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Charles S. Weems Jr.

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## PASSAGE OF TITLE AND RISK OF LOSS UNDER THE UCC AND LOUISIANA LAW

Louisiana, one of only three states<sup>1</sup> which have not at this writing adopted the Uniform Commercial Code,<sup>2</sup> is now surrounded by UCC states. Since the UCC is under study by the Louisiana State Law Institute, a comparison of article 2 of UCC and present Louisiana law on the question of passage of title and risk of loss in sales is timely.

### LOUISIANA'S APPROACH TO TITLE AND RISK

The French theory of title and risk as embodied in the Code Napoléon was conceived in reaction to and in a desire to avoid the principles of Roman law on which prior French law was based.<sup>3</sup> Generally, under Roman legal theory, the contract of sale formed only a personal engagement (obligation) between the parties which required delivery of the *res* in pursuance of the contract to pass ownership.<sup>4</sup> Title passed only upon the accomplishment of this delivery or transfer of possession (known as *traditio*).<sup>5</sup> Though opposed by some jurists,<sup>6</sup> Roman law transferred risk to the purchaser as soon as the sale was perfected by an agreement of the parties as to object and price.<sup>7</sup> As a result, though the risk of loss was on the buyer, if the seller failed to abide by the contract, the buyer had no right to demand the thing and was relegated to an action in damages against the seller.<sup>8</sup> Though these Roman principles retained their efficacy in the old French law, the rule requiring delivery before ownership could pass was early circumvented through such clauses as that of *déssaisine-saisine* by which the vendor agreed to pass title via a fictional delivery and hold the goods for his vendee.<sup>9</sup> Therefore, when the drafters of the Code Napoléon offered the precept that a sale was to be perfected and

1. Other states in which the UCC has not been adopted are Arizona and Idaho.

2. Hereinafter referred to as UCC.

3. See 9 FENET, DISCUSSIONS 112-13 (1836); 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) VII-VIII (1959).

4. 1 POTHIER, TREATISES ON CONTRACTS 200-01 (Cushing transl. 1839).

5. CODE 3.32.27; CODE 4.49.11; BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 135-37 (1928); Comment, 6 TUL. L. REV. 272 (1932).

6. 1 POTHIER, TREATISES ON CONTRACTS 189 (Cushing transl. 1839).

7. *Id.* at 187; Williston, *The Risk of Loss after an Executory Contract of Sale in the Civil Law*, 9 HARV. L. REV. 72 (1895); Comment, 6 TUL. L. REV. 272 (1932).

8. 1 POTHIER, TREATISES ON CONTRACTS 201 (Cushing transl. 1839).

9. See 1 *id.* 196-98; Comment, 6 TUL. L. REV. 272, 275 n.18 (1932).

title and risk were to pass upon consent of the parties to object and price,<sup>10</sup> they were not proposing a new principle, but were continuing an established practice which gave fullest effect to the will of the parties, recognizing the sale as a true consensual contract, and thereby giving the buyer the real right of demanding the thing sold itself.<sup>11</sup>

The Civil Code adopting almost verbatim the French provisions in the area, the Louisiana approach is that, absent contrary agreement, both ownership and risk pass to the vendee upon perfection of the sale. This perfection is accomplished upon the concurrence of three things: consent of the parties, specific identification of the object, and the fixing of a sufficiently certain price.<sup>12</sup>

When there is doubt as to the specific identification of the object, as when goods are identified only as being of a certain kind or description, Louisiana courts have held that the object becomes adequately determined to perfect the sale when there has been an "appropriation" of the goods to the contract. Although this is an obscure standard, the cases afford an indication of what particular acts will be sufficient. Separation of the goods from a larger mass and delivery to the carrier for shipment,<sup>13</sup> setting apart the goods in containers sealed by the government and sending the buyer the individual identification numbers of the containers,<sup>14</sup> and warehousing the goods separated from the mass coupled with a delivery to the buyer of the warehouse receipt,<sup>15</sup> all have been held sufficient. It may thus be concluded that there must be some act by the vendor isolating the goods from a general mass which involves an element of irrevocability, so that he no longer has complete control over the destination of the goods.

The perfected sale requires a price that is certain,<sup>16</sup> meaning that the parties must so bind themselves that the price, if not

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10. FRENCH CIVIL CODE arts. 1138, 1583 (Wright's transl. 1908).

11. See annotations to article 1583 in 41 DALLOZ CODES ANNOTÉS, NOUVEAU CODE CIVIL 10-11 (1907); 9 FENET, DISCUSSIONS 109-13 (1836).

12. LA. CIVIL CODE arts. 2456, 2464, 2467 (1870).

13. *George D. Witt Shoe Co. v. J. A. Seegars & Co.*, 122 La. 145, 47 So. 444 (1908); *State v. Shields*, 110 La. 547, 34 So. 673 (1903).

14. *Edgwood Co. v. Falkenhagen*, 151 La. 1072, 92 So. 703 (1922).

15. *Kessler & Co. v. Manhein*, 114 La. 619, 38 So. 473 (1905).

16. LA. CIVIL CODE art. 2464 (1870). For an interesting and detailed analysis of Louisiana law as regards a sufficiently certain price necessary to perfect a sale, see Hebert & Lazarus, *Some Problems Regarding Price in the Louisiana Law of Sales*, 4 LA. L. REV. 378 (1942). It is important to note that under

specifically fixed, may be determined without further action or agreement on their part.<sup>17</sup> Consequently, if they agree that the price is to be fixed by experts who refuse or fail to do so,<sup>18</sup> or if the parties stipulate that the settlement is to be agreed upon at a later date, then fail to agree,<sup>19</sup> there is no sale. If the price is a "good and valuable consideration,"<sup>20</sup> or when the sale is made "for about"<sup>21</sup> so much, the price is uncertain; but if it is left to be fixed in accordance with market or wholesale price,<sup>22</sup> it is sufficiently definite.<sup>23</sup> Inasmuch as both ownership and risk pass to the buyer upon the perfection of the sale, regardless of whether the price has been paid or the object delivered<sup>24</sup> Louisiana law has in effect made the principle *res perit domino* a part of its civilian system, passing title upon the consent of the parties with risk following ownership as an incident and consequence of it.

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the UCC the parties, if they so intend, can complete a contract of sale though the price is not settled. Section 2-305 provides that "in such a case the price is a reasonable price at the time for delivery if (a) nothing is said as to price; or (b) the price is left to be agreed by the parties and they fail to agree; or (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded." The section further states that "when a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price." Section 2-305 concludes by clearly stating that if "the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract."

17. *Louis Werner Sawmill Co. v. O'Shee*, 111 La. 817, 35 So. 919 (1904).

18. *Lake v. LeJeune*, 226 La. 48, 74 So. 2d 899 (1954); *Louis Werner Sawmill Co. v. O'Shee*, 111 La. 817, 35 So. 919 (1904).

19. *Clark Warehouse & Imp. Co. v. Jacques & Edmond Weil*, 152 La. 707, 94 So. 326 (1922).

20. *Conway v. Bordier*, 6 La. 346 (1834).

21. *Wright & Anderson v. Anthon*, 17 La. App. 633, 136 So. 754 (1931).

22. *Baucum & Kimball v. Garrett Mercantile Co.*, 188 La. 728, 178 So. 256 (1937).

23. In *H. T. Cottam & Co. v. Moises*, 149 La. 305, 307, 88 So. 916, 917 (1921); referring to a contract of sale in which no price whatsoever was mentioned, the court said (adopting the judgment of the court of appeal): "I. It is immaterial that no price was agreed upon. When goods are ordered from a merchant without any stipulation as to price, he has a right to recover their market value. *Helluin v. Minor*, 12 La. Ann. 124, 125; *Morris, Tasker & Co. v. Fleming*, 21 La. Ann. 411; *Pehlan v. Wilson*, 114 La. 823, 38 South. 570; *Smith's Mercantile Law*, p. 613." The case apparently still stands for the proposition that when a buyer agrees to purchase merchandise from a merchant and nothing is said as to price, the court will find the market price therefor implied, despite the fact that no cases have been discovered following the holding in this vein and that the cases relied on as authority do not seem to support the statement. Equity aside, it is difficult to distinguish such a situation from those in which a vague statement as to price is made and the court has found the sale not perfected because further action or agreement is required between the parties. The UCC provides for the completion of a sale when nothing has been said as to price in a similar manner. See note 16 *supra*, referring to section 2-305.

24. LA. CIVIL CODE arts. 1909, 2456 (1870).

## THEORY OF TITLE AND RISK UNDER THE UCC

The UCC states that "the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties appl[y] irrespective of title to the goods except where the provisions [of the article on sales] refers to such title."<sup>25</sup> Since only one provision of the sales article refers to title<sup>26</sup> — and that reference is insignificant — it may be said that title is of no practical consequence under the UCC. However, if the ultimate question is location of title, as for example, when determining the applicability of public regulation, the UCC provides rules based on the theory that title passes to the buyer when the seller delivers the goods if he is to do so, or fulfills his obligation to the buyer if he is not. Risk of loss is completely separated from the passage of title under the UCC — unlike its predecessor, the Uniform Sales Act, which embraced the concept *res perit domino* with reverence<sup>27</sup> — and is treated singularly as a charge to be borne by the party in control of the goods, who can therefore be expected to insure them. This basic theory presents a vastly different approach from that embodied in present Louisiana law:

"The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character."<sup>28</sup>

Though title and risk under the UCC often pass simultaneously, the reasons therefore are different, as noted above. No longer

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25. Section 2-401.

26. Section 2-722 provides that if a third party deals with goods identified to a contract of sale in a manner which causes actionable injury to a party to the contract, the right of action against the third party is in any party to the contract "who has title to or a security interest or a special property or an insurable interest in the goods," as well as in the party who either bore the risk of loss or has assumed it if the goods have been destroyed or converted. In such a context title is of little consequence, as the title holder will usually fall under one of the other categories which would make him eligible to bring an action against the third party.

27. For an impassioned defense of the old common law rules and the institution of title against the concepts of the UCC, see Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561 (1950).

28. Comment, section 2-101.

is the fine question of passage of title the decisive issue in assigning risk of loss, for under the UCC focus is on possession, delivery, tender of delivery, and the agreement of the parties.

#### UCC COMPARED WITH LOUISIANA LAW ON PASSAGE OF TITLE

In the absence of explicit agreement stipulating when title is to be transferred, the UCC provides that it shall pass "at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place."<sup>29</sup> Therefore, in a shipment contract not requiring delivery by the seller at destination, title passes to the buyer upon delivery to the carrier regardless of any reservation of a security interest through the bill of lading,<sup>30</sup> because it is then that the seller has completed his performance with respect to physical delivery. Similarly, if the shipment contract requires delivery at a particular destination, title passes at the destination when the goods are properly tendered by the carrier to the buyer.<sup>31</sup> In Louisiana, it is possible for title in goods that are to be shipped to pass prior to delivery to the carrier if the sale has been perfected at that time, although the seller has not yet completed his performance with respect to their physical delivery.<sup>32</sup> If perfection of the sale depends on the appropriation of goods by surrender to a carrier who is to transport them under a bill of lading, the applicable Louisiana law is the Uniform Bills of Lading Act<sup>33</sup> which provides that title is transferred according to the form of the bill if the parties have not agreed otherwise. If the shipment is consigned to the buyer, title passes upon delivery to the carrier,<sup>34</sup> but if consignment is to the seller, he retains title to the goods.<sup>35</sup> In the latter case, the Act provides that "if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property shall be deemed to be only for the purpose of securing performance by the buyer,"<sup>36</sup> indicating that all

29. Section 2-401 (2).

30. Section 2-401 (2) (a).

31. Section 2-401 (2) (b).

32. For example, if *A* contracted to sell, and *B* to buy, a single specific object for a fixed price, ownership in the object would pass to *B* upon the completion of the agreement, though *A* might be required to subsequently ship the object to *B*.

33. LA. R.S. 45:940 (1950).

34. *Id.* 45:940(1).

35. *Id.* 45:940(2).

36. *Ibid.*

other attributes of ownership would pass to the buyer. Though such a reading would produce results identical to those reached under application of the UCC provisions, Louisiana courts have not followed such an interpretation, holding that title remains in the seller in such a situation.<sup>37</sup> Louisiana apparently is the only state which has applied this uniform legislation in a non-uniform way.<sup>38</sup>

If delivery is to be made without moving the goods, the UCC provides that title passes upon delivery of the title document if the seller is to do this.<sup>39</sup> In the absence of an express provision between the parties to that effect, Louisiana law would presumably dictate a passage of ownership upon the perfection of the sale although the seller has yet to deliver a document of title. If no title document is to be delivered, title passes at the time and place of contracting if the goods are identified at that time within the meaning of the UCC.<sup>40</sup> This provision is in essence the same as Louisiana's existing law, although the requirements under the UCC for goods to be "identified" are not as stringent as the previously discussed Louisiana concept of "appropriation" because risk of loss and remedies of the parties do not hinge on "identification."

Under the UCC "a rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a 'sale.'"<sup>41</sup> This section will presumably be important in determining where title lies for the purposes of taxation and similar matters. Louisiana law has no counterpart.

The unimportance of title under the UCC is clearly shown by the section on third-party purchasers.<sup>42</sup> Though the basic common-law rule that a vendor with a voidable title can pass a good title to a bona fide purchaser is retained,<sup>43</sup> it is further provided that "any entrusting of possession of goods to a mer-

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37. *C. W. Greeson Co. v. Harnischfeger Corp.*, 231 La. 934, 93 So.2d 221 (1957). See also *California Fruit Exchange v. John Meyer, Inc.*, 166 La. 9, 116 So. 575 (1928).

38. See BUGAN, *WHEN DOES TITLE PASS* 80-88 (2d ed. 1951).

39. Section 2-401(3) (a).

40. Section 2-401(3) (b).

41. Section 2-401(4).

42. Section 2-403.

43. Section 2-403(1).

chant<sup>44</sup> who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course<sup>45</sup> of business."<sup>46</sup>

"'Entrusting' includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law."<sup>47</sup>

This represents, to a degree, an adoption of the French doctrine *la possession vaut titre*,<sup>48</sup> which was rejected through omission by the drafters of the Civil Code. The furthest that Louisiana courts have heretofore been willing to go in the direction of that doctrine is that an owner who clothes another with indicia of ownership is estopped from demanding the thing when it has passed into the hands of a bona fide purchaser,<sup>49</sup> though in one case all that was apparently given was bare possession to a dealer in that particular type goods.<sup>50</sup> The possibility of other forms of estoppel also exists.<sup>51</sup> Of course, where credit is extended, although fraud on the part of the buyer is involved, the latter obtains a voidable title and can therefore transfer a good title to a bona fide purchaser.<sup>52</sup> This somewhat muddled area of our law would be cleared through an application of the UCC rules.

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44. Section 2-104(1) defines "merchant" as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." The Comment notes that the definition is intended to cover the professional vendor and not the casual, inexperienced seller.

45. Section 1-201(9) states that "'buyer in ordinary course of business' means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker."

46. Section 2-403(2).

47. Section 2-403(3).

48. FRENCH CIVIL CODE art. 2279 (Wright's transl. 1908). Goods lost or stolen are excepted from the operation of this rule but it is doubtful that obtaining by false pretenses would be included in such a category. See *Jeffrey Motor Co. v. Higgins*, 230 La. 857, 89 So.2d 369 (1956).

49. *Flatte v. Nichols*, 233 La. 171, 96 So.2d 477 (1957); *William Frantz & Co. v. Fink*, 125 La. 1014, 52 So. 131 (1910).

50. *William Frantz & Co. v. Fink*, 125 La. 1014, 52 So. 131 (1910).

51. See *Lynn v. Lafitte*, 177 So. 83 (La. App. 2d Cir. 1937). See also *Packard Florida Motors Co. v. Malone*, 208 La. 1058, 24 So.2d 75 (1945).

52. *Flatte v. Nichols*, 233 La. 171, 96 So.2d 477 (1957); *Trumbull Chevrolet Sales Co. v. Maxwell*, 142 So.2d 805 (La. App. 2d Cir. 1962).



## UCC AND LOUISIANA LAW ON RISK OF LOSS

*General Rules*

Risk of loss when there has been no breach of the sale contract is covered by section 2-509<sup>53</sup> of the UCC. In shipment contracts, risk passes to the buyer upon proper delivery to the carrier, unless the vendor is required to deliver the goods to a particular destination, even if the seller purports to reserve title or some possessory interest in the goods as a security measure.<sup>54</sup> The rationale is that here the seller relinquishes control of the goods and the buyer may reasonably be expected to insure them from that point. The Comment to section 2-509 states that in order to have a proper delivery to the carrier, the seller must contract with the carrier to meet "the requirements of the section on shipment by the seller,"<sup>55</sup> and the delivery must be made under circumstances which will enable the seller to take any further steps necessary to a due tender." However, if the delivery is to be made at a particular destination, risk passes when the goods are properly tendered to the buyer by the carrier.<sup>56</sup>

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53. Section 2-509 provides: "*Risk of Loss in the Absence of Breach.* (1) Where the contract requires or authorizes the seller to ship the goods by carrier (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

"(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer (a) on his receipt of a negotiable document of title covering the goods; or (b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or (c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4) (b) of Section 2-503.

"(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

"(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510)."

54. Section 2-509(1) (a).

55. The section on shipment by the seller, section 2-504, provides that the seller must (a) put the goods in the possession of such a carrier and make such arrangements for their transportation as is reasonable, (b) promptly deliver or tender to the buyer any documents necessary for the buyer to obtain possession of the goods, and (c) promptly give the buyer notice of shipment. Failure by the seller to meet the requirements of (a) or (c) is a ground for rejection only if material delay or loss ensues.

56. Section 2-509(1) (b).

Under Louisiana law, as with title, risk normally passes upon perfection of the sale.<sup>57</sup> Yet, it appears that if the seller is to transport the thing sold to another place for delivery to the buyer, title will not pass until he does so.<sup>58</sup> If the Louisiana sale involves a shipment under a bill of lading, the form of the bill will control passage of risk under the Uniform Bills of Lading Act,<sup>59</sup> whose provisions would produce results identical with the UCC rules<sup>60</sup> if properly construed. But, as we have seen, our courts have so interpreted the Act that when the shipment is made under a reservation in the bill, both title and risk remain in the seller in the absence of an express agreement to the contrary.<sup>61</sup>

In a bailment situation under the UCC, where goods are held by the bailee to be delivered to the vendee without being moved, risk of loss shifts upon the buyer's receipt of a document of title,<sup>62</sup> or upon the "acknowledgment by the bailee of the buyer's right to possession of the goods."<sup>63</sup> This produces results substantially similar to those reached under present Louisiana law, as such an act by the seller normally perfects the sale because it is an "appropriation" with an element of irrevocability. But it would appear to be possible in Louisiana for the sale to be perfected so as to transfer risk if the goods were sufficiently identified prior to any giving of title documents, thereby putting the buyer in the situation of bearing the risk of loss though he could not immediately take possession of the goods.

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57. LA. CIVIL CODE art. 2467 (1870).

58. See *Martin v. T. L. James & Co.*, 237 La. 633, 112 So.2d 86 (1959), in which the seller was to transport materials to specific destinations for delivery to the buyer. The court held that title in the materials would not pass until the buyer had completed delivery to the specified places, though it avoided the consequences of this reasoning by finding on rehearing that a delivery was accomplished, neither restating nor renouncing the holding made on original hearing as to when title would pass. See *John M. Parker Co. v. E. Martin & Co.*, 148 La. 791, 88 So. 68 (1920), in which the seller shipped cotton to the buyer under a Shipper's Order Notify bill. There, ignoring the Uniform Bills of Lading Act (see note 36, *supra*, and the material referred to), the court held that title to the cotton did not pass until it had reached its destination where it might be delivered to the buyer.

59. LA. R.S. 45:940 (1950).

60. Section 2-509(1).

61. *C. W. Greeson Co. v. Harnischfeger Corp.*, 231 La. 934, 93 So.2d 221 (1957).

62. Section 2-509(2)(a). However, under section 2-503(4)(b) when a *non-negotiable* document is tendered to the buyer the risk of loss will remain on the seller during a reasonable time for presenting the document to the bailee and securing his acknowledgment of the transfer.

63. Section 2-509(2)(b).

In all other situations not involving breach of the sale contract, risk under the UCC passes upon the buyer's receipt of the goods if the seller is a merchant,<sup>64</sup> or upon tender of delivery by the seller to the buyer if he is not.<sup>65</sup>

"The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession."<sup>66</sup>

This rule epitomizes the UCC philosophy on risk of loss, that risk should rest on the party who has physical control of the goods and can therefore be expected to insure them. Under Louisiana law, of course, risk would pass immediately upon perfection of the sale, and would produce the result of a buyer having risk of loss while his goods were still completely in the control of his vendor. However, the Louisiana buyer is protected to an extent by the seller's obligation to guard sold but undelivered goods as a faithful administrator or suffer any loss occasioned by failure to do so.<sup>67</sup> This duty requires reasonable care,<sup>68</sup> but does not include insuring the goods for the account of the buyer in the absence of specific instructions to do so.<sup>69</sup>

### *Breach of Contract*

In cases of breach of the contract of sale, UCC section 2-510<sup>70</sup> controls. If the breach results from failure of tender or delivery to conform to all conditions of the agreement, risk

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64. See note 44 *supra*.

65. Section 2-509(3).

66. Comment 1, section 2-509.

67. LA. CIVIL CODE art. 2468 (1870).

68. *Delahoussaye v. Adeline Sugar-Factory Co.*, 50 La. Ann. 544, 23 So. 619 (1898); *Fearn, Putnam & Co. v. Richardson*, 12 La. Ann. 752 (1857); *Pennington Grocery Co. v. Schmidt & Zeigler*, 5 La. App. 434 (1927).

69. *Hanan & Richards Co. v. Bowles*, 25 La. Ann. 453 (1873); *Acme Burlap Bag Co. v. Hardin Bag Co.*, 1 La. App. 379 (1925).

70. Section 2-510 states: "*Effect of Breach on Risk of Loss.* (1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance. (2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning. (3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time."

will remain on the seller until the defect is cured<sup>71</sup> or the buyer accepts the goods.<sup>72</sup> Apparently the burden of establishing conformity of the goods is borne by the seller until they are accepted, after which the buyer must prove any non-conformity alleged.<sup>73</sup> This rule is a logical application of the basic UCC theory on risk: since the seller will have control over the goods until the defect is cured or the buyer accepts the goods, he must bear the risk. Louisiana law is substantially the same, as a seller who is in default<sup>74</sup> with respect to delivery or compliance at the time required in the contract has the risk of loss from the time of default.<sup>75</sup> But this rule is qualified by the fact that if destruction of the goods would have been equally certain had delivery been accomplished, the buyer must nevertheless suffer the loss.<sup>76</sup> No Louisiana cases have been discovered when the question of passage of risk or title was involved where non-conforming goods were delivered. Presumably, if the vendor breached the contract by failing to deliver the kind of goods required or stipulated, risk of loss would remain with him;<sup>77</sup> whereas if the goods delivered were subject merely to a redhibitory defect, risk would shift to the vendee.<sup>78</sup> The UCC further provides that where there has been a breach, and the party damaged is the one upon whom the risk of loss falls, then if the goods should become injured or destroyed, that party may treat any portion of the loss uncovered by his own insurance as resting on the wrongdoer.<sup>79</sup> But if it is the buyer who

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71. According to the Comment to section 2-510, this term contemplates "situations in which the seller makes changes in goods already tendered, such as repair, partial substitution, sorting out from an improper mixture and the like since 'cure' by repossession and new tender has no effect on the risk of loss of the goods originally tendered."

72. Section 2-510(1).

73. This conclusion is reached by the wording of section 2-607(4): "The burden is on the buyer to establish any breach with respect to the goods accepted." Evidently, until acceptance the burden will therefore rest on the seller.

74. The term is used here to mean either a delaying of the giving of possession, or as defined in article 1911, which provides three ways that a debtor may be put in default: (1) by the contract's providing that a party's failure to comply with its terms puts him in default; (2) by the other party's demanding performance via a suit, a writing, a protest by a notary, or a verbal requisition before two witnesses; and (3) by the law in cases where a breach of the contract alone is declared a default.

75. LA. CIVIL CODE arts. 1910, 2470 (1870).

76. *Id.* art. 2470.

77. In this situation presumably title and risk would not pass because of the absence of an "appropriation" by the seller of the kind of thing the vendee had consented to purchase.

78. See LA. CIVIL CODE art. 2533 (1870). Here risk apparently falls on the buyer for the reason that in such a case the contract is subject to avoidance by him.

79. Section 2-510(2) and (3).

breaches the contract before passage of risk to him, the seller can treat risk as resting on the buyer to the extent of any deficient insurance coverage only for a "commercially reasonable time."<sup>80</sup> Louisiana, of course, has no such provision, saying simply that if the buyer delays obtaining possession he must bear the risk except where the thing sold is damaged through the gross neglect of the seller in failing to care for the thing.<sup>81</sup>

### *Sale Under a Suspensive Condition*

There are certain situations arising in the Civil Code which might, under different sets of circumstances, fall under any of several UCC provisions regarding risk and title. The first of these is the sale made under a suspensive condition, including the buyer's reservation of the right of view and trial,<sup>82</sup> in which ownership and risk do not pass until the condition is fulfilled.<sup>83</sup> The cases<sup>84</sup> under articles 2044, 2457, 2460, and 2471, dealing with such sales, have reached results similar to those which would be reached under the UCC: risk of loss and title to the goods do not pass until fulfillment of the condition. But when the condition merely involves an inspection of the goods by the buyer, UCC section 2-513(4)<sup>85</sup> provides that such an inspection does not affect the passage of title or the shifting of risk unless there is an express agreement to that effect. For the most part, Louisiana jurisprudence holds that title and risk do not pass until acceptance when an inspection is contemplated.<sup>86</sup> The UCC rule does present problems. For example, a buyer whose goods sent f.o.b. shipping point have been destroyed will find difficulty in proving they were non-conforming goods. But the buyer can always protect himself through an express agreement concerning risk prior to inspection.

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80. Section 2-510(3).

81. LA. CIVIL CODE art. 2469 (1870).

82. *Id.* art. 2460.

83. *Id.* art. 2471.

84. *Jackson Motors v. Calvert Fire Ins. Co.*, 239 La. 921, 120 So.2d 478 (1960); *Wampler v. Wampler*, 239 La. 315, 118 So.2d 423 (1960); *De La Vergne Co. v. New Orleans & Western R.R.*, 51 La. Ann. 1733, 26 So. 455 (1899); *Jochams v. Ong*, 45 La. Ann. 1289, 14 So. 247 (1893); *Burton v. Lumbermen's Mut. Cas. Co.*, 152 So.2d 235 (La. App. 4th Cir. 1963); *Hamilton Co. v. Medical Arts Bldg. Co.*, 17 La. App. 508, 135 So. 94 (1931).

85. Section 2-513(4) provides that the "place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss."

86. *American Creosote Works v. Boland Mach. & Mfg. Co.*, 213 La. 834, 35 So.2d 749 (1948); *California Fruit Exchange v. John Meyer, Inc.*, 166 La. 9, 116 So. 575 (1928). *But see Brown-McReynolds Lumber Co. v. Commonwealth Bonding & Cas. Co.*, 11 Orl. App. 49 (La. App. 1913).

*Sale by Weight, Tale, or Measure*

Where a sale of goods is by weight, tale, or measure under Civil Code article 2458, risk remains on the seller until the goods are weighed, counted, or measured,<sup>87</sup> unless there is express agreement to the contrary.<sup>88</sup> The question of when title passes in such a sale has gone almost unconsidered, although two early cases<sup>89</sup> which have not been overruled held that title passes upon the completion of the agreement, prior to the weighing, counting, or measuring, and dicta in at least two other cases<sup>90</sup> support that finding. The contrary position, that title does not pass until the act of weighing, counting, or measuring, also has support in one decision, however.<sup>91</sup> It is submitted that the very wording of article 2458, that such a sale is "not perfect, inasmuch as the things so sold are at the risk of the seller, until they be weighed, counted or measured,"<sup>92</sup> means that except for transfer of risk the sale is perfect upon completion of the agreement with respect to all other incidents of ownership, including title. The Court of Cassation clearly recognized that this was the intent of the article and pointed out that article 1585 of the Code Napoléon (Louisiana Civil Code article 2458) makes a sale by weight, tale or measure imperfect only in the sense that the risk remains on the vendor until the act of weighing, counting, or measuring, and that the buyer can demand delivery<sup>93</sup> of the thing sold. The court stated that

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87. *Kohler v. Huth Constr. Co.*, 168 La. 827, 123 So. 588 (1929); *Milliken & Farnwell v. American Sugar Refining Co.*, 143 La. 667, 79 So. 214 (1918); *Goodwyn v. Pritchard*, 10 La. Ann. 249 (1855); *Fearn, Donegan & Co. v. Maltby & Co.*, 9 La. Ann. 8 (1854).

88. *Kelham & Co. v. Carroll, Hoy & Co.*, 20 La. Ann. 111 (1868); *Clark & Thieneman v. Norwood*, 19 La. Ann. 116 (1867).

89. *Shuff v. Morgan*, 9 Mart.(O.S.) 592 (La. 1821), directly held that article 2458 called for a splitting of the incidents of ownership. Its reasoning was followed in *Davenport v. Adler*, 52 La. Ann. 263, 26 So. 836 (1899). The question was even later raised in *Lee Lumber v. Hotard*, 122 La. 850, 48 So. 286 (1909), but there the court waived any decision thereon, and based their conclusion on other grounds.

90. *Louisiana State Rice Milling Co. v. McCowan*, 180 La. 174, 156 So. 213 (1934); *Cook v. West*, 3 Rob. 331 (La. 1842).

91. See *Lambeth v. Wells*, 12 Rob. 51 (La. 1845); *Comment*, 5 LA. L. REV. 293 (1943).

92. LA. CIVIL CODE art. 2458 (1870).

93. Discussions upon presentation of the draft of the Code Napoleon show that the article was stated in its final form to make it clear that the buyer would have the right to demand delivery of the goods, a real right based on ownership. When the draft was submitted, the tribunal observed as is reported in 9 FENET, DISCUSSIONS 85 (1836): "This article, as it is proposed in the projet, may give rise to great difficulty. It may be concluded that, in the case stated, there is no sale; so that the buyer does not have the right to force the vendor to perform his engagement. However, the obligation exists and the vendor may always be

"far from derogating from the general principle established by article 1583 (Louisiana article 2456, which makes the sale perfect upon the consent of the parties as to thing and price)," article 1585 makes the sale perfect in all respects other than risk.<sup>94</sup> No such problem would exist under the UCC since title and risk are not linked, and the buyer, rather than taking risk immediately upon weighing, counting, or measuring, would be responsible only when the seller no longer has control of the goods or has at least made a tender of delivery. It would be possible for title to pass prior to the act of weighing, counting, or measuring if the goods were at that time identified to the contract. Under Louisiana law, however, if the parties clearly express their intention that the object of a sale, an undetermined part of a determined whole, come from that particular whole and from no other, and the whole is lost or destroyed by inevitable accident, the loss will fall on the buyer.<sup>95</sup> The result under the UCC would be different since the vendor has complete control of the goods in such a situation and risk would therefore not have passed to the buyer.

### *Lump Sale*

Where goods are sold in a lump, article 2459 provides that the sale is perfect though the goods "may not have been weighed, counted, or measured."<sup>96</sup> The courts have interpreted this article to apply only to a sale for a lump price.<sup>97</sup> For example, a sale of all the one-inch pipe located in kilns for a fixed total (or lump) price was held complete despite the fact that the amount of pipe actually contained proved to be less than estimated.<sup>98</sup> In such a situation, title and risk pass immediately to the buyer upon perfection of the agreement. Under the UCC, of course, this would not be the case. Title might pass at that time if no documents of title were to be given and no shipment by the seller was required. But risk would not pass until the seller

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required either to deliver the thing sold, or, if he may not do it, pay damages." See note 100 *infra*.

94. See the opinion of the Court of Cassation, Arrêt du 11 Novembre, 1812, Sirey 1813, part 1, p. 52, as quoted in *D. Kelham & Co. v. Carroll, Hoy & Co.*, 20 La. Ann. 111 (1868).

95. LA. CIVIL CODE arts. 1916, 1917 (1870). See *Warren & Crawford v. Kirk*, 24 La. Ann. 150 (1872).

96. LA. CIVIL CODE art. 2459 (1870).

97. *Peterkin v. Martin*, 30 La. Ann. 894 (1878); *Rhea v. Otto*, 19 La. Ann. 123 (1867).

98. *Mobile Mach. & Supply Co. v. York Oilfield Salvage Co.*, 171 So. 872 (La. App. 1st Cir. 1937).

relinquished control of the goods or made a tender of delivery, depending on the circumstances, under section 2-509. Until that time the seller's possession and control would preclude the likelihood that the buyer would have insured the goods.

### CONCLUSION

The advantages of the UCC provisions stem mainly from their sound, commercially-oriented practice of divorcing passage of title from the shifting of the risk of loss, and in placing the risk on the party who is, or should be, in control of the goods, and who, under modern business practices, may be expected to carry insurance on them. The result—a far cry from the maxim *res perit domino* which previously pervaded the common law and is still firmly entrenched in the Civil Code—interestingly represents a return to the old Roman practice of dealing with title and risk separately, though the effects and the reasons are quite different. Although the French, in treating sale as a consensual contract the perfection of which does not depend on delivery, generally placed risk of loss from the time of perfection on the buyer, it appears that they recognized an exception in the case of sales by weight, tale, or measure. And as noted previously, article 2458, taken almost verbatim from the Code Napoléon,<sup>99</sup> supports a splitting of the incidents of ownership by its very wording.<sup>100</sup> This exception founded in the French law was directly adopted in early decisions<sup>101</sup> of the Louisiana courts. The Uniform Bills of Lading Act, in force in Louisiana, clearly states that if only the form of the bill prevents title from passing to the buyer upon shipment, the seller's continu-

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99. FRENCH CIVIL CODE art. 1585 (Wright's transl. 1908).

100. That the drafters of the original article in the Code Napoleon intended it to provide for a splitting of the incidents of ownership is shown in the observations of the tribunal when the draft was submitted. In 9 FENER, DISCUSSIONS 85 (1836), the report of the tribunal reads (transl. by J. Denson Smith): "The only effect that the stated circumstance (i.e., the weighing, counting, or measuring) should produce is that, the sale not being accomplished, although it exists, the risks that the thing sold are exposed to, in this particular case, are at the charge of the seller until the weighing, counting, or measuring." If the sale "exists" though it has not been "accomplished" by a final determination and the giving of possession, and the thing is "sold," then can the conclusion be any other than that ownership has passed to the buyer while the seller retains possession much in the nature of a security interest and bears the risk because he is still in control of the goods? This conclusion is supported by the fact the article was made to provide, and the tribunal further observed, that in such a case the buyer has the real right of demanding the goods. Such a right, it is submitted, would not attach were not the buyer meant to be vested with ownership.

101. See note 89 *supra*.



ing property interest in the goods is only for the purpose of securing performance.<sup>102</sup> This should lead to the conclusion that risk falls on the buyer during shipment despite the seller's reservation of a security interest through, for example, a "Shipper's Order Notify" bill. But the courts have avoided such a conclusion. As said in *C. W. Greeson Co. v. Harnischfeger Corp.*:<sup>103</sup>

"Prompted by a reluctance to countenance any sort of splitting of the incidents of ownership, our courts have construed this provision to mean that, where goods delivered f.o.b. to a carrier are consigned to the vendor, risk of loss remains in said vendor during transit unless there is an express agreement between the parties that the risk is to be assumed by the vendee upon delivery to the carrier."

The contrary, and it is submitted, the proper, interpretation generally prevails in common-law jurisdictions, the usual statement being that title and risk both pass to the buyer despite the shipper's reservation which gives the vendor a special property in the goods to secure payment from the buyer, thereby withholding possession from the buyer.<sup>104</sup>

If in the French sources of Louisiana law, in the Civil Code itself, and in an even later expression of the legislative will, the Uniform Bills of Lading Act, there exists a basis for splitting the incidents of ownership in certain situations, Louisiana should not be reluctant to accept that theory as embodied in the UCC regarding risk and title. Such an approach seems to be more just and practically adapted to modern business customs, and the clearly-worded rules of the UCC might well prove far easier to apply than the often ambiguous and difficult jurisprudential tests which now surround transfer of risk and title under Louisiana law.

CHARLES S. WEEMS, JR.

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102. LA. R.S. 45:940(2) (1950).

103. 231 La. 934, 949, 93 So.2d 221, 226 (1957).

104. *Alderman Bros. Co. v. Westinghouse Air Brake Co.*, 92 Conn. 419, 103 Atl. 267 (1918); *Maffei v. Ginocchio*, 299 Ill. 254, 132 N.E. 518 (1921); *Standard Casing Co. v. California Casing Co.*, 233 N.Y. 413, 135 N.E. 834 (1922); *Sawyer v. Dean*, 114 N.Y. 469, 21 N.E. 1012 (1889).