First Commerce Title

Office: 318-752-8080 Fax: 318-752-8426
2708 Village Lane, Bossier City, LA 71112
www.firstcommercetitle.com

Title Notes Article March 2011

What Is a Usufruct?

from the desk of David M. Touchstone

I never heard the word "usufruct" until I entered law school, so I'm betting that if you are a layperson you have either never heard it or have only a passing familiarity with it. If you are a real estate agent or mortgage originator, you need to understand what this word means.

DAVID M. TOUCHSTONE
First Commerce Title, President

Usufruct comes from the Latin word "usufructus." More particularly, it comes from a combination of two Latin words: "usus" and "fructus." Like the word "usufruct," much of the law of Louisiana, particularly in the field of property law, comes to us from the ancient Romans. Those old Romans were some pretty smart folks; they were especially blessed with fine legal minds. Before we get into the Romans and usufruct, let's digress for a moment and talk some about what property is. When we think of the word "property," most of us immediately think of land and buildings. Certainly, the word "property" includes land and buildings, but that is not all it includes. As I look around me while writing this, I see a yellow marking pen, stacks of books, a television, carpet, furniture, my eight year old's house shoes, etc. All of that stuff is property. A 401K account, corporate stock, municipal bonds, a claim against the insurance company that owes you money for your roof, and a lawsuit against the guy who ran a red light and damaged your Subaru are all property. Pretty much anything you can touch and everything that is intangible but has value constitutes "property." The Romans figured this out too. The Roman legal scholars searched for universal truths, concepts that connected everything, ideas that could be used to build a set of laws that would treat everything that should be classed together according to the same laws. Here's what they figured out about property: no matter what kind of property it is, there are only three things you can do with it. That's right, I said there are only three things you can do with property. The first time I heard this in law school I was skeptical, but I listened. Here are the three things that can be done with property: (1) you can use it, (2) you can alienate it, and (3) you can get fruits from it. From time to time, I mentally challenge this system of classification to see if I can find a fourth thing that can be done with property. There just isn't a fourth thing. Let's talk some more about the

three things you can do. First, there's "use." If it's a car, you can drive it. If it's a house, you can live in it. If it's a field, you can grow cotton on it. If it's a marking pen, you can mark with it. You get the idea. Now, let's talk about what it means to "alienate." The most complete type of alienation is transfer of ownership, which can be effected by sale, donation, exchange, or partition. Less complete versions of alienation are granting of various types of real rights such as mortgage, servitude, and building restrictions. The third thing that one can do with property is obtaining fruits from it. If the property is a cow, you can get milk and a calf. If the property is corporate stock, you can get a dividend. You get the idea.

So recapping, you can (1) use property, (2) alienate property, and (3) get fruits from property. The Latin word for "use" is "usus." The Latin word for "fruit" is "fructus." The Latin word for "alienation" is "abusus." Now we're getting some place. The idea behind a usufruct is a combination of two of the three things that can be done with property. So, a person with a right of usufruct has the right to use the property according to its nature, and if that property is of a type that produces any fruits, the person with the right of usufruct has a right to take possession of and forever retain the fruits. By the way, we call a person who has a right of usufruct a "usufructuary." But what about that third thing, the right to alienate (what the Romans called "abusus")? Does a usufructuary have the right to alienate (dispose of) property that is subject to the usufruct? The short answer is "sometimes." We'll talk some more about that in a minute.

By now, you may have realized that since a usufructuary has only two of the three rights that can be exercised over property, somebody else must have the third one, the right of disposition (alienation). Now I don't know where we Louisiana lawyers came up with this one, and don't blame me because this wasn't my idea, but we call the person who has the right of disposition the "naked owner." There for a while we were under the control of the French and you know how they can be. Maybe they were just trying to make the law of usufruct a little sexier and they decided to call that other person "le naked owner." Anyway, that's what we call a person who has the right of disposition, but who doesn't have the right of use and the right to the fruits. I recall thinking when I first heard about this, "Well, what good is that?" I mean, who would ever want to be that other guy without the right of use and without the right of getting the fruits? Who would ever want to be the naked owner? The answer is "nobody." Well, put it this way, nobody ever wants to *remain* a naked owner. The good thing about being a naked owner is that eventually the rights of use and fruits return to the naked owner. When that happens, the naked owner loses the "naked" and is now an "owner." An "owner" has all three rights. So, naked owners are pretty much like buzzards, just circling, circling, waiting for the day that the usufruct terminates.

As you might imagine, there is a natural tension between usufructuaries and naked owners. The law of property contains numerous rules to regulate this natural tension and do justice between these conflicting interests. If, for instance, the usufructuary abandons the property that is subject to the right of usufruct, the naked owner can seek and obtain a judgment of a court terminating the usufruct. If a usufructuary fails to provide ordinary maintenance, or fails to pay ordi-

nary recurring expenses associated with the usufruct property (such as annual property taxes), or damages the usufruct property through negligence or intention, then a range of remedies is available to a court that wishes to provide protection to the naked owner. Depending on the type of property, the seriousness of the violation by the usufructuary, the manner in which the usufruct was created, and the personal circumstances of the contending parties, a court can choose to (1) terminate the usufruct, or (2) require the usufructuary to provide the naked owner with security such as a surety bond or a pledge of a certificate of deposit, or (3) terminate the usufruct, but require the naked owner (now full owner) to pay an annuity to the former usufructuary.

We need to turn our attention now to how usufructs come into existence and how they end. Usufructs come into existence as a matter of law in certain circumstances, by wills, and by conventional acts. Most of the usufructs that we real estate lawyers encounter in our practice arise as a matter of law. In Louisiana, property may either be owned as community property or as separate property. [If you want to read an article I wrote on how property gets classified as community and separate property and the legal effects arising from the classification, go to firstcommercetitle.com, then click on "Articles," then click on "How Community Property Law Affects Real Estate."] If a person is married at the time he or she dies, and if the deceasing spouse has not made a will, and if the deceasing spouse and the surviving spouse own community property together, and if the deceasing spouse is survived by descendants, then the descendants will inherit the deceasing spouse's half interest in the property of the community, and the surviving spouse will inherit, as a matter of law, a right of usufruct over the deceasing spouse's half interest in the community property. This type of usufruct, arising as a matter of law, (i.e. not created by any volitional act of the person from whom the usufruct emanates) is referred to as a "legal usufruct." Probably, more than 80% of the usufructs we title lawyers encounter are legal usufructs. Sometimes the descendants of the deceasing spouse are not the descendants of the surviving spouse. While we all know that parents and kids don't always get along, things can get a lot more fractious when the surviving spouse is the stepparent of the deceasing spouse's children. We're going to talk some more about that in a minute.

The next most common source of usufructs is acts of donation. It is not uncommon for title examiners to encounter an act of donation in which the donor reserves to himself a right of usufruct. Sometimes, parents use acts of donation as estate planning tools, but the parents aren't ready to give up the income from or use of the property. If, for instance, a parent owns a tract of land on which there is a mineral lease generating royalty payments, the parent may want to donate the land, but reserve a right of usufruct and thereby continue to receive the royalty payments. Sometimes, testators create rights of usufruct in their wills. For instance, a parent might will his child a right of usufruct while passing the naked ownership to his grandchild.

Okay, now it's time to talk about how usufructs end. As I discussed above, usufructs can be terminated in certain circumstances by judgment of a court, but judicial termination represents a very tiny fraction of the universe of usufruct terminations. The vast majority of usufructs terminate when the usufructuary

dies. If a right of usufruct has been created for the benefit of multiple persons, the usufruct does not terminate until the last of the collective usufructuaries dies. As set forth above, usufructs are often created by contracts (e.g., donations) and by wills. When usufructs are created in contracts or wills, the creator of the usufruct can set a term for the usufruct or the creator may establish that the usufruct is subject to some condition which coming into effect results in termination of the usufruct. And, of course, a usufructary can abandon the right of usufruct by signing an appropriate document to that effect.

Property which is the object of the right of usufruct may either be consumable or non-consumable. Let us suppose a scenario in which all the property owned by John Smith was acquired while John was married to Judy Smith. In our scenario, John dies without a will, survived by two kids and by Judy. At the time of John's death, John and Judy owned a house and had $20,000 in the bank. Under these circumstances, Judy owns an undivided one half interest in the house and the cash in the bank and has a usufruct over John's half of the house and cash. John's kids own John's half of the house and the cash, subject to the right of usufruct in favor of Judy. Judy can exclude the kids from the house, but cannot sell John's half of the house. Thus, Judy can live in the house until she dies or remarries. At this point, I need to mention that surviving spouse legal usufructs terminate when the surviving spouse dies or remarries. Continuing with our scenario, Judy can exercise her right of usufruct over John's half of the cash by…spending it or investing it and earning interest on it. Because Judy can spend the cash in order to exercise her right of usufruct over it, that portion of the usufruct that extends to the cash is said to be consumable. Use of the cash is made by consuming it, i.e., spending it. Well, you may be asking yourself, what good is having a naked ownership interest in something that gets used up before the naked owner's interest can ever crystallize into full ownership? Just this – when Judy's right of usufruct ends and if Judy is still living, she will be obligated to restore the $10,000 to John's children. If Judy's usufruct ends because Judy dies, then Judy's estate will be obligated to restore the $10,000 to John's heirs. If John's children are not also Judy's children, they will be entitled to request a decree from a court granting them security to insure that at the end of Judy's usufruct they will recover the cash due them.

The general rule regarding consumables and non-consumables subject to a usufruct is that the usufructuary can dispose of consumables, but cannot dispose of non-consumables. Real estate, of course, is a non-consumable, and in the vast majority of sales of real estate the signatures of both the usufructuary and the naked owner will be required to deliver good title to a buyer. There is an exception to this rule that happens in a small fraction of usufructs. Article 568 of the Louisiana Civil Code allows the person who creates the right of usufruct to endow the usufructuary with the *power of disposition*. In just about every instance in which I have seen a usufructuary granted the power of disposition, the usufruct was created in a will. Naturally, when the will stipulates a usufruct with a power of disposition we real estate attorneys look at the language pretty carefully to assure ourselves that the usufructuary has an unquestionable right to sell the property without the signature of the naked owner.

When you are in the process of listing a property and then drafting a buy/sell agreement, you need to keep the ideas of this article in mind if the property is subject to a right of usufruct. On the one hand, the property cannot generally be sold without the cooperation (signatures) of both the naked owner and the usufructuary. Without the usufructuary's signature, the buyer will get nothing more than a naked ownership interest and, thus, will be unable to take possession of the property. If the usufructuary alone sells the property, then the buyer will get the usufructuary's right to the possession of and fruits from the property, but when the usufructuary dies (or, in some cases, remarries), the usufruct will terminate and the buyer will have nothing. But now we need to take a moment and review Civil Code Article 616, which can rock your world if you screw this up. Article 616 states:

> When property subject to usufruct is sold, whether in an action of partition or by agreement between the usufructuary and the naked owner, the usufruct attaches to the proceeds of the sale unless the parties provide otherwise.

This means the usufructuary gets the proceeds from the sale. Let's think this through. If you have the usufructuary and the naked owner sign a buy/sell agreement they will, of course, be obligated to perform the contract and complete the sale of the property. Let us suppose that you fail to consider what agreement the usufructuary and the naked owner wish to make regarding the proceeds from the sale. They come to the closing, sign the deed and the closing attorney prepares a proceeds check payable to the usufructuary alone. That's right…the usufructuary gets ALL the money and the naked owner gets NONE of the money. This may not be what the naked owner had in mind when he hired you to list the property. You might just find yourself as a defendant in a malpractice suit. Or what if the naked owner discovers after he has signed the buy/sell agreement that the usufructuary will get all the money at closing and the naked owner absolutely refuses to come to closing. Now, the buyer sues the usufructuary and the naked owner for breaching the buy/sell agreement and the usufructuary and the naked owner file a third party demand against you for failing to advise them of this prior to their signatures on the buy/sell agreement. The fact that Article 616 says that the usufructuary receives the proceeds of the sale does not mean that the usufructuary and the naked owner cannot contract otherwise. Article 616 is simply a default rule if the parties fail to make an agreement regarding allocation of the sale proceeds. Obviously, in situations in which there is a usufruct, a real estate agent needs to discuss this with the selling parties and they need to put in writing (preferably on the buy/sell agreement) how the proceeds of the sale will be disbursed. If the agreement is that the usufructuary will receive all or a portion of the cash from the sale in his/her role as usufructuary, the agreement between the usufructuary and the naked owner should also stipulate whether the usufructuary will owe anything to the naked owner at the end of the usufruct. If you are not sure how to word this or are just concerned that you don't understand all this well enough to handle this provision on your own, call me or such other attorney you deem appropriate to help you with this. But I want to warn you that this is not a pie in the sky danger; this is a real danger that arises fairly frequently. If the naked owner is not so much concerned about being

paid at closing as he is worried that the usufructuary will blow the cash and the naked owner will never see it, this situation can be handled by having the usufructuary and naked owner agree that the usufructuary will receive the proceeds from the sale, but some safe and meaningful form of security will be given to the naked owner assuring eventual payment to the naked owner.

Well, there is a lot more we can discuss about the law of usufruct, but I think we have pretty well covered the high points that are likely to arise in your business as a real estate agent.