SUPREME COURT
STATE OF LOUISIANA
DOCKET NO. 2006-C-2227

Elizabeth W. Naquin, Plaintiff-Appellee,

VERSUS

Lafayette City-Parish Consolidated Government, *et al*, Defendants-Appellants

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A CIVIL PROCEEDING

WRIT OF CERTIORARI
TO THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL, DOCKET NO. CA 06-00904,
AND THE 15TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF LAFAYETTE, NO. 2006-2014
HONORABLE EDWARD D. RUBIN

AMICUS CURIAE BRIEF FILED ON BEHALF OF THE LOUISIANA MUNICIPAL ASSOCIATION IN SUPPORT OF THE DEFENDANT/APPELLANT

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STATEMENT OF INTEREST OF AMICUS CURIAE

This amicus brief is filed by the Louisiana Municipal Association ("LMA"), a not-for-profit, non-partisan and non-political organization established in 1926 and serving the interests of the state's villages, towns, and cities. It is comprised of approximately 300 municipalities throughout the state and was formed to protect and promote the interests of municipalities and their citizens through legislative advocacy, training conferences and conventions, publications, and policy development.

This Court has allowed the LMA to file an *amicus* brief in support of the City of Lafayette's application for writs, and the LMA files this amicus brief in support of Lafayette's position on the merits.

LMA members are authorized by statutes and ordinances to issue bonds and to pay the ongoing obligations of those bonds from a pledge of taxes, revenues, and other items specified by applicable law. LMA members and those who purchase the bonds depend, to a certain extent, upon the ability of LMA members under these laws to use the cash flow from the pledge to pay outstanding principal and interest payments on the bonds as they come due without having to declare the bonds in default.

The decision below, if not corrected by this Court, may cast a shadow over the many statutes and ordinances LMA members use.

STATEMENT OF THE CASE

The LMA adopts Lafayette's Statement of the Case.

ARGUMENT

The LMA's *amicus* position in this case relates not merely to the precise language of R.S. 45:844.41 *et seq.* and the ordinance passed by Lafayette, but also to the broader issue concerning the misuse of the term "pledge" in the Third Circuit's opinion. Lafayette's brief fully covers the interpretation of R.S. 45:844.41 *et seq.* and the Supplemental Bond Ordinance, and the LMA adopts that analysis.

The LMA's concern is that erroneous language and reasoning in the Third Circuit's opinion concerning "pledge" may have a potential impact on the future interpretation of numerous other statutes that use the word "pledge" in connection with bond financing. Because LMA members employ bond financing, the LMA urges this Court not to accept the Third Circuit's limited and erroneous view of pledge, but rather to declare clearly that the concept of a pledge of a revenue stream and the use of portions of those monies to pay principal and interest as they come due completely complies with Louisiana pledge law.

The Third Circuit below relied upon its earlier decision in *BellSouth.*[1] *BellSouth* is not the "law" of this state and is not controlling here. The language in *BellSouth* about pledge is not correct and the decision is neither *res judicata*[2] nor *jurisprudence constante.*[3] It is up to this Court to declare the proper interpretation of Louisiana law, and that law is clear — Louisiana law has always permitted the pledge of an income stream and the use of cash from that stream to pay ongoing expenses without declaring a default and cutting off the flow of revenue.

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[1] *BellSouth Telecommunications, Inc. v. City of Lafayette*, 2005-1478 (La. App. 3 Cir. 1/5/06), 919 So.2d 844, 856. The court below wrote, op. at p. 14, "As stated in *BellSouth*, 919 So.2d 844, pledged resources are not seizable until there has been an event of default."

[2] The parties in this case and *BellSouth* are not identical.

[3] *Jurisprudence constante* requires a long unbroken line of cases and cannot rest upon but a single decision. *Willis-Knighton Medical Center v. Caddo Shreveport Sales and Use Tax Com'n*, 2004-0473 (La. 4/1/05), 903 So.2d 1071. As this Court stated in *Doerr v. Mobil Oil Corp.*, 2000-0947 (La. 12/19/00), 774 So.2d 119, 127: "Under the civilian tradition, while a single decision is not binding on our courts, when a series of decisions form a 'constant stream of uniform and homogenous rulings having the same reasoning,' *jurisprudence constante* applies and operates with 'considerable persuasive authority.' James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 La. L.Rev. 1, 15 (1993)."

BellSouth's holding is the only one in Louisiana to reach the result that one cannot use cash from a revenue stream to pay principal and interest as they come due without having to declare a default in the underlying obligation.

I. Numerous Louisiana Statutes Use the Word "Pledge" in Conjunction With the Right of the Borrower to Utilize a Portion of Ongoing Cash Flow to Pay Principal and Interest that is Due

Both the Third Circuit and the plaintiff have a strained and improper view of pledge that is tied to a flawed analysis. First, both seem to believe that one cannot pledge an income stream; both seem to believe that an income stream must be pledged in conjunction with something else. Second, both equate an income stream with "fruits," and then leap to the conclusion that one cannot use the fruit of a fruit. The analysis is faulty because (a) there are numerous statutes that permit the pledge of income streams, (b) what has been pledged is the ever-flowing income stream, not the individual dollars of which the stream consists (that is, a pledged income stream is not a "fruit" but is rather what has been pledged), and (c) while a portion of cash from a pledged income stream is "fruit" under Louisiana law, the stream itself is not.

Many bond authorization statutes employ precisely this analysis when they speak in terms of paying principal and interest of bonds from the "pledge and proceeds" or the "pledge and dedication" of funds. These statutes allow the pledge of revenues to both secure bonds ***and*** to pay ongoing expenses as they accrue. The underlying framework of these statutes is clear — a revenue stream is pledged, and then the statutes allow a portion of the cash from the revenue stream to be used to pay ongoing expenses, principal, and interest without having to declare a default in the underlying obligation. The only way to read these statutes without wrenching the words (including "pledge") from their meaning is to give them their plain meaning — cash from pledged revenue streams may be used to pay, on an ongoing basis, principal and interest on bonds to bondholders to ***prevent*** the bonds from going into default.

These statutes include but are not limited to:

- statutes allowing a bond to be "payable from" or even "solely from" an income stream[4] (meaning that payments on bonds must be made as principal and interest comes due);

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[4] *See*, emphasis supplied: R.S. 33:2737.5, concerning Ascension Parish School Board sales taxes ("the board may issue bonds ***payable solely from an irrevocable pledge*** and dedication of the avails or proceeds of the tax"); R.S. 33:2740.14 concerning St. Tammany Parish special recreation districts (granting the district the power to "incur debt and issue bonds ***payable from an irrevocable pledge*** and dedication of all or a portion of the proceeds of a parcel fee"); R.S. 33:2740.16, concerning Assumption Parish Gravity Drainage Districts (granting the district the power to "issue bonds ***payable from an irrevocable pledge*** and dedication of all or a portion of the proceeds ..."); R.S. 33:3051 concerning bond refunding ("Any municipality, parish or parish school board which has heretofore issued or hereafter issues bonds ***payable from*** a pledge and dedication of . . .").

- statutes allowing pledges of income sufficient to pay the bond amounts coming due each year;[5]
- statutes allowing pledges of income streams to be used to "reimburse debt service payments"[6] (meaning payments as they accrue);
- and statutes allowing a pledge to pay interest as it "matures" (meaning as interest comes due, as opposed to interest when in default).[7]

Even the bond statute at issue in this case demands a similar reading. R.S. 45:844.52(C)(4) expressly states that "[n]othing in this Chapter shall preclude a local government . . . from ***pledging*** the resources of such utilities . . . ."[8] There is no other way to read this other than as express statutory authority for a local government to pledge the revenue stream from its utilities and to allow the use of cash ("fruits") from that income stream to pay the principal and interest on the bonds as it may come due.

Louisiana's law of pledge, as it currently exists, is not straitjacketed and confined as both the plaintiff and the Third Circuit insist. The rules of pledge are not merely those created in the 1870 Civil Code; in fact, a Westlaw search reveals over 600 uses of the term "pledge" in conjunction with

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[5] *See*, emphasis supplied: R.S. 39:692, concerning the payment of refunding bonds ("In addition, a parish school board, subject to the approval of the Louisiana State Board of Elementary and Secondary Education, shall secure the payment of refunding bonds issued under this Subpart by anticipation and ***pledge*** of its annual revenues ***in an amount sufficient to pay interest and principal falling due each year***").

[6] *See*, emphasis supplied: R.S. 32:1751, concerning the Tri-State Corridor Commission (giving the Commission the authority to levy "and ***to pledge*** the proceeds of such levy ***to the reimbursement of debt service payments*** for bonds issued on the behalf of the commission").

[7] *See*, emphasis supplied: R.S. 2:604(8), concerning the Airport Authorities Law (providing that bonds "may be secured by the pledge of the income and revenues of such public work or work of public improvement in an amount sufficient to pay the principal of ***and the interest*** on such bonds or other debt obligations ***as they severally mature***"); R.S. 39:1011 concerning bonded indebtedness (providing that bonds may be secured "by the ***pledge*** of the income and revenues derived or to be derived from the work of public improvement owned, leased, or operated by such political subdivision, sufficient in amount ***to pay the principal of and the interest*** on such bonds or other debt obligations ***as they severally mature***"); R.S. 33:4690.11(C)(4) concerning the City of Covington special public improvement districts (granting the district the power to "incur debt and issue bonds ***payable in whole or in part from an irrevocable pledge*** and dedication of all or a portion of the proceeds ... which are to be used to pay principal and interest on the bonds ..."); R.S. 33:9033.1, concerning Calcasieu Parish sales tax increment financing ("A local governmental subdivision, in Calcasieu Parish only, may issue revenue bonds ***payable solely from an irrevocable pledge*** and dedication of . . ."); R.S. 34:1224, concerning the Greater Baton Rouge Port Commission (authorizing the Commission to issue bonds "and to ***pledge, for the payment of the principal and interest of such negotiable bonds or notes, the revenues derived***. . ." from operations); R.S. 34:1404(C), concerning the Greater Ouachita Port Commission (authorizing the Commission to issue bonds and "***pledge for the payment of the principal and interest*** of such negotiable bonds or notes the revenues . . ." from operations); R.S. 34:1454, concerning the Greater Krotz Springs Port Commission (authorizing the Commission to issue bonds and "to ***pledge, for the payment of the principal and interest*** of such negotiable bonds or notes, ***the revenues*** derived from . . ." operations); R.S. 38:1807(C)(12) concerning St. Tammany subdrainage districts ("To incur debt and issue bonds payable from an irrevocable pledge and dedication of all or a portion of the proceeds of . . ."); and R.S. 47:302.12(C)(1), concerning Calcasieu Parish sales taxes (the Parish Authority "may issue bonds ***payable from a pledge*** and dedication of the amounts of proceeds of . . ." the tax).

[8] Emphasis supplied.

Louisiana statutes dealing with bonds. This does not include the use of the term "pledge" in non-bond contexts.

Nonetheless, as the next sections of this brief demonstrate, the ability of a creditor to use the cash from a pledged income stream to pay ongoing expenses is completely consistent with both the structure and historical context of the Civil Code.

II. Under Louisiana Law, a "Pledge" Has Always Included the Right to Use a Stream of Cash to Pay a Creditor Principal and Interest As These Come Due.

It is important to note at the outset that, while the pledge of movables provisions of the Civil Code were superseded in 1990 by Louisiana's adoption of its version of Article 9 of the Uniform Commercial Code, those Civil Code provisions were not repealed and remain in effect for pre-1990 transactions.[9] Further, the more than six hundred other Louisiana laws addressing pledge contained in the Revised Statutes were not repealed by the 1990 legislation concerning the U.C.C.

Thus, the use of the term "pledge" today, in dealing with movables, is not confined to provisions of the Civil Code that were essentially unchanged from 1870 to 1990. Nonetheless, there is nothing inconsistent with Civil Code analysis concerning the use of cash from the pledge of a revenue stream to pay ongoing expenses.

In thinking about pledge historically, it is helpful to use three examples. The first is the pledge of land ("antichresis") that produces fruits (crops) once a year. The second is the pledge of a movable that produces fruits once a year (a ten year note with one annual payment of principal and interest). The third is the pledge of an income stream (such as the revenues pledged to secure bonds under the many Louisiana statutes containing these types of authorizations; see footnotes 4-7, above).

As will be seen, Louisiana law has always allowed a creditor to apply fruits to ongoing expenses. In the case of a land that produces a crop once a year, if that crop is harvested and the crop proceeds are applied to ongoing expenses, there is no more crop for the year and no need to declare a default; yet, the pledge is not extinguished and continues on next year's crop when it grows.

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[9] Louisiana's first adoption of Chapter 9 of Louisiana's Commercial Laws (Louisiana's version of U.C.C. art. 9) originated in Acts 1988, No. 528, and Acts 1989, No. 135, 137, and No. 598. Section 10 of Acts 1989, No. 135, provides that "[a]ll . . . pledges . . . entered into prior to January 1, 1990 and all rights, duties and interests flowing therefrom shall remain in full force and effect . . . ."
Chapter 9 was re-enacted by Acts 2001, No. 128, and some additional revisions were made by Acts 2006, No. 533 .

The same concept is applied to the annual payment on the ten-year note. When that annual payment is made and the monies are applied to ongoing expenses, interest, and principal, there are no more payments for the remainder of that year; yet, the pledge continues and the creditor can utilize next year's payment when it rolls around to again pay principal and interest without a default and without extinguishing the pledge.

Likewise, when a revenue stream is pledged, it is the ongoing stream (the constant flowing stream of cash) that is pledged; portions of this cash (the fruits of the stream) can be used to pay principal and interest without declaring a default and without permanently diverting the stream. Just as next year's crop will grow and next year's note payment will be made, the stream of cash will continue to flow.

What happens when there is a default is completely different. In that situation, the land is sold, or the note is seized and sold, or the income stream is completely and permanently diverted. In each instance, a default completely terminates the future fruits and allows the creditor to get not only the current fruits (be they crops, a note payment, or a portion of cash flow), but also the entirety of all future fruits immediately as well as the entirety of the pledged immovable property, the pledged note, and the pledged revenue stream.

With these examples in mind, one can now review the evolution of pledge under Louisiana law.

A. The Civil Code Use of the Word "Pledge" Includes Both the Pledge of Movables and the Pledge of Immovables.

Since 1808, when the Digest of Laws was prepared, Louisiana law on pledge has essentially been unchanged. Neither the 1825 Code nor the 1870 Code altered the basic structure of "pledge," and that Civil Code structure has remained intact until today.[10] In fact, the pledge provisions are largely unchanged since the 1870 version of the Civil Code was adopted. As detailed below, Louisiana law has always allowed creditors who hold in pledge items that produce cash flow to apply that cash flow to the loan's interest and principal as these come due; Louisiana law has never required that there be a default

[10] The history of each Civil Code article from the 1808 Code through 1870 Code can be found in "1972 Compiled Edition of the Civil Codes of Louisiana," edited by Joseph Dainow and published by West's Publishing as Volumes 16 and 17 of its Louisiana Civil Code series.

before the creditor can apply to the outstanding debt the cash from a pledged item that has an income stream.

Under all three Codes (1808, 1825, and 1870), the "pledge" articles have had a consistent structure. Written in times when the most valuable asset owned was land (as opposed to movables), the redactors first set forth the general rules of pledge.[11] Next, the redactors created separate rules for the pledge of movables as opposed to the pledge of immovables; the former was entitled "pawn"[12] and the latter "antichresis."[13] Under the Civil Code, the word "pledge" expressly includes both "pawn" and "antichresis."[14]

In the 1800s it was generally thought that, except for negotiable and non-negotiable notes, no movable would have such value that it would generate income on its own. Thus, the concept of the pledge of income producing properties was dealt with in those Civil Code articles concerning pledged notes[15] and the pledge of immovables ("antichresis").

B. Antichresis.

The more detailed rules for dealing with the pledge of income-producing and revenue-generating items are found in the section of the pledge articles concerning antichresis, for immovables formed the primary basis of wealth and wealth-accumulation in the 1800s. In fact, the concept of antichresis is found in the Code Napoleon.[16]

The Civil Code contemplated in the 1870s that there were two ways to grant a security interest on immovables. The first was a mortgage — a non-possessory right which gave the creditor only the option of seizing and selling the property upon default.[17] Under the mortgage articles, there was no way

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[11] These are currently contained in Chapter 1 of Title XX of the Civil Code, C.C. arts. 3136-3153.

[12] These are currently contained in Chapter 2 of Title XX of the Civil Code, C.C. arts. 3154-3175. "Pawn" under the Civil Code differs from the current rules on pawnshops and pawnbrokers; there are special pawnshop laws contained in R.S. 37:1781-1809.

[13] These are currently contained in Chapter 3 of Title XX of the Civil Code, C.C. arts. 3176-3181.

[14] C.C. art. 3134: "There are two kinds of pledge: The pawn. The antichresis."

[15] C.C. arts. 3158-3162, 3168 & 3169.

[16] *See* Dainow, "1972 Compiled Edition of the Civil Codes of Louisiana," demonstrating that all of the antichresis articles had direct parallels to the Code Napoleon.

[17] Civil Code (1870) article 3278 provided: "Mortgage is a right granted to the creditor over the property of the debtor for the security of his debt, and gives him the power of having the property seized and sold in default of payment." That concept is carried forward in current Civil Code articles 3278 and 3279, amended by Acts 1991, No. 652, §1 .

for a creditor to have any rights to crops ("fruits") and rents ("civil fruits"[18]) prior to default. In fact, the concept of a "crop pledge" did not arise until 1874,[19] four years after the enactment of the 1870 Civil Code.

In addition to mortgage, however, the Civil Code redactors allowed creditors through antichresis to directly access the crops and rents. In fact, a creditor could hold a mortgage, an antichresis, or both.[20] Because land was always generating crops and rents, the antichresis articles specifically allowed the creditor to use "fruits" as they came due, to apply them to both principal and interest as they came due,[21] as well as using the "fruits" to pay taxes and make repairs on the property.[22] These articles are unchanged since 1870.

Thus, in 1870, if one wanted to pledge rent income or crops as security for a debt, it could be done as a "pledge" (for that word encompassed antichresis), but it would be clear that the rules of antichresis would apply. While today, there are other mechanisms, in addition to antichresis, to encumber income streams,[23] the pledge articles (including antichresis) remain in full force and effect.[24]

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[18] C.C. art. 551 provides in pertinent part (emphasis supplied): "Civil fruits are revenues derived from a thing by operation of law or by reason of a juridical act, such as ***rentals***, interest, and certain corporate distributions."

[19] The crop pledge act was originally enacted by La. Act 66 of 1874.

[20] C.C. art. 3181 provides (emphasis supplied): "Every provision, which is contained in the present title with respect to the antichresis, can not prejudice the rights which third persons may have on the immovable, given in pledge by way of antichresis, such as a privilege ***or mortgage***. The creditor, who is in possession by way of antichresis can not have any right of preference on the other creditors; ***but if he has by any other title, some privilege or mortgage lawfully established or preserved thereon, he will come in his rank as any other creditor***."

See also, Pickersgill v. Brown, 7 La.Ann. 297 (1852) (emphasis supplied): "A mortgage in favor of one creditor, not put into action by fieri facias or writ of seizure, may coexist with an antichresis in favor of another creditor. The antichresis operates upon the fruits, which the creditor, holding it, is thereby authorized, by his debtor, to gather. A mortgage affects the land. ***If the holder of the antichresis gathers the fruits before the mortgage creditor seizes, he can apply them to his debt***. Just as the owner himself would have held the gathered fruits free from the mortgage, had he granted no antichresis [sic]. The creditor in antichresis, when has gathered the fruits, owes his account to the owner, and not to the inactive mortgagee."

[21] C.C. art. 3176 provides, in pertinent part (emphasis supplied): "The creditor acquires by this contract the right of reaping the fruits or other revenues of the immovables to him given in pledge, ***on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt***."

[22] C.C. art. 3177.

[23] *See, e.g.*, the provisions of Louisiana's version of the Uniform Commercial Code, R.S. 10:9-101 *et seq.*, and R.S. 9:4401 dealing with "assignment" (meaning granting a security interest) in the rents of immovables.

[24] While the provisions of "pawn" (the pledge of movables) were superseded by Louisiana's version of the Uniform Commercial Code, R.S. 10:9-101 *et seq.*, the rules of antichresis remain valid and intact.

C. The Pledge ("Pawn") of Income-Producing Movables.

The only type of pawn that the 1870 Civil Code redactors could conceive of as generating income was the pawn of third party notes (expressly dealt with in C.C. arts. 3168[25] and 3169[26]) and the pawn of dividend-producing stock.[27]

C.C. arts. 3168 and 3169 (unchanged since 1870), in the pawn provisions of the Civil Code, expressly give the creditor the right to "deduct" from any fruits that a movable bears the amount owed to the creditor.[28] Thus, if dividends come due on pledged stock or interest comes due on a pledged note (*e.g.* a third party note pledged to a creditor where the maker of the note must make regular payments) the stock dividends and note's interest must be first applied to the interest owed to the creditor, then to principal.

The meaning of these articles is clear. The creditor must either hold the dividends and interest in pledge, or, at the creditor's option, the creditor may apply the dividends and interest to the debt that the pledgor owes to the creditor. To read these provisions as requiring a "default" would be to ignore the provisions of C.C. art. 3170, which mandates that when a creditor holds an item in pledge, such as a note, which matures while in pledge, the creditor "must apply it to the payment of the debt due to himself, and restore the surplus, should there be any, to the person from whom he held it in pledge."[29] Note that the concept of "default" on the secured loan is nowhere contained in C.C. art. 3170, and it would be nonsensical for any such concept to apply. The same holds true for C.C. art. 3169, dealing with interest-bearing notes held in pledge; for these items, interest is applied first to the interest on the principal obligation, then to the obligation itself, without any reference to "default."

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[25] C.C. art. 3168 provides (emphasis supplied): "The fruits of the pledge are deemed to make a part of it, and therefore they remain, like the pledge, in the hands of the creditor; but he can not appropriate them to his own use; he is bound, on the contrary, to give an account of them to the debtor, ***or to deduct them from what may be due to him***." The Code Napoleon had a similar provision. See *Dainow*, "1972 Compiled Edition of the Civil Codes of Louisiana,"

[26] C.C. art. 3169 provides: "If it is a credit which has been given in pledge, and if this credit brings interest, the creditor shall deduct this interest from those which may be due to him; but if the debt, for the security of which the claim has been given, brings no interest itself, the deduction shall be made on the principal of the debt."

[27] *See* C.C. art. 3158.

[28] *See In re Liquidation of Hibernia Bank & Trust Co.*, 205 La. 890, 18 So.2d 330 (La. 1944), where this Court stated concerning pledged stock: "dividends flowing from such pledged collateral form a part of that pledge, although they remain in the hands of the pledgee, rendering the pledgee either liable to account for them to the pledgor ***or to apply them toward the reduction of the obligation the collateral itself secured***."

[29] C.C. art. 3170 provides: "If the credit which has been given in pledge becomes due before it is redeemed by the person pawning it, the creditor, by virtue of the transfer which has been made to him, shall be justified in receiving the amount, and in taking measures to recover it. When received, he must apply it to the payment of the debt due to himself, and restore the surplus, should there be any, to the person from whom he held it in pledge."

D. The Case Law Amply Demonstrates That Creditors Have Always Had the Right to Use the Cash Flow to Pay Current Income and Principal.

In the instant case, the Third Circuit has ignored the well-settled law of this state — the right of a creditor to use a revenue stream from a pledge to pay principal and interest on the underlying debt without having to declare it in default. This is the case whether what has been pledged is immovable or movable.

Historically, Louisiana cases have always fully enforced the rights of creditors, under C.C. art. 3176, to use the crops and cash flow from rental income on property to apply to principal and interest that is owing under an antichresis; a sample of those cases are detailed in the following footnote.[30]

This only makes sense, for the entire structure of antichresis, as well as C.C. arts. 3168-3169 (dealing with the pledge of movables), is to allow the creditor to use the civil fruits to pay ongoing expenses.[31] The only reference to a default event in the entirety of the antichresis articles concerns what happens if the property owner refuses to turn over the fruits,[32] but as long as the creditor is collecting the fruits, he may apply them to interest, principal, taxes, and upkeep on the property.[33]

Although some may consider that antichresis is "an antiquated contract,"[34] the fact that other security devices are more commonly used today does not mean that the basic principles underlying a

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[30] See: *Moore v. Boagni*, 111 La. 490, 35 So. 716, 718 (La. 1903) (stating that the creditor's intent to retain the rent and revenues of pledged property is "one of the essential elements to constitute an antichresis"); *Johnson v. Hinds*, 199 So. 149 (La. App. 1 Cir. 1940) (holding that an agreement to collect rents until expenses advanced for funeral were fully repaid was a contract of antichresis); *Payne v. Habbard*, 42 La. Ann. 395, 7 So. 572 (La. 1890) (stating that the amount due for rent on a plantation "if collected, must be applied to the interest, if any is due the creditor; if not, then to the reduction of the principal").

Cases have never required a "default" as a prerequisite to a creditor holding an antichresis from applying the revenue stream to the debt. *See, e.g., Calderwood v. Calderwood*, 23 La. Ann. 658 (La. 1871), where a contract appeared, on its face, to be a sale, but was accompanied by a counter-letter which revealed the contract to be a pledge or antichresis, to provide security for a debt in the amount of $2,470. The defendant gave the decedent a note for $4,030 for the property, stipulating that his note would be returned to him when decedent repaid the $2,470 debt, and thereafter the property would be re-conveyed to decedent or his heirs. At the time of his death, the decedent had not defaulted on his debt; rather, under the agreement, the amount was gradually reduced by the "rents and revenues derived by [defendant] under this contract," which the court called "an antichresis." Since those rents and revenues collected by defendant "exceed[ed] the amount of [decedent's] debt and interest, together with the taxes, necessary repairs and other charges paid by [defendant]," the debt had been discharged and the antichresis terminated. Therefore, the defendant was ordered to return the property to the decedent's widow and to "restore the amount of the rents received by him in excess of the sum which he [was] entitled to retain as pledgee."

[31] C.C. arts. 3176-3177.

[32] C.C. art. 3179.

[33] C.C. arts. 3176-3177.

[34] *Harang v. Ragan*, 134 La. 201, 63 So. 875, 877 (La. 1913). *Cf.* Leonard Oppenheim, Comment, "Antichresis: An Ancient Security Device Revived," 13 Tul. L. Rev. 131 (1938). Both the First Circuit and Fourth Circuit Courts of Appeal, however, have approvingly referenced antichresis as a viable security device in the last two decades. *See Guste v. Hibernia Nat'l Bank*, 94-0264 (La. App. 4 Cir. 5/16/95), 655 So.2d 724, 731; and *Hancock v. Bridges*, 547 So.2d 1103, 1106 (La. App. 1 Cir. 1989).

creditor's rights to use the income stream in an antichresis are inapplicable. Louisiana Courts have recognized that antichresis principles fully apply to show that a creditor holding a revenue-producing pledge can apply the income stream to payments as they come due without waiting for any default to occur on the underlying obligation. As has been shown, exactly the same result occurs under the "pawn" provisions for movables under C.C. arts. 3168-3169.

It is clear that what Lafayette's ordinance did here concerning pledge is entirely consistent with Louisiana law. A few other examples, outside of antichresis and outside of the bond arena, also prove Louisiana statutes have never uniformly and absolutely required a loan to be in default before fruits of a pledge are utilized to pay ongoing principal, interest, and other expenses. These statutes include Louisiana's former Assignment of Accounts Receivable law,[35] and the former "pledge of incorporeal rights not evidenced in writing" statute.[36] Even the Deficiency Judgment Act recognizes the creditor's rights to collect ongoing cash from a revenue stream without creating a deficiency act bar. Under the Deficiency Judgment Act, a creditor may collect cash under a "pledge or assignment of accounts receivable,"[37] which is, of course, the pledge of an income stream. There is no requirement that the debt be in default prior to the receipt of these amounts.

III. Nationally, the Entire Bond-Finance System Depends, to a Certain Extent, Upon the Ability to Pay Principal and Interest on Bonds as They Accrue From the Cash Flow of the Assets Which Secure the Bonds.

In her opposition to the Lafayette's writ application, the plaintiff belittled the LMA's reference (in its *amicus* brief in support of the writ) to the national bond market. The plaintiff's position, however, is off base.

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[35] This law, R.S. 9:3101 *et seq.*, was amended by Acts 1990, No. 1079, § 3, eff. Sept. 1, 1990 at 12:01 A.M. part of the U.C.C. enactment, and was later repealed by Acts 2001, No. 128, § 18, eff. July 1, 2001 at 12:01 A.M. Once the obligee had been put on notice of the pledge, the obligee had to pay the assignee. There is no requirement that, in order to collect the pledged proceeds, the loan had to be in default. The statute expressly applied to "pledges and collateral assignments," R.S. 9:3101(2), and the terms "pledge" and "assignment" were used interchangeably.

[36] R.S. 9:4321 *et seq.*, repealed by Acts 2001, No. 128, §18. Under this statute, once the obligee was put on notice of the pledge, the obligee had to pay the assignee; a default was not required or necessary. Under the statute, an "incorporeal right not evidenced in writing" encompassed the situation where the mere possession of a written instrument did not prove the right of the bearer to collect the debt. For example, a credit card receipt proves that the credit card owner has made a charge, but the person who physically possesses the receipt cannot on that sole basis use it to collect from the owner. Thus, the right of a credit card issuer to collect from the credit card owner would have been classified, under this law, as an "incorporeal right not evidenced in writing," even though there was a written credit card receipt and credit card application form. Today, of course, this would be treated as an account receivable under the U.C.C.

[37] R.S. 13:4108(5)(c)

The relevancy of the national bond market is not that the New York market for New York bonds will be affected by a decision in this case; rather, the relevancy is the national bond market relies upon the very principles that are at issue here — that the Louisiana bond market, like the national bond market, depends, to a certain extent, upon the ability of borrowers to pledge a stream of cash flow and to use portions of that stream to pay principal and interest as they accrue without having to declare a default in the under the bonds.

As the LMA has explained in its earlier brief in support of the writ, national bond finance depends upon the ability of public bodies to raise money by issuing bonds and using a dedicated revenue stream to pay principal and interest as it accrues. Without the assurance of either a dedicated revenue stream to keep payments current, or without the full faith and credit of the issuing entity, investors in the bond market may be hesitant to risk buying a bond not knowing if and when payments would be made. While bond investors want collateral (a security interest) for the bonds in the unlikely event that the bonds default, the most important thing is to keep the bond payments current. This Court can take judicial notice of the impact that a bond default had on New York in the 1970s and on Orange County California in the 1980s.[38] Investors in the bond market may not place as high a value on bonds issued by jurisdictions where there is legal uncertainty; the decision below potentially could create uncertainty.

Through the issuance of what is known as "revenue bonds," state and local governments throughout the United States have been able "to undertake billions of dollars of a wide range of capital improvements[39] without placing an additional burden on their credit capacity or increasing their taxes to pay the debt service on the obligations."[40] Revenue bonds are obligations whose interest and principal are to be paid solely from a pledge of the specified revenue of the issuer as the interest and principal accrues.[41] Revenue bonds are often secured solely by revenues earned by the income of utilities or projects erected or constructed with the proceeds of the bond issue.[42] "In addition to the revenues of a

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[38] For a historical overview, see Ann Judith Gellis, "Municipal Securities Market: Same Problems - - No Solutions," 21 Delaware Journal of Corporate Law 427 (1996).

[39] "Bridges, airports, water and sewer treatment facilities, health care facilities, and state and local housing projects are generally financed by revenue bonds." Public Securities Association of New York, "Fundamentals of Municipal Bonds," page 19 (1st ed. 1981).

[40] M. David Gelfand, "State & Local Government Debt Financing," § 2:12 (Supp. 2002).

[41] *Id.*

[42] Beth A. Buday, J.D, and Donna M. Poczatek, J.D., "McQuillin Law of Municipal Corporations," § 43.11 (3d ed. 1995).

specific project pledged to the repayment of principal and the payment of interest on the bonds, the issuer may be authorized by appropriate legislation to pledge a pool of revenues from more than one project or to impose special taxes, apply other revenues, or pledge its full faith and credit to the payment of debt service on the bonds."[43] This is precisely what was done through R.S. 45:844.52(C)(4) which expressly states that "[n]othing in this Chapter shall preclude a local government . . . from ***pledging*** the resources of such utilities . . . ." in support of the bonds.[44]

IV. Conclusion.

As this brief has shown, both *BellSouth* and the court below were incorrect in concluding that Louisiana law requires a "default" requirement before fruits of a pledge can be used to pay ongoing expenses.

The Louisiana Municipal Association urges this Court to refuse to adopt either the language or rationale of *BellSouth* and the court below concerning pledge. The LMA respectfully requests that this Court declare, in no uncertain terms, what the law of Louisiana has always been — that when a revenue stream is pledged, no "default" is required in order for the creditor to dip into the stream and apply cash from the stream to interest and principal payments as they come due.

Respectfully submitted by,

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[43] M. David Gelfand, "State & Local Government Debt Financing," § 2:12 (Supp. 2002); Jerome J. Shestack, "The Public Authority," 105 U.Pa. L. Rev. 553 (1957). *See also, Allegheny Inst. Taxpayers Coalition v. Allegheny Reg'l Asset Dist.*, 556 Pa. 102, 727 A.2d 113 (Pa. 1999)(district did not exceed statutory authority when planning to develop sports stadiums when it authorized pledge of revenues as a guarantee and for the payment of debt service of bonds); *City of Prichard v. First Alabama Bank*, 646 So.2d 552 (Ala. 1994) (revenue bonds were issued to finance the construction of a municipal complex and secured by a pledge and assignment of revenues derived from the project and rent received under a lease for payments of the principal and interest on the bonds); *State ex rel. Marockie v. Wagoner*, 191 W.Va. 458, 446 S.E.2d 680 (W.Va. 1994) (statute authorizing pledge of lottery profits to the repayment of principal, interest, and redemption premium, if any, on revenue bonds or refunding revenue bonds used to finance the construction and maintenance of school facilities, did not violate West Virginia Constitution); *Ziegler v. Witherspoon*, 331 Mich. 337, 49 N.W.2d 318 (Mich. 1951)(grant of mandamus to enforce governmental agreement where revenue bonds were issued for the construction and financing of limited access highways within the City of Detroit which were secured by the pledge of annual sums from the state highway fund to meet the interest and serial payments on the bonds); *Droege v. Kenton County Fiscal Court*, 300 Ky. 186, 188 S.W.2d 320 (Ky. 1945)(court would not enjoin resolution providing for issuance of bonds for purpose of erecting and building and acquiring equipment for an airport payable only from and secured by a pledge of income derived from operation of the airport to meet interest and retirements on the bonds). These decisions are attached, *in globo*, as Exhibit "A."

[44] Emphasis supplied.

VERIFICATION

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned notary, personally came and appeared:

Michael H. Rubin

who, after being duly sworn, did depose and say that he is an attorney for the Louisiana Municipal Association, and that allegations contained in this Amicus Curiae brief filed are true and correct to the best of his knowledge, information and belief.

Affiant further states that copies of this pleading have been mailed to the following:

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Michael H. Rubin
Sworn to and subscribed
before me this 31 day of October, 2006.

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La. Bar No: 29418 - My Commission is for Life.