not satisfied, do not affect the perfection of a security interests, are as follows. Note: The omission of these requirements *may* result in the clerk of court refusing to accept the financing statement for filing. R.S. 10:9-516.

▫ **Related to the Secured Party**-The financing statement should contain the address of the secured party.

▫ **Related to the Debtor**-The financing statement should contain the address of the debtor and indicate whether the debtor is an individual or an organization. If the debtor is an organization, it should provide the type of organization, a jurisdiction of organization of the debtor, and an organizational identification number (TIN), if one exists.

* + **Possession**-Possession is another means of perfecting a security interest. For certain types of collateral, possession is the *only* way to perfect. For other types of collateral it is *optional* to perfect through possession.
    - *Possession*-Article 9 does not define "possession." We use the civil law definition here:

corpus + animus.

* + - *Where* ***Permissible****: Corporeals and Documentary Collateral*-Perfection through possession is permissible for corporeals (goods) and documentary collateral. Remember: documentary collateral includes instruments, chattel paper, documents, and investment property.
    - *Where* ***Mandatory****: Money*-For money, possession is the **exclusive means of perfecting** a security interest. Note: security interests in cash are extremely rare. Normally, this is a late grab to perfect at the last minute (after the debtor has defaulted and the creditor thinks the debtor is in trouble). The creditor may have access to the cash and then go grab to perfect when it thinks that may be necessary.
  + **Control—**"A security interest in investment property, deposit accounts, letter-of-credit rights,

electronic chattel paper, electronic documents, or a life insurance policy may be perfected by control." R.S. 10:9-314(b). Some security interests may be perfected through **control**. This concept applies to certain collateral that cannot be "possessed" but over which "control" may be maintained by a creditor. We will study three types of collateral for which control is a method of perfecting: deposit accounts, investment property, and life insurance.

* + - Basically possession-we make clear that the creditor has a security interest.
    - *Required v. Permissive*-For life insurance and deposit accounts, control is the **ONLY WAY** to perfect a security interest. It is **not possible** to perfect by filing a financing

statement. In contract, for investment property, taking control is an *alternative* way to perfect.

* + - *HOW to Perfect Through Control*-the method differs based on the type of collateral.
      * **Deposit Accounts*-*** (ONLY by control) "The secured party has control of a deposit account if: (1) the secured party is the bank with which the deposit account is maintained; (2) the debtor, secured party, and bank have agreed in an authenticated record that the bank [where the account is located] will comply with instructions originated by the secured party directing deposition of funds in the deposit account without further consent by the debtor; or (3) the secured party becomes the bank's customer with respect to the deposit account." R.S. 10:9-104.

▫ A bank creditor has automatic control (?) over its own accounts. A non- bank creditor may sign on as a joint account with the debtor, but that's rare.

* + - * **Investment Property—NOT TESTED**-The method by which control is accomplished depends on the KIND of investment property at issue: (1) certificated securities (shares of stock represented by certificates); (2) uncertificated security (shares of stock issued online); (3) securities entitlements (shares sold by brokerage houses). We won't get into the weeds on this. In short, a secured creditor takes control of certificated securities through taking possession of the certificate and having the certificate registered in the name of the secured party. With uncertificated securities, the only means is registration. With securities entitlements, it's more complex but one way is to execute a "control agreement" by which the broker agrees that it will comply with entitlement orders originated by the creditor. R.S. 8-106; 8-301.

▫ Investment property can be perfected through control, possession, or financing statement.

* + - * **Life Insurance**-(ONLY by control). A secured party has control over a life insurance policy (i) if the secured party is the issuer of the policy; or (ii) if the insurer authenticates a record acknowledging notice of the granting of a security interest to the secured party in the policy. Also, "[i]f the beneficiary of a life insurance policy taken as collateral is not the insured or his estate, a security interest does not attach with respect to rights under the policy until the policy beneficiary authenticates a record evidencing the beneficiary's consent in the security interest. This requirement does not apply when the beneficiary may be changed upon the sole request of the insured or when the policy itself provides that it may be pledged or assigned without the beneficiary's consent." R.S. 10:9-107.1.
  + **Automatic Perfection**-For some types of collateral, perfection is automatic-i.e., it occurs upon attachment. The list of collateral to which this rule applies is found in R.S. 10:9-309 (there are

13). We will study only two examples: (1) agricultural liens; and (2) PMSIs.

* *Agricultural Liens in favor of Agricultural Laborers*-Recall that "[a]n agricultural lien in favor of an agricultural laborer upon crops and upon their proceeds to the extent subject to the agricultural lien" is perfected upon attachment. R.S. 10:9-309(13). An "agricultural laborer" is defined as "an individual holding an agricultural lien securing payment of wages due him for labor he performed as a worker, thresherman, combineman, grain drier, or overseer." R.S. 10:9-102(d)(1).
* *Purchase Money Security Interest (PMSI)*-Perfection occurs upon attachment for "a

purchase money security interest in consumer goods" except as otherwise provided by law.

R.S. 10:9-309(1).

* **Definition of Purchase Money Security Interest**-"An obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used."

R.S. 9:103(a)(2).

▫ Generally, this is property bough with the funds advanced. Examples: car loan with financing through the affiliate agency (Toyota Financial); BestBuy Credit.

* + **Perfecting in Proceeds**-"A security interest in proceeds is perfected [automatically] if the

security interest in the original collateral was perfected." R.S. 10:9-315. However, after 20 days, the security interest may become unperfected in certain circumstances. In all of the following cases, perfection continues after 20 days; (said another way, it becomes unperfected after 20 days unless one of the following is true)-

* + - A filed financing statement covers the new type of collateral by specific type of property;
      * If the type of new property (proceeds) was covered by the original financing

statement, we don't need the statement to specify "after-acquired property" (?)

* + - An amendment is filed to cover the new type of collateral within the 20-day grace period;
      * If edited in time, then the amendment will relate back to the date of **original** filing.
    - The proceeds are identifiable cash proceeds;
    - A filed financing statement covers the original collateral, the proceeds are a type of collateral in which perfection can be accomplished by filing, and the proceeds were not acquired with cash proceeds.
      * This last type won't be tested!!!
  + **Fixtures and Land-Related Collateral**-UCC 9 covers movables. Even though land is immovable, we have some parts of immovable property that can be covered through Article 9.

Special perfection rules apply to collateral that are closely related to immovables. These types of collateral include: (1) fixtures; (2) crops; (3) standing timber; (4) as-extracted collateral.

* + - *Special Rules—In General*-"To be sufficient, a financing statement that covers as- extracted collateral or standing timber that constitutes goods, or that is filed as a fixture filing and covers goods that are to be come fixtures, must." R.S. 10:9-502(b).
      * Satisfy all of the "normal" requirements for financing statements;
      * Specify that the financing statement is filed to perfect an interest in fixtures/standing timber/as-extracted collateral (check the box if using the form provided by the Secretary of State's office.
      * Provide a description of the real property to which the collateral is related sufficient to cause the mortgage to be effective against third persons if the description were contained in a mortgage of real property filed for registry;

▫ Insert all requirements for property descriptions from Mortgage. Needs to be precise.

* + - * If the debtor does not have an interest of record in the real property, provide the name of a record owner.
    - *Fixtures*
      * **In General**-"Goods, other than consumer goods and manufactured homes, that after placement on or incorporation in an immovable have become a component part of such immovable as provided in Civil Code arts. 463, 465, and 466, or that have been declared to be a component part of an immovable under Civil Code Article 467." R.S. 10:9-102(41). Despite being immovable, this collateral is being governed by Article 9.
      * **Timing**-For fixtures, fixture filing must be accomplished **before the movable is affixed** to the immovable. If the fixture filing is not made before the good is affixed to the immovable, it does not "continue" in the fixture and is thus unenforceable, even against the debtor. R.S. 10:9-334(a). After incorporation, you need a mortgage.
      * **Consumer Goods Excluded**-Consumer goods that become fixtures are excluded from Article 9 in Louisiana and cannot become subject to a continuing security interest. R.S. 10:9-334(a).
    - *Unharvested Crops*
      * **In General**-Under LCC 474, unharvested crops are movables by anticipation if they belong to someone other than the owner of the ground or the owner of the ground grants a security interest in them. Thus, for Article 9 purposes unharvested crops are always "movable" and governed by the "normal" rules of Article 9. Once the crops are harvested, they are "goods" and are subject to "normal" Article 9 rules **plus** ruels for agricultural filings.
      * **Effective Financing Statement/Agricultural Registry**-Recall that for farm products, perfection requires an "effective financing statement" (UCC-1F) be filed in the "central registry" (a distinct registry from that maintained for UCC-1 filings). Filing may be made in *any parish of the state* and must contain:

▫ (1) the names and addresses of the debtor and creditor;

▫ (2) the debtor's social security number or taxpayer identification number;

▫ (3) a description of the farm products subject to the security interest; and

▫ (4) a "reasonable" description of the immovable on which the crops are growing, which must include the parish where the farm is located.

* + - *Standing Timber*
      * **In General**-Standing timber that is not destined for harvest is either a component part of the immovable or a separate immovable. Thus, mortgage law governs a creditor's security rights in timber in most cases. Under Article 9, however, standing timber is a "good" when it is "to be cut and removed" by someone other than the landowner, and only if it is subject to a "recorded timber conveyance."

R.S. 10:9-102(a)(44). If these requirements are med, a creditor can take a security interest in the timber via Article 9. Once trees are cut down, they become movable lumber and are subject to "normal" Article 9 rules plus rules for agricultural filings.

▫ **But what does it mean when crops and timber, once cut, are subject to both**? You have to refile and perfect as to the goods in a new way? You have to just keep your thumb on the pulse of the farmer and make sure you know when it's cut? That doesn't seem efficient?

* + - * **Central Agricultural Registry**-If the timber is subject to Article 9, then the financing statement must be filed in the central agricultural registry. In addition, even if the standing timber is immovable, the financing statement must be filed in the central agricultural registry to be effective against "buyers in the ordinary course of business." R.S. 3:3656.
    - *As-Extracted Collateral*-Recall that Article 9 recognizes a category called "as-extracted collateral," which encompasses oil, gas, and minerals that are the objects of security interests that are contracted while the minerals are still in the ground but that attach only upon extraction from the ground. R.S. 10:9-102(a)(6). A security interest is perfected through a "fixture filing."
* Maintaining Perfection Over Time
  + **Perfection through Possession or Control**-Perfection is maintained indefinitely, so long as perfection or control persists.
  + **Perfection through Filing**-Perfection lapses with the passage of time, but perfection can be maintained despite the passage of time with a continuation statement.
    - *Lapse*-"A filed financing statement is effective for a period of **five years** from the date of **filing**." R.S. 10:9-515(a).
      * Not from date of perfection. Filing may be before attachment (and thus before perfection).
    - *Effect of Lapse*-"Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected." R.S. 10:9-515(c).
    - *Continuation*-"If a 'continuation statement' is filed **within six months *before*** the expiration of the effective period, the effectiveness of financing statement continues for **another five years**." R.S. 10:9-515(d)&(e).
      * Like reinscribing a mortgage, except the additional time for mortgage is from time the notice is recorded, where here we have it an additional five years from the expiration of the first.
      * The continuation statement must be filed **BEFORE** lapse. If you file after lapse, you will be **newly** perfecting, and therefore losing your rank.
* Priorities

## UCC 9 Creditor vs. UCC 9 Creditor

* + - *General Rules*
      * Perfected vs. Unperfected-Perfected wins. R.S. 10:9-317(a)(1) and R.S. 10:9- 322(a)(2).
      * Among Unperfected-First to attach wins. R.S. 10:9-322(a)(3). Old rule-first in time, first in right.
      * Among Perfected-First to "file or perfect" wins. R.S. 10:9-322(a).

▫ Example in Slides-Acadia Bank when filed first and perfected second. If you file before attachment, you may preserve your spot in line even if you perfect later.

* + - *Exceptions*
      * Exceptions for Alternative Means of Perfection

▫ **Perfection by Possession vs. Filing (Security Interests in Instruments)**-Security interests in instruments perfected by possession beat all other interests not perfected by possession ***IF*** the secured party:

* + - * + (1) gives value (actually advances the loan), and
        + (2) takes possession in **good faith** without notice that the security interest violates the right of an earlier-perfected secured party. R.S. 10:9-330(d).

Possessor must lack actual knowledge of the prior right.

Example in Slides: Bayou Bank wins.

## ▫ Perfection by Control—R.S. 10:9-327–9-329.

* + - * + *General Rule*-A security interest perfected by control will defeat interests not perfected by control.
        + *Conflicts Between Control Parties*-Generally, rank according to

priority in time of obtaining control; i.e., first to get control wins.

Example in Slides: BB wins by perfecting through control.

* + - * PMSI Exceptions-R.S. 10:9-324

▫ **General Rule**-A PMSI perfected within 20 days of a debtor receiving possession of the collateral ranks above all other secured creditors, irrespective of when other secured interests arose.

* + - * + Consumer good PMSIs are automatically perfected, so will always

win.

▫ **PMSI vs**. **PMSI**-A seller's PMSI takes priority over a lender's PMSI.

## UCC 9 Creditor vs. Lienholder

* + - *Judicial Lien Creditors*
      * Definition-A "lien creditor" is a creditor who has acquired a lien on the property

involved by attachment, sequestration, seizure, levy, or the like. R.S. 10:9-102(52).

* + - * General Rule-A perfected security interest beats a juridical lienholder. But prior to perfection, the judicial lien-holder generally wins. R.S. 10:9-317(a)(2)(A).

▫ A perfected security interest will beat judicial lienholder basically every time.

* + - * Exception for PMSI-If a PMSI ***attaches before*** the lien creditor's rights arise, the then PMSI creditor has **priority** over a lien creditor if the PMSI creditor "files a financing statement before or within 20 days after the debtor receives delivery of the collateral." R.S. 10:9-317(e).

▫ Slide Example: Carl wins unless Bank files within 20 days of delivery.

* + - *“Statutory Lienholders" or Holders of Privileges*
      * Definition-A "lien" is a privilege on personal property created by operation of law that entitles the privileged creditor to be preferred before other creditors. R.S. 10:9-102(d)(10).
      * General Rule-Article 9 security interests that have attached (even if unperfected) generally take priority over privileges. R.S. 10:9-322(h). ("A security interest has priority over a conflicting lien, other than an agricultural lien, in the same collateral except as otherwise provided in this Chapter or except to the extent the lien is created by a statute that expressly provides that the lien has priority over the security interest.")

▫ Usually, Article 9 will beat a privilege, because consensual security interests beat most privileges (which arise by law) most of the time. Exception is when the statute creating the privilege expressly provides that the privilege wins.

* + - * Exception for Possessory Lien-R.S. 10:9-333.

▫ **Definition**-A possessory statutory privilege for services or materials furnished in a person's ordinary course of business. For example, the "artisan/repairman" privilege is of this type.

▫ **Rule**-The privilege has priority over an Article 9 security interest unless the statute granting the privilege provides otherwise. Consider the Civil Code and Revised Statutes addressing the artisan/repairman's privilege.

* + - * + *Statute Does Not Say Otherwise*

Artisan's Privilege, LCC 3217(2)-This privilege is possessory and the relevant Code article does not provide an

exception to the Article 9 ranking rule. The artisan's privilege therefore beats an Article 9 security interest (even a perfected one).

Carrier's Privilege, LCC 3217(9)-This privilege is possessory and the relevant Code article does not provide an exception to the Article 9 ranking rule. The carrier's privilege therefore beats an Article 9 security interest (even a perfected one).

* + - * + *Statute Says Otherwise (i.e., Article 9 beats the lien)*

Statutory Repairman and Mechanics Privileges-R.S. 9:4501(B) and 9:4502(B) both provide that the privilege is **inferior to a “previously perfected security interest”** under Article 9. This language indicates that the statutory privileges trump unperfected Article 9 security interests and later perfected Article 9 security interests, but not prior perfected security interests.

Statutory Hauling or Trucking Privilege-R.S. 9:4601. Same as above, the statute provides that the privilege is inferior to a "previously perfected security interest" under Article 9.

* + - * Express Statutory Exceptions-R.S. 10:9-323(h) provides that Article 9 security interests do not outrank a lien "to the extent the lien is created by a statute that expressly provides that the lien has priority over the security interest."

▫ **Attorney Charging Liens**-R.S. 9:5001 provides that the attorney's lien trumps a prior perfected security interest. R.S. 9:5001 (providing that the privilege will "take rank as a first privilege thereon superior to all other privileges and security interests under Chapter 9 of the Louisiana Commercial Laws.")

* + - * Farm Product Movables (Ranking Order)-R.S> 10:9-322(g)
        + [Just memorize the list]

▫ (1) agricultural privileges in favor of agricultural laborers, with equal rank among themselves; (recall that "agricultural laborer" includes "the worker, thresherman, combineman, grain drier, or overseer.") Also, these don't have to be perfected.

▫ (2) The lessor's privilege, if perfected (Under UCC 9, you'd file a UCC- 1F).

▫ (3) Other perfected agricultural liens and perfected security interests (with contests between perfected rights ranking according to priority in time of filing OR perfection).

▫ (4) The lessor's privilege, if unperfected.

▫ (5) Other unperfected agricultural liens and security interests (with the first security interest or agricultural lien to **attach or become effective** having priority.)

* + - * + Example in Slides: Laborers, Lessor, Big Bank

## UCC 9 Creditor vs. Mortgagees

* + - *General Rule*-"[A] security interest in fixtures is subordinate to a conflicting interests of an encumbrancer or owner of the related real property other than the debtor." R.S. 10:9-

334(c). In other words, absent a special exception, the mortgagee wins.

* + - *Growing Crops on Land Subject to a Mortgage*-"A perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in the real property." R.S. 10:9-334(i).
      * Security interest in crops, if perfected, have priority over mortgage.
    - *Other Component Parts of an Immovable Subject to a Mortgage*-A mortgage or other interest in a movable generally extends to its component parts, see LCC 469. If a movable good to which an Article 9 security interest has attached is later affixed to an immovable, the mortgagee has priority over the Article 9 creditor UNLESS one of three conditions is met:
      * (1) An Article 9 fixture interest is properly perfected by fixture filing before the immovable property interest is **recorded**. R.S. 10:9-334(e)(1)(B).
      * (2) The security interest is a PMSI and is perfected by fixture filing before the fixture is affixed. R.S. 10:9-334(d). (However, there are exceptions for "construction mortgages.") A properly perfected PMSI in a fixture will beat even a prior recorded mortgage.
      * (3) The immovable rights holder in an authenticated record consents to the security interest or disclaims any interests in the fixture. [Subordination] R.S. 10:9- 334(f)(1). Relatedly, if the debtor can legally remove the fixture without the consent of the immovable rights holder, the fixture security interest holder can exercise this right as well. R.S. 10:9-334(f)(2).

## UCC 9 Creditor vs. Buyers/Lessees

* + - Security interests generally follow collateral into the hands of third parties to whom the debtor has transferred the collateral. R.S. 10:9-315(a)(1) ("Except as otherwise provided in this Chapter: (1) a security interest continues n collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest.")
    - ***Right of Pursuit***. We treat buyers and lessees the same for our purposes. Buyers take free

and clear if unperfected, but donee won't. Buyer will also win over a perfected interest IF

(1) Buyer in the ordinary course; or (2) Garage sale

### SLIDES FOR ORGANIZATION

* + - *Unperfected Security Interests*-"[A] buyer [or lessee] . takes free of a security interest. if the buyer gives value and receives delivery of the collateral before it is perfected." R.S. 10:9-317(b)&(c).
    - *Buyers in the Ordinary Course of Business*-"[A] buyer in the ordinary course of business. takes free of a security interest created by the buyer's seller, even if the security interests is perfected and the buyer knows of its existence." R.S. 10:9-320(a).
      * **“Ordinary Course of Business”—La. R.S. 10:1-201(b)**-To fall within this special rule, the buyer and the transaction must meet ALL three of the following requirements:

▫ (1) A person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods.

* + - * + We require particular knowledge that this item is burdened by a security interest. Most buyers meet this!!!

▫ (2) The seller is "in the business of selling goods of that kind" and the sale to the person **comports** with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices; AND

* + - * + Must be a regular sale of inventory, and not a going out of business

or liquidation sale.

▫ (3) "May buy for cash, by exchange of other property, or on secured or

unsecured credit," but not "in total or partial satisfaction of a money debt."

* + - * + Buyer can't be favored if he took a dation en payement to jump a

better-ranked creditor.

* + - * **Buyer in Ordinary Course Exception Not Applicable**-Even when all of the above requirements are met, the BOC exception does not apply in any of the three following circumstances:

▫ (i) When the buyer is "buying farm products from a person engaged in farming operations"

▫ (ii) When the inventory is in the creditor's possession

▫ (iii) When the security interest was created by the predecessor of the buyer's

seller.

* + - * + Security interest created by the debtor who is the new seller in second sale.
    - *Garage Sale Exception, La. R.S. 10:9-320(b)*-The buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys: (a) for value; (b) primarily for the buyer's personal, familial, or household purposes; and (c) before the filing of a financing statement covering the goods.
      * Applies to consumer goods, probably subject to a PMSI (which is automatically perfected)

## Pledges of Leases and Rents of an Immovable

* Note that a lot of these rules are written for hypothetical situations that have not yet presented in real life. It's supposed to fill some holes in UCC 9. Two things that aren't covered are (1) insurance policies other than life insurance or (2) lessor's rights to leases and rents of an immovable.
* Overview of Pledge
  + **Definition and Scope**-"Pledge is a real right established by contract over property of the kind described in Article 3142 to secure performance of an obligations." LCC 3141.
    - *Property Susceptible of Pledge*-"The only things that may be pledged are the following:

(1) A movable that is not susceptible of encumbrance by security interest; (2) the lessor's rights in the lease of an immovable and its rents; (3) Things made susceptible to pledge by law.

* + - * **Distinction from Prior Law**-Under prior law, the pledge was defined as "a contract by which one debtor gives something to his creditor as security for his debt." LCC 3133 (1870). Despite this broad formulation, since 1990, the law of pledge has applied only the pledges that are exempt from or otherwise excluded from Article 9. Thus, the revised definition brings the law of pledge up to date and harmonizes the law of pledge with the UCC. LCC 3141, cmt. (c).

## Property Susceptible of Pledge Under Current Law

▫ Movables Not Covered by Article 9

* + - * + **Corporeal Movables**-Note that under present law, there are

actually no corporeal movables subject to pledge, because UCC Article 9 preempts the field on how to grant a security interest in corporeal movables. The Law Institute left open the possibility that, in the future, a particular corporeal movable may be insusceptible of encumbrance under Article 9 and therefore subject to the law of pledge.

* + - * + **Incorporeal Movables**-Policies of insurance other than life

insurance are not governed by UCC Article 9. We will not cover this type of pledge.

▫ A Lessor's Rights in the Leases of an Immovable and its Rents-Leases of movables and their rents can be encumbered by an Article 9 security interest. However, leases of **immovables** and their rents cannot be encumbered by Article 9. They are susceptible of pledge instead.

* + - * + Technically the rights in lease of immovable are incorporeal movables, based on LA's categorization of things. However, it's not really apparent or easy to grasp, so we were explicit with this

category.

▫ Things Made Susceptible to Pledge by Law-This category does not include **anything** presently, but the legislature is permitted to enact statutes that may create specific rules for the pledge of items that do not fit into the first two categories.

* + - *Nature*-Pledge is an accessory real right that gives the pledgee preference in the thing pledged.
      * **Accessory Real Right**-"Pledge is accessory to the obligation hat it secures and may be enforced by the pledge only to the extent that he may enforce the secured obligation." LCC 3144.
      * **Right of Preference**-"Pledge gives the pledgee the right to be satisfied from the thing pledged and its fruits **in preference** to unsecured creditors of the pledgor and to other persons whose rights become effective against he pledgee after the pledge has become effective as to them." LCC 3145.

▫ Right of Pursuit available if recorded.

* Pledges of Leases and Rents of an Immovable
  + **Concept**-A lessor of an immovable (i.e., a "landlord") may pledge a lease of immovable property (an incorporeal movable) or his right to the rents due to the landlord from such leases (also an incorporeal movable). This is essentially the pledge of an income stream resulting from the lease

of land.

* + - *Law Governing*-A special chapter is established in the title of pledge for leases of immovables and their rents. In addition, "[i]n all matters for which no special provision is made in this Chapter, the pledge of the lessor's rights in the lease of an immovable and its rents is governed by the provisions of Chapter 1 of this Title." LCC 3175.
    - *Power to Pledge*-"A contract of pledge may be established only by a person having the power to alienate the thing pledged." LCC 3151. This includes a lessor or sublessor, neither of whom needs to be the owner of the thing leased.
    - *Example*-SLIDES-Rights in lease (to collect rent) is a valuable stream of income. If you get a mortgage on the immovable, then realize that the property is leased, foreclosure

doesn't make the property as valuable when subject to the lease, so you may want to get an additional pledge on the leases and rents.

* + **Rights Susceptible of Pledge—**"A pledge may be established over all or part of the least of an

immovable, including those not yet in existence, without the necessity of specific description of the leases in the contract establishing the pledge. If the pledge is established over leases not yet in existence, the pledge encumbers future leases as they come into existence." LCC 3171.

* + - You can pledge future/uncertain leases, and you can have a contingent assignment of rights in the lease (as in "if I lease, you have the rights").
    - *Lessor's Rights in a Lease*-Any right of the landlord in the lease may be pledged, although as a practical matter the creditor will require the landlord to pledge the entire lease and its rents. The landlord may pledge future leases and rents of immovable property as well.
    - *Not the Lessee's Rights in a Lease*-A lessee's rights in a lease of an immovable may not be pledged; those may be encumbered through a mortgage of the lessee's "leasehold" interest. LCC 3286(4).
      * **Exception: Where Lessee is a Sublessor**-If the lessee is acting as a sublessor the lessee may pledge his rights a s sublessor in the lease.
    - *Not the Lessor's Rights in the Lease of a Movable*-The owner of movable property that is leased may encumber both the movable and the stream of rental income from it under Article 9.

## Obligations for Which Pledge May be Given

* + - *In General*-"A pledge may be given to secure the performance of any lawful obligation, including obligations that arise in the future. As to all obligations, present and future, secured by the pledge, notwithstanding the nature of the obligations or the date on which they arise, the pledge has effect between the parties from the time that the requirements for formation of the contract of pledge are satisfied and has effect as to third persons from the time that the applicable requirements for Article 3153 through 3155 are satisfied." LCC 3146.
      * All obligations may be the principle obligation for the pledge of leases and rents, even future uncertain obligations.
    - *Pledge Securing Obligation Other than Payment of Money*-"A pledge that secures an obligation other than one for the payment of money, such as an obligation for the performance of an act, secures the claim of the pledgee for the **damages** he may suffer from the **breach** of the obligation." LCC 3147.
    - *Pledge Securing an Obligation of Another Person*-A person may pledge his property to secure an obligation of another person. In such a case, the pledgor may assert against the pledgee any defense that the obligor could assert **except for lack of capacity or discharge in bankruptcy**. The pledgor may also assert any other defenses available to a surety. LCC 3148.
      * This is just like surety and mortgage. We don't let you argue lack of capacity or discharge in bankruptcy, because that's the whole point of security.
      * When the pledgor isn't the principle obligor, we call it "real surety" because the pledgor is acting as a surety, but instead of his payments, he's putting his property on the line.
      * **Defenses**-Because the status of a person who has pledged his property as security for the debt of another is akin to that of a surety, this Article grants to him the same defenses that are available to a surety under LCC 3046. In the event of a

modification of the principal obligation without his consent, the pledgor is also entitled to assert the defenses available to a surety under LCC 3062.

▫ Here, we apply the rules as they apply to commercial sureties, because if

you're pledging leases and rents, you're probably in a commercial context.

## Prerequisites: Effectiveness Between Parties

* + - *General Requirements*
      * **Written Contract of Pledge**-"The pledge of a corporeal movable is effective between the parties only if the thing pledged has been **delivered** to the pledgee or a third person who has agreed to hold the thing for the benefit of the pledgee. The pledge of other things is effective between the parties only if established by written contract, but delivery is not required." LCC 3149.

▫ Same as law of mortgage-can even be the same document as mortgage, incorporating the pledge of leases and rents (or even future uncertain leases and rents).

* + - * **Acceptance**-"A written contract of pledge need not be signed by the pledgee,

whose consent is presumed and whose acceptance may be tacit." LCC 3150.

* + - *Specific Requirements: LCC 3168*-"A contract establishing a pledge of the lessor's rights in the lease of an immovable and its rents must state precisely the nature and situation of the immovable and must state the amount of the secured obligation or the maximum amount of secured obligations that may be outstanding from time to time." LCC 3168.

### Again, exact same as mortgage!!!

* + - * **Property Description**-The contract must "state precisely the nature and situation of the immovable." This is the same rule as found in LCC 3288 for mortgages.
      * **Amount of secured Obligation/Maximum Amount**-The contract must state the amount of the secured obligation or a maximum amount. This is the same rules as that found in LCC 3288 for mortgages.
    - *Pledge Contained in Act of Mortgage*-"A pledge of the lessor's rights in the lease of an immovable and its rents may be established in an act of mortgage of the immovable. In that event, the pledge is given the effect of recordation for so long as the mortgage is given that effect and is extinguished when the mortgage is extinguished. LCC 3170.

## Enforcement Against Third Persons

* + - *General Requirements*-"A pledge is without effect as to third persons unless it has become effective between the parties and is established by written contract." LCC 3153. "The pledge of the lessor's rights in the lease of an immovable and its rents has effect against third persons in accordance with the provisions of Chapter 2 of this Title." LCC 3154.
      * Note that the tenant is a third person to the pledge, and the pledgee is a third person to the lease. For the Tenant, we don't require registry, but written notice of the pledge. This is like assignment of rights, where the obligor has effectivity from notice.
    - *Specific Requirements: LCC 3169*-The pledge of the lessor's rights in a lease of an immovable and its rents is without effect as to third persons unless the contract establishing the pledge is recorded in the manner prescribed by law. Nevertheless, the pledge is effective as to the lessee from the time that he is given written notice of the pledge, regardless of whether the contract establishing the pledge has been recorded.
      * **For Persons Other Than Lessee**-Recordation in the usual manner is required.

LCC 3346 ("[T]he pledge of the lessor's rights in the lease of an immovable and its

rents, is recorded in the **mortgage records** of the parish in which the immovable is located.") *Note, however, that between multiple pledgees, there are some special rules about who can collect rent from the lessee. See Below.*

* + - * **For Lessee**-For the tenant, the pledge has effects from the time the lessee receives written notice of the pledge. See also LCC 3161.
    - *Pledge Contained in Act of Mortgage*-"A pledge of the lessor's rights in the lease of an immovable and its rents may be established in an act of mortgage of the immovable. In that event, the pledge is given the effect of recordation for so long as the mortgage is given that effect and is extinguished when the mortgage is extinguished." LCC 3170.
    - *Time of Effectivity*-A properly recorded pledge has effects as to third persons from the time of **recordation**, even with respect to future secured obligations and future collateral. (We don't have special rules on pledge for recordation-it's all the same as what we did in mortgage.)
      * **Future Secured Obligations**-". As to all obligations, present and future, secured by the pledge, notwithstanding the nature of the obligations or the date on which they arise, the pledge has effect between the parties from the time that the requirements for formation of the contract of pledge are satisfied and has effect as to third persons from the time that the applicable requirements of Articles 3153 through 3155 are satisfied." LCC 3146.
      * **Future Collateral**-"The pledge has effect as to third persons, even with respect to leases not in existence at the time of formation of the contract establishing the pledge, from the time the contract establishing the pledge is **recorded in the manner prescribed by law**." LCC 3171.
    - *Method and Duration of Recordation—(Governed by General Law of Registry—see Mortgage—this is all review)*
      * ***Duration; General Rule****—“Except as otherwise expressly provided by law, the effect of recordation of an instrument creating a mortgage* ***or pledge*** *or evidencing a privilege ceases ten years after the date of the instrument." LCC 3357.*
      * ***Duration When Instrument Describes Maturity Date 9 Years or More After Date of Instrument****—“If an instrument creating a mortgage* ***or pledge*** *or evidencing a privilege describes the maturity of any obligation secured by the mortgage,* ***pledge*** *or privilege and if any part of the described obligation matures nine years or more from the instrument, the effect of recordation ceases six years after the latest maturity date described in the instrument." LCC 3358.*
      * ***Effect of Amendment****—“If before the effect of recordation ceases an instrument is recorded that amends a recorded mortgage,* ***pledge****, or privilege to describe or modify the maturity of a particular obligation that it secures, then the time of cessation of the effect of recordation is determined by reference to the maturity of the obligation last becoming due described in the mortgage,* ***pledge****, or privilege as amended." LCC 3361.*
    - *Reinscription (Again, governed by General Law of Registry and all Review).*
      * ***Method of Reinscription****—“A person may reinscribe a recorded instrument creating a mortgage* ***or pledge*** *or evidencing a privilege by recording a signed written notice of reinscription. The notice shall state the name of the mortgagor* ***or pledgor****, or the name of the obligor of the debt secured by the privilege, as it appears in the recorded instrument, as well as the registry number or other*

*appropriate recordation information of the instrument or of a prior notice of reinscription, and shall declare that the instrument is reinscribed." LCC 3362.*

* + - * ***Method of Reinscription Exclusive****—“The method of reinscription provided in this Chapter is exclusive. Neither amendment of an instrument creating a mortgage* ***or pledge****, or evidencing a privilege, nor an acknowledgement of the existence of a mortgage,* ***pledge****, or privilege by the mortgagor,* ***pledgor****, or obligor constitutes a reinscription of the instrument." LCC 3363.*
      * ***Effect of Timely Recordation of Notice of Reinscription****—“A notice of reinscription that is recorded before the effect of recordation ceases continues that effect for ten years from the date the notice is recorded." LCC 3364.*
      * ***Effect of Notice Recorded After Cessation of Effect of Recordation****—“A notice of reinscription that is recorded after the effect of recordation of the instrument sought to be reinscribed has ceased, again reproduces the effects of recordation, but only from the time that the notice of reinscription is recorded. The effect of recordation pursuant to this Article shall continue for ten years from the date on which the notice of reinscription is recorded, and the instrument may be reinscribed thereafter from time to time as provided by Article 3362. Reinscription pursuant to this Article does not require that the mortgage* ***or pledge*** *or evidence of privilege be again recorded, even after the original recordation has been cancelled." LCC 3365.*
    - *Cancellation (Again, governed by the General Law of Registry and all Review)*
      * ***Cancellation Upon Written Request****—“A. The recorder of mortgages shall cancel, in whole or in part and in the manner prescribed by law, the recordation of a mortgage,* ***pledge,*** *or privilege upon receipt of a written request for cancellation in a form prescribed by law and that: (1) Identifies the mortgage,* ***pledge*** *or privilege by preference to the place in the records where it is recorded; and (2) Is signed by the person requesting the cancellation. B. The effect of recordation of the instrument ceases upon cancellation by the recorded pursuant to the provisions of this Article." LCC 3366.*
      * ***Cancellation After Effect of Recordation has Ceased****—“If the effect of recordation of a mortgage, pledge, or privilege has ceased for lack of reinscription… the recorded upon receipt of a written signed application shall cancel its recordation." LCC 3367.*

## Modification or Termination of the Lease

* + - RELISTEN to first 15 minutes of 3/29 lecture.
    - *In General*-"The parties to a contract from which a pledged obligation arises may agree to modify or terminate the contract or to substitute a new contract. If made in good faith, the agreement is effective against the pledgee without his consent. Nevertheless, after written notice of the pledge is given to the obligor of a pledged obligation that has been **fully earned** by the pledgor's performance, an agreement modifying or extinguishing the pledged obligation is without effect against the pledgee unless made with his consent." LCC 3164.
      * **Good Faith Required**-If the modification is made in bad faith, then the modification is never enforceable against the pledgee.

▫ We have no definition of good faith here. Basically, we think just unintentional, not maliciously done for the purpose of harming the creditor would be good faith.

* + - * **When Consent Required**-If the modification is made in good faith, consent is not required if the modification or termination is made before the lessee has written notice of the pledge. If the modification or termination is made after the lessee has written notice of the pledge, the consent of the pledgee is required.
      * We don't know what **fully earned** means. This is a term borrowed from Article 9, and there are only a handful of cases nationwide that mention it. We think that the obligation must be due and exigible and the tenant has no defense against the landlord.
      * **Quick and Dirty**-Modifications are enforceable against pledgee if made in good faith. Exception: modifications to obligations that are fully earned by pledgor's performance made **after** written notice of the pledge is given to the lessee are **not enforceable** unless the pledgee consents.
    - *Attachment of Pledge to Obligations Arising Under Modified or Substituted Contract*- "Upon the modification of a contract from which a pledged obligation arises, or the substitution of a new contract, the pledge encumbers the corresponding rights of the pledgor under the modified or substituted contract." LCC 3165.
      * After modification, termination, or substitution, the pledge attaches to the rights of the pledgor as modified, terminated, or substituted.
    - *Modification as Default of Pledgor*-"The pledgor and pledgee may agree that a modification or termination of the contract from which ah pledged obligation of a third person arises, or the substitution of a new contract, is a default by the pledgor." LCC 3166.
      * Pledgor and pledgee can agree that modification/termination constitutes **default**- that changing the lease puts landlord in breach of pledge and maybe even agree to stipulated damages.

## Hypotheticals

▫ (1.) On February 1, 2018, Landlord and Tenant enter into a written lease of Blackacre for a term of 5 years. The lease was properly recorded in the conveyance records. In Year 1, Landlord borrowed $1,000,000 from Big Bank and, to secure the loan, pledged Landlord's rights to collect rent under the lease. The pledge agreement was properly recorded in the mortgage records, but Tenant **was not notified** of the pledge. In Year 2, Landlord and Tenant agreed to reduce the term of the lease by 2 years so that the lease will now end **early** on January 31, 2021. Q1: *Is this modification enforceable against Big Bank?* This looks like good faith, and there wasn't written notice, so no exception. Enforceable against Bank. Q2: *What if, instead of shortening the term, Landlord and Tenant agreed to immediately terminate the lease because the Tenant was suffering from cash-flow problems?* Probably good faith and enforceable against Bank if done before Bank gave notice to tenant. Q3: *What if, instead of terminating the lease, Tenant found a new tenant, Retailer, who agreed to sign a new lease with Landlord for the same price?* Novation-binding on bank.

## So to preserve the pledge, the creditor needs/wants to (1) give

**written notice of the pledge to the tenant, and (2) agree in the pledge not to modify, at least not without consent of the creditor.**

▫ (2.) Same facts as above, except the loan agreement between Landlord and Big Bank provides that any modification of the lease constitutes a "default" of the loan, permitting the Creditor to demand immediate payment of the entire principal balance. Now, what is the result of the modification?

## Rights and Obligations of the Parties

* + - *Enforcement of Obligations Under Lease*-"If the thing pledged is an obligation of a third person, the pledgee is entitled to enforce performance of the third person's obligation when it becomes due and to retain as security any payment or other thing received from the third person. The pledgee may **apply** any money collected to the secured obligation, even if not yet due. He must account to the pledgor for any payment or other thing remaining after the secured obligation has been satisfied." LCC 3160.
      * Pledgee can collect rent directly from lessee if the lessee has been given written notice and the creditor directs lessee in writing to pay the pledgee. Pledgee then can apply rent collected to the principle obligation, even if not yet due.
      * Below, it's helpful to remember that the "pledged obligation" is the lease, and the

"obligor" in that obligation is the lessee.

* + - * **Performance by Obligor of Pledged Obligation**-"A third person obligated on a pledged obligation is bound to render performance to the pledgee only from the time that the pledgor or pledgee notifies him of the pledge and directs him in writing to render performance to the pledgee. Performance that the third person renders to the pledgor before that time extinguishes the pledged obligation and is effective against the pledgee." LCC 3161.
      * **Defenses Available to Obligor of a Pledged Obligation**-"Unless the obligor of a pledged obligation makes a contrary agreement with the pledgor or pledgee, he may assert against the pledgee any defense arising out of the transaction that gave rise to the pledged obligation. He may also assert against the pledgee any other defense that arises against the pledgor before the obligor has been given written notice of the pledge." LCC 3162.

▫ Tenant v. Creditor-Any defense on the lease itself that would prevent tenant from having to pay landlord can be raised against the creditor. And also any other claims against landlord arising before written notice (compensation-setoff).

* + - * **Clause Prohibiting Pledge**-A clause in a contract restricting the pledge of the rights of a party to payments that are or will become due under the contract, making the pledge or its enforcement a default under the contract, or providing that the other party is excused from performance or may terminate the contract on account of the pledge, is without effect." LCC 3163.

▫ Anti-pledge clause is unenforceable as against public policy. But a negative pledge clause is enforceable.

▫ "Negative Pledge" Allowed-LCC 3163 cmt. d. A negative pledge clause is one in which an obligor agrees with one of his creditors that he will no encumber one or more of his assets in favor of another creditor. Thus, a lessor may validly agree with one of his creditors that he will not pledge to another creditor his rights to rents arising under a lease of an immovable. The reason the anti-pledge Article doesn't apply to such an agreement is that the contract restricting the pledge is not the contract under which the pledged payments will become due. Here, the pledged payments arise under the lease between the lessor and lessee, while the prohibition against pledging those payments arises under the contract between the lessor and his creditor.

* + - * + Creditor and Lessor agree that the lessor/debtor can't pledge his leases and rents to any other creditor, and if he does, it's a breach of

the loan agreement (i.e., immediate default and acceleration, for instance).

▫ Pledgee Not Bound for Pledgor's Obligations-"In the absence of an assumption by the pledgee, the existence of a pledge does not impose upon the pledgee liability for the pledgor's acts or omissions, nor does it bind the pledgee to perform the pledgor's obligations." LCC 3167

* + - * + Pledge only transfers the "rights side" of the lease to the creditor and not the "duties" owed to the tenant. If the creditor wants the duties, it would have to be through assumption.
        + This is fairly frequently tested on the bar exam.

▫ Judicial Sale Prohibited-"A pledge of the lessor's rights in the lease of an immovable and its rents does not entitle the pledgee to cause the rights of the lessor to be sold by judicial process. Any clause to the contrary is absolutely null." LCC 3174. So how does the creditor enforce the pledge? See 3174 cmt. (b): "The pledge of a lessor's rights in the lease of an immovable and its rents is enforced only by collection of rents and enforcement of other obligations of the lessee under the lease. . If necessary, the pledgee may enforce his rights by bringing suit directly against the lessee. He may also employ remedies available under the Code of Civil Procedure to seize the rents in the hands of the lessee, but he cannot cause the lessor's rights under the lease to be sold by judicial process."

* + - * + The Pledgee cannot seize and sell the pledgor's rights in the lease,

but he MAY:

Collect rent; enforce other obligations under the lease

Seize rent from lessee if necessary

Bring suit directly against lessee.

* + - * + WHY? Because this would be a really weird dismemberment of property rights-we want to ensure that the property and the pledge go together.
  + **Conflicts Among Pledgees** (~Ranking)
    - *Payment of Rent to a Superior Pledgee*-A lessor may pledge his rights in a lease of an immovable and its rents to more than one creditor [absent a negative-pledge clause]. If a second-to-record pledgee has collected rent, he may need to account to a first-to-record pledgee. This is governed by LCC 3173.
      * **General Rule**-"Except as provided in this Article, a pledgee is not bound to account to another pledgee for rent collected."
      * **Exceptions**-"A pledgee shall account to the holder of a superior pledge for rent the pledgee collects **more than one month before it is due** and for rent he collects **with actual knowledge** that the payment of rent to him **violated written directions given to the lessee** to pay rent to the holder of the superior pledge."

▫ First to record is first ranked, but an inferior pledgee who accepts rent gets to keep it unless (1) he collected rent more than one month early, or (2) he collected rent with actual knowledge that the lessee had received written direction to give rent to the superior pledgee.

▫ PRACTICE POINT: If you're first to record/first in right, you need to

immediately direct the tenant to play you, as the pledgee, and watch the

records to make sure that any later-recorded pledgee gets notice of your notice to the tenant.

* + - *Payment of Rent to Another Pledgee Upon Extinguishment of Secured Obligations*-"After all secured obligations owed to a pledgee have been extinguished, he shall deliver any remaining rent collected to another pledgee who has made written demand
    - upon him for the rent before he delivers it to the pledgor."
      * In any event, a pledgee who has been accepting rent and becomes paid in full must pay any other pledgees the excess upon written demand.
    - *Hypothetical*-On January 1, Landlord pledges his rights in a lease with Tenant to Big Bank to secure a loan. The pledge is properly recorded in the mortgage records. On February 15 of the same year, Landlord pledges his rights in the same lease with Tenant to Baby Bank to secure a second loan. The pledge is also properly recorded in the mortgage records, and Baby Bank sends Tenant written notification of the pledge and directs Tenant to immediately remit all rental payments owed for the rest of the year directly to Baby Bank. Baby Bank does so on March 1. *Can Big Bank require Baby Bank to turn over the rent collected?* As long as Baby Bank didn't collect any rents more than a month in advance, and Big Bank didn't send written notice of the same sort to Tenant (or even if they did and Baby Bank didn't know about it), Baby Bank gets to keep the payments.

# Ranking of Privileges

**Security Devices Affective Movables**

* **Privileges: The Civil Code**
  + **Special v. General Privileges**
    - **General Rule**-Special Privileges Outrank General Privileges *See* La. Civ. Code art. 3254 (the title of this article actually says it best): "If the movable property, not subject to any special privilege, is sufficient to pay the debts which have a general privilege on the movables, those debts are paid in the following order: [ranking scheme for general privileges follows.]" Implicit in this sentence is a rule that special privileges are paid first if there is *not*enough movable property to satisfy the debtor's obligations.
    - **Exception—Spouse/ Children in Necessitous Circumstances Outrank All Other Rights Except Vendor’s Privilege.** *See* La. Civ. Code art. 325412 "The thousand dollars secured by law in the surviving spouse or minor children, as set forth in Article 3252, shall be paid in preference to all other debts, except those for the vendor's privilege and expenses incurred selling the property."
  + **Among the Special Privileges** -"But when part of the movables are subject to special privileges,

and . . . there be equality [concurrence] between the special privileges, the following rules shall

direct the determination." La. Civ. Code art. 3255.

* + *Note: the “numbering" that follows is not suggestive of the rank of the privileges*. *It follows the order in which these privileges are discussed in the Civil Code. We will determine the proper rank order of the privileges in class.*
    - **The Lessor’s Privilege** -The lessor's privilege primes all other privileges, with the exception of the privilege of the spouse/children in necessitous circumstances and the funeral chargesprivilege.
      * **General Rule for the Lessor’s privilege** -"But the lessor has a preference on the price of these movables, over all the other privileged debts of the deceased, such as expenses of the last illness, and others which have a general privilege on the movables." La. Civ. Code art. 3258.

▫ Note La. Civ .Code art. 3256:"Whatever may be the privilege of the lessor, charges for selling the movables subjected to [the lessor's privilege] are paid before that which is due for the rent, because it is those charges which procure the payment of the rent."

* + - * **Exception for funeral charges** -"The case is the same with respect to the funeral expenses of the debtor and his family; when there is no other source from which they can be paid, they have a preference over the debt for rent or hire, on the price of the movables contained in the house or on the farm." La. Civ. Code art. 3257.
      * **Exception for spouse/children in necessitous circumstances** -*See again* CC 3254¶2. As noted above, this privilege primes every other privilege except the vendor's privilege.

## The Depositor’s Privilege

* + - * **The Depositor’s Privilege (Review)**-Recall that the depositor *owns* the thing deposited and thus has the right to reclaim it from the creditor as long as the thing is "identically the same" which he deposited. *See* La. Civ. Code art. 3222. The only "privilege" the depositor enjoys is on the *price* of the thing deposited when it is wrongfully sold. *See* La. Civ. Code art. 3223. The ranking rules thus deal with the right of the depositor to the price of the thing wrongfully sold. The price will need

to be identifiable, thus, practically speaking, this occurs when the thing is sold in a judicial sale.

* + - * **Depositor v. Lessor** -"If, among the movables with which the house or farm, or any other thing subject to the lessor's privilege, is provided, there should be some which were deposited by a third person in the hands of the [lessee] or farmer, the lessor shall have a preference over the [depositor] on the things deposited for the payment of his rent, unless it be proved that the lessor knew that the things deposited did not belong to the tenant or farmer." La. Civ. Code art. 3260.
      * **Depositor’s Privilege v. Other Privileges —**"With the exception stated in the foregoing article, the privilege of the depositor on the thing deposited is not preceded by any other privileged debt, even funeral expenses.." La. Civ. Code art. 3261.

## The Civil Code Possessory Privileges (of the Depositary, the Innkeeper, the Carrier, the Artisan/Repairperson

* + - * **Depositary’s Privilege** -"The privilege of him who has taken care of the property of another, has a preference over that property, for the necessary expenses which he incurred, above all the other claims for expenses, even funeral charges; his privilege yields only to that for the charges on the sale of the thing preserved." La. Civ. Code art. 3262.
      * **Privilege of Innkeepers** -"The privilege of innkeepers on the effects of travelers deceased in their house, is postponed to funeral and law charges, but is preferred to all other privileged debts of the deceased." La. Civ. Code 3264.
      * **Privilege of Carriers**-"The privilege of carriers, for the cost of transportation and incidental expenses, yields only to the charges which would arise from the sale of the goods.." La. Civ. Code art. 3265.
      * **The Artisan/Repairman’s Privilege** -Article 3263 suggests that the vendor's privilege trumps the artisan/repairman's privilege. There is no special exception in the code. However, *Cozzo v. Ulrich*, 14 Orl. App. 137 (Teiss.) (La. 1916) held that the artisan's lien is superior to the vendor's privilege, and this holding can be generalized to any possessory privilege.

## Vendor’s Privilege

* + - * **Vendor’s Privilege v. Lessor’s Privilege** -"The privilege of the vendor on movables sold by him, which are still in the possession of the vendee, yields to that of the owner of the house or farm which they serve to furnish or supply, for his rents. .." La. Civ. Code art. 3262. As this Article makes clear, the vendor's privilege yields to the lessor's privilege.
      * **Vendor’s Privilege v. General Privileges** -Recall that general privileges (with the exception of the privilege for the spouse/children in necessitous circumstances) yield to special privileges. *See* La. Civ. Code. art. 3254.
  + **Among the (Remaining) General Privileges** -".Funeral charges are the first paid. Law charges, the second. Expenses of last illness, the third. The wages of servants, the fourth. Supplies of provisions, the fifth. The salaries of clerks, secretaries, and others of that nature, the sixth." La.

Civ. Code art. 3254.

## Statutory Privileges and Article 9 Security Interests

* + **The Attorney’s Privileges**
    - **The Lawyer’s Charging Lien** -"A. A special privilege is hereby granted to attorneys at law for the amount of their professional fees on all judgments obtained by them, and on

the property recovered thereby, either as plaintiff or defendant, **to take rank as a first privilege thereupon superior to all other privileges and security interests under Article 9 of the Louisiana Commercial Laws.**B. The term "professional fees," as used in this Section, means the agreed upon fee, whether fixed or contingent, and any and all other amounts advanced by the attorney to or on behalf of the client, as permitted by the Rules of Professional Conduct of the Louisiana State Bar Association." La. R.S. 9:5001.

* + - **The Contingency Fee Privilege** -"A. By written contract signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit, proposed suit, or claim in the assertion, prosecution, or defense of which he is employed, whether the claim be for money or for property.**Such interest shall be a special privilege to take rank as a first privilege thereon, superior to all other privileges and security interests under Chapter 9 of the Louisiana Commercial Laws...”** La. R.S. 37:218A. . "The term "fee" as used in this Section, means the agreed upon fee, whether fixed or contingent, and any and all other amounts advanced by the attorney to or on behalf of the client, as permitted by the Rules of Professional Conduct of the Louisiana State Bar Association." La. R.S. 37:218B.
  + **The Trauma Care Provider’s Privilege** -"The privilege of an attorney shall have precedence

over the privilege created under this Section." La. R.S. 9:4752.

## Article 9 Security Interests and Other Statutory Privileges

* + - **Non-Farm Product Movables —**Recall that Article 9 security interests that have attached (even if unperfected) generally take priority over privileges. *See* La. R.S. 10:9-322(h) ("A security interest has priority over a conflicting lien, other than an agricultural lien, in the same collateral except as otherwise provided in this Chapter or except to the extent the lien is created by a statute that expressly provides that the lien has priority over the security interest."). *Among* Article 9 Security Interests, the ranking scheme described in Detailed Outline 5, Installment 4 applies. *Between* Article 9 security interests and privileges, Article 9 security interests generally win.
      * **Exception: Possessory Liens, Unless Otherwise Provided by Law** -"A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise." La. R..S. 10:9-

333(b). Note: a "possessory lien" is defined as "a lien other than an agricultural lien: (1) which secures payment for payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business; (2) which is created by operation of law in favor of the person; and (3) whose effectiveness depends on the person's possession of the goods." La. R.S. 10:9-333(a). This includes the **Civil Code Possessory Privileges (depositary, innkeeper, carrier, artisan/repairperson)**. This generally does *not*include the statutory privileges.

▫ **Statutory Repairperson, RS 9:4502**-"This privilege is inferior to the vendor's privilege, a chattel mortgage previously recorded, a previously perfected security interest under Chapter 9 of the Louisiana Commercial Laws..." La. R.S. 9:4502B.

▫ **Statutory Mechanic’s Privilege, RS 9:4501**-"This privilege is superior to all other privileges except for a vendor's privilege, a chattel mortgage previously recorded, a previously perfected security interest under Chapter 9 of the Louisiana Commercial Laws." La. R.S. 9:4501B.

▫ **The Statutory Hauler’s Privilege, RS 9:4601**-"This privilege is inferior to a vendor's privilege, a chattel mortgage previously recorded, a previously

perfected security interest under Chapter 9 of the Louisiana Commercial

Laws." La. R.S. 9:4601B.

▫ **Statutory Warehouse Privilege, RS 10:7-209**-This statute creating this possessory privilege does not provide that it is inferior to an Article 9 security interest. I will never test you on the ranking of the statutory warehouse privilege, and, I pray, neither will the bar examiner. I point this out only to show you an example of a statutory possessory privilege whose enacting legislation does not expressly state that it is inferior to an Article 9 security interest.

## Farm Product Movables

* + - * **Between Article 9 Security Interests and Liens** -La. R.S. 10:9-322(g).

▫ agricultural privileges in favor of agricultural laborers, with equal rank among themselves; (Recall that "agricultural laborers" includes "the worker, thresherman, combineman, grain drier, or overseer.")

▫ the lessor's privilege, if perfected;

▫ other perfected agricultural liens and perfected security interests (with contests between perfected rights ranking according to priority in time of filing or perfection).

▫ the lessor's privilege, if unperfected;

▫ other unperfected agricultural liens and security interests (with the first

security interest or agricultural lien to attach or become effective having priority.)

* + - * **Between Article 9 Security Interests and Other Conflicting Lien** -"A security interest has priority over a conflicting lien, other than an agricultural lien, in the same collateral except as otherwise provided in this Chapter or except to the extent the lien is created by a statute that expressly provides that the lien has priority over the security interest." La. R.S. 10:9-322(h).

## Right of Pledge to Cash Proceeds of Rent, RS 9:4402

* + - **Right to Cash Proceeds in General** -"A. Unless otherwise agreed, a pledge of the lessor's interest in the rents of an immovable encumbers any identifiable cash proceeds of rent, such as money, checks, deposit accounts, or the like." RS 9:4402A.
    - **Against Transferee of Funds from Deposit Account** -"B. The right of a pledgee to proceeds of rent deposited into a deposit account maintained with a financial institution are subject to the rights of the following persons: . (2) A transferee of funds from the deposit account, unless the transferee acts in collusion with the pledgor in violating the rights of the pledgee." La. RS 9:4402B(2).
    - **Pledgee v. Pledgee** -"C. B. The right of a pledgee to proceeds of rent deposited into a deposit account maintained with a financial institution are subject to the rights of the following persons: (4) "Another pledgee holding a superior pledge of the rent." La. R.S. 9:4402B(4). [Recall that ranking between pledgees is determined by the public records doctrine.]
    - **Pledgee v. Other Secured Creditors** -"B. The right of a pledgee to proceeds of rent deposited into a deposit account maintained with a financial institution are subject to the rights of the following persons: (1) "The financial institution with which the deposit account is maintained; (2) A secured party holding a security interest perfected by control of the deposit account in accordance with R.S. 10:9-104."
* **Vicious Circles** -Some conflicts between privileges are impossible to resolve.
  + **Example: Lessor, Vendor, Funeral** -The lessor beats the vendor, the vendor beats the funeral

home, but the funeral home beats the lessor.

* + - **Hypothetical** Terri rents an apartment from Louis. Terri purchases a television from Victor, who agrees to let Terri pay for the television anytime within the next month. The following day, Terri dies. Assume that Terri owes $1000 to Louis, $1000 to Victor, and that the costs of Terri's burial, which were $1000, were fronted by the Funeral Home.
      * **The lessor beats the vendor**
      * **The vendor beats the funeral home**
      * **The funeral home beats the lessor**
  + **Example: Vendor, Lessor, Repairman** -The lessor beats the vendor, the vendor beats the statutory repairman, the repairman beats the lessor.
    - **Hypothetical —**Terri rents an apartment from Louis. Terri purchases a television from Victor, who agrees to let Terri pay for the television anytime within the next year. A few days later the TV broke and Terri took it to Robby for repairs. Once the repairs were complete, Terri took the TV home but did not pay the cost of repairs. Robby enforced its privilege against the TV (through seizure) and Victor and Louis both intervened in the lawsuit, asserting their privileges.
      * **The statutory possessory privileges beat the lessor**
      * **The lessor beats the vendor**
      * **The vendor beats the statutory possessory privilege**
  + **Resolution —**Commentators suggest that vicious circles could be resolved by applying the last amended statute or by applying the rule that best achieves the overall societal purpose. Neither of these approaches will definitively resolve the conflicts.

## Security Devices Affecting Immovables

* **Special Privileges** -Recall that under Article 3254, special privileges outrank general privileges. The

only special privilege affecting immovables that we have studied thus far is the vendor's privilege.

* + **Vendor’s Privileges v. Vendor’s Privileges** -"If there are several successive sales, on which the price is due wholly or in part, the first vendor is preferred to the second, and the second to the third, and so throughout as provided in Article 3186, and assuming timely recordation as

provided in Article 3274, each such vendor is preferred to the previously recorded mortgages of his vendor and their successors." La. Civ. Code art. 3251. Note that the rank is established by timing of recordation. *See* La. Civ. Code art. 3274.

## Vendor’s Privileges v. Mortgage

* + - **Ranking of Vendor’s Privilege —**"No privilege shall have effect against third persons, unless recorded in the manner required by law in the parish where the property to be affected is situated. It shall confer no preference on the creditor who holds it, over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded within seven days from the date of the act of obligation of indebtedness when the registry is required to be made in the parish where the act was passed or the indebtedness originated and within fifteen days, if the registry is required to be made in any other parish of this State. It shall, however, have effect against all parties from the date of registry." La. Civ. Code art. 3274.
      * **Vendor’s privilege beats mortgage** -Privilege is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, ***even those who have mortgages***." La. Civ. Code art. 3186. Note that this language is qualified by rules regarding the *timing* of recordation.

▫ When act of sale is filed in the mortgage records prior torecordation of a mortgage.

▫ When act of sale is filed in the mortgage records afterthe recordation of a mortgage **within 7 days (15 days if the act must be recorded in a different parish than where it was executed)**, it will rank from the date of the execution of the act of sale.Thus, any mortgage filed between the execution of the act of sale and the recordation of the act of sale will be inferior to the vendor's privilege, even though recorded first.

- **Hypothetical**-On April 1, Seller and Buyer enter into an Act of Credit Sale of immovable property located in Tangipahoa Parish. The act was executed in Tangipahoa Parish and states that the purchase price is payable over time. On the same date, Buyer grants Creditor a mortgage in the property. On April 2, Creditor files its act of mortgage in the mortgage records. On April 6, Seller files the Act of Credit Sale in the mortgage records. Who has priority: Seller or Creditor? How would it affect your answer, if at all, if Seller did not file the Act of Credit Sale until April 14?

▫ **Judicial Mortgages**-Under the Louisiana jurisprudence, a timely filed vendor's privilege outranks a judicial mortgage against the purchaser, even when the judgment was filed *before*the Act of Sale was passed. The underlying rationale is that the buyer's interest in the property attaches at the moment of sale; however, at that point the buyer's rights are already encumbered by the vendor's privilege in favor of the seller, and the judicial mortgage holder cannot expect to receive more rights than Buyer received in the sale.

* + - * **Mortgage beats vendor’s privilege** -If the vendor's act of sale is not filed within 7/15 days then the vendor's privilege dates from the time of recordation. An earlier-filed mortgage will trump a later-filed act of sale evidencing the vendor's privilege.

## General Privileges

* + **Immovables Liable Only When Movables Insufficient** -"If the movables of the debtor, by reason of the special privileges affecting them or for any other cause, are not sufficient to discharge the debts having a privilege on the whole movable property, the balance must be raised

on the immovables of the debtor, as hereafter provided." La. Civ. Code art. 3266.

* + **General Privileges Need Not Be Recorded** -Unlike the vendor's privilege, the general

privileges that extent to immovables need not be recorded to be preserved against third persons.

## Spouse/ Children in Necessitous Circumstances Outrank All Other Rights Except Vendor’s

**Privilege** - *See* La. Civ. Code art. 325412 "The thousand dollars secured by law in the surviving spouse or minor children, as set forth in Article 3252, shall be paid in preference to all other debts, except those for the vendor's privilege and expenses incurred selling the property." *See also* La. Civ. Code art. 3252.

* + **Among the (Remaining) General Privileges** -Among the general privileges on immovables,

the order is as follows: funeral charges, judicial charges [law charges], expenses of last illness, wages of servants, and salaries of secretaries, clerks, and other agents of their kind. *See* La. Civ. Code art. 3252, 3270, 3254.

* + **Mortgages Lose to General Privileges** -"*Privilege*is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have

mortgages." La. Civ. Code art. 3186. Without any qualifying language about recordation or timing, we must assume that this article applies literally.

* + - **Exception: Privilege of Spouse/Children Yields to Conventional Mortgage** - According to La. Civ. Code art. 3252, the privilege of the spouse/children is paid in preference to everyone except the vendor's privilege and "conventional mortgages." Presumably, to trump the privilege, the conventional mortgage would have to have been perfected through filing, but this is not clear in Article 3252.

## Mortgages v. Mortgages

* + **Timing as to –After-Acquired Property** -Recall that after-acquired property may be the object of a mortgage, and, in such a case, the mortgage is "established" when the property is acquired by the mortgagor. *See* La. Civ. Code art. 3292.
    - **Example** -On April 1, Betty grants a mortgage to Creditor in a tract of land that she has not yet purchased. On the same day, the mortgage is properly recorded. On May 1, Betty purchases the property and records the act of sale in the conveyance records. The mortgage attaches *and*becomes effective against third persons on May 1.
  + **Timing as to Future Indebtedness** -Recall that a mortgage may secure obligations that may

arise in the future. In such a case, the mortgage has effects as to third persons from the time the contract of mortgage is filed for registry. La. Civ. Code art. 3298.

## Article 9 Creditors v. Mortgages

* + **General Rule —**"[A] security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor." La. R.S. 10:9-334(c). In other words, absent a special exception, the mortgagee wins.
  + **Growing Crops on Land Subject to a Mortgage** -"A perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in the real property." La. R.S. 10:9-334(i).
  + **Other Component Parts of an Immovable Subject to a Mortgage** -A mortgage or other interest in a movable generally extends to its component parts, see CC 469. If a movable good to which an Article 9 security interest has attached is later affixed to an immovable, the mortgagee has priority over the Article 9 creditor unless oneof three conditions is met:
    - An Article 9 Fixture interest is properly perfected by fixture filing before the immovable property interest is recorded. *See* La. R.S. 10:9-334(e)(1)(B). In other words, first to record or perfect wins.
    - The security interest is a PMSI and is perfected by fixture filing before the fixture is affixed. *See* La. R.S. 10:9-334(d). (However, there are exceptions for "construction mortgages.") In other words, properly perfected PMSI in a fixture will beat even a prior recorded mortgage.
    - The immovable rights holder in an authenticated record consents to the security interest or disclaims any interest in the fixture. *See* La. R.S. 10:9-334(f)(1). In other words, the holder of the mortgage can consent to the superiority of the fixture filing.

# Private Works Act

## Overview

* Notion-To encourage people to supply labor and materials for construction and improvement of immovable property, the law provides a privilege in the immovable to secure unpaid claims for wages and material supplied on credit. Outside of Louisiana, such a privilege is generally called a "mechanic's and materialman's lien" (or M&M lien). In Louisiana such privileges are called Private Works Act privileges, as the Private Works Act is the statute that creates and regulates such privileges.
  + Generally, any laborer or supplier contributing to the construction or improvement of an

immovable can get a PWA privilege.

* Construction Contract Practice
  + **A Multiplicity of Actors**-The average construction project, whether residential or commercial, involves a number of persons and/or entities, each of which handles a different aspect of the overall project. These persons include those who offer services and/or labor and those who supply

materials for the project.

* + **Contract Structure**-The owner of the immovable that is to be improved usually does not contract with all of these individuals directly. Instead, he or she usually hires a General Contractor (GC) who oversees the project. The GC then enters into individual contracts (termed subcontracts)

with the various persons who will supply labor and supplies to the project. Those subcontractors ("subs") often hire their own subcontractors to complete all or part of their part of the work and/or to supply materials for the project.

* + **The Problem**-The owner will pay the price of the work to the GC, who is in turn expected to pay the subs, who are in turn expected to pay their own subs. However, if the GC fails to pay a sub or a sub fails to pay its own sub, then the unpaid party has little meaningful recourse against

the party with whom it has contracted directly. The risk inherent in this line of work might deter people from entering the business to begin with, to the detriment of the larger economy.

* + - This problem arises from the fact that normally parties can only sue those with whom they have a contract (privity). If they didn't contract directly with the owner, they can't really get a judgment on the owner or file a privilege on the immovable they worked on. Instead, people further down the line are left holding the bag.
  + **The Solution**-The law provides security to those who might otherwise be unpaid. The security

is provided by the immovable that was improved through the labor and materials supplied.

* + - Note that even with this privilege, there may be a conflict with other mortgages on the property (such as the bank's mortgage on the loan which funded the project, and was presumably paid to the GC and not forwarded to the subs). There may also be a conflict with fixture filings, though building materials are not covered by fixture filings.
* Applicable Law
  + **Civil Code (LCC 3249 ¶¶ 2–3)**-"Creditors who have a privilege on immovables, are: (2) Architects, undertakers, bricklayers, painters, master builders, contractors, subcontractors, journeymen, laborers, cartmen and other workmen employed in constructing, rebuilding or

repairing houses, buildings, or making other works. (3) Those who have supplied the owner or other person employed by the owner, his agent or subcontractor, with materials of any kind for the construction or repair of an edifice or other work, when such materials have been used in the erection or repair of such houses or other works."

* + - This sets forth the Civil Code authority for this species of privilege. This article is supplemented by the Private Works Act.
  + **Private Works Act (La. R.S. 9:4801–4842)**-The "law" in this area is set forth in the Private

Works Act, a special statutory regime that is similar to the M&M lien law of other states.

* + - *Basic Rights of Protected Parties Under the PWA*-The law protects contractors (general

and sub) involved in a "work," as the term is defined in R.S. 9:4808.

* + - * ***A "claim" (right to sue) against the owner in favor of contractors who are not in privity with him***-R.S. 9:4802(A) gives a "claim" against the owner for all amounts owed to laborers, movable lessors, suppliers, and other subcontractors who are not in privity of contract with the owner.
      * ***A privilege on the immovable to secure payment of the price of work or materials***-R.S. 9:4801 (those who contract with the owner) and R.S. 9:4802(B) (those who contract with someone other than the owner) give a privilege on the immovable constructed, repaired, or improved to those with claims.
      * In some states, the collective amount of claims are capped at the price agreed between the owner and GC-Louisiana has no such limit.
    - *Further Elaboration on the Parties Under the PWA*
      * ***"Owner"****—*The term "owner" is defined in R.S. 9:4806. In general, this terms includes "[a]n owner, co-owner, naked owner, owner of a predial or personal servitude, possessor, lessee, or other person owning or having the right to the use or enjoyment of an immovable or having an interest thereon."

▫ Limitations

* + - * + **Only the Owner who Contracted or Consented**-The claims against an "owner" granted by R.S. 9:4802 (for persons without contractual privity with the owner) are limited to the owner or owners *who contracted with the contractor* or *agreed in writing* to

work procured by a lessee.

* + - * + **Only the Interest of the Owner who Contracted or Consented**- The privilege granted by R.S. 9:4801 and 9:4802 affects only the interest in or on the immovable enjoyed by the owner whose obligation is secured by the privilege.

### Persons Protected

▫ R.S. 9:4801

* + - * + **Contractors**, for the price of their work. Note that "contractor" is a defined term under R.S. 9:4807(A): "A contractor is one who

contracts with an owner to perform all or part of a 'work.'"

* + - * + **Laborers or employers of the owner**, for the price of work performed at the site of the immovable.
        + **Sellers**, for the price of movables sold to the owner that become

component parts of the immovable, or are consumed at the site of the immovable, or are consumed in machinery or equipment used at the site of the immovable.

* + - * + **Lessors**, for the rent of movables used at the site of the immovable and leased to the owner by written contract.
        + **Registered or certified surveyors or engineers, or licensed architects, or their professional subconsultants**, for the price of professional services rendered in connection with a work that is

undertaken by the owner.

* + - * + **4801 provides for a privilege—because 4801 people have already**

**contracted directly with the owner, their “claim” comes from**

**contract.**

▫ R.S. 9:4802

* + - * + **Subcontractors**, for the price of their work.
        + **Laborers or employees of the contractor or subcontractor**, for the price of work performed at the site of the immovable.
        + **Sellers**, for the price of movables sold to the contractor or a subcontractor that become component parts of the immovable, or

are consumed at the site of the movable, or are consumed in machinery or equipment used at the site of the immovable.

Generally this includes building materials and equipment needs (such as motor oil).

*Cable & Connector Warehouse, Inc. v. Omnimark, Inc.*- Bellows contracted to act as a GC on the build out of a number of floors in a commercial office building. Bellows subcontracted with Sandoz for installation of cabling for the computer system. Sandoz purchased the necessary cabling materials from Omnimark, which, in turn, purchased the cabling from plaintiff, Cable & Connector (CCW). CCW brought a claim under PWA as a "seller." Claim failed because the term "seller" only covers those who **sell to the contractor or subcontractor.** We cut off protections at sellers of sellers.

Court considered whether they could award damages for detrimental reliance, but what's the point of the PWA if we'll allow recovery for detrimental reliance for anyone who isn't covered? Similarly, we may want to grant damages for unjust enrichment, but those are only available if there is no other remedy available, and here he could sue the company with whom he had a contract and didn't pay.

* + - * + **Lessors**, for the rent of movables used at the site of the immovable and leased to the contractor or a subcontractor by written contract.

## Prime consultant registered or certified surveyors or engineers, or licensed architects, or their professional subconsultants, for

the price of professional services rendered in connection with a work that is undertaken by the contractor or subcontractor.

## 4802 provides a claim and a privilege, because the 4802 people aren’t in privity with the owner and would otherwise have no claim.

* + - *Means by Which Owner can Avoid Private Works Act Claims and Privileges*-The PWA offers the owner a means of avoiding claims (and their attendant privileges) owed to persons with whom the owner did not contract. R.S. 9:4802(C) says: "The owner is relieved of the claims against him and the privileges securing them when the claims arise from the performance of a contract by a general contractor for whom **a bond is given** and

maintained as required by R.S. 9:4812 and when **notes of the contract with the bond attached is properly and timely filed** as required by R.S. 9:4811."

* + - * The owner is relieved of the claims and privileges when the claims arise from the performance of a contract by a general contractor **for whom a bond is given and maintained** and when **notice of the contract with the bond attached is properly and timely filed**. [Note: the owner cannot avoid claims and privileges of those with whom the owner contracted directly by these means. Basically this works for 4802 claims but not claims for those covered by 4801.]
      * ***Filing A "Notice of Contract"***-R.S. 9:4811(A) requires that "written notice" of a contract between an owner and GC be filed before the contractor begins work.

▫ **Requirements**-R.S. 9:4811(A), the notice:

* + - * + (1) Shall be signed by the owner and the contract.
        + (2) Shall contain the legal property description of the immovable upon which the work is to performed and the name of the project.
        + (3) Shall identify the parties and give their mailing addresses.
        + (4) Shall state the price of the work, or, if no price is fixed, describe the method by which the price is to be calculated and give an estimate of it.
        + (5) Shall state when payment of the price is to be made.
        + (6) Shall describe in general terms the work to be done.

*Courts interpret these requirements* ***super strictly****. There*

*isn't any “close enough" when filing a notice of contract.*

Also, you must attach a bond, according to 9:4812.

▫ **Place of Recordation**-R.S. 9:4831 requires that the notice of contract be filed for registry with the recorder of **mortgages** of the parish in which the work is to be performed.

* + - * + Note that the recordation requires a valid legal property description (requirement 2 above), and a street/mailing address is not enough.

▫ **Lapse and Reinscription**-R.S. 9:4834 provides that a notice of contract ceases **five** years after it is filed, unless it is reinscribed (in the same manner as mortgage [insert link]) prior to lapse. The effect of reinscription ceases five years after the request for reinscription is filed.

* + - * ***Procurement of a "Construction Bond" (and attachment of the evidence thereof to the notice of contract)***-R.S. 9:4812 requires the general contractor to furnish and maintain the bond (promise) of a surety [insert link to suretyship] for the work to be performed under the contract. The bond shall be attached to the notice of the contract when it is filed.

▫ **Minimum Amount of Bond Required**-R.S. 9:4812(B) sets forth minimum amounts for the bond depending upon the overall price of the work stipulated or estimated in the contract.

▫ **Incentive for Contractor to File Notice of Claim and Procure Bond**- Under R.S. 9:4811(D), "[a] general contractor shall not enjoy the privilege granted by R.S. 9:4801 if the price of the work stipulated or reasonably estimated in his contract exceeds $25,000 unless notice of the contract is timely filed." So the contractor can't claim his privilege unless he's procured and filed a bond.

▫ The surety guarantees (1) that the subs will get paid, and (2) that the contractor will do satisfactory work for the owner.

* + - *Cancellation/Erasure of PWA Claims and Privileges*-Privileges are *filed* against the property in the public records. The owner has options for erasing them from the public records. [Basically, this is a way for the owner to get out on the backend if no notice/bond was filed at the beginning.]

### Claims/Privileges that were improperly filed or are/have become ineffective—

R.S. 9:4833(A) allows the owner to demand written authorization from the claimant for removal of the privilege, or to initiate a summary proceeding to have the privilege declared improper.

▫ If the claimant fails to cancel their claim in the records, the claimant will be responsible for damages and attorney fees when the owner brings suit against the claimant to clean up the records.

* + - * ***Claims/Privileges that were properly fined and are still effective***-The recorded cannot cancel the claims and privileges from the public records unless one of the two following occurs:

▫ (1) the owner deposits with the recorder of mortgages a bond, case, or certified funds in the amount of 125% of the claim. R.S. 9:4835.

* + - * + If you do this, your property is no longer burdened, but the owner is still on the hook for all claims (which are now just unsecured and have no privileges attached).

▫ (2) The owner invokes a concursus proceeding of all claimants and deposits with the registry of the court the amounts owed to him by the general contractor. If the court determines that the property amount has been deposited and other requirements complied with, the court can issue an order discharging the owner from liability and directing the cancellation fo the claims and privileges from the public records.

* + - * + This is similar to just paying everyone what they claim-deposit the

funds and walk away, letting the claimants fight over the money.

## Definitions

* "Owner"-R.S. 9:4806(A) defines "owner" more broadly than the term is generally defined. R.S. 9:4806(B) then limits claims against owners to those owners who have contracted with the contractor or what agreed in writing to be liable for those claims.
  + **In General**-"An owner, co-owner, naked owner, owner of a predial or personal servitude, possessor, lessee, or other person owning or having a right to the use or enjoyment of an immovable or having an interest therein shall be deemed to be an owner." R.S. 9:4806(A).
  + **Limitation**-"The claims against an owner granted by R.S. 9:4802 are limited to the owner or owners who have agreed in writing to the price and work of the contract of a lessee, wherein such owner or owners who have specifically agreed to be liable for any claims granted by the provisions

of R.S. 9:4802. If more than one owner has contracted each shall be **solidarily** liable for the

claims." R.S. 9:4806(B).

* + - An owner can only create liability for himself or anyone who agreed to be bound for/with him.
  + **Privilege Affects Only the Interest of the Owner**-"The privilege granted by R.S. 9:4801 and

4802 affects only the interest in or on the immovable enjoyed by the owner whose obligation is

secured by the privilege." R.S. 9:4806(C).

* + - You can't encumber more than your own interest in the thing.
  + **Note on Lessees**-When a lessee contracts for work to improve the immovable subject to the lease, the lessor is not ordinarily responsible as "owner" for claims of persons involved in the work, nor do the privileges granted by the PWA encumber the lessor's ownership interest in the

immovable; instead, the privileges burden only the lessee's leasehold interest.

* + - *Illustration*-*Cajun Contractors vs. EcoProduct Solutions, LP*-A lessee contracted for improvements to be constructed on property leased by it.
    - *Privilege on Lessee's Interest Subordinate to the Lessor*-"The privilege granted by this Part upon a lessee's rights in the lease or buildings and structure shall be **inferior and subject to** all of the rights of, or obligations owed to, the **lessor,** including the right to resolve the lease for nonperformance of its obligations, to execute upon the lessee's rights and sell them in satisfaction of the obligations free of the privilege. If a sale of the lease is made in execution of the claims of the lessor, the privilege attaches to that portion of the sale proceeds remaining after satisfaction of the claims of the lessor." R.S. 9:4806(D). Under this provision, if the lessee defaults upon the lease, the lessor may dissolve the lease or seize and sell the lessee's occupancy rights at a foreclosure sale. In either case, the PWA claims upon the lessee's interest are extinguished.
      * In a battle between the PWA privilege and a lessor, the lessor will win. The lessor can just dissolve the lease and get his property back free and clear of a privilege. In order to actually have the property bound, the lessor needs to consent to actually bind the property. So practically, no one will want to contract with just the lessee, and a GC is incentivized to force a lessor to sign on. Then, the lessor and lessee can work out their liability between themselves, probably in a side contract with the lessee indemnifying the lessor.
      * **Unrecorded Lease?** The rules in 4806(D) apply regardless of whether the lease is found in the public records.
* "Contractor," "General Contractor," and "Subcontractor"-R.S. 9:4807 defines these terms. The distinction matters for **when** filing is required and how they **rank** against each other.
  + **Contractor**-"A contractor is one who contracts with an owner to perform all or part of a work."

R.S. 8:4807(A).

## General Contractor

* + - *In General*-"A general contractor is a contractor: (1) Who contracts to perform all or substantially all of the work; or (2) Who is deemed to be a general contractor by R.S. 9:4808(B).
    - *Those Deemed to be General Contractors*-"If written notice of a contract with a proper bond is properly filed within the time required by R.S. 9:4811, the work to be performed under the contract shall be deemed to be a work separate and distinct from other portions of the project undertaken by the owner. The contractor, whose notice is so filed, shall be deemed a general contractor." R.S. 9:4808(B).
  + **Subcontractor**-"A subcontractor is one who, by contract made directly with a contractor, or by

a contract that is one of a series of contracts emanating from a contractor, is bound to perform all

or a part of a work contracted for by the contractor." R.S. 9:4807(C).

* "Work"
  + **In General**-"A work is a single continuous project for the improvement, construction, erection, reconstruction, modification, repair, demolition, or other physical change of an immovable or its component parts." R.S. 9:4808(A).
    - *Effect of Multiple Contracts*-In general, the fact that the work is to be performed by multiple contractors does not cause a single project to be divided into separate "works." Nevertheless, if a notice of contract is properly filed, then the work is to be performed under *that* contract is deemed to be a "work" separate and distinct from other portions of the project. R.S. 9:4808(B).
      * This only applies to contractors, not subs-i.e., there can only be a separate work if the contract is between the contractor and owner for a particular part of the project and the bond/notice of contract is properly and timely filed. Distinct notices of work can artificially divide up the "work" into "works."
  + **Site Preparation**-Site preparation work of the nature described in R.S. 9:4808(C) is **deemed** to be a **separate work** to the extent that the site preparation work is not a part of the contractor's work.
    - R.S. 9:4808(C): "The clearing, leveling, grading, test piling, cutting or removal of trees and debris, placing of fill dirt, leveling of the land surface, demolition of existing structures, or performance of other work on land for or by an owner or the owner's contractor, in preparation for the construction or erection of a building or other construction thereon to be substantially or entirely built or erected by a contractor, shall be deemed a separate work to the extent the preparatory work is not a part of the contractor's work for the erection of the building or other construction."
* "Commencement," "Substantial Completion," and "Abandonment"
  + **Commencement—**Under R.S. 9:4820(A)(2), work is begun "by placing materials at the site of the immovable to be used in the work ***or*** conducting other work at the site of the immovable the effect of which is visible from a simple inspection and reasonably indicative that the work has begun."
    - *Things* ***Not*** *Constituting Commencement of Work [Exceptions]*
      * Site Preparation-"For these purposes, services rendered by a surveyor, architect, or engineer, or the driving of test piling, cutting or removable of trees and debris, placing of fill dirt, demolition of existing of existing of structures, or leveling of the land surface shall ***not*** be considered."
      * Placing of Materials Having a Value of Less Than $100-".nor shall the placing of materials having an aggregate price of less than one hundred dollars on the immovable be considered."
  + **Substantial Completion**-Under R.S. 9:4822(H), a "work" is "substantially completed" when:
    - "The last work is performed on, or materials are delivered to the site of the immovable or that that portion or area with respect to which a partial notice of termination of work is filed; or"
      * Contractor is totally done or files notice of termination as to part of the work.
    - "The owner accepts the improvement, possesses or reoccupies the immovable, or that portion or area of the immovable with respect to which a notice of partial termination is filed, although minor or inconsequential matters remain to be finished or minor defects or errors in the work are to be remedied."
      * Owner pays pretty much everything to the contractor but reserves the right to enforce their punch list.
  + **Abandonment**-Under 9:4822(I), a work is "abandoned by the owner if he terminates the work

and notifies persons engaged in the performance the he no longer desires to continue it or he otherwise objectively and in good faith manifests the abandonment or discontinuance of the project."

## Notice and Filing Requirements

* General Rules: Timely Recordation of a Statement of Claim
  + **In General**-LCC 3272 says that **all** privileges **must be recorded** with the recorder of **mortgages**

in the parish where the immovable is located to be effective.

* + **What to File: A “Statement of Claim”**-TO preserve the PWA claim and privilege, all claimants must file a statement of claim in the mortgage records of the parish where the immovable is located. In addition, if the claimant is not in privity with the owner **and** a notice of contract was timely

filed, the claimant must **deliver to the owner** a copy of the statement of claim. R.S. 9:4822(A).

* + - *Requirements for a Statement of Claim*-According to R.S. 9:4822(G), a statement of claim or privilege (1) shall be in writing; (2) shall be signed by the person asserting the privilege; (3) shall reasonably identify the immovable (with a legal property description, see R.S. 9:4831(C)); and (4) describe the amount claimed and the nature of the work, reasonably itemizing elements like the person with whom the person contracted and specific materials/services supplied.
      * This is particular, but probably need to memorize for the bar exam. The 4th

requirement is really just "how much you're owed and what you did."

* + - All claims under PWA need to be filed; however, a 4802 claimant needs to give notice to the owner if there was a notice of contract timely filed. Here, we assume that the 4802 claimant has no knowledge of who the owner is unless that notice of contract appears in the records. The other requirement (claimant not in privity) is just saying that the notice to owner is only required by 4802 claimants.

## When to File—R.S. 9:4822

* + - *Overview*
      * Time Periods for Filing-R.S. 9:4822 provides for three different time periods (30 days, 60 days, and 70 days).
      * Time From Which Periods Run-In general the time periods run from one of two events that marks the completion of the project. The time for filing in all cases is measured from an event that marks completion of the entire project or a distinct, identified portion of the project, not completion of an individual claimant's task.

## ▫ Substantial Completion, OR

▫ **Notice of Termination**-A "notice of termination" is defined in R.S. 9:4822(E) and (F). In short, if the owner in good faith believes that the work is substantially complete (or the contractor fails to perform) the owner may file a notice of termination in the mortgage records to "start the clock" on claim/privilege filings. The owner may file a notice of terminations for **part** of the work to "start the clock" on claims associated with **that part** of the work.

* + - * + You don't need the "part" to be a "separate work" in order to be able

to file a separate notice of partial termination. This is a way to cut of claims early as to parts of the project that finish early, when the project can last a really long time. [Basically, don't let the framers get 8 years to file a claim because the building takes 7.75 years to build after the framers finish.]

* + - * + The time starts running from whichever occurs later. A "Johnny on the Spot" sub who files after substantial completion but before

notice of termination is filed, even when there is ultimately a notice of termination filed, will not be penalized for filing early.

* + - *General Rule: 60 Days*
      * (a) All claimants in contractual privity with the owner.
      * (b) All 4802 claimants ***if*** notice of contract ***was not timely filed***.
    - *70 Days*-If notice of contract was NOT timely filed, sellers of **movables for residential construction**. (Regardless of whether 4801 or 4802 claimant.)
    - *30 Days from Notice of Termination [not Substantial Completion]*-All other claimants

**not in privity** if notice of contract WAS timely filed.

* + - * Just memorize these stupid rules-they don't make sense.
* Special Rules-Certain claimants must either **file or give notice** of their **contract** or claim in order for their privileges to **arise** (i.e. exist at all). These rules are exceptional; for most claimants, all that is required is timely recordation of a **statement of claim**.
  + **General Contractor When Contract Price Exceeds $25,000**-When the contract price exceeds

$25,000, the general contract must file a notice of contract before work begins to establish or preserve his privilege. R.S. 9:4811(D). Note that for **this** purpose, the GC isn't required to file (or even procure) a **bond**.

* + **Lessor of Movables**-Under 9:4802(G)(1), a lessor of movables who is not in privity of contract with the owner must deliver **notice of the lease** to the **owner *and* contractor** not more than \*10 days\* after the movables are first placed at the site of the immovable for use in a work.
    - This is like the equipment rentals (bulldozers, etc.).
  + **Materialmen (Sellers of Movables)**-Under 9:4802(G)(2)-(3), all supplies of movables for

**residential** construction (whether in privity with the owner or not) must deliver by registered or certified mail, return receipt requested, **notice of nonpayment** to the **owner** at least **10 days** before filing the statement of claim and within either 75 days after the last day of the month when the movables were delivered or the expiration of the lien filing period if a notice of contract was recorded.

* + - This shortens the period in which these suppliers must give notice of their claim.
    - SEE SLIDES
  + **Professional Subconsultants**-Under 9:4801(5) and 9:4802(5)(B), a "professional subconsultant" must give notice to the owner within 30 days after the date that the subconsultant

enters into a written contract of employment. A "professional subconsultant" is a surveyor, engineer, or architect" who is not in privity of contract with the owner.

## Enforcement of PWA Privileges

* Action to Enforce Claim or Privilege-PWA claimants must commence an action against he owner to enforce their claims or privileges within **one year** after the filing of the statement of claim or privilege to preserve it. R.S. 9:4823(A)(2). IF the owner has timely filed a notice of contract and posted a bond, the PWA claimant must initiate an action against he surety within the same time period to assert rights against the bond proceeds. R.S. 9:4813(E).
* Lis Pendens-R.S. 9:4833 provides that the effect of the recordation of a statement of claim against third persons will cease **unless a lis pendens** is filed within **one year of filing a statement of claim.**

## Ranking of PWA Privileges—R.S. 9:4821

* Laborer's Privileges-After government liens (*not covered here*), the privileges of laborers rank first. This includes those of laborers hired directly by the owner (R.S. 9:4801(2)) and those hired by someone

other than the owner (R.S. 9:4802(A)(2)). Laborers not only outrank other PWA privileges, but they also outrank **prior recorded** mortgages and privileges.

* + These are natural persons so we protect the people doing the primary work.
  + **Special Rule for Vendor’s Privilege**-"When the vendor of lands finds himself opposed by

workmen seeking payment for a house or other work erected on the land, a separate appraisement is made of the ground and of the house, the vendor is paid to the amount of the appraisement on the land, and the other to the amount of the appraisement on the building." LCC 3268.

* + - This is being repealed, but this will be the rule for the bar exam.
* Prior-Perfected Mortgages and Vendor's Privileges-If perfected **prior** to the time the PWA privilege is

effective, both a mortgage and a vendor's privilege beat the PWA privilege.

## When is a PWA Privilege “Effective”?

* + - *General Rule: From Commencement of Work or Filing Notice of Contract*-In general, a PWA privilege is effective from the time of the commencement of the "work" or the filing of a notice of contract, whichever occurs first. *See* R.S. 9:4820. For purposes of determining when "work" beings, site preparation is not considered.
      * Even if site preparation is a separate "work" (which isn't always the case),1 we never consider site preparation to be work for the purposes of effectivity.
    - *Exception: From Filing of Statement of Claim*-- Some PWA privileges are effective only from the time of the filing of a statement of claim. For example, this is the case for the site preparation work. Also, privileges arising under R.S. 9:4801(5) (surveyors, engineers, architects) are governed by this rule.
  + **“No-Work Affidavit”**-Because a PWA privilege generally ranks from the commencement of

"work," and if "work" precedes the filing of a mortgage, PWA privileges will outrank the mortgage, a mortgagee has an interest in knowing with certainty whether "work" has commenced. A mortgagee can obtain a "no-work affidavit" from an engineer, surveyor, or architect, or building inspector stating that the person visited the construction site on a specific date and neither work nor materials were present that would indicate the commencement of "work." If this affidavit is filed in the mortgage records within **four business days** of its execution, and the mortgage is recorded before or within **four business days** after the affidavit is filed, the mortgage will trump any PWA privilege.

* Privileges Granted by R.S. 9:4801(3), (4), and 4802(A)(1), (3), and (4)-These include sellers and lessors in privity with the owner, and subcontractors, sellers, and lessors who are not in privity with the owner.
  + Among claimants in this category, they are paid pro-rata.

1 Some site preparation {but not all) is considered a "separate work" under the definition of "work" [R.S. 9:48048{C)]. The site preparation that is a "separate work" is only that which is performed "by or for an owner or the owner's contractor" {i.e., someone who is in privity of contract with the owner) and only if it is "not a part of the contractor's work." The designation of site

preparation as a "separate work" has two consequences. First, the lien period for claimants who performed this work will run from a notice of termination or substantial completion of the separate site preparation work. Second, the effective date of those privileges will be the filing of a statement of claim or privilege (not the commencement of any work).

For purposes of defining the effective date of PWA privileges, the commencement of work is NEVER measured by "services rendered by a surveyor, architect, or engineer, or the driving of test piling, cutting or removal of trees and debris, placing of fill dirt, demolition of existing structures, or leveling of the land surface **shall not be considered**." [R.S. 9:4820{A){2)]. Thus, site preparation is not "work" under this provision, regardless of whether it would be considered a "separate work" under 9:4808. IF the claimant who has engaged in site preparation has not engaged in separate work, then the effective date of that claimant's privilege will be the filing of a notice of contract or the commencement of "work," unless the claimant is a 4801{5) claimant {whose privileges are always effective from the time of the filing of the statement of claim, *see* R.S. 9:4822(D)(1)(b)).

* Privileges Granted by R.S. 9:4801(1) and (5)-These include those of the general contractor and architects, surveyors, and engineers hired by the owner (and their professional subconsultants).
* All other Mortgages and Privileges-Ranked in the order they would otherwise be ranked.

# In Class Review Problems

**References**

## Precis Outline Suretyship:

1. Suretyship is an *accessory* contract by which a person binds himself to a creditor to fulfill the obligation of another upon the failure of the latter to do so. La. Civ. Code art. 3035. (Common law & LA practice suretyships often called guarantee agreements-surety=guarantor). Like other security devices, a suretyship can be used to secure any principal obligation-past, present, future, definite or indefinite. La. Civ. Code art. 3036.
2. **Suretyship *Nature* and *Attributes***
   1. **Personal** security device-affords the creditor a right against another person other than the debtor. This is a right to a performance.
   2. **Accessory** contract-made to provide security for the performance of an obligation and depends upon validity of the principal obligation
   3. **Unilateral**-obligation runs only to creditor
   4. **Gratuitous**-Louisiana requires no consideration
   5. **Consensual**-made by agreement, nothing compels a surety to grant the contract
   6. **Express**-it can NEVER be implied or assumed
3. **Three Kinds of Suretyship**-The law identifies three kinds of suretyship arrangements: Commercial, legal, & ordinary. La. Civ. Code art. 3041. Each one is categorized according to the type of obligation guaranteed and the source and terms of the suretyship contract.
   1. **Commercial**-A suretyship is commercial if *one of three*conditions is met:
      1. The surety is engaged in a suretyship business (e.g., a bonding company);
      2. Either the surety or the principal obligor is a business entity (e.g., a corporation, partnership, or LLC); or
      3. Either the principal obligation or the suretyship contract arises out of a "commercial transaction" of the

principal obligor *or* the surety, respectively.

* 1. **Legal**-A legal suretyship arises pursuant to separate specific legislation, regulation, or court order. La. Civ. Code art. 3043.
  2. **Ordinary**-Ordinary suretyship is the exceptional, residual category, only encompassing unremunerated, family or friendship-oriented arrangements in which individuals stand behind other individuals to support domestic goals.
     1. Note: The designation of suretyship agreement as "ordinary" as opposed to "commercial" is that an

ordinary suretyship contract is strictly construed in favor of the surety. La. Civ. Code art. 3044.

1. ***Creation* of the suretyship agreement**
   1. First and foremost, suretyship is a contract which requires (1) cause, (2) capacity, (3) consent, and (4) object.
      1. *Note on consent*: Under La. Civ. Code art. 3039 consent of the creditor is established upon receipt and is presumed requiring no notice of acceptance. Consent of the obligor does not have to be present (*Bloomenstiel*).
   2. The two formal requirements for creating a suretyship contract are the contract must be express and in writing. La. Civ. Code art. 3038.
      1. **In Writing**-The term "writing" as applied to a contract [of suretyship] means either an act under private signature or an authentic act. La. Civ. Code art. 3038 cmt. d.
      2. **Express**-For the suretyship agreement to be express it must be clear that the surety has actually promised to pay the principal obligation if the principal obligor does not. Any ambiguity as to the duties undertaken in the contract will be interpreted *not* to create a suretyship. Anything less clear than "I will pay if the obligor does not" is not good enough. Guaranteeing that the principal obligor will pay is also

not enough. (*Ball Marketing Enterprise v. Rainbow Tomato Co.*; *Blair Rubber Co. v. Altra Cotings Technology, Inc.*; *American Bank & Trust Co. of Coushatta v. Boggs & Thompson*; *Gulf Coast Bank & Trust Co. v. Montoli & Pitre, LLC*)

* + - 1. Suretyship *cannot* be implied from context; the existence and terms of the suretyship contract must be clear from the four corners of the writing. The law emphasizes that parole evidence is *not admissible* to "establish . . . a promise to pay the debt of a third person." La. Civ. Code art. 1847.
      2. *“Implied" Suretyship of Ostensible Principals*-Although writing that is ambiguous about the promise of one party to pay the debts of another will not be interpreted to create a suretyship obligation, some writings in which one party clearly promises to pay a debt on which someone else is liable are governed by suretyship rules even if the parties framed the transaction otherwise. Specifically, someone who has signed a contract as a co-obligor may be treated as a surety (with a surety's rights and defenses) rather than a solidarily liable co-obligor. The co-obligor in such a situation does not, on the surface, seem to be able to assert any of the rights and defenses of a surety, as she is a principal obligor according to the contract. However, the co-obligor will nonetheless be treated as a surety, entitled to all of the rights and defenses of a surety if **(1)** the "principal cause" of the contract is to guarantee performance of the obligation and **(2)** the creditor "clearly knows" that the two ostensible principal obligors are really a principal obligor and someone "standing behind" the principal obligor's debt.

## Effects of Suretyship

* 1. *Surety-Obligee Relationship*- "A surety, ore each surety when there is more than one, is liable to the creditor in accordance with the provisions of this Chapter, for the full performance of the obligation of the principal obligor without benefit of division of discussion, even in the absence of an express agreement of solidarity. La. Civ. Code art. 3045. The surety is obligated to pay the obligee when the principal obligor fails to perform and the obligee is not required to seek performance from the principal obligor as a prerequisite to enforcing the surety's obligation. As a default rule, the surety is obligated to pay the entire debt owed by the principal obligor. Of course, the surety is bound only to the extent set forth in the suretyship agreement; if the surety agreed to be bound for less than the entire debt, then the suretyship agreement controls. (Suppletive nature of contractual law).
     1. Certain defenses unavailable to surety-Article 3045 makes clear that the defenses of discussion and division are not available to the surety.
        1. Discussion: Discussion is a defense whereby an obligor can require that the obligee seek performance from another person or entity before seeking performance from the obligor. This is not available to a surety.
        2. Division: This defense is not available to the surety because the surety is bound solidarily with both the obligor and the other sureties.
     2. Defenses surety *may* assert
        1. **Defenses relating to the contract of suretyship**between the surety and the obligee such as: lack of capacity; failure of consent; improper form).
        2. Defenses relating to the principal obligation-The general rule is that the surety may raise against the creditor any defense to the principal obligation that the principal obligor could assert except lack of capacity or discharge in bankruptcy of the principal obligor." La. Civ. Code art. 3046. Sureties cannot raise the defense of bankruptcy because the whole point of suretyship is to increase the likelihood that the obligee gets paid in the event that the principal obligor becomes insolvent and is unable to perform.

1. *Surety's* ***Collection*** *Rights Against the Principal Obligor*-La. Civ. Code art. 3047 states "A surety has the right of subrogation, the right of reimbursement, and the right to require security from the principal obligor."
   1. Subrogation-"The surety who pays the principal obligation is subrogated by operation of law to the

rights of the creditor." La. Civ. Code art. 3048.

* + 1. Subrogation is the substitution of one person to the rights of another. La. Civ. Code art. 1825. Subrogation may be legal or conventional. *Id.*Subrogation in the context of suretyship occurs by operation of law and no special language is needed to grant subrogation.
    2. Effects of Subrogation-La. Civ. Code art. 1826-when the surety pays the obligee the surety steps into the place of the obligee and receives the right to be paid that is owed by the principal obligor. Because the surety stands in the shoes of the creditor, if the debtor had a valid defense against the debtor, the debtor may assert that defense against the surety.
  1. Reimbursement-A surety who pays the creditor is entitled to reimbursement from the principal obligor. He may not recover reimbursement until the principal obligation is *due* and *exigible* (currently subject to payment). La. Civ. Code art. 3049.
     1. A surety who in good faith pays the creditor when the principal obligation is extinguished, or when the principal obligor has the means of defeating it, is nevertheless entitled to reimbursement from the principal obligor if the surety made a reasonable effort to notify the principal obligor that the creditor was insisting on payment or if the principal obligor was apprised that the creditor was insisting on payment. La. Civ. Code art. 3050.
     2. Multiple Solidary Obligors: "A surety for multiple solidary obligors may recover from any of them

reimbursement of the whole amount he has paid to the creditor." La. Civ. Code art. 3049.

* 1. Two Limitations: (1) "A surety may not recover from the principal obligor, by way of subrogation or reimbursement, the amount paid to the creditor if the principal obligor also pays the creditor for want of being warned by the surety of the previous payment. In these circumstances, the surety may recover from the creditor. La. Civ. Code art. 3051. (2) "A surety may not recover from the principal obligor more than he paid to secure a discharge, but he may recover by subrogation such attorney's fees and interests as are owed with respect to the principal obligation. Note: attorney's fees and interest are not available in an action for reimbursement. This is because the action for reimbursement is an independent personal action and thus subject to the usual rule that attorney's fees are not recoverable in the absence of a contract. (In contrast, the surety who proceeds against the principal obligor by way of subrogation is entitled to the same rights the creditor could exercise, including the creditor's right to collect attorney's fee and interest.) La. Civ. Code art. 3052 cmt. (c).

1. *Surety's Right Against the Obligee to Demand Security*-"A surety, before making payment, may

demand security from the principal obligor to guarantee his reimbursement when:

* 1. The surety is sued by the creditor;
  2. The principal obligor is insolvent, unless the principal obligation is such that its performance does not require his solvency;
  3. The principal obligor fails to perform an act promised in return for the suretyship; *or*
  4. The principal obligation is due or would be due but for an extension of the term not consented to by the

surety." La. Civ. Code art. 3053.

* + 1. Exception-"The principal obligor may refuse to give security if the principal obligation is extinguished or if he has a defense against it." La. Civ. Code art. 3053.
    2. "If within ten days after the delivery of a written demand for the security, the principal obligor fails to provide the requires security or fails to secure the discharge of the surety, the surety has an action to require the principal obligor to deposit into the registry of the court fund sufficient to satisfy the surety's obligation to the creditor as a pledge for the principal obligor's duty to reimburse the surety." La. Civ. Code art. 3054. This is a fairly hollow remedy because the principal obligor is unlikely to have the funds sufficient to deposit, otherwise PO would not need a surety at all because could pay the price on his/her own.

## Extinction and Termination of Suretyship

* 1. "The obligations of a surety are extinguished by the different manners in which conventional obligations are extinguished, subject to the following modifications." La. Civ. Code art. 3058. The general ways that obligations are extinguished are: performance, novation, remission, compensation, and confusion. The articles on suretyship provide some variations upon those general rules.
     1. In line with the nature of a suretyship as accessory, the extinction of the principal obligation extinguishes the suretyship. La. Civ. Code art. 3059.
  2. Modification of the principal obligation-
     1. What is modification/ an event affecting suretyship?
        1. Modification or Amendment-The most typical modifications contemplated here are extension of time that results in the accruing of additional interests or an increased interest rate. (*Abadi v. Markey*-not modification because there was consent and lack of consent is required).
        2. Impairment of Real Security-For example, if the creditor releases real security that existed at the time of the suretyship, or permits a mortgage to lapse in the public records.
     2. The modification or amendment of the principal obligation, or the impairment of a real security held for it, by the creditor, in any material manner and without consent of the surety has the following effects . .

." La. Civ. Code art. 3062

* + - 1. An ordinary suretyship is extinguished. La. Civ. Code art. 3062.
      2. A commercial suretyship is extinguished to the extent that the surety is prejudiced by the action of the creditor, unless the principal obligation is one other than for the payment of money, and the surety should have contemplated that the creditor might take such action in the ordinary course of performance of the obligation. *The creditor has the burden of proving* that the surety has not been prejudiced or that the extent of the prejudice is less than the full amount of the surety's obligation. La. Civ. Code art. 3062.
    1. Prescription of the principal obligation-"Prescription of the principal obligation extinguishes the obligation of the surety." La. Civ. Code art. 3060. NOTE: Prescription does not actually "extinguish" an obligation, but simply bars an action for its enforcement.
       1. Actions for repayment of money lent, arrearages of rent, and an open account prescribe *three years* from the date the payment is due. La. Civ. Code art. 3494. Actions for repayment of promissory notes prescribe *five years* from the time the note is due (note distinction between demand note and time instrument). La. Civ. Code art. 3498.
    2. Other Rules of Prescription
       1. Prescription of Surety's Action for Reimbursement and Contribution-"A surety's action for contribution from his co-sureties and his action for reimbursement from the principal obligor prescribe in ten years." La. Civ. Code art. 3061; see also 3499.
       2. Interruption of Prescription Against Surety-"The interruption of prescription against a surety is effective against the principal obligor and other sureties only when such parties have actually agreed to be bound together with the surety against whom prescription was interrupted." La. Civ. Code art. 3061. This is in contrast to the general rule regarding interruption of prescription under the law of obligations (1799). The difference stems from the suretyship articles' recognition of the fact that not all occurrence of suretyship involve the parties agreeing to be solidarily bound with one another.
    3. Termination (Revocation) of Suretyship-"A surety may terminate the suretyship by notice to the creditor. The termination does not affect the surety's liability for obligations incurred by the principal obligor, or obligations the creditor is bound to permit the principal obligator to incur at the time the notice is received, nor may it prejudice the creditor or principal obligor who has changed its position in reliance on the suretyship . . ." La. Civ. Code art. 3061.

## Mortgage:

1. "Mortgage is an *accessory* right created over property to secure the performance of an obligation." La. Civ. Code art. 3278. Mortgage is an indivisible real right that burdens the entirety of the mortgaged property and follows the property into whatever hands the property may pass." La. Civ. Code art. 3280. (See also 3280 cmt. (a)-"Each and every portion of the property mortgaged, is liable for each and every portion of the debt."). "Mortgage may be established only as authorized by legislation." La. Civ. Code art. 3281. "Our lawgivers have thought it wise to restrain the power of hypothecating property, which is one of the rights of dominion . . ."
2. **Mortgage *Nature* and *Attributes***
   1. **Accessory**-"Mortgage is accessory to the obligation that it secures. Consequently, except as provided by law, the mortgagee may enforce the mortgage only to the extent that he may enforce any obligation it secures." La. Civ. Code art. 3282.
      1. ***See also*:** La. Civ. Code art. 3282 cmt. (a)- "Although the rights of the mortgagee may not be enforced until the principal obligation is due and unperformed, the rights of mortgage may exist before the obligation is incurred or before there has been a default upon it."
   2. **Real**-Mortgage is created over property. La. Civ. Code art. 3278. Property is susceptible of mortgage. La. Civ. Code art. 3278.
   3. **Non-possessory**-Mortgage is a non-possessory security right. La. Civ. Code art. 3278. Mortgage confers on the mortgagee rights in the thing that is subject to the mortgage, and those rights are good against the world.
   4. **Consensual/Legal**-Mortgages may be conventional (i.e., established by agreement of the parties) or legal or judicial (i.e., established by law).
3. **Property Susceptible of Mortgage**-La. Civ. Code art. 3286 sets forth an exclusive list (cannot be

deviated from) "[t]he only things susceptible of mortgage . . ."

* 1. A corporeal immovable with its component parts
  2. A usufruct of a corporeal immovable
  3. A servitude of right of use with its right that the holder of the servitude may have in the buildings and other constructions on the land
  4. The lessee's rights in the lease of an immovable with its rights in the buildings and other constructions

on the immovable

## Kinds of Mortgages

* 1. Classification According to Manner of Creation. La. Civ. Code art. 3284.
     1. Conventional-"A conventional mortgage is established by contract." This is the only form of volitional

or consensual mortgage.

* + 1. Legal-"A legal mortgage is established by operation of law."
    2. Judicial-"A judicial mortgage is established by law to secure a judgment." (must be filed in the public

records).

* 1. Classification According to Property Encumbered. La. Civ. Code art. 3285.
     1. General-"A general mortgage burdens all present and future property of the mortgagor."
        1. Legal and judicial mortgages are general mortgages.
        2. No property descriptions necessary; as long as the appropriate document is filed in the public records, the mortgage attaches to all immovable property in that parish.
     2. Special-"A special mortgage burdens only certain specified property of the mortgagor."
        1. Conventional mortgages are special mortgages
        2. The property subject to the mortgage must be specifically described.

1. **Types of Obligations Secured by Mortgages**-One can divide mortgages into three categories based upon the types of obligations that they secure: (1) single-advance mortgage loans; (2) determinate future

advance mortgage loans; and (3) indeterminate future advance mortgage loans (aka revolving or fluctuating lines of credit.

* 1. **Single Advance Mortgage Loans**-The most common type of mortgage is a mortgage made to secure a single loan or obligation that is incurred at the time the mortgage is created.
  2. **Determinate Future Advance Mortgage Loans**-Mortgages may also be used to secure a debt that will be incurred in the future. A "determinate" future advance mortgage secures a debt in a fixed amount that may be secured in the future.
  3. **Indeterminate Future Advance Mortgage Loans**-Mortgages may also be used to secure debts that *may*be incurred in the future. An "indeterminate" future advance mortgage secures unspecified debt that may be incurred in the future up to a fixed amount. (Stated maximum amount, but unsure how much collectively will be).
     1. **The problem**-Under *prior law*, payments on loans secured by a mortgage reduced the mortgage. Once the amount stated in the mortgage was lent *once* and paid down, the mortgage was extinguished.
     2. **The old solution**-The collateral mortgage-To get around the problem described above, lawyers in

Louisiana used the law of pledge to create a unique security device called a "collateral mortgage."

* + - 1. The collateral mortgage involved four documents or steps
         1. The collateral mortgage note
         2. The collateral mortgage
         3. The hand note(s)
         4. The pledge or UCC security agreement

1. The Present Solution: The Multiple Indebtedness Mortgage-In 1992, new law became effective that provides for a substitute for the collateral mortgage. (Note: irrespective of this substitute, a collateral mortgage is still possible under Louisiana Law).
   1. La. Civ. Code art. 3298 Governs the Multiple Indebtedness Mortgage
      1. A mortgage "may" secure future obligations
      2. Effects between the parties and third persons
      3. No requirement that the note be parahed for identification with the mortgage
      4. Termination
      5. Continuation
   2. Jurisprudential Interpretation
      1. *In re Hari Aum, LLC*
      2. *Keybank Nat'l Assoc. v. Perkins Rowe Associates, LLC*
2. **Rights Created by Mortgage**-"Mortgage gives the mortgagee, upon the failure of the obligor to perform the obligation that the mortgage secures, the right to cause the property to be seized and sold in the manner provided by law and to have the proceeds applied toward the satisfaction of the obligation in preference to the claims of others." La. Civ. Code art. 3279.
   1. Seizure and Sale-First, the mortgagee may have the mortgaged property seized and sold and the proceeds applied to the principal obligation. The right of foreclosure *must* be exercised through judicial process (no self-help allowed).
   2. Preference-Second, the mortgagee enjoys a preference in the proceeds ahead of the claims of others.

## Conventional, Legal, & Judicial Mortgages

* 1. **Conventional Mortgages**-"A conventional mortgage is simply a mortgage created by contract." La.

Civ. Code art. 3284.

* + 1. **Creation/Effectiveness *Between Parties***-To be a conventional mortgage, must meet all four requirements in La. Civ. Code art. 3287-3288.
       1. **Written**-The word "convention" is simply another way of saying "agreement" or "contract," so a conventional mortgage arises by contract, subject to a simple form requirement. LUETA (La. Rev. Stat. 9:2601 *et seq.*) theoretically allows for the substitution of electronic records for the paper-and-ink writing historically required here, but most parties will continue to fulfill this requirement by memorializing their mortgage contracts on paper.
       2. **Signed by the Mortgagor**-Only the property owner-the person conveying contingent property rights-needs to sign the contract, as evidentiary and cautionary functions of signed writings apply only to that person. Note: The term "mortgagor" refers to the *owner of the immovable property (or property rights) subject to the mortgage*-*not* necessarily to the person who owes the secured debt.
          1. No witnesses or notary signatures are required to form a valid conventional mortgage, although there are certain advantages to memorializing a mortgage in an authentic act (1833). These advantages include that (1) an authentic act is self-proving (i.e., more readily admissible as evidence in court) and (2) a mortgage in authentic form can be enforced through the simpler and quicker method of "executory process." This is in contrast to mortgages that are under private signature alone, which are enforceable against the property owner, but in a case of dispute, their genuineness might have to be proven by extrinsic evidence, and they must be enforced by cumbersome "ordinary process."
          2. La. Civ. Code art. 3289-"A contract of mortgage need not be signed by the mortgagee whose consent

is *presumed*and whose acceptance may be tacit."

* + - 1. **Statement of (Max.) Amount**-Most mortgages simply state that they secure a certain amount borrowed by the property owner, plus accruing interest. The total secured amount, or at least its calculation, is *clear*and *fixed*. But sometimes someone wants to use immovable property to secure fluctuating lines of credit, in which the total amount borrowed and outstanding at any given moment rises and falls as the business "draws" on the line of credit and repays portions of it over times. Using a mortgage on immovable property to secure such "floating" indebtedness obligations was quite complicated until 1993, then reform of the law in that year made things much simpler. NOW, a mortgage may either state (1) an exact fixed amount to be secured by the mortgage (perhaps plus accruing interest), or (2) it can state the maximum amount of a floating debt that can be outstanding at any one time secured by the mortgage.
         1. If performance of a non-monetary obligation is secured by the mortgage, the mortgage must state a dollar figure that represents each parties' agreement as to the maximum amount of damages for breach of that obligation that will be secured by the mortgage. La. Civ. Code. art. 3294.
      2. **Precise and Specific Description of the Property**-Perhaps the most important aspect of the mortgage document is the description of the property serving as collateral. Unlike the quite liberal rules for describing movable collateral in a security agreement, immovable collateral must be described with a rather high level of specificity in a mortgage. The requirements for the amount of specificity demanded of the description of the mortgaged property developed in the courts over a long period of time, and the codification of this requirement in the Civil Code "is intended to insure that this jurisprudence will continue to be authoritative in determining what kinds of descriptions are sufficient." La. Civ. Code art. 3288, cmt. (b).
         1. *Metcalfe v. Green*-A property description is sufficient if it identifies the property with reasonable certainty and the description is not to mislead or keep in the dark the creditors of the mortgagor or other persons having an interest.
         2. La. Civ. Code art. 2440 cmt. (b)-Under this article, a description of immovable property in an act of sale is sufficient if it *enables a person to locate and identify the property*. *See Hargrove v. Hodge*, 121 So. 224 (La. App. 2d Cir. 1928). (COME BACK AND ADD TRADITIONS INTERPRETATION THAT IS RELEVANT TO THIS ARGUMENT.)
         3. Although mortgage law does not allow for the encumbrance of indefinite "after-acquired" immovable property, some future rights in immovables may be mortgaged. *First*, as a matter of law, a mortgage encompasses not only the described property, but also all component parts affixed to that property at any point, including in the future. La. Civ. Code arts. 469, 3286 cmt. (b), and 3291; La. Rev. Stat. 9:5391. *Second*, one can mortgage specific property that the mortgagor does not yet own but expects to acquire in the future so long as a detailed description of the property is provided.
    1. **Termination of Conventional Mortgages**-According to La. Civ. Code art. 3319: "A mortgage is extinguished: (1) by the extinction or destruction of the thing mortgage; (2) by confusion as a result of the obligee's acquiring ownership of the thing mortgaged; (3) By prescription of all the obligations that the mortgage secures; (4) By discharge through execution or other judicial proceeding in accordance with the law; (5) by consent of the mortgagee; (6) by termination of the mortgage in the manner provided by Paragraph D of Article 3298; (7) When all obligations, present and future, for which the mortgage is established have been incurred and extinguished."

## Defenses to Conventional Mortgages

* + - 1. Defenses:
         1. The principal obligation is unenforceable
         2. The mortgage has been terminated
      2. Conditions for Asserting Defenses
         1. In general-"Neither the mortgagor nor a third person may claim that the mortgage is extinguished or is unenforceable because the obligation the mortgage secures is extinguished or is unenforceable unless the obligor may assert against the mortgagee the extinction or unenforceability of the obligation that the mortgage secures." La. Civ. Code art. 3296
         2. When Mortgage Secures Another's Obligation
  1. **Legal Mortgages**-A legal mortgage arises whenever a specific law provides for it. A legal mortgage is a general mortgage and encumbers all of the mortgagor's immovable property, present and future, within certain geographical limits. La. Civ. Code art. 3302-3303.
     1. *Example*: A natural tutor must obtain a certificate stating the value of all of the child-tutee's property, and this certificate must be filed in the mortgage records of all parishes where the tutor owns immovable property. When this is accomplished, a legal mortgage is established over all of the tutor's immovable property in favor of the child-tutee to secure the value of all of the child's property. La. Civ. Code art. 4134.
  2. **Judicial Mortgages**-A judicial mortgage arises when a judgment creditor on a money judgement (but not for other, non-monetary judgements) files a certified copy of the judgment in the mortgage records of a parish in which the judgment debtor has immovable property. La. Civ. Code arts. 3299-3300. This mortgage secures the judgment debtor's payment of the amount specified in the judgement; that is, if the judgment debtor does not pay, the judgment creditor-mortgagee can have the debtor's immovable property seized and sold (in preference to other creditors) to satisfy the judgment. A judicial mortgage is a general mortgage and encumbers all of the mortgagor's immovable property, present and future, within certain geographical limits. La. Civ. Code art. 3302-3303.
     1. A suspensive appeal of the money judgment has no effect on the judicial mortgage thus created. La. Civ. Code art. 3304.
     2. A money judgment prescribes 10 years after it is rendered (art. 3501), so to preserve the judicial mortgage securing the judgment, it must be "revived" in a simple proceeding filed before expiration, Code of Civ. Proc. art. 2031, *in addition* to the mortgage's being "reinscribed" every 10 years.
  3. **Mortgages Withouta Mortgage**-Sometimes, creditors wish to avoid the requirements of mortgage law but nonetheless to obtain the advantages of using property to secure performance of an obligation. A long line of *jurisprudence constante*, however, establishes that a transaction that is "in the nature of a

secured transaction" will be treated as one, even if it is called or documented otherwise by the parties.

(*Look to the intent of the parties*).

1. **Sale with a right of redemption**-In such sham "sales," the borrower would remain in possession of the property, and if the borrower paid back the secret loan that fulfilled the "redemption" condition, and ownership would transfer back to the borrower. If the borrower failed to pay the loan, however, the lender already "owned" the property and could therefore ask the sheriff to repossess the property, which the lender would resell to cover the unpaid loan after the redemption period expired. Such disguised sales are called "*pignorative contracts*." If a transaction is found to be pignorative, it will be recharacterized as a secured transaction, and if the requirements of a secured transaction have not been met (e.g., the form requirements for a conventional mortgage), the "secured creditor" might lose the protections illegitimately sought. Additionally, the court might nullify the sale as against public policy and refuse to allow the lender to repossess the property from the defaulting borrower.
   1. **Exception to the rule prohibiting pignorative transactions: Bond for Deed Transaction**. In a "bond for deed" transaction, the seller of an immovable remains the legal owner of the property but transfers possession to a buyer in exchange for the buyer's promise to pay the purchase price over time (and the seller generally promises to apply the buyer's payments to the seller's unpaid mortgage note). The deal is that the seller will transfer the "deed" (ownership of the property) only when the borrower has fulfilled his "bond" (promise to pay the purchase price of the property.) This is a very dangerous situation for the buyer. Without some special legal regulation, the seller could immediately repossess he property (which she still owns) if the buyer fails to make any payment and the buyer might have to sue for a refund of any amounts already paid. Moreover, even if the buyer does pay, if the seller fails to apply the buyer's payments to the seller's unpaid low-interest mortgage note, the seller's bank's mortgage will continue to encumber the property even after the buyer has paid the entire contract price to the seller. To receive a clean "deed," the buyer would then have to pay the seller's bank whatever the seller failed to remit to the mortgage lender.
2. **“Perfection” of Mortgages: Filing and Recordation—**To make a mortgage effective against third parties who might also establish rights in the collateral, the mortgagee must provide notice to such third parties of the existence of the mortgagee's rights.
   1. **Filing for Recordation**-With respect to mortgages in immovable property the process is called "registry" or "recordation" and the original mortgage document itself must be filed in the mortgage records of the parish in which the immovable property is located. La. Civ. Code arts. 3341, 3346. Simply filing the mortgage with the proper recorder of mortgages produces as a matter of law the "effect of recordation." La. Civ. Code art. 3347. The moment of effectiveness is established when the recorder stamps the document with the date and time of filing. La. Civ. Code art. 3348. Louisiana's immovable property records are divided into 2 separate sets:
      1. Conveyance records-hold acts of sale, lease, and donation of immovables (La. Civ. Code arts. 3338, 3346).
      2. Mortgage records-collect acts of mortgage and privilege over immovables (La. Civ. Code arts. 3338, 3346).A mortgage must be filed in the proper records to be effective. The entire original act of mortgage (or a certified copy of an original recorded in another parish La. Civ. Code art. 3355) must be filed in the mortgage records. (3338, 3344-3345). Once again, the act of mortgage need not be in authentic form to be recorded, but an authentic act offers certain important advantages.
      3. In Louisiana and most other states, acts affecting immovables, including mortgages, are effective against third parties only from the moment of filing in the proper officer, regardless of any notice or knowledge on the part of third parties. Louisiana is said to have a "pure race" statute and the first person to win the "race" to the courthouse and record his or her rights in the proper office wins.
      4. Third Parties Ability to Find the Mortgage-The simple fact of having placed the mortgage in the public records is the key, but the only way a mortgage can fulfill its notice function is if third parties can find it by searching the index of grantors and grantees by the mortgagor's name. Unlike Article 9 rules for the debtor's name on the UCC-1, however, mortgage law contains little guidance on how accurate the mortgagor's name must be. La. Civ. Code art. 3353 provides that a filed mortgage document is effective even if it contains an erroneous or inaccurate mortgagor's name so long as the name listed "is not so indefinite, incomplete, or erroneous as to be misleading and the instrument as a whole reasonably alerts a person examining the records that the instrument may be that of the party." This is a vague provision that gives little direction absent some jurisprudential gloss. Good practice, of course, is to use the complete and accurate legal name of the debtor, consistent with similar practice under UCC Article 9.
   2. **Lapse & Reinscription**-To be effective against third parties, a mortgage must have been properly filed and the effectiveness of its inscription in the mortgage records must not have lapsed. The mortgage records are "self-purging," so old mortgages are automatically invalidated against third parties after a certain time.
      1. The default rule is that a mortgage is effective on the records for 10 years after the date of the mortgage document (when it was executed). La. Civ. Code art. 3357.
         1. *Exception:* If the mortgage document describes the maturity date (due date) of the secured obligation, and any part of that obligation matures 9 years or later after the date of the mortgage document, such a mortgage is effective for 6 more years after the latest maturity date of the described obligation. La. Civ. Code art. 3358.
         2. *Effect of Amendment*-La. Civ. Code art. 3361: "If before the effect of recordation ceases an instrument is recorded that amends a recorded mortgage, pledge, or privilege to describe or modify the maturity of a particular obligation that it secures, then the time of cessation of the effect of the recordation is determined by reference to the maturity of the obligation last becoming due described in the mortgage pledge, or privilege as amended.
3. *Reinscription*-to maintain an effectively recorded mortgage, it must be "reinscribed" before lapse. This is a simple process in which the mortgagee (creditor) signs and files a written "notice of reinscription" in the same officer where the original mortgage was filed. The notice must "declare that the mortgage is reinscribed" and state (1) the name of the mortgagor (as stated in the originally recorded mortgage) and

(2) the registry or other recordation number of the original filed mortgage (or previous notice of reinscription. La. Civ. Code art. 3362. This simple notice extends the mortgage for ten more years after the date of the filing of the notice (*not*from the original lapse date of the mortgage). La. Civ. Code art. 3364. Filing this notice is the only way to extend the effectiveness of a mortgage. La. Civ. Code art. 3363.

* 1. If the notice is filed *after* the effect of the recordation has lapsed, the notice functions to "revive" the lapsed mortgage inscription for 10 more years, but the priority of the mortgage is reset to the (much later) date of filing the late notice. La. Civ. Code art. 3365.

1. **Transfer of Mortgages and Mortgaged Property**-Both mortgaged property and secured obligations are often transferred from the original mortgagor and mortgagee to third parties. Mortgage law addresses such situations to protect the rights of the original and subsequent parties.
   1. **Transfer of the Secured Principal Obligation**-This involves the secured creditor's transfer of the principal obligation along with the mortgage. A mortgagee might sell (assign) the obligation to another bank or investor who then steps into the original mortgagee's shoes with respect to the obligation. The law clarifies that the transferee of the secured obligation automatically also steps into the bank's shoes with respect to the rights represented by the mortgage.
      1. A transfer of a principal obligation automatically carries with it as transfer of an accessory real rights, such as mortgage. La. Civ. Code arts. 2645, 3312.
         1. No separate transfer or assignment of the mortgage is necessary; indeed, transferring only the mortgage would have no effect, as mortgages cannot survive separate from their principal obligations.
      2. This rule is subject to 2 small twists:
         1. The transferee might receive greater rights than the original mortgagee had if a modification of the mortgage has not been recorded. La. Civ. Code art. 3356. Transferees take free of unrecorded modifications, so mortgagors are well advised to record any modification to the mortgage that insures to their benefit.
         2. If the mortgage transfers only part of the secured obligation(s) (e.g., one of multiple notes secured the same mortgage), **pre-1993 law** suggested that the original mortgagee subordinated her rights to the transferee i.e., in case of foreclosure, the original mortgagee-transferor would collect the collateral sale proceeds only after the new mortgagee-transferee has received payment in full. Now, the law clarifies that the original mortgagee-transferor and the new mortgagee-transferee rank equally in the proceeds of enforcement of the mortgage. La. Civ. Code arts. 3311, 3313.
            1. Multiple obligations secured by the same mortgage get paid from the proceeds of a collateral sale pro rata based on the secured amount each is owed (unless otherwise agreed).
   2. **Transfer of the Mortgaged Property—Third Possessors**-Mortgage law provides that a mortgage follows the immovable property into the hands of a transferee unless the mortgagee explicitly releases the mortgage (of course, provided the mortgage has been properly recorded and is effective against third parties). La. Civ. Code art. 3280. The transferee of the mortgaged property will not be personally liable on the secured obligation, however, unless the transferee "assumes" the mortgage and obligation. Thus, a transfer of the property without a release of the mortgage produces an "in rem" mortgage, enforceable against the property but not personally against the property owner-transferee.
      1. Someone who takes mortgaged property but is not personally liable on the secured obligation is called a "third possessor." La. Civ. Code art. 3315. Such third possessors have constitutional rights to receive notice of foreclosure before losing their property interests.
      2. Mortgage law protects both mortgagees and third possessors, balancing their competing interests and incentives in 2 ways:
         1. Since third possessors are not personally liable on the secured obligation, they might not be concerned about the condition of the property. To protect the interests of the mortgagee, the law imposes a duty on third possessors to indemnify (reimburse) the mortgage for the third possessor's negligently or intentionally allowing harm to come to the property to the prejudice of the mortgagee. La. Civ. Code art. 3316.
         2. In contrast, if a responsible third possessor improves the mortgaged property, and the mortgagee later forecloses after default on the principal obligation, the third possessor might lose the value of the improvements to the mortgagee unfairly. Consequently, the law allows the third possessor in such cases to recover costs of her improvements from the proceeds of the foreclosure sale, but only to the extent these improvements increased the value of the property. La. Civ. Code art. 3318.
2. Collateral Mortgages and Multiple Indebtedness Mortgages (COMBINE WITH SECTION ABOVE)
   1. Construction Mortgages: Unproblematic Future Loans-Note that the problem is not that that mortgages cannot secure future
   2. The Problem: Fluctuating Lines of Credit
   3. The Collateral Mortgage Package
      1. Pledge of the Collateral Mortgage Note
      2. Hand Note
      3. The Collateral Mortgage
      4. A Final Note on Prescription
   4. Permanent Fix: The Multiple Indebtedness Mortgage
3. **Ranking Mortgages—Priorities**

**Quick Look**

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| **SURETYSHIP** | |
| **Defined** | Article 3035: "Suretyship is an **accessory contract** by which a person binds himself to a creditor **to fulfill the**  **obligation of another** upon the failure of the latter do so." |
| **Suretyship as a Contract** | Suretyship is first and foremost a contract and must have (1) cause; (2) capacity; (3) object; (4) consent. Consent is unique in suretyship, article 3039 states: "Suretyship is established upon receipt by the creditor of the writing evidencing the surety's obligation. *The creditor's acceptance is presumed* and no notice of acceptance is required." |
| **Nature & Attributes** | Suretyship is **personal**, **accessory**, **unilateral**, **gratuitous** (usually), **consensual**, and **express**. |
| **Personal**- Suretyship gives creditor rights against a person as opposed to rights in a thing. |
| **Accessory**- (art. 1913) Made to provide security for the performance of the principal obligation |
| **Unilateral**- (art. 1907) The debtor does not assume a reciprocal obligation to the surety. ". . . contract by which a  person binds himself . . ." (art. 3035). |
| **Gratuitous**- (art. 1910) If the surety obtains no advantage. This aligns with the civilian concept that a donative act is sufficient cause for a contract. |
| **Consensual-** (art. 1927) Consent is a requirement of a contract. Suretyship is a contract (art. 3035). |
| **Express**- (art. 3038) "Suretyship must be **express** and in writing." |
| **Formation** | **Article 3038**: "Suretyship must be *express* and *in writing*." |
| **Written:** 3038 cmt. d states act under private signature (1837) or an authentic act (1833) is sufficient. Authentic Act is advantageous because it is self-authenticating. (notary, 2 witnesses, signed by everyone). Act under private signature just must be signed by the parties. LUETA\* |
| **Express:** 3038 cmt. b in cases where suretyship is unclear doubt is resolved against finding of suretyship. Jurisprudential gloss on **express** requirement:  **Insufficient** to find a suretyship- "Will take such steps as are necessary to assure payment by [debtor]" (*Ball*); "Your institution will be satisfied regarding any outstanding loans." (*American Bank*)  **Sufficient** to find a suretyship- "I am willing to personally guarantee . . ." (*Blair*) |
| **Parol Evidence Implications**- Parol evidence governs the use of extrinsic evidence to prove existence or contents of a contract. (arts 1848-1849). The general rule is parol evidence cannot be used to negate an authentic act or act under private signature (art. 1848). In the interest of justice, however, parol evidence may be admitted to prove vice of consent or modification by subsequent valid oral agreement. Modification-only if the extrinsic evidence is itself written and express. Vice of Consent-(fraud; duress; error) *Bollich*- Surety can limit liability through the use of parol evidence in relation to error. (1952 cmt. d). *Bollich* was probably incorrectly decided though because typically don't grant relief for not knowing what you should have known. **Relationships**- *Creditor/Surety-* (3040 cmt.) PE should be inadmissible "imperative requirements of the Code may not be modified." Art. 3038 requirements (express & written) are imperative. *Rationale*: Unilateral contract where creditor consent is presumed so strictly construed and if the contract is so ambiguous that the scope of the surety's obligation can't be determined then there should be no suretyship at all. *Creditor/ Debtor-* "Any lawful obligation" (art. 3036). *Surety/Surety-*Parol evidence is admissible  (art. 3055 cmt. b). *Debtor/Surety* ➔ Nothing in code requiring this relationship to be evidenced by writing. |
| **Surety acting as ostensible principal** (art. 3037)- Even though "ostensibly" principal obligor-will be considered surety if (1) principal cause of the contract is to guarantee performance of the principal obligation, and (2) the creditor "clearly knows" of this cause. Both parties sign as principal obligor but in reality one is a surety-Huge exception  because using *extrinsic evidence*. |
| **Kinds of Suretyship** | Article 3040: "There are three kinds of suretyship: **commercial, legal,** and **ordinary**." |
| **Commercial Suretyship:** (1) surety engaged in a surety business; (2) principal obligor or the surety is a business corporation, partnership, or other business entity; (3) principal obligation arises out of a commercial transaction OR the suretyship arises out of a commercial transaction of the surety. (art. 3042) |
| **Legal Suretyship:** Given pursuant to legislation, administrative act or regulation, or court order (art. 3043) (formerly split into legal & judicial). |
| **Ordinary Suretyship:** Catchall for suretyship that is not commercial or legal. Main difference is that it is to be strictly  construed in favor of surety (art. 3044; see art. 3039). |
| **Effects of Suretyship** |  |