



Contracts and Leases

Lesson 5

Real Estate Leases

45 Hour Louisiana Post-Licensing

I. REAL ESTATE LEASES

A. LEASES IN GENERAL

Lease is a synallagmatic (bilateral) contract by which one party, the lessor, binds himself to give to the other party, the Lessee, the use and enjoyment of a thing for a term in exchange for a rent that the Lessee binds himself to pay.

The consent of the parties as to the thing and the rent is essential but not necessarily sufficient for a contract of lease. *La. C.C. art. 2668*

1. **Lease.** Lease is a nominate contract, meaning special rules apply in addition to the general rules concerning contracts.
2. **Requirements** Historically, the three basic requirements for an enforceable lease were described just as they were for sales, as thing, price and consent. In 2004, the Louisiana Legislature updated the rules governing lease to more accurately refer to the “price” as “rent.” The thing is the premises to be leased.
3. **Rent.** *La. C.C. art. 2676, §2. The Rent* reads in part:

“Agreement as to the rent.

The rent shall be fixed by the parties in a sum, either certain or determinable, through a method agreed by them. It may also be fixed by a third person designated by them.

If the agreed method proves unworkable, or the designated third person is unwilling or unable to fix the rent, then there is no lease.

a. If the rent has been established, and thereafter is subject to redetermination either by a designated third person or through a method agreed to by the parties, but the third person is unwilling or unable to fix the rent or the agreed method proves unworkable, the court may either fix the rent or provide a similar method in accordance with the intent of the parties. Acts 200c, No. 821, § 1, eff. Jan. 1, 2005.”

Unless the lease states otherwise, rent is due at the beginning of the term and “is payable at the address provided by the lessor and, in the absence thereof, at the address of the Lessee.” *La. C.C. art. 2703* (Lessor should always put his address. Imagine if the manager had to go to every apartment to pick up the rent.)

b. Interpreting and Enforcing Fair Market Value Provisions in Renewal Options. For a lease to be enforceable, the rent must be “fixed by the parties in a sum either certain or determinable through a method agreed by them. It may also be fixed by a third person designated by them.” *La. C.C. art. 2676*. Provisions for a renewal term will not be enforceable unless the rent is set according to the same terms. Determining rent for a renewal period is difficult because the lessor does not want to underestimate the value of the lease at a time set in the future. Therefore, many leases provide that the rent for renewal periods will be determined by: (1) a third party, (2) fair market value, or (3) a consumer price index.

(i) Third Party. If the third party is unwilling or unable to fix the rent, then there is no lease (this applies to original term only). *La. C.C. art. 2676*. If the rent is established and the third person is needed to re-determine the rent (e.g.,

renewal period), but is unwilling or unable, the court may fix the rent. This a change from prior law in which failure of the third party to determine the rent for a renewal period also meant no enforceable lease. The 2005 revision made the rule more like the one for sales.

(ii) Fair Market Value. The most common definition of this is “what a willing buyer will pay a willing seller in an arm’s length transaction.” However, fair market value is not easily determinable. Even appraisers use more than method to determine fair market value. If a lease provides a certain “method” for determining renewal rent, such as fair market value (or CPI, to be discussed), and that method proves unworkable, then the rent may be set by the court for the renewal term; however not for original term. *La. C.C. art. 2676.*

(iii) Consumer Price Index (“CPI”). CPI is another common method of determining rent for a renewal period. There is no one consumer price index. Instead, there are several indexes covering what urban consumers pay over a period of time for various goods and services. It is important to choose the right index. The United States Department of Labor Bureau of Labor Statistics maintains the indexes.

4. **Residential Lease Deposits.** Louisiana Revised Statutes 9:3251 govern deposits made in residential leases (as the Code defines that term). Under that statute, the Lessor must return the deposit to the Lessee within one month after the lease terminates. However, the Lessor is entitled to retain from the deposit (i) all, or any portion of the deposit which is reasonably necessary to remedy a default by the Lessee, and/or (ii) remedy unreasonable wear and tear to the premises. If the Lessor does retain any portion of the deposit, the Lessor must forward to the Lessee within one month after the lease terminates, an itemized statement accounting for the proceeds and giving reasons for retaining any of the deposit, as well as returning any sums not retained. The statute requires the Lessee to give the Lessor a forwarding address for such purposes. If a Lessee, however, abandons the premises either without giving notice, as required, or prior to the termination of the lease, the Lessor is relieved of this responsibility.

Enforcement of this provision is very much in the Lessee’s favor. Failure of the Lessor to comply with the statute gives the Lessee the right to recover actual damages or two hundred dollars, whichever is greater. However, and notably, the Court may award costs and attorneys fees. While these do not go to the Lessee, the cost of these items to the Lessor could far exceed the Lessee’s damage. The statute states that failure to remit within thirty days after written constitutes willful failure.

In the event there are to be sums “deposited” with the Lessor that are not to be refundable, for example, a “pet deposit”, it is better to not describe those as “deposits” at all, but rather describe them as a fee or, better, extra rent.

5. **Types of Lease.** The 2004 Revision classifies leases as follows:

... residential, when the thing is to be occupied as a dwelling; agricultural, when the thing is a predial estate that is to be used for agricultural purposes; mineral, when the thing is to be used for the production of minerals; commercial, when the thing is to be used for business or commercial purposes; or consumer, when the thing is a movable intended for the Lessee's personal or familial use outside his trade or profession. This enumeration is not exclusive. When the thing is leased

for more than one of the above or for other purposes, the dominant or more substantial purpose determines the type of lease for purposes of regulation. *La. C.C. art. 2671.*

6. **Contract Rules** Just as a Purchase Agreement, a lease is a contract that comes into existence through offer and acceptance. All of the same contract rules apply to leases, except for the obligation to put everything in writing. Leases may be entered into orally; however, an oral lease does not affect third parties.
7. **Term** The term of the lease is provided by agreement of the parties or by the rules in the Civil Code. The duration of the term may be “determined or indeterminate” (e.g., based on an uncertain event). *La. C.C. art. 2678.* The lease of any immovable (commercial or residential) is month to month if the term is not supplied. *La. C.C. art. 2680.* The duration can never exceed 99 years. *La. C.C. art. 2679.* A lease for a longer duration will be considered to be 99 years. *La. C.C. art. 2679.*

Example. Lessee leases an office from Lessor. Because Lessee’s job causes him to move around a lot, Lessor agrees to the proviso that “the lease will terminate within 30 days of notice from Lessee that Lessee is required to leave the City.” In this case the term is for as long as Lessee works in the City, but the duration is indeterminate.

8. Lessor’s Obligations.

- a. The Lessor's principal obligations:

The Lessor is bound:

- (i) To deliver the thing to the Lessee;
- (ii) To maintain the thing in a condition suitable for the purpose of which it was leased; and
- (iii) To protect the Lessee's peaceful possession for the duration of the lease. *La. C.C. art. 2682.* In residential leases, this warranty encompasses a disturbance by a person who, with the lessor’s consent, has access to the thing or occupies adjacent property belonging to the Lessor (*La. C.C. art. 2700*)

- b. Warranty of Use. Lessors warrant to the Lessee that:

... the thing is suitable for the purpose for which it was leased and that it is free of vices or defects that prevent its use for that purpose. *La. C.C. art 2696.*

- c. Redhibitory Defects.

- (i) This warranty also extends to vices or defects that arise after the delivery of the thing and are not attributable to the fault of the Lessee. *La. C.C. art. 2696.*

Example. Lessor rents an apartment that once suffered termite damage, which Lessor believed was removed. Shortly after Lessee moved in, part of the ceiling fell down. Lessor is liable for replacing the ceiling and any damage to Lessee for the defect.

(ii) The lessor's warranty extends to unknown vices or defects. However, if the Lessee knows of such vices or defects and fails to notify the lessor, the Lessee's recovery for breach of warranty may be reduced accordingly. *La. C.C. art. 2697*

(iii) The warranty concerning vices and defects may be waived, but only by clear and unambiguous language that is brought to the attention of the Lessee. *La. C.C. art 2699* Nevertheless, a waiver of warranty is ineffective:

(a) To the extent it pertains to vices or defects of which the Lessee did not know, and the lessor knew or should have known;

(b) To the extent it is contrary to the provisions of Article 2004 (which nullifies any provision in a lease that excludes or limits the liability of one party for intentional or gross fault or one that excludes or limits the liability of one party for causing physical injury to the other party.)

(c) In a residential or consumer lease, to the extent it purports to waive the warranty for vices or defects that seriously affect health or safety.

An amendment to the Code is unique because it extends liability to people who are not parties to the contract (e.g., family members):

In a residential lease, the warranty provided in the preceding Articles [against vices and defects] applies to all persons who reside in the premises in accordance with the lease. *La. C.C. art. 2698*

9. **Premises Liability and Shift of Risk.** Under Louisiana Revised Statutes 9:3221, the owner of premises leased under a contract where the Lessee assumes responsibility for their condition is not liable for injury caused by any defect in the premises to the Lessee, or anyone on the leased premises who derives his right to be there from the Lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.

The key element here is that this must be contracted for. Further, using or tracking the language of the statute (and perhaps direct reference to it) is strongly encouraged. Waivers of liability are strictly construed in Louisiana; therefore, any failure in the drafting will cause the waiver to be lost.

10. **Rights of Military Personnel.** Louisiana Revised Statutes 9:3261: (Rights of military personnel to Terminate Lease) provide that:

a. Any active or reserve member of the armed forces of the United States, including the National Guard and the United States Coast Guard, may terminate his residential lease agreement, pursuant to Subsection B of this Section, if any of the following occur:

(1) The member has received initial or permanent change of station orders to depart thirty-five miles or more from the location of the dwelling unit.

(2) The member has received initial or temporary duty orders in excess of three months duration to depart thirty-five miles or more from the location of the dwelling unit.

- (3) The member is discharged, released, or retires.
- (4) The member is ordered to reside in government-supplied quarters.
- (5) The member is notified of the availability of government-supplied quarters which were not available to the member at the time the lease was executed, provided that the member notifies the lessor in writing that the member has a pending request or application for government supplied quarters at the time the lease is entered into.

b. Lessees who qualify to terminate a rental agreement pursuant to Subsection A shall do so by serving on the Lessor a written notice of termination to be effective on a date stated therein, said date to be not less than thirty days after the date the notice is served on the Lessor. The termination shall be no more than sixty days prior to the date of departure necessary to comply with the official orders or any supplemental instructions for interim training or duty prior to the transfer. Prior to the termination date, the Lessee shall furnish the Lessor with a copy of the official notification of orders, or a signed letter confirming the orders from the Lessee's commanding officer, or a statement signed by the housing officer certifying that no government-supplied quarters were available at the time the lease was executed.

c. In consideration of early termination of the lease, the Lessee shall not be liable for more than one month's rent if, as of the effective date of the termination, the Lessee has completed less than six months of the lease agreement, or one-half of the rent for one month, if the Lessee has completed at least six months of the lease agreement. The Lessee shall be entitled to the full return of any security deposit if such member has otherwise complied with the requirements of the lease.

d. The provisions of this Section may not be waived or modified by the agreement of the parties under any circumstances.

11. Lessee's Obligations. The Lessee's principal obligations

The Lessee is bound:

- (i) To pay the rent in accordance with the agreed terms;
- (ii) To use the thing as a prudent administrator and in accordance with the purpose for which it was leased; and
- (iii) To return the thing at the end of the lease in a condition that is the same as it was when the thing was delivered to him, except for normal wear and tear or as otherwise provided hereafter. *La. C.C. art. 2683*

12. **Lease Expenses.** Parties are free to contract for the responsibility of expenses. In default of provisions in the lease, the Code provides a few default rules. For example, the Lessor is bound to make repairs that become necessary to maintain the thing in a condition suitable for the purpose for which it was leased (*La. C.C. art 2691*). The Lessee is bound to repair damage caused by his fault (or by those on the premises with his consent), and to repair any deterioration resulting from use that exceeds the normal or agreed use. Also, Lessors are bound to pay all taxes, assessments and other charges that burden the thing. These default provisions, however, normally will not cover the expenses incurred in modern leasing, nor do the Code defaults represent modern practice. Therefore, Lessors and Lessees (and the licensee representatives) must make clear expression of expenses and allocation of them. Some particular methods of allocation are:

“Triple Net” Lease. In the vernacular, this generally refers to lease where the lessor leases the property with all rent being “net” to him. The “triple” reference normally means the Lessee is paying property taxes, maintenance and repair. However, this term is somewhat fluid as it has no legal meaning. It is appropriate to be specific about what expenses are being paid by whom.

“Common Area Maintenance Charges (“CAM”). In projects in which there is shared use of facilities, such as a shopping center or office building, Lessor’s, as additional rent, recoup common charges from Lessees. These charges include costs for maintaining common areas (lobbies, hallways, parking lots) maintenance and repair of those areas, as well as a myriad of other charges. Normal charges include costs for common lighting, security, administration, insurance and taxes. Lessees traditionally pay these on a square foot basis. The charges are usually billed annually at the end of a year. There is also traditionally a right of the Lessee to audit the charges. As a measure of protection, Lessors and Lessees will often agree on a “bottom” and a “top”. For example, the Lessor might set CAM at \$2.50 per square foot, to be adjusted based on annual expenditures, but in no event will CAM be less the \$1.50 per square foot. Likewise, Lessees might contract that, regardless of actual costs, their CAM charge will never exceed \$3.50 per square foot.

13. **Contract Rules.** Leases are unique contracts because the parties may agree on virtually everything. As with all contracts, the lease is the “law between the parties.” In most cases, the rules in the Civil Code are merely back-up in the event that something is not covered. (In fact, despite the obligations stated in the Civil Code, most leases require the Lessee to take full responsibility for maintenance and repairs.)
14. **Licensee Responsibility.** In residential leasing, any lease “executed” (read “handled”) by a licensee must contain (1) the reference to the web site listing registered sex offenders (*La.R.S. 37:1469*) and (2) the licensee must provide the mold information pamphlet (*La.R.S. 37:1470*).
15. **Possession.** Further, the Lessor warrants the Lessee's “peaceful possession of the leased thing” (i.e., eviction). In a residential lease, this warranty encompasses a disturbance caused by a person who, with the Lessor's consent, has access to the thing or occupies adjacent property belonging to the Lessor (e.g., manager and neighbors).
16. **Reconduction.** Reconduction occurs when the Lessee remains in possession of the premises after the expiration of a fixed term and without notice to vacate. In that case, the lease is viewed as reconducted. In that event, the Civil Code provides the term of the lease, and it is as though the lease was renewed. *La. C.C. art. 2721*

17. **Default.** The Lessor may seek to regain possession of the leased premises in the event the Lessee fails to pay the rent or defaults on any other term of the contract (as with any contract, the rules pertaining to default apply). In that event, the Louisiana Code of Civil Procedure provides rules for eviction.

18. **Recording a Lease and/or Memorandum of Lease.**

a. A lease of immovable property does not affect third parties unless the lease is recorded. A lease may be made orally or in writing. A lease of an immovable is not effective against third persons until filed for recordation in the manner prescribed by legislation. *La. C.C. art. 2668.*

b. Despite the rule that leases may be oral, most leases are in writing. However, not all leases are recorded. Typically, residential leases are not recorded because of their short duration. On the other hand, commercial Lessors and Lessees may want to record their lease to put third parties on notice, but may not want to make public everything the lease contains. For that reason, the law permits recordation of an “extract of lease” or “memorandum of lease.” *LSA-R.S. 44:104.* The extract shall include:

- (i) The names and signatures of the Lessor and Lessee;
- (ii) The date of execution of the lease;
- (iii) A brief description of the leased property;
- (iv) The term of the lease; and
- (v) A reference to the existence of any renewal or purchase option contained in the lease.

c. As long as a lease is recorded, the sale of the leased thing will not affect the lease. The effects of the lease continue. *La. C.C. art. 2711.* However, and typically when the Lessor sells the thing to a third party, the Lessor also assigns his rights in the lease to the third party who agrees to abide by the terms of the lease. A sale does not mean the Lessor is released from liability. Lease is a personal contract and does not “run with the land.” Therefore, Lessors typically require a release by the Lessee and a hold harmless from the buyer of any liability occurring after the transfer of the lease to the buyer.

19. **Assignment/Sublease/Encumbrance**

a. Sublease/Assignment. The default rule is that all leases may be subleased, assigned and encumbered unless the Lessor indicates otherwise in the lease. If the lease denies the right to do one, but fails to mention the others, then the assumption will be that the Lessor intended to deny the right to do all. *La. C.C. art. 2713*

The Lessee has the right to sublease the leased thing or to assign or encumber his rights in the lease, unless expressly prohibited by the contract of lease. A provision that prohibits one of these rights is deemed to prohibit the others, unless a contrary intent is expressed. In all other respects, a provision that prohibits subleasing, assigning, or encumbering is to be strictly construed against the Lessor. *La. C.C. art. 2713.*

b. Assignment. The act of transferring one's rights in a lease. The Lessee may assign his rights in the lease to a third party. In that event, unless prohibited by the lease, the original Lessee is relieved of any further obligations in the lease.

c. Sublease. In the case of a sublease, the original Lessee is not relieved of any obligations. Essentially the Lessee becomes a sublessor and the person to whom he subleases is the sublessee. The sublessor (original Lessee) is still liable for the rent and should make sure that his Lessee abides by all of the terms of the original lease in addition to any sublease.

d. Encumbrance.

(i) Prior law concerning assignment and sublease, La. C.C art. 2725, did not mention the right to encumber at all. New law, La. C.C. art. 2713 specifically includes the right to encumber the lease, unless otherwise prohibited.

(ii) An important addition to the new law is the fact that if the lease specifies that any one of these (assignment, sublease, encumbrance) are prohibited, but fails to mention the others then the assumption is that none of them are permitted. It is essential to remember this fact because, while many Lessors may want to prohibit the Lessee from mortgaging his leasehold interest, Lessees typically need to be assured of having this right or risk limiting means of obtaining necessary financing.

20. **Lease Financing.** Leased property is particularly valuable because of the ways in which rights to the property can be "broken up" for the purpose of financing.

a. Land. The Lessor can mortgage his rights in the land separate from any improvements currently on the land or to be constructed upon the land. In some cases, if a Lessor is leasing unimproved land upon which the Lessee will construct a building, the Lessor may mortgage the land for the purpose of obtaining financing for the Lessee's project. The land is used as security for construction financing and then the improvements will be used as security for the permanent loan once construction is complete.

b. Improvements. Use of improvements as security depends upon ownership. In most cases, improvements are owned by the Lessor and are included within the Lessor's mortgage over the land. In some cases, the improvements are owned by the Lessee, but may revert to the Lessor once the lease is terminated. In those cases, the Lessee may use the improvements as security during the term of the lease.

c. Lessee's rights. Lessees typically secure loans by using the lease as collateral. In 1996 in the case of *Carriere v. Bank of Louisiana*, 702 So.2d 648 (La. 1996), *reh'g denied*, the Louisiana Supreme Court's holding indicated that Lessee's rights fall into 2 categories:

(i) Leasehold estate. This term is not recognized in Louisiana law, but is adopted from the common law. In *Carriere*, the Supreme Court had to decide whether a collateral mortgage of a “leasehold estate” included the obligation to pay rent. The court held that it did not. The court indicated that the right of use, occupancy and enjoyment (the basic rights held by a Lessee) can be severed from the Lessee’s obligation to pay rents. Therefore, in *Carriere*, the lender who foreclosed upon the Lessee’s “leasehold estate” was not obligated to pay rent to the Lessor. Instead, the obligation to pay rent was retained by the Lessee.

(ii) Use, occupancy and enjoyment. As indicated above, these are the basic rights granted to Lessees in any lease.

d. Fixture filing. The movables (appliances and equipment) within the leased premises may also be used as collateral. Again, as with improvements, the right to encumber these depends upon ownership. If something is truly a “fixture”, then it is considered a component part of the improvement (e.g., a stove affixed to the wall of a leased restaurant). On the other hand, appliances and equipment that remain movable (i.e., not affixed to the premises) may be mortgaged by the Lessee. In some case the lease may specify that ownership of what would otherwise be considered fixtures shall be retained in the Lessee. In that case, such fixtures may be mortgaged along with other movables owned by the Lessee. Use of fixtures as collateral is governed by the Uniform Commercial Code (UCC – Chapter 9 of Title 10 of the Louisiana Revised Statutes.)

e. Lessor’s Lien. A Lessor has a privilege upon the Lessee’s movables as security for the Lessee’s obligations, including the obligation to pay rent. *La. C.C. art. 2707*. Addressing this issue in a lease is particularly important if the Lessee intends to use the movables as collateral. In Louisiana, UCC security interests outrank the Lessor’s lien by law.

f. Rental stream (*La. R.S. 9:4401*). The Lessor may secure any obligation by an assignment of the rents Lessor expects to receive. Such an assignment is often made in conjunction with a mortgage on the Lessor’s property interest. In that event, the assignment may be contained within the mortgage or in a separate agreement. The assignment may be of any presently existing or anticipated future rents pertaining to the immovable property described in the agreement. Also, the mortgage can call for a present assignment (“lock box”) security where the rent is paid directly to the lender or default assignment where the lender must seize the rent if there is a default.

21. **Subordination and Non-Disturbance.** Standard commercial lease agreements typically contain a clause providing for a “Subordination, Non-Disturbance and Attornment Agreement” (SNDA). A recorded lease outranks subsequently recorded mortgages. This point is important to a Lessor who intends to mortgage his property interest in the future.

Also, and as important, if there is an existing mortgage on the land and the Lessee subsequently records his lease, the lender on the land, upon foreclosure, takes the land free and clear of the lease. No Lessee wants this to happen, especially if they have expended money in or on the leased premises (think build-to-suit leases). The SNDA provides all three parties; Lessor, Lessee and lender with the following assurances:

a. Attornment. Lessee agrees to abide by the terms of the lease even if Lessor no longer holds right in the lease, essentially agreeing to the replacement of lender as Lessor in the event of default by Lessor.

- b. **Non-Disturbance.** As long as Lessee is not in default of the lease, lender and other third parties agree to maintain Lessee in peaceable possession of the leased premises under the same terms as the lease.
- c. **Subordination.** In exchange for the protections Lessee seeks, the lender may require that Lessee subordinate his rights in the leased thing to lender's mortgage and any future mortgages.
- d. **Estoppel Certificate.** The lease may obligate either the Lessee or Lessor to execute an estoppel certificate if requested. The "certificate" is usually done in the form of a letter or other document that certifies to the other party (or the lender) that the lease is not in default. Lender may require these prior to approval of Lessor financing (ensures that the leases, which may generate significant income, are still in effect).

22. Condemnation/Expropriation Issues.

- a. If the property is totally lost, destroyed or expropriated then the lease terminates.
- b. Partial destruction, loss or expropriation causes more issues and should be fully covered in the lease, as opposed to relying on the default rules in the Civil Code. Generally, partial destruction, loss or expropriation results in diminution of the rent or termination depending upon the circumstances. However, these rules fail to cover other issues. For example, in the case of expropriation, who gets the money awarded for loss of the property? The answer should be addressed in the lease, otherwise the Department of Transportation and Development gives the funds to the owner (Lessor) if the lease has a clause that lease terminates. What of the Lessee who paid to construct the leased premises lost to expropriation?

23. Insurance. This may be one of the most important sections in a lease. All parties may purchase some form of insurance. Clearly, if the Lessee agrees to assume liability for the condition of the premises and all occurrences on the premises, then the Lessee should obtain casualty and liability insurance. Likewise, the Lessor should obtain insurance on all common areas. Oftentimes both parties may request that they be named as "additional" insured, "named" insured or "loss payee" on the policy.

- a. **Named insured.** The "named" insured is essentially the owner of the policy, the person that can enforce the policy. The named insured pays for the policy. Oftentimes Lessors will ask to be a named insured on the Lessee's policy (and vice versa); however, insurance companies typically reject this request.
- b. **Additional insured.** In the case of a liability policy this means extending coverage to a third party, which is typically done by endorsement (the term is usually only connected with liability policies; however, a party may be named as an additional insured on a property policy if the party has an insurable interest in the insured property). Coverage for the additional insured is typically limited. The endorsement may exclude negligent actions by the additional insured or for claims alleging personal injury. The additional insured is not obligated to pay the premiums.

c. Loss payee. A party may also be named as a loss payee on a policy. The loss payee has no independent right to enforce the policy. The loss payee simply receives payments and does not have any of the protections or obligations of named or additional insured. The additional party may be named as a loss payee “as their interests may appear” (e.g., Lessee’s interest in the contents of the building and Lessor’s interest in the building).

d. Certificates of Insurance. Under Louisiana law, a “Certificate of Insurance” cannot change the policy itself. Simply getting named as a “loss payee” on a certificate is of no effect. The policy itself must be amended, usually by an endorsement. These are not considered of any real value.

24. **“Go Dark” Clauses.** These are important to the Lessor, particularly in the case of shopping centers or malls. This clause would prevent the Lessee from shutting down his business while continuing to pay the rent. If rent is paid, the Lessor cannot evict the Lessee. However, Lessors do not want closed businesses to detract from the appeal of nearby businesses. A “go dark” clause means the Lessee cannot simply continue to pay rent if business operations cease. The Lessee is obligated to keep the business operating, otherwise be deemed in breach of the lease.

25. **Lease Commission.**

a. Prior to the revision of the Civil Code chapter on lease (effective 1/1/05), La. C.C. *art. 2683.1* provided, “whenever a commission is owed by the Lessor to a third party for perfecting the lease of immovable property, the amount of the commission to whom it is owed shall be clearly stated in the written lease agreement.” This article was not included in the revision. There is no explanation for its deletion. However, it is still recommended that the broker’s commission be included in the lease.

b. Recent case law reflects the importance of careful drafting when providing for the broker’s commission in the lease.

In a Louisiana case (2002-0835, (La.App. 1 Cir. 2/14/03), 840 So.2d 641). Agent and Lessor entered into formal commission agreements in which Lessor agreed to pay the agent a percentage of the lease revenues procured by the agent. After the relationship terminated, the agent sued the Lessor seeking to recover “alleged accumulated, unpaid commissions and future commissions” in relation to those leases in which the Lessor refused to continue to pay a commission. The main issue centered upon language in various agreements between the parties that provided for the Lessor to pay the agent “his heirs, successors or assigns, a real estate commission equal to five (5%) percent of all monies collected during the initial term, options, renewals, extensions, assignments or additional leases with the Lessee.” The court was called upon to decipher the meaning of this language in order to determine for how long the agent would be entitled to further commissions.

The court questioned whether or not this language reflected a time frame of “unspecified duration,” as the trial court found (in which case, the contracts might be terminable at will) or a “definite term.” The court reasoned that “the ‘duration’ of the contract is its ‘term’...” Furthermore, the court indicated that the term of a contract fits one of the following scenarios: “(1) a certain or fixed term; (2) an uncertain but determinable term; or (3) an uncertain and undeterminable term.” The First Circuit found that the commission agreements did not contain an uncertain and undeterminable term, “but rather an uncertain but determinable term.” The term is determined “by the happening of a future event; i.e., the termination of the applicable lease.” The First Circuit interpreted the commission agreements as having a determinable term because “the payment of commission is specified as being due ‘during the initial term, options, renewals, extensions, assignments or additional leases with the Lessee.’” Therefore, the right to receive commission payments ends when the tenancy ends.

In addition, the court reasoned that the identity of the Lessee was also important to determining the right of the agent to receive lease payments. Since the commission agreements stated that the commissions were based on leases “with the Lessee” the court found that if the juridical identity of the Lessee changed and new leases were signed to that effect, the agent would not be entitled to commission payments from the new leases. For example, Lessor enters into a lease with Jim Smith, an individual. Jim Smith then forms a corporation called Smith Enterprises, Inc. The lease with Jim Smith is cancelled and the Lessor then signs a new lease with Smith Enterprises, Inc. This change in juridical identity – from individual to corporation – means that the agent is no longer entitled to a percentage of the lease payments because “the Lessee” has changed. Therefore, even though it was the agent who may have been responsible for procuring Jim Smith for a lease with Lessor, entitling agent to a commission payment, essentially the agent is not responsible for the lease with Smith Enterprises. The First Circuit indicated that if the parties intended for payments to extend to successors of the Lessee, then the lease should have specified that fact in the same way that it specified that commission payments were due to the “heirs, successors or assigns” of the agent.