

**LOUISIANA STATE LAW INSTITUTE**

**THE MEETING OF THE COUNCIL**

**September 9-10, 2016**

**Friday, September 9, 2016**

**Persons Present:**

Bergstedt, Thomas	Lovette, John
Braun, Jessica	McIntyre, Edwin R., Jr.
Breard, L. Kent	Medlin, Kay C.
Brister, Dorrell J.	Mengis, Joseph W.
Burris, William J.	Norman, Rick J.
Castille, Prston J., Jr.	Pohorelsky, Peter
Crawford, William E.	Popovich, Claire
Crigler, James C.	Richardson, Sally
Cromwell, L. David	Riviere, Christopher H.
Csaki, Molly L.	Scalise, Ronald J., Jr.
Davidson, James J., III	Smith, Gary L., Jr.
Davnados, Nick	Sole, Emmett C.
Dawkins, Robert G.	Storms, Tyler
Dimos, Jimmy N.	Stuckey, James A.
Doguet, Andre	Thibeaux, Robert P.
Domingue, Billy J.	Tate, George J.
Forrester, William R., Jr.	Thibeaux, Robert P.
Garrett, J. David	Title, Peter S.
Gasaway, Grace B.	Tooley-Knoblett, Dian
Gregorie, Isaac M. "Mack"	Tucker, Zelda W.
Griffin, Piper D.	Vance, Shawn
Hargrove, Joseph L., Jr.	Varnado, Sandi S.
Hester, Mary C.	Vestal, Roxanne
Holdridge, Guy	Vetter, Keith
Johnson, Pamela Taylor	Weems, Charles S., III
Kostelka, Robert "Bob" W.	White, H. Aubrey, III
Lavergne, Luke	Wilson, Evelyn
Leefe, Richard K.	Yiannopoulos, A. N.
Levy, H. Mark	Ziober, John David
Little, F. A.	

On Friday, September 9, 2016 in the Hotel Monteleone in New Orleans, Louisiana, the President of the Louisiana State Law Institute, Mr. John David Ziober, called the meeting of the Council to order at 10:00 a.m.

The President began the meeting by having all those present state their name and their hometown. He then informed the Council that Mr. L. David Cromwell, the Reporter of the Security Devices Committee, would be presenting materials from the Security Devices Committee. He then stated that the morning session would last until 12:00 p.m. Immediately thereafter, the Executive Committee would hold a brief meeting. Mr. Ziober then yielded the floor to Mr. Cromwell.

## **Security Devices**

Mr. Cromwell began his presentation by giving a brief overview of the Security Devices Committee's work on the Private Works Act (PWA) and thanked the members of the Committee and special advisors for their continued efforts. He then asked those present to turn their attention to the document that was made available prior to the meeting and was entitled, "Louisiana State Law Institute, Security Devices Committee, Revision of the Private Works Act, R.S. 9:4801 et seq., Avant-Projet No. 3, Prepared for Consideration by the Council, September 9, 2016".

He asked the Council to turn their attention to R.S. 9:4831. He briefly introduced the Section, and a motion was made to adopt the changes as presented in Subsections C and D. This motion was seconded, and R.S. 9:4831(C) and (D) were unanimously approved to read as follows:

R.S. 9:4831. Filing; place of filing; contents

\* \* \*

C. If the work is evidenced by a notice of contract that contains a complete property description of the immovable, reference in any subsequent filing to the notice of contract, together with its registry number or other appropriate recordation information, shall be sufficient to meet the requirements of Subsection B. If the work is evidenced by a notice of contract that contains either a complete property description of the immovable or another reasonable identification of the immovable, reference to the notice of contract, together with its registry number or other appropriate recordation information, shall be deemed a reasonable identification of the immovable in a statement of claim or privilege filed under this Part.

D. Reference in a statement of claim or privilege to a notice of contract that does not contain a reasonable identification of the immovable shall not alone be sufficient to preserve the privilege of the claimant against a third person having or acquiring an interest in the immovable but shall nevertheless be sufficient to preserve all rights of the claimant against the owner, the contractor, and his surety.

He then introduced R.S. 9:4801. Mr. Cromwell explained that, upon further consideration following a prior Council meeting, the Committee now recommended the removal of the previously-approved words "Subject to their compliance with the provisions of this Part", as seen on lines 7 and 8 of page 6. A member then questioned Mr. Cromwell regarding Note 3 of the "Reporter's Notes", as found on line 13 on page 7. The Reporter agreed to strike the words, "be deleted", and informed the Council that he will draft new comments to accompany the changes made to the PWA and suppress the current comments. The Council agreed with this course of action. He then introduced the changes made to Paragraph 5, as seen on line 20 on page 6. A motion to approve these

changes was seconded and unanimously approved by the Council. Thus, R.S. 9:4801(5) was approved to read as follows:

R.S. 9:4801. Improvement of immovable by owner; privileges securing the improvement

The following persons have a privilege on an immovable to secure the following obligations of the owner arising out of a work on the immovable:

\* \* \*

(5) Registered or certified surveyors or engineers, ~~or licensed architects, or their professional subconsultants, employed engaged by the owner, licensed architects engaged by the owner, and the professional subconsultants of each of them,~~ for the price of professional services rendered in connection with a work that is undertaken by the owner. ~~A "professional subconsultant" means a registered or certified surveyor or engineer or licensed architect employed by the prime professional, as described in this Paragraph. In order for the privilege of the professional subconsultant to arise, the subconsultant must give notice to the owner within thirty days after the date that the subconsultant enters into a written contract of employment. The notice shall include the name and address of the subconsultant, the name and address of his employer, and the general nature of the work to be performed by the subconsultant.~~

The Reporter then introduced R.S. 9:4802. A motion was made to remove the words "Subject to their compliance with the provisions of this Part", as seen on lines 8 and 9 on page 8, and to accept the recommended changes to Paragraph 5, as seen on lines 21 and 22 on page 8. This motion was seconded and approved unanimously by the Council. Thus, R.S. 9:4802(5) was approved to read as follows:

R.S. 9:4802. Improvement of immovable by contractor; claims against the owner and contractor; privileges securing the improvement

A. The following persons have a claim against the owner and a claim against the contractor to secure payment of the following obligations arising out of the performance of work under the contract:

\* \* \*

(5) ~~Prime consultant registered~~ Registered or certified

surveyors or engineers, ~~or licensed architects, or their professional subconsultants, employed~~ engaged by the contractor or a subcontractor, or licensed architects engaged by the contractor or a subcontractor, and the professional subconsultants of each of them, for the price of professional services rendered in connection with a work that is undertaken by the contractor or subcontractor.

(a) ~~A "professional subconsultant" means a registered or certified surveyor or engineer, or licensed architect employed by the prime consultant.~~

(b) ~~For the privilege under this Subsection to arise, a prime consultant or professional subconsultant shall give written notice to the owner within thirty working days after the date that the prime consultant or professional subconsultant is employed. The notice shall include the name and address of the prime consultant or professional subconsultant, the name and address of his employer, and the general nature of the work to be performed by the prime consultant or professional subconsultant.~~

Next, Mr. Cromwell introduced R.S. 9:4803, and a motion was made to adopt the changes recommended. A few questions ensued. One member asked the Reporter whether there is any jurisprudence that holds that, based on a theory of indemnification, an owner is entitled to reimbursement for defending himself against a R.S. 9:4802 claim. The Reporter indicated that he was unaware of any such jurisprudence, but he assured the Council member that the Staff Attorney would research the issue and report any findings. The Council agreed with this course of action. Following this approval, the Council unanimously agreed that R.S. 9:4803(B), (C), and (D) should read as follows:

R.S. 9:4803. Amounts secured by claims and privileges

\* \* \*

B. The claim or privilege granted the lessor of a movable by R.S. 9:4801(4) or R.S. 9:4802(A)(4) is limited to and secures only that part of the ~~rentals~~ rents accruing during the time the movable is located at the site of the immovable for use in a work. A movable shall be deemed not located at the site of the immovable for use in a work after:

\* \* \*

C. The privileges granted by R.S. 9:4801 and the claims and privileges granted by R.S. 9:4802 do not secure payment of attorney fees or other expenses of litigation.

D. When a juridical person is engaged by an owner, contractor, or subcontractor to provide surveying, engineering, or

architectural services, or is engaged as a professional subconsultant, claims and privileges under this Part arise in favor of that juridical person for amounts owed to it under this Section, and no claim or privilege arises under this Part in favor of any surveyor, engineer, architect, or other person that it employs.

Subsequently, Mr. Cromwell asked the Council to consider R.S. 9:4806. After introducing the Section, a motion was made to adopt the recommended changes. This motion was seconded, and R.S. 9:4806 was unanimously approved to read as follows:

R.S. 9:4806. Owner defined; interest affected

\* \* \*

E. The inclusion in a statement of claim and privilege of the name of an owner who is not responsible for the claim under R.S. 9:4806(B) shall not give rise to liability on the part of that owner or create a privilege upon that owner's interest in the immovable.

There were no suggested changes to R.S. 9:4807; however, the Reporter included it in the materials for the sake of comprehensiveness. Mr. Cromwell then introduced R.S. 9:4808 and a motion was made to adopt the changes as shown in the document. This motion was seconded. A question was raised as to the use of "properly", as found on line 8 of page 16. After the Reporter answered this question, the Council unanimously approved R.S. 9:4808(B) to read as follows:

R.S. 9:4808. Work defined

\* \* \*

B. If written notice of a contract ~~with a proper bond attached~~ 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 of contract is so filed, shall be deemed a general contractor.

\* \* \*

After this action, the Reporter asked the Council to turn its attention to R.S. 9:4809. While introducing this Section, Mr. Cromwell stressed the fact that the Committee was not seeking the Council's approval for the exact wording of the Section—it will be modified at a later date—rather the Committee wished for the Council to approve the concept of creating a definitional section in the Act at R.S. 9:4809. A member then questioned the Reporter over the definition of the word "substantial completion". The Council unanimously agreed with the proposed idea and placement of the new Section.

Next, the Reporter introduced R.S. 9:4810, which was previously approved to serve as a new definitional section in the Act. A motion was made to adopt the proposed change to the definition of a "professional subconsultant",

as it is found on line 17 of page 19. This motion was seconded and the definition of "professional subconsultant" in proposed R.S. 9:4810 was approved to read as follows:

R.S. 9:4810. Miscellaneous definitions

\* \* \*

A professional subconsultant is a registered or certified surveyor or engineer, or a licensed architect, who is engaged by another registered or certified surveyor or engineer or licensed architect.

\* \* \*

The Reporter then reminded the Council that they had previously approved the proposed revisions to the next two Sections, R.S. 9:4811 and 4812. As such, he asked the members of the Council to turn their attention to R.S. 9:4813. After Mr. Cromwell introduced the recommended changes to Subsection E, a motion was made that the changes be accepted as proposed. This motion was seconded. Revised Statute 9:4813(E) was approved to read as follows:

R.S. 9:4813. Liability of the surety

\* \* \*

E. The surety's liability, except as to the owner, is extinguished as to ~~all persons who fail~~ each person who fails to institute an action asserting ~~their~~his claims or rights against the owner, the contractor, or the surety ~~within~~ no later than one year after the expiration of the time specified in R.S. 9:4822 for ~~claimants~~ the person to file ~~their~~ his statement of claim or privilege.

\* \* \*

Thereafter, Mr. Cromwell directed the Council's attention to R.S. 9:4814. He explained that the Committee was recommending that the text found in the Section be removed to another location in the Act. A motion was made to adopt this recommendation. The motion was seconded and passed unanimously. He then introduced R.S. 9:4815 and stated that the Committee recommended that this Section also be transferred to another location within the Act. Again, a motion was made to adopt this recommendation. The motion was seconded and passed unanimously.

Due to the next few Sections in the Act being blank, Mr. Cromwell asked the Council to consider R.S. 9:4820. He introduced the Section, and a motion was made to adopt the recommended changes to Subsection C and to delete existing Subsection D. Thereafter, a few members of the Council posed questions to the Reporter. He and a member of the Council assuaged their concerns. The motion to accept the changes to Subsection C and the deletion of D was revived, seconded, and adopted unanimously. Mr. Cromwell then introduced the new, proposed language for Subsection D. A motion to adopt the language was made. This motion was seconded and unanimously approved. Thus, R.S. 9:4820 was approved to read as follows:

R.S. 9:4820. Privileges; effective date

\* \* \*

C. A person acquiring or intending to acquire a mortgage, privilege, or other right, in or on an immovable may conclusively rely upon an affidavit made by a ~~registered or certified engineer or surveyor, licensed architect, or building~~ qualified inspector employed by the city or parish or by a lending institution chartered under federal or state law, to the effect that states he inspected the immovable at a specified time and work had not then been commenced nor materials placed at its site, provided the inspection occurs, and the affidavit is filed, within four business days before or within four business days after the execution of the affidavit, and the filing of the mortgage, privilege, or other document creating the right is filed before or within four business days of the filing of the affidavit. ~~The correctness of~~ Insofar as the rights of the person to whom or for whom the affidavit is given are concerned, the facts recited in the affidavit shall be deemed to be true at the time of the inspection and to remain true at the time of filing of the mortgage, privilege, or other document, and the correctness of those facts may not be controverted to affect the priority of the rights of the person to whom or for whom it is given, unless actual fraud by such person is ~~proven~~ proved. A person who gives a false or fraudulent affidavit shall be responsible for any loss or damage suffered by any person whose rights are adversely affected.

~~D. A person acquiring or intending to acquire a mortgage, privilege, or other right under Subsection C of this Section shall have priority in accordance with R.S. 9:4821, regardless of whether work has begun or materials were delivered to the job site after the effective date and time of the affidavit, but prior to the recordation of the mortgage, privilege, or other right, provided that the document creating the right was filed before or within four business days of the filing of the affidavit.~~

D. Notwithstanding the other provisions of this Part, the privileges granted upon an immovable by R.S. 9:4801(5) and those securing a claim arising under R.S. 9:4802(A)(5) shall have no effect as to third persons acquiring rights in, to, or on the immovable before the statement of claim or privilege is filed.

Subsequently, the Reporter asked the Council to turn their attention to R.S. 9:4821. He briefly introduced the Section and a motion was made to adopt it as it is shown in the materials. This motion was seconded. Two questions were then addressed to the Reporter. After he answered them, the Council unanimously adopted the changes to the Section. Thus, R.S. 9:4821 was adopted to read as follows:

R.S. 9:4821. Ranking of privileges arising under this Part

~~A. The privileges granted by R.S. 9:4801 and 4802 rank among themselves and as to other mortgages and privileges in the following order of priority:~~

~~(1) Privileges for ad valorem taxes or local assessments for public improvements against the property, liens, and privileges granted in favor of parishes for reasonable charges imposed on the property under R.S. 33:1236, liens and privileges granted in favor of municipalities for reasonable charges imposed on property under R.S. 33:4752, 4753, 4754, 4766, 5062, and 5062.1, and liens and privileges granted in favor of a parish or municipality for reasonable charges imposed on the property under R.S. 13:2575 are first in rank and concurrent regardless of the dates of recordation or notation of such liens and privileges in any public record, public office, or public document.~~

~~(2) Privileges granted by R.S. 9:4801(2) and 4802(A)(2) rank next and equally with each other.~~

~~(3) Bona fide mortgages or vendor's privileges that are effective as to third persons before the privileges granted by this Part are effective rank next and in accordance with their respective rank as to each other.~~

~~(4) Privileges granted by R.S. 9:4801(3) and (4) and 4802(A)(1), (3), and (4) rank next and equally with each other.~~

~~(5) Privileges granted by R.S. 9:4801(1) and (5) rank next and equally with each other.~~

~~(6) Other mortgages or privileges rank next and in accordance with their respective rank as to each other.~~

~~B. A person acquiring or intending to acquire a mortgage, privilege, or other right under R.S. 9:4820(D) shall have priority in accordance with the provisions of this Section, regardless of whether work has begun or materials were delivered to the jobsite after the effective date and time of the affidavit, but prior to the recordation of the mortgage, privilege, or other right, provided that the document creating the right was filed before or within four business days of the filing of the affidavit.~~

A. The privileges granted by this Part are superior to all mortgages and other privileges, regardless of the dates on which the mortgages or privileges become effective as to third persons, except as follows:

(1) Each privilege granted by this Part is inferior to privileges for ad valorem taxes or local assessments for public improvements



against the immovable, privileges granted in favor of parishes for reasonable charges imposed on the immovable under R.S. 33:1236, privileges granted in favor of municipalities for reasonable charges imposed on the immovable under R.S. 33:4752, 4753, 4754, 4766, 5062, and 5062.1, and privileges granted in favor of a parish or municipality for reasonable charges imposed on the immovable under R.S. 13:2575.

(2) Each privilege granted by this Part other than those arising under R.S. 9:4801(2) and those securing a claim arising under R.S. 9:4802(A)(2) is inferior to bona fide mortgages and vendor's privileges that are effective as to third persons before the privilege granted by this Part becomes effective as to third persons.

B. Except as otherwise provided in Subsection C, the privileges granted by this Part rank among themselves in the following order of priority, regardless of whether they arise from the same work or different works and regardless of the dates on which the privileges become effective as to third persons:

(1) Privileges granted by R.S. 9:4801(2) and those securing a claim arising under R.S. 9:4802(A)(2) rank first and concurrently with each other.

(2) Privileges granted by R.S. 9:4801(3) and (4) and those securing a claim arising under R.S. 9:4802(A)(1), (3), and (4) rank next and concurrently with each other.

(3) Privileges granted by R.S. 9:4801(1) and (5) and those securing a claim arising under R.S. 9:4802(A)(5) rank next and concurrently with each other.

C. A privilege under this Part that is superior to a mortgage or vendor's privilege in accordance with Subsection A is also superior to all privileges under this Part that are inferior to the mortgage or vendor's privilege.

Mr. Cromwell then introduced the final Section of his presentation, R.S. 9:4822. He first introduced the Committee's proposed changes to Subsection A to state the general rule of when a statement of claim or privilege must be filed. A motion was made to adopt the changes as shown. This motion was seconded and unanimously approved. He then introduced the Committee's proposal to relabel existing Subsections A and B as Subsections B and C, respectively, and to make additional changes to the latter of these Subsections. A motion was made to adopt the changes to these two Subsections. This motion was seconded. A member of the Council then asked the Reporter whether the proposed language of Subsection E would allow a contractor to obtain and file a judgment having the effect of a notice of termination after the period for filing statements of claim or privilege had already expired, thereby giving rise to a new period for filing those statements. The Reporter agreed to draft some language

that would eliminate that possibility. After a few more questions regarding the notice period were voiced and answered, the Council unanimously adopted the redesignation of the two Subsections and the proposed changes to Subsection C. The Reporter then introduced the Committee's proposal to delete current Paragraph D(1), because its substance would now fall within the general rule of new Subsection A. A motion was made to adopt this recommendation. The motion was seconded and was adopted unanimously. Thus, R.S. 9:4822(A)-(D)(1) were adopted to read as follows:

R.S. 9:4822. Preservation of claims and privileges

A. Except as otherwise provided in Subsections B and C of this Section, a person granted a privilege under R.S. 9:4801 or a claim and privilege under R.S. 9:4802 shall file a statement of his claim and privilege no later than sixty days after:

(1) The filing of a notice of termination of the work; or

(2) The substantial completion or abandonment of the work, if a notice of termination is not filed.

~~A. B.~~ If a notice of contract is properly and timely filed in the manner provided by R.S. 9:4811, the persons a person to whom a claim or privilege is granted by R.S. 9:4802 shall within thirty days after the filing of a notice of termination of the work:

~~(1) File~~ file ~~a statement of their claims or~~ his claim and privilege.

~~(2) Deliver and deliver~~ to the owner a copy of the statement of claim or privilege. If the , if his ~~address of the owner is not given in the notice of contract, the claimant is not required to deliver a copy of his~~ the statement to the owner, of claim and privilege:

(1) No later than thirty days after the filing of a notice of termination of the work; or

(2) No later than six months after the substantial completion or abandonment of the work, if a notice of termination is not filed.

~~B. C.~~ A general contractor to whom a privilege is granted by R.S. 9:4801 of this Part, and whose privilege has been preserved in the manner provided by R.S. 9:4811, shall file a statement of his privilege within sixty days after the filing of the notice of termination or substantial completion of the work.:

(1) No later than sixty days after the filing of a notice of termination of the work; or

(2) No later than seven months after the substantial completion or abandonment of the work, if a notice of termination is not filed.

~~C. Those persons granted a claim and privilege by R.S. 9:4802 for work arising out of a general contract, notice of which is not filed, and other persons granted a privilege under R.S. 9:4801~~

~~or a claim and privilege under R.S. 9:4802 shall file a statement of their respective claims and privileges within sixty days after:~~

~~(1) The filing of a notice of termination of the work; or~~

~~(2) The substantial completion or abandonment of the work, if a notice of termination is not filed.~~

~~D. (1) Notwithstanding the other provisions of this Part, the time for filing a statement of claim or privilege to preserve the privilege granted by R.S. 9:4801(5) expires sixty days after the latter of:~~

~~(a) The filing of a notice for termination of the work that the services giving rise to the privilege were rendered; or,~~

~~(b) The substantial completion or abandonment of the work if a notice of termination is not filed. This privilege shall have no effect as to third persons acquiring rights in, to, or on the immovable before the statement of claim or privilege is filed.~~

Following this action by the Council, Mr. Cromwell returned the floor to the President of the Council, Mr. Ziober, at 11:58 a.m. At that time the President broke the meeting for lunch, and the Executive Committee assembled for their meeting.

#### LUNCH

After the lunch break, President John David Ziober introduced Professor Melissa T. Lonegrass, Reporter of the Landlord Tenant Committee to present materials in response to SCR No. 131 of the 2014 Regular Session of the Legislature regarding Security Deposits.

### Landlord Tenant

#### Security Deposits Draft Legislation:

1. The Reporter introduced the Council to the directive in Senate Concurrent Resolution No. 131 of the 2014 Regular Session of the Legislature which requested the Law Institute to study the laws applicable to the rights of landlords and residential tenants and make recommendations for legislation. Professor Lonegrass also informed the Council that the Committee has studied the Revised Uniform Residential Landlord Tenant Act and the laws of several peer states.

2. The Reporter turned the Council's attention to proposed R.S. 9:3251(A). She explained that many of the changes are to bring the terminology in line with the Civil Code or simply to clarify the law. The first substantive change involving the return of the security deposit is that the thirty day time period does not begin to run until the lessee provides an address to the lessor. In response to the discussion, the Reporter explained that the case law is very clear that lessor's must return the full deposit or a portion thereof and a statement explaining the retention. The case law also implies that the statement must be in writing, but the Council voted to add the word "written" to the proposal. The Council also discussed that all of these proposals are required and may not be altered by the lease due to the inequitable bargaining power of the parties.

3. In proposed R.S. 9:3251(B) there are two substantive changes. First, the Committee learned that courts are requiring lessees to have a forwarding address on file with the post office to comply with the "forwarding address" language of present law. However, lessees often do not have a new physical address yet and proposed legislation in 2014 suggested that only a mailing address be required. Therefore, the Committee proposes that only an address be furnished to the lessor. Secondly, the Committee reasoned that the security deposit is the property of the lessee and it should not be forfeited if no address is given. The Reporter explained that the Unclaimed Property Act is also applicable. The Council mentioned making sure the language is broad enough to cover the return of the security deposit by electronic means. The Reporter agreed to clarify the language in Comment (b) makes this clear.

4. The Reporter next explained why the Committee is proposing to delete the present law in R.S. 9:3251(B) and (C). The Committee felt strongly that the result under present law conflicts with the law of assumption and may lead to an unfair result for lessees. The Council agreed. In Subsection C, the Council also agreed with the deletion of present law due to the harsh effect it may have on lessees who comply with the lease and to whom the security deposit is due.

5. The discussion of new R.S. 9:3251(C) was lengthy. This Subsection follows the national trend and clearly classifies the security deposit as a security interest. But the Committee was concerned with mom and pop lessors having to comply with the Uniform Commercial Code Secured Transactions law. Therefore, the proposal exempts them from the requirements of keeping a separate account and paying interest. However, many Council members had a hard time conceptualizing how this would procedurally work. They discussed cash collateral as a security interest, tracing rules, the necessity of a security agreement, remedies, and self-help. Due to the complexity of this area of the law, members also suggested simply stating the objective with terms such as "property" and "ownership" and removing the references to the Uniform Commercial Code all together. It was also suggested that references to C.C. Arts. 3140 and 3159 in security and pledge could be used to avoid UCC language. However, the Reporter emphasized the advantages of bringing in the UCC and the nationwide trend to address this issue and the relationship between the parties. It is desirable to prevent lessees from having to fight other creditors for their security deposits.

6. After all of this discussion, the Council adopted the following and recommitted Subsection C:

**§ 3251. Lessee's deposit to secure lease; retention by lessor; conveyance of leased premises; itemized statement by lessor Return of deposit; right of retention**

A. Any ~~advance or~~ deposit of money furnished by a ~~tenant or~~ lessee to a ~~landlord or~~ lessor in a residential lease to secure the performance of ~~any part of a written or oral lease or rental agreement~~ obligations of the lessee shall be returned to the ~~tenant or lessee of residential or dwelling premises~~ within one month after the lease shall terminate in accordance with R.S. 9:3252, except that the ~~landlord or~~ lessor may retain all or any portion of the ~~advance or~~ deposit which that is reasonably necessary to remedy a ~~default of the tenant~~ the lessee's failure to perform or to remedy ~~unreasonable wear to the premises~~. If any portion of an ~~advance or a~~ deposit is retained, ~~by a landlord or lessor, he~~ the lessor shall ~~forward~~ furnish to the ~~tenant or~~

~~lessee, within one month after the date the tenancy terminates, an a written itemized statement accounting for the amount retained proceeds which are retained and giving the reasons therefor for the retention.~~

~~B. The tenant lessee shall furnish the lessor a forwarding an address at the termination of the lease, to which such the deposit and any statements may shall be sent. A lessee who fails to furnish an address to the lessor does not forfeit the right to the return of the deposit or to any written itemized statements.~~

~~B. In the event of a transfer of the lessor's interest in the leased premises during the term of a lease, the transferor shall also transfer to his successor in interest the sum deposited as security for performance of the lease and the transferor shall then be relieved of further liability with respect to the security deposit. The transferee shall be responsible for the return of the lessee's deposit at the termination of the lease, as set forth in Subsection A of this Section.~~

7. The Reporter next directed the Council to proposed R.S. 9:3252 and explained the Apartment Associations concerns and need for this proposal. The Council also discussed a shorter time period, but an increased burden would be place on the lessor. They once again talked about the Unclaimed Property Act and its five year window and other issues such as whether we should place a cap on the amount of the security deposit as 25 other states do. Ultimately the Council approved the following:

**§ 3252. Return of deposit; time period**

A. The lessor shall return the deposit and furnish a written itemized statement accounting for any retention within one month after the date of the termination of the lease. If the lessee remains in possession of the premises after the termination of the lease, the period within which the lessor shall return the deposit and furnish any statement does not begin to run until the lessee has relinquished possession to the lessor.

B. If the lessee has not furnished an address to the lessor for the return of the deposit, the period within which the lessor shall return the deposit and furnish any statement does not begin to run until the address is furnished.

8. Moving to proposed R.S. 9:3253(A), the Reporter explained that the awarding of damages and attorney fees is existing law. This proposal attempts to clarify the phrase "willful failure" and increase the amount recoverable from \$200 to \$300 to give the statue more teeth. The Committee would also like the Council to decide whether twice the amount or an amount equal to the portion of the deposit wrongfully withheld should be the third damage option. Finally, the Reporter informed the Council of the reasons for deleting the demand requirement. Issues discussed included the circular language of the proposal, changing "withheld" to "retained", class actions, why lessee advocates favor actual damages, the use of a summary proceeding, interest and C.C. Art. 2000, good faith, the effects of the new requirement that the statement provided be written, and judicial control. With the following changes, the Council recommitted this Subsection to the Committee:

**§ 3253. ~~3252.~~ Return of deposit; damages; venue attorney fees**

A. The lessor's willful failure to comply with R.S. ~~9:3251~~ 9:3252 shall give the tenant or lessee the right to recover, in addition to any portion of the deposit wrongfully retained, actual

~~damages or two three hundred dollars, or twice the amount of the portion of the deposit wrongfully retained, whichever is greatest. greater, from the landlord or lessor, or from the lessor's successor in interest. Failure to remit within thirty days after written demand for a refund shall constitute willful failure.~~

9. The Council noted that new Subsection (B) of proposed R.S. 9:3253 deletes the venue provision. They looked at C.C.P. Art. 80 which also provides venue relative to leases and gave examples of lessor's mailing leases to parents in another city to sign for college student lessees. It was moved, seconded, and approved to add the existing venue provision back into the proposal. Therefore, the proposed Subsection (B) now becomes Subsection (C).

**§ 3253. 3252. Return of deposit; damages; venue attorney fees**

B. An action for the recovery of such damages may be brought in the parish of the lessor's domicile or in the parish where the property is situated.

C. In an action for the return of the lessee's deposit, the court may award costs and attorney fees to the prevailing party.

10. The final Subsection presented was R.S. 9:3254 which makes it clear that these rights are not waivable. This was approved without discussion.

The Council adjourned for the day.

**LOUISIANA STATE LAW INSTITUTE**

**THE MEETING OF THE COUNCIL**

**September 9-10, 2016**

**Saturday, September 10, 2016**

**Persons Present:**

Barrios, Bryan	McIntyre, Edwin R., Jr.
Bergstedt, Thomas	Mengis, Joseph W.
Breard, L. Kent	Morel, Stephen
Burris, William J.	Norman, Rick J.
Castille, Preston J., Jr.	Odinet, Christopher K.
Chetta, Chloe	Richardson, Sally
Crawford, William E.	Scalise, Ronald J., Jr.
Crigler, James C., Jr.	Shlamba, Stephen
Cromwell, L. David	Sole, Emmett C.
Davidson, James J., III	Storms, Tyler
Davnados, Nick	Stuckey, James A.
Dawkins, Robert G.	Tate, George J.
Dimos, Jimmy N.	Thibeaux, Robert P.
Domingue, Billy J.	Tooley-Knoblett, Dian
Garrett, J. David	Tucker, Zelda
Gregorie, Isaac M. "Mack"	Vetter, Keith
Griffin, Piper D.	Waller, Mallory
Haymon, Cordell H.	White, H. Aubrey, III
Hester, Mary C.	Yiannopoulos, A. N.
Holdridge, Guy	Ziober, John David
Johnson, Pamela Taylor	
Kostelka, Robert "Bob" W.	
Lavergne, Luke	
Levy, H. Mark	

President David Ziober opened the Saturday session of the September 2016 Council meeting at 9:00 a.m. by calling on Professor A.N. Yiannopoulos, Reporter of the Aleatory Contracts and Signification of Terms Committee, to present the Committee's proposed revisions with respect to Title XIV of the Louisiana Civil Code.

**Aleatory Contracts and Signification of Terms Committee**

The Reporter began his presentation by explaining to the Council the three documents that were disseminated in advance of the meeting: the majority proposal, a minority proposal, and reference materials. He explained that Title XIV of the Civil Code, "Of Aleatory Contracts," is currently comprised of three articles, a definition and two articles concerning gaming and betting, all of which need to be revised. However, he also explained to the Council that the Committee could not unanimously decide on a method of such revision. The majority of the Committee voted to repeal Title XIV in its entirety and to instead enact one article in the Obligations Title of the Civil Code, proposed Article 1968.1, on page 1 of the "Proposed Civil Code Revisions" materials. However, a minority report was also prepared, proposing to maintain Title XIV of the Civil Code but repeal the existing articles in that Title and instead replace them with

proposed Articles 2983 and 2984, on pages 3 and 4 of the "Alternative Proposals" materials. At this time, it was moved and seconded to adopt the majority proposal to repeal Title XIV of the Civil Code, "Of Aleatory Contracts," and instead enact one article on gaming and betting contracts elsewhere in the Code.

One Council member questioned whether, in adopting the majority proposal, Article 1912 defining aleatory contracts would be affected, and the Reporter assured him that the Committee did not intend to alter that provision. When another Council member questioned whether the term "gambling" should be used instead of "gaming" or "wagering," the Reporter explained that the Council was not being asked to approve specific language, but rather to make a policy decision with respect to which method of revision it wanted the Committee to pursue. At this time, another member of the Council questioned the substantive differences between the majority and minority proposals as applied to a gaming and wagering contract, which, though absolutely null, has been performed. Committee and Council member Professor Ron Scalise explained that, under the majority proposal, the articles governing absolute nullity would apply, namely Article 2033, which would require the parties to have "clean hands" before they were restored to the situation that existed before the contract was made. Alternatively, Committee member Professor Nick Davrados explained that, under the minority proposal, a second article governing the effects of gaming and wagering contracts specifically would control and provide that whatever has been freely performed in compliance with a gaming and wagering contract may not be reclaimed. Several Council members then expressed their concern that this provision seemed to suggest the creation of a natural obligation.

After discussing the substantive differences between the majority and minority approaches, a Council member questioned the stylistic differences between the two. The Reporter explained that he intended for an aleatory contract to remain a nominate one and was most concerned with preserving the civilian tradition. He also expressed a general distaste for eliminating titles of the Civil Code altogether since those titles could potentially be used for some unforeseen issue in the future. Much discussion with respect to this sentiment ensued among the Council and Committee members, at the conclusion of which a member of both expressed her concern that if the minority report was adopted, the "Of Aleatory Contracts" Title of the Civil Code would be much broader than the two articles on gaming and wagering contracts it contained. At this time, a policy vote was taken on the earlier motion to adopt the majority of the Committee's approach to repeal Title XIV of the Civil Code and to enact one article on gaming and wagering contracts, and the motion passed over a few objections. The Reporter then expressed his intent to return to the Council after his Committee had drafted the specific language for and comments to this provision.

At this time, Professor Ron Scalise expressed his concern with respect to the placement of the majority's proposed article in the Obligations Title of the Civil Code. He explained to the Council that the style of this proposal was jarring in comparison to the surrounding articles on obligations and their cause, and he suggested either revising the specific language of the article or perhaps relocating it to another section of the Code. The Council generally agreed and suggested placing it either in Article 1968 on unlawful cause or near the definition of aleatory contract in Article 1912. The Reporter then concluded the Aleatory Contracts and Signification of Terms Committee's presentation to the Council.

After a brief break, President David Ziober then called on Mr. Stephen G. Sklamba, Reporter of the Tax Sales Committee, to present the Committee's proposed revisions to Article VII, Section 25 of the Louisiana Constitution.



## Tax Sales

The Reporter began his presentation by providing the Council with brief background information concerning the Committee's formation and its initial task to determine whether Louisiana should employ a tax lien system. The Reporter also discussed the Committee's work with respect to harmonizing the Louisiana Constitution with the statutory revision completed by the Law Institute's Adjudicated Properties Committee. After reminding the Council that it had previously adopted Section 25(A) at its August 2016 meeting, the Reporter directed their attention to Section 25(B), on page 3 of the materials.

The Reporter explained that the Committee made no changes to the existing provision with respect to redemption of a tax certificate sold at auction concerning the five percent penalty and interest at a rate of twelve percent per year, or one percent per month. He also explained, however, that the Committee had decided to start the running of the time period for redemption from service of notice of the suit to terminate interests and convert ownership in the property. The Reporter then informed the Council that the issue of defining costs in the Constitution had been discussed at great length by the Committee at several of its meetings, but that both he and a majority of the Committee members were in agreement that the issue of defining costs should be left to the courts to decide. It was then moved and seconded to adopt Section 25(B). A Council member questioned whether, when redemption takes place, there is some sort of proof given or issued, and the Reporter assured the Council that since both it and the Committee had expressed an interest in keeping the Constitutional provision as broad as possible, the detailed mechanics of redemption would be covered by the statutes.

With respect to the issue of costs, one guest explained that the Louisiana Supreme Court has previously linked the definition of costs with what is provided in the Constitution, in which costs are only contemplated in the context of redemption rather than to allow the sheriff or the municipality to recover any additional costs incurred. The Reporter replied that this issue was heavily debated at the Committee level and that ultimately, the Committee decided not to leave the issue of defining costs to the legislature because it felt that courts were in a better position to decide what costs should be. At this time, a Council member questioned how costs that are incurred after redemption but before an action to terminate interests and convert ownership were going to be treated, and the Reporter explained that the Committee did not intend to change the statute that provided for the filing of a petition to recover costs along with a statement of expenses. Another Council member then questioned how the sheriff will know what costs to assess a tax debtor upon redemption of the property, and the Reporter and another Council member explained that the sheriff knows what is required to comply with the statutes because these costs have been imposed the same way for years. At this time, the motion to adopt Section 25(B) as presented, including the deletion of Subparagraphs (B)(2) and (3), then passed with no objection. The adopted proposal reads as follows:

(B) Redemption. ~~(1) The property sold shall be redeemable for three years after the date of recordation of the tax sale, by paying the price given, including costs, five percent penalty thereon, and interest at the rate of one percent per month until redemption.~~ The tax certificate may be redeemed at any time prior to the rendition of a judgment terminating interests and converting

ownership, or for adjudicated properties, prior to transfer or dedication of tax title by the political subdivision. Redemption shall be in favor of the tax debtor, his successors or assigns, and does not occur until payment of the amount paid or due at auction, costs, a five percent penalty, and interest at the rate of one percent per month calculated on the amount paid or due at the auction, excluding premium. The redemption payment shall also include the amount of subsequent taxes paid by the tax certificate purchaser, his successors or assigns, together with interest at the rate of one percent per month, and a five percent penalty.

~~(2) In the city of New Orleans, when such property sold is residential or commercial property which is abandoned property as defined by R.S. 33:4720.12(1) or blighted property as defined by Act 155 of the 1984 Regular Session, it shall be redeemable for eighteen months after the date of recordation of the tax sale by payment in accordance with Subparagraph (1) of this Paragraph.~~

~~(3) In any parish other than Orleans, when such property sold is vacant residential or commercial property which has been declared blighted, as defined by R.S. 33:1374(B)(1) on January 1, 2013, or abandoned, as defined by R.S. 33:4720.59(D)(2) on January 1, 2013, it shall be redeemable for eighteen months after the date of recordation of the tax sale by payment in accordance with Subparagraph (1) of this Paragraph.~~

Next, the Reporter directed the Council's attention to Section 25(C), on pages 3 and 4 of the materials. The Reporter explained that the Committee recommended deletion of the old language in light of its proposed mandatory termination and conversion action. It was then moved and seconded to adopt Section 25(C). When one Council member questioned the meaning of the first sentence, the Reporter suggested changing "shall" to "may" on line 10 of page 4. The Council member agreed, but also suggested adding "at" between "brought" and "any" on the same line and replacing "prior to the filing of a termination and conversion action and no later than in response to" with "after the tax auction and shall be brought prior to the rendition of a final judgment in" on lines 10 and 11 of the same page. It was then moved and seconded to adopt this proposal. After several questions concerning issues such as failure to receive service and proof of auction for purposes of title examinations, both of which would be taken care

of during the termination and conversion action, the motion to amend passed with no objection. The Council then voted on the motion to adopt Section 25(C) as amended, and the motion passed without objection. The adopted proposal reads as follows:


(C) Annulment. ~~No sale of property for taxes shall be set aside for any cause, except on proof of payment of the taxes prior to the date of the sale, unless the proceeding to annul is instituted within six months after service of notice of sale. A notice of sale shall not be served until the final day for redemption has ended. It must be served within five years after the date of the recordation of the tax deed if no notice is given. The fact that taxes were paid on a part of the property sold prior to the sale thereof, or that a part of the property was not subject to taxation, shall not be cause for annulling the sale of any part thereof on which the taxes for which it was sold were due and unpaid. No judgment annulling a tax sale shall have effect until the price and all taxes and costs are paid, and until ten percent per annum interest on the amount of the price and taxes paid from date of respective payments are paid to the purchaser; however, this shall not apply to sales annulled because the taxes were paid prior to the date of sale. A suit to annul a tax auction may be brought at any time after the tax auction and shall be brought prior to the rendition of a final judgment in a termination and conversion action. When tax title has been adjudicated to a political subdivision, a suit to annul a tax auction shall be brought prior to transfer or dedication of tax title by the political subdivision.~~

The Council then considered Section 25(D), on pages 4 and 5 of the materials, and it was moved and seconded to adopt the provision. One Council member suggested replacing "tax auction purchaser" with "tax certificate purchaser" on lines 4 and 5 of page 5, as well as replacing "lien" with "privilege" on line 5 of the same page. The Reporter accepted both of these changes. Another Council member suggested replacing "tax auction party" with "interested party" throughout the provision, but after discussion, the Council ultimately decided to use "defendant" rather than "interested party" or "tax auction party." The Reporter also agreed to replace "process" with "notice" on line 3 of page 5 and to use "persons served with notice" on line 1 of the same page. When one Council member questioned why 30 months was the amount of time used on line 18 of page 4, the Reporter explained that this period was selected because, in conjunction with the 6-month period for either redeeming or filing a responsive

pleading in the suit to terminate interests and convert ownership, the time period will effectively remain the same as under current law. Another question was raised with respect to this 6-month period in light of the earlier revisions to Section 25(C), and it was suggested that this language be revised to read: "Within six months from the date of service but prior to the rendition of a final judgment."

A great deal of discussion then ensued with respect to the language on line 22 of page 4 that the court shall render judgment declaring the tax certificate purchaser to be the owner of the property. Several Council members expressed concern that this language was too strong, such as in the case of a mortgagee or problems with service, where the tax certificate purchaser may not, in fact, be the owner of the property at all. These members suggested that perhaps it should be clarified that the tax certificate purchaser is the owner only as to the interests in the property held by each tax debtor served with notice of the termination and conversion action. Other Council members echoed this concern and agreed with this suggestion, and after more discussion, it was moved and seconded to recommit Section 25(D) for further consideration by the Committee. The motion to recommit passed with no objection.

At this time, Council members instructed the Reporter and his Committee to consider several issues with respect to this provision, including incorporating a standard for determining whether a property is blighted or abandoned, imposing some sort of requirement of raising an exception of prematurity, and applying the general rules of the Code of Civil Procedure where possible. The September 2016 Council meeting was then adjourned.

  
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Jessica Braun                      4-3-17  
Date

  
\_\_\_\_\_  
Claire Popovich                      4/3/2017  
Date

  
\_\_\_\_\_  
Mallory Waller                      4/3/2017  
Date