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Obligations

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LEGISLATION

Prescription of Claims Against Joint Tortfeasors

During the 1988 session, the legislature once again turned its attention to the nature of the liability of joint tortfeasors.[1] In 1987, the legislature amended and reenacted article 2324 of the Civil Code, imposing joint rather than solidary liability on joint tortfeasors other than those who conspire to cause harm.[2] As noted in the discussion of that amendment in last year's symposium, the legislature suppressed the attendant effects of solidarity by defining joint tortfeasors as joint obligors.[3] One of these effects, the rule that an act sufficient to interrupt prescription against one joint tortfeasor is effective against all, was reinstated in 1988.

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1. For a discussion of the action taken by the legislature in this field last year, see Schewe, Developments in the Law, 1986-1987—Obligations, 48 La. L. Rev. 423 (1987).

2. La. Civ. Code art. 2324 (as amended and reenacted by 1988 La. Acts 373):

> A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.
>
> B. If liability is not solidary pursuant to Paragraph A, or as otherwise provided by law, then liability for damages caused by two or more persons shall be solidary only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages; however, when the amount of recovery has been reduced in accordance with the preceding article, a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of fault has been attributed. Under the provisions of this Article, all parties shall enjoy their respective rights of indemnity and contribution. Except as described in Paragraph A of this Article, or as otherwise provided by law, and hereinabove, the liability for damages caused by two or more persons shall be a joint, divisible obligation, and a joint tortfeasor shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, or immunity by statute or otherwise.

3. Schewe, supra note 1, at 425.

Act 430 of 1988 added paragraph C to article 2324:

> Interruption of prescription against one joint tortfeasor, whether the obligation is considered joint and divisible or solidary, is effective against all joint tortfeasors. Nothing in this Subsection shall be construed to affect in any manner the application of the provisions of R.S. 40:1299.41(G).

Under this amendment, nonconspiratorial joint tortfeasors remain joint obligors but they are now expressly subject to the same mechanisms of interrupting prescription as are solidary obligors.[4] Although the legislation is straightforward, it does raise a few issues that deserve mention.

The revisions of article 2324 raise an interesting question of retroactivity: whether the 1988 revision should apply retroactively to all cases governed by the 1987 revision. Paragraph B of article 2324, added by Act 373 of 1987, became effective on September 1, 1987,[5] and, according to a recent court decision,[6] governs any delict occurring after that date. Consequently, a delict occurring after September 1, 1987, will not create a solidary obligation and, putting aside for a moment the effect of article 2324(C), a suit filed against one tortfeasor should not interrupt prescription against other joint tortfeasors.

Victims of delicts that occurred after September 9, 1987, may be able to take advantage of the protection afforded by article 2324(C). Although paragraph C may not have been effective when the delict occurred, the one-year prescriptive period[7] for a delict that occurred after September 9, 1987, would not expire until *after* September 9, 1988, the effective date of the amendment.[8] Arguably, a suit filed anytime within this one-year period against one joint tortfeasor should be effective against all of them. This result should follow because the interruption of prescription occasioned by the *filing* or *pendency* of the suit[9] will extend beyond the effective date of article 2324(C).

For victims of delicts that occurred between September 1 and September 9, 1987, the application of article 2324(C) is more problematic. A claim that arose during this period may have prescribed before the

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4. See La. Civ. Code arts. 1799 & 3503.

5. Because Act 373 of 1987, amending and reenacting Louisiana Civil Code article 2324(B), did not specify an effective date, Louisiana Constitution article 3, § 19 provides that it became operative on the sixtieth day after the end of 1987 legislative session (September 1, 1987).

6. Adamson v. City of Lafayette, 521 So. 2d 1258, 1261 (La. App. 3d Cir.), writ denied, 526 So. 2d 798 (1988).

7. La. Civ. Code art. 3492.

8. Act 430 of 1988, which added Civil Code article 2324(C), also did not specify an effective date and, accordingly, became operative on the sixtieth day after the end of the 1988 legislative session (September 9, 1988). See supra note 5.

9. See La. Civ. Code arts. 3462 & 3463.

effective date of article 2324(C). Thus, even if the victim commenced a timely suit against one joint tortfeasor, because any cause of action he might have had against the others would have prescribed before article 2324(C) became effective, the filing of the suit would not operate to interrupt prescription against all. The retroactive operation of article 2324(C) would cure this problem, and statutes that lengthen prescriptive periods are generally applied retroactively. It is, however, uncertain at this point whether the courts will use article 2324(C) to resurrect claims that arose, could have been sued upon, and would have prescribed before the effective date of its enactment,[10] although this result would not inequitably affect a tortfeasor against whom prescription has not been tolled and would be consistent with the remedial spirit of Act 430.

The express provision that paragraph C of article 2324 is not to apply to Louisiana Revised Statutes 40:1299.41(G), part of the Medical Malpractice Act, raises another question regarding the 1987 change to article 2324.[11] Essentially, section 1299.41(G) provides that, when a claim against a qualified health care provider is filed with a medical review panel, prescription is suspended against all other solidarily liable health care providers. Although this section should be applied without respect to paragraph C of article 2324, references to paragraphs A and B of article 2324 may be proper.[12] If paragraph B of article 2324 were invoked, section 1299.41(G) would have no effect at all, for that section suspends prescription only against health care providers who are *solidarily* liable. Unless it results in a breach of contract, medical malpractice gives rise to a delictual obligation,[13] one that is not likely to be solidary under the 1987 amendment to article 2324(B). Thus, under article 2324 and section 1299.41(G), as presently worded, a medical malpractice claimant who files a demand against a qualified health care provider in a medical review panel proceeding may not be able to rely upon that demand to suspend or interrupt prescription against other potentially liable health

10. Statutes modifying periods of repose generally are given retroactive effect upon the premise that they are procedural or remedial in nature. See La. Civ. Code art. 6, comment (d); Lott v. Haley, 370 So. 2d 521 (La. 1979). The jurisprudence on the subject, however, appears to have considered only the choice of applying the law in effect at the time the cause of action arose or the law in effect at the time the suit was filed. E.g., Barfield v. Barfield, 483 So. 2d 1085, 1089 (La. App. 2d Cir. 1986). Apparently, no court in Louisiana has yet confronted a case in which it was necessary to apply a statute affecting prescription that was enacted *after the filing of the suit.*

11. Although the "interruption" provisions of article 2324(C) appear different from the "suspension" tenets of Louisiana Revised Statutes 40:1299.41(G), the distinction went unnoticed in at least one case. Ferguson v. Lankford, 374 So. 2d 1205, 1208 (La. 1979).

12. Presumably, the words "this Subsection" in article 2324(C) refer to paragraph (C) and not the entire article.

13. La. R.S. 40:1299.41(A)(8) (1977 & Supp. 1988).

care providers who are not joined in that claim or sued separately in court.

Employer's Right to Contribution or Indemnity Against Employee

Besides addressing problems associated with the prescription of claims against joint tortfeasors, the legislature, during the past session, attempted to correct difficulties that have arisen in a quite different area of the law of obligations, namely, the right of an employer who has been held liable for the negligence of an employee to sue that employee for contribution or indemnification. Louisiana Revised Statutes 9:3921, as enacted in 1984, precluded a derivatively responsible employer from obtaining indemnification or contribution from a primarily liable employee when that employee had received a "remission, transaction, compromise, or other conventional discharge" from the damaged creditor.[14] In *Barbin v. State*,[15] discussed last year, the first circuit held that this statute did not prevent an employer from recovering indemnification from an employee when both were cast in judgment. As the court correctly observed, section 3921 protected the employee from claims for indemnification only if he entered into a "transaction or compromise or conventional discharge with the damaged creditor."[16] In 1988 the legislature negated this holding. The full text of paragraph A of the statute, with the modifications highlighted, now reads as follows:

> Nothwithstanding any provision in Title III of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950 to the contrary, every master or employer is answerable for the damage occasioned by his servant or employee in the exercise of the functions in which they are employed. Any remission, transaction, compromise, or other conventional discharge in favor of the employee, *or any judgment rendered against him for such damage* shall be valid as between the damaged creditor and the employee, and the employer shall have no right of contribution, division, or indemnification from the employee nor shall the employer be allowed to bring any incidental action under the provisions of Chapter 6 of Title I of Book II of the Louisiana Code of Civil Procedure against such employee.[17]

The change in the language of section 3921, in apparent response to *Barbin*, suggests the legislature has decided that an employer who is liable and is compelled to pay because of an employee's negligence

14. La. R.S. 9:3921 (Supp. 1988 & as amended by 1988 La. Acts No. 401).
15. 506 So. 2d 888 (La. App. 1st Cir. 1987).
16. Id. at 894.
17. La. R.S. 9:3921(A), as amended by 1988 La. Acts No. 401.

should not have a demand for indemnification. But if this speculation is accurate, the legislature's task is not complete: the right to indemnification when the employee neither joins in the suit nor settles with the creditor still remains.

As a consequence, both the employer and the employee may be forced into anomalous positions in the face of a claim against one or both of them. Although the derivatively liable employer is interested in receiving indemnification, he will not want an employee in the creditor's lawsuit because a judgment against the employee will destroy his claim for reimbursement. The employee faces another dilemma: if he is sued by the creditor, he escapes liability to his employer; but if he is not joined by the creditor, he may be sued later by his employer. Thus, oddly, the employee may wish to be named as a defendant in the litigation; if he is cast in judgment with his employer, and the creditor seeks and obtains satisfaction of the judgment from the employer first, he will avoid liability altogether. In that event the employee will have the best of both worlds: the creditor, because the employer will have paid the judgment, will not be able to collect from him, and the employer, by virtue of section 3921, will be barred from seeking indemnification or contribution.

JURISPRUDENCE

During the past year the reported decisions treated a number of subjects within the law of obligations, including cause,[18] novation,[19] contract formation,[20] conditions,[21] compensation,[22] stipulations pour au-

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18. E.g., Lauer v. Catalanotto, 522 So. 2d 656 (La. App. 5th Cir. 1988).

19. E.g., C & A Tractor Co. v. Branch, 520 So. 2d 909, 910 (La. App. 3d Cir. 1987) ("Under La. C.C. art. 1881, a novation takes place when the parties expressly declare their intention to extinguish the original obligation . . . and substitute a new obligation. . . .").

20. E.g., O'Neal v. Chris Steak House, Inc., 525 So. 2d 325, 327 (La. App. 1st Cir. 1988); Merchants Trust & Sav. Bank v. Olano, 512 So. 2d 1218, 1221 (La. App. 5th Cir. 1987) ("A promise to pay money need not be in writing unless it is a promise to pay the debt of a third person.").

21. E.g., O'Neal v. Chris Steak House, Inc., 525 So. 2d 325, 328 (La. App. 1st Cir. 1988) ("[A]n obligor cannot be permitted to benefit from his having prevented the fulfillment of the condition upon which his obligation rests and that in such instance the condition is to be considered fulfilled. LSA-C.C. art. 2040 (1870); Moss v. Guarisco, 459 So. 2d 1 (La. App. 1st Cir. 1984), writ denied, 462 So. 2d 1247 (La. 1985).").

22. E.g., Mega Transp., Inc. v. Kieffer, 526 So. 2d 460, 462 (La. App. 5th Cir. 1988) ("The jurisprudence has established that for set-off to be applicable there must be the contemporaneous existence of distinct debts that are equally liquidated and demandable. Beninate v. Licata, 473 So. 2d 94 (La. App. 5th Cir. 1985), writ denied, 477 So. 2d 1124 (La. 1985)."); Powerhouse Wholesale Elec. Supply, Inc. v. Spartan Bldg. Corp., 525 So. 2d 1216, 1221 (La. App. 1st Cir. 1988) ("[F]or compensation to be applicable,

trui,[23] proof of agreements,[24] solidarity,[25] compromises,[26] subrogation,[27] lesion,[28] revocation of agreements,[29] performance,[30] interference with contract rights,[31] accord and satisfaction,[32] and interpretation of agreements.[33] The more significant or the more unusual of the opinions are noted in the following discussion.

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two distinct debts, equally liquidated and demandable, must exist contemporaneously. United States Fidelity & Guaranty Company v. Southern Excavation, Inc., 480 So. 2d 920 (La. App. 2d Cir. 1985), writs denied, 481 So. 2d 1337 and 1339 (La. 1986)."); Sims v. Hays, 521 So. 2d 730, 733 (La. App. 2d Cir. 1988) ("A claim is liquidated when the debt is for an amount capable of ascertainment by mere calculation in accordance with accepted legal standards. Olinde Hardware & Supply v. Ramsey, 98 So. 2d 835 (La. App. 1st Cir. 1957); Coburn v. Comm'l Nat'l Bank, 453 So. 2d 597 (La. App. 2d Cir. 1984), writ denied 457 So. 2d 681 (La. 1984). Aubry and Rau define a liquid debt as one whose existence is certain and its quantity determined.").

23. E.g., Spears v. McCormick & Co., 520 So. 2d 805, 812 (La. App. 3d Cir. 1987), writ denied, 522 So. 2d 563 (1988) ("The fact that a third party may incidentally derive a benefit from a contract does not necessarily create a stipulation pour autrui. State Farm Fire and Casualty v. Williams, 486 So. 2d 849, 851 (La. App. 1st Cir. 1986).).

24. E.g., Frank v. Motwani, 513 So. 2d 1170 (La. 1987); Swindell v. Bulger, 526 So. 2d 422, 424 (La. App. 4th Cir. 1988) ("[S]ince construction contracts do not have to be in writing in this state, written construction contracts may be modified by oral agreement and by the conduct of the parties, even when the written contract provides that all change orders must be in writing. Pelican Electrical Contractors v. Neumeyer, 419 So. 2d 1, 5 (La. App. 4th Cir. 1982), writ denied, 423 So. 2d 1150 (La. 1982).").

25. E.g., Travis v. Hudnall, 517 So. 2d 1085 (La. App. 3d Cir. 1987).

26. E.g., Willett v. Price, 515 So. 2d 477 (La. App. 1st Cir. 1987), writ denied, 516 So. 2d 367 (1988).

27. E.g., Smith v. Manville Forest Prod. Corp., 521 So. 2d 772 (La. App. 2d Cir.), writ denied, 522 So. 2d 570 (1988).

28. E.g., Nation v. Wilmore, 525 So. 2d 1269, 1270 (La. App. 3d Cir. 1988) ("In an action for lesion beyond moiety, the vendor must prove by clear and convincing evidence that the price given was less than one-half of the value of the thing sold. LSA-C.C. arts. 2589, 2591; Bisco v. Middleton, 383 So. 2d 1047 (La. App. 1st Cir. 1980). The standard to be applied to determine the value of the property is the fair market value at the time of the sale. LSA-C.C. art. 2590; Goulas v. Goulas, 426 So. 2d 735 (La. App. 3d Cir. 1983)."); Landry v. Istre, 510 So. 2d 1310, 1314-15 (La. App. 3d Cir. 1987).

29. E.g., Frank v. Motwani, 513 So. 2d 1170 (La. 1987).

30. E.g., Hanover Petroleum Corp. v. Tenneco, Inc., 521 So. 2d 1234 (La. App. 3d Cir.), writ denied, 526 So. 2d 800 (1988).

31. E.g., Professional Answering Serv., Inc. v. Central Louisiana Elec. Co., 521 So. 2d 549, 551 (La. App. 1st Cir. 1988) (" 'Forcum-James [Co. v. Duke Transportation Co., 231 La. 953, 93 So. 2d 228 (1957)] appears to establish the dogmatic rule that there is no cause of action for tortious (intentional or negligent) interference with contracts.' . . . We concluded, reluctantly, that *Forcum-James* had not been overruled by PPG Industries [Inc. v. Bean Dredging, 447 So. 2d 1058 (La. 1984)]. . . .") (quoting Community Coffee Co. v. Tri-Parish Const. & Materials, Inc., 490 So. 2d 1109 (La. App. 1st Cir. 1986).).

32. E.g., Barras v. Breaux, 526 So. 2d 1231 (La. App. 3d Cir. 1988) (dation en paiement is an accord and satisfaction or a compromise).

33. E.g., Ciaccio v. Cazayoux, 519 So. 2d 799, 802 (La. App. 1st Cir. 1987) ("[C]ourts

Lawful Cause and Objects for Contracts

From time to time, courts have questioned the validity of the lawfulness of the cause or the object of an agreement.[34] These matters historically have involved prostitution[35] or gambling.[36] *Lauer v. Catalanotto*,[37] seems to fall in the latter category. A more exacting review of the case, however, is in order.

Mr. Lauer sued Mr. Catalanotto for breach of contract, contending that they had combined in a joint venture for the purpose of gambling.[38] According to Mr. Lauer, the details of the agreement were as follows: (i) Mr. Catalanotto was to travel to Las Vegas, Nevada to participate in games of chance for a period of four to five days; (ii) Mr. Catalanotto was to put $10,000 at risk in this enterprise; and (iii) Mr. Lauer, who was to be at Las Vegas at the same time as Mr. Catalanotto, would absorb one-half of any of the losses and would receive one-half of any of the winnings.[39] Mr. Lauer urged in his petition that Mr. Catalanotto won $16,000 as a result of his gaming activities, but then refused to turn over Mr. Lauer's share. For his part, Mr. Catalanotto denied these assertions.[40]

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are bound to give legal effect to all written contracts according to the true intent of the parties and this intent is to be determined by the words of the contract when these are clear, explicit, and lead to no absurd consequences. LSA-C.C. arts. 2045, 2046; Leenerts Farms, Inc. v. Rogers, 421 So. 2d 216 (La. 1982).").

34. E.g., A Better Place, Inc. v. Gianni Inv. Co., 445 So. 2d 728 (La. 1984) (drug paraphernalia); Schwegmann v. Schwegmann, 441 So. 2d 316 (La. App. 5th Cir.), writ denied, 443 So. 2d 1122 (1983), cert. denied, 467 U.S. 1206, 104 S. Ct. 2389 (1984) (meretricious services). See Schewe, Developments in the Law, 1983-1984—Obligations, 45 La. L. Rev. 447, 451-53 (1984).

35. E.g., Rosenblath v. Sanders, 150 La. 882, 91 So. 2d 252 (1922).

36. E.g., Martin v. Seabaugh, 128 La. 442, 54 So. 935 (1911); Lamy v. Will, 140 So. 2d 794 (La. App. 4th Cir. 1962).

37. 522 So. 2d 656 (La. App. 5th Cir. 1988).

38. Id. at 657.

39. Id.

40. As stated by the court,

> In his answer, defendant asserted that plaintiff had approached him about entering into a "cow" in which they would both put up an equal amount of money, with defendant doing the gambling and the two sharing in the profits and/or losses in the "cow." Defendant alleged that upon arriving in Las Vegas, plaintiff decided not to enter the "cow" with defendant; that plaintiff did not mention it further; that defendant made a $1,300 personal loan to plaintiff and that plaintiff made no reference to the "cow." Defendant reconvened for repayment of the alleged loan and also sought damages for defamation, alleging plaintiff had "slandered the name of [defendant] all over this town calling him various and sundry names ***."

Id.

Prior to trial, Mr. Catalanotto moved for a summary judgment on the ground that article 2983 of the Civil Code[41] forbids the recovery of gaming debts. The district court denied the motion for two reasons: first, a material issue of fact existed whether the litigants entered into the agreement described by Mr. Lauer; and second, Mr. Lauer was not prohibited, as a matter of law, from prevailing on the debt "because the gambling took place in Las Vegas, where gambling is legal."[42] At the trial of the matter, the district court concluded that it had "no doubt that plaintiff thought he had an agreement,"[43] but that he, nevertheless, had not satisfactorily proved the existence of the contract. Mr. Lauer appealed.

The fifth circuit, in reversing the judgment, explained its rationale as follows:

> We find plaintiff's petition failed to state a cause of action because recovery of gambling debts is specifically prohibited by Article 2983 of the Civil Code . . . . [T]he fact that the gambling took place in a state in which it is legal does not grant plaintiff a remedy to recovery such monies under Louisiana Law. Louisiana public policy traditionally has considered gaming *contra bonos mores* and our state constitution has long directed the legislature to suppress gambling.[44]

Insofar as the court simply recited the maxim that gaming contracts are not enforceable under the law of Louisiana, it certainly blazed no new path. The court's interpretation of Louisiana law was both consistent with prior jurisprudence and correct.

What is interesting about the decision is not what the court said, but rather what it omitted. The court wholly overlooked the question of what substantive law governed the purported agreement between Mr. Lauer and Mr. Catalanotto. The factual recitation by the court does not disclose any of the information pertinent to that inquiry, for example: (i) where the parties were located at the time they confected their agreement; (ii) whether either or both Mr. Lauer or Mr. Catalanotto

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41. La. Civ. Code art. 2983 reads as follows:

> The law grants no action for the payment of what has been won at gaming or by a bet, except for games tending to promote skill in the use of arms, such as the exercise of the gun and foot, horse and chariot racing.

42. 522 So. 2d at 657.

43. Id. The appellate panel stated that "[t]he judge relied on the testimony of a third party who stated he had overheard the parties' conversation prior to the Las Vegas trip, that . . . 'defendant did not accept or reject' the offer." Id. The district court also granted judgment on the reconventional demand.

44. Id. at 657-58 (citing La. Const. art 7, § 6; La. Const. art. 9, § 8 (1921); La. R.S. 14:90 (1986)).

are domiciliaries of Louisiana; and (iii) whether the parties intended the law of Nevada to control their pact.[45]

Depending upon further development of the evidence, it may be concluded that the fundamental issue that requires decision is of jurisdiction over the subject matter—whether, in light of article 2983, Louisiana courts provide an available forum in which to bring a claim based upon the law of another State (in this instance Nevada), when the foreign law is repugnant to the public policy of this state. This examination, however, directs only a dismissal of the suit for want of jurisdiction and will not produce a decision on the merits (the validity of the agreement that forms the subject matter of the litigation).[46] Assuming that the alleged contract between Mr. Lauer and Mr. Catalanotto was formed under and is governed by the laws of Nevada, then the court simply should not have ruled upon the enforceability of their agreement; it should have declined to hear their dispute. The issues in this conflict of laws scenario[47] are complex and a full treatment of them is beyond the scope of this portion of the symposium. Nevertheless, it should be noted that if Mr. Lauer could have obtained personal jurisdiction over and sued Mr. Catalanotto in the court system of Nevada, a final judgment, rendered in his favor and made executory in Louisiana, would have been enforceable against Mr. Catalanotto by virtue of the full faith and credit clause of the Constitution of the United States.[48]

Subrogation

In the past the courts questioned whether an insurer is legally subrogated to the rights of its insured upon payment of the claim.[49]

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45. See Louisiana Conflicts Jurisprudence: Contracts Symposium, 47 La. L. Rev. 1181, 1196-1211 (1987) (hereinafter "Contracts Symposium"); see also Beale, What Law Governs the Validity of a Contract, 23 Harv. L. Rev. 260 (1909).

46. Inherent in this is a word-by-word review of the beginning of the text of article 2983—"[t]he law grants no action. . . ." It may be that "[t]he law" refers to the judicial system, as established by the state constitution, the substantive law, and the Code of Civil Procedure and its ancillaries. Thus, even if the agreement by and between Mr. Lauer and Mr. Catalanotto is controlled by the laws of Nevada and is lawful, it could not be enforced through the courts of Louisiana. Alternatively, "[t]he law grants no action" may be the expression of the legislature that the courts of this State are open to present demands arising out of gaming arrangements but that agreements of this sort are invalid substantively, to the extent not inconsistent with the Constitution of the United States, regardless of the laws of the jurisdiction or jurisdictions where they were confected or had effect. See infra note 48 and accompanying text.

47. See Contracts Symposium, supra note 45, at 1196-1211.

48. U.S. Const. art. IV, § 1; Fauntleroy v. Lum, 210 U.S. 230, 28 S. Ct. 641 (1908).

49. [T]he issue of legal suborgation of an insurer to the rights of its insured against a tortfeasor upon payment of the claim of the insured is not only a mystery in the law of Louisiana but is mired in a Serbonian bog, using the

Eventually, that issue was resolved in favor of the insurer.[50] During the past year, however, the second circuit court of appeal correctly declined to allow legal *or* conventional subrogation of an insurer to the rights of its insured prior to full satisfaction of the insured's losses.[51] In so ruling, the court in *Smith v. Manville Forest Products Corp.*[52] did not permit the insurer to compete with the insured with respect to recovery.

Although the background of the case is complicated, the significant events may be set forth as follows. Mr. Smith's wife and son were injured in an automobile accident caused by the negligence of Lori Patten. At the time of the accident, Mr. Smith, an employee of Manville Forest Products Corporation ("Manville"), and his family participated in a health care plan administered by an affiliate of Manville. Mr. Smith submitted to Manville a statement of the medical expenses that resulted from the injuries to his child. He then secured court approval to enter into a compromise agreement with Ms. Patten and her liability insurer on behalf of his son, and received the full coverage of $10,000. Manville refused to pay any expenses until Mr. Smith signed a "Right of Reimbursement Agreement."[53] Mr. Smith executed this document, reserving

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inimitable prose of Justice Cardozo, Landress v. Phoenix Mutual Life Insurance Co., 291 U.S. 491, 499, 54 S. Ct. 461, 463 (1934) (Cardozo, J., dissenting). Professor Johnson waxed eloquent on the subject in this symposium a few years ago, and his thoughts are recommended. . . . Johnson, The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Obligations, 39 La. L. Rev. 675, 675-85 (1979).

Schewe, Developments in the Law, 1984-1985—Obligations, 46 La. L. Rev. 595, 607 (1986).

50. Aetna Ins. Co. v. Naquin, 488 So. 2d 950 (La. 1986). See Schewe, Developments in the Law, 1985-1986—Obligations, 47 La. L. Rev. 377, 383 (1986).

51. Smith v. Manville Forest Prod. Corp., 521 So. 2d 772 (La. App. 2d Cir.), writ denied, 522 So. 2d 570 (1988).

52. Id.

53. Section 7.08 of the "Right of Reimbursement Agreement" reads as follows:

Subrogation

If a Participant is injured through the alleged act or omission of another person, the benefits shall be provided only if the Employee or adult Dependent shall agree in writing.

(a) to reimburse this Plan for the amount of benefits provided immediately upon collection of damages, if any, whether by legal action, settlement or otherwise;

(b) to the extent that collection of damages is sought through any means, to provide this Plan with a lien and order directing reimbursement of medical payments, not to exceed the amount of benefits provided by this Plan. The lien and order may be filed with the person whose act caused the injuries, his agent or carrier, the court or the attorney of the Employee. This Plan or its authorized agents including the Administrator, shall have the right to intervene in any suit or other proceeding to protect the reimbursement rights hereunder. This Plan shall be responsible for its attorneys fees.

Id. at 774.

all rights against his own uninsured/underinsured ("UM") carrier. Mr. Smith then entered into a court-approved settlement with his UM carrier on behalf of his son, receiving $24,500 of the $25,000 coverage under the policy. When Mr. Smith submitted additional claims to Manville, it refused to make further payments and demanded reimbursement of the $10,377.78 it previously had paid. At this point Mr. Smith sought a declaratory judgment that Manville was not entitled to "reimbursement or subrogation from the insurance proceeds."[54] Manville answered and, via a reconventional demand, sought a money judgment for the sums already paid. The district court, presumably overlooking the principle embodied in article 1826 of the Civil Code, that an insurer's subrogation is not to injure the insured, granted a motion for summary judgment in favor of Manville, concluding that the "Subrogation" provision of the "Right of Reimbursement Agreement" not only established a right of subrogation against third persons but required "the insured participant to reimburse the plan [by direct payment] in the event of any recovery."[55]

On appeal, as before the district court, Mr. Smith contended that his son's damages exceeded the available insurance and that the "Subrogation" clause, because it provided for conventional subrogation, was inoperative until his son, the subrogor, was fully compensated. The appellate court, assuming for the purposes of the appeal that the "plaintiff's son's damages exceeded the available amount of insurance proceeds,"[56] reversed the judgment and remanded the matter for a determination of whether the son had been fully compensated. In its discussion, largely centering on the distinction between reimbursement and subrogation clauses in insurance agreements, the court made the following remark of importance regarding conventional subrogation:

> An insurer that makes payment to its insured may enforce a conventional subrogation agreement contained in its policy. However, subrogation cannot injure the insured, and if he has been paid only in part for his damages, he may exercise his right for what remains due in preference to his insurer.[57]

The soundness of the second circuit's conclusion may be demonstrated through a few short illustrations. Suppose A is the insurer, B is the insured, and C is the tortfeasor. By reason of C's negligence, B suffers damages of $50,000. C pays B $30,000, A pays B $20,000, and

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54. Id.

55. Id. at 775.

56. Id.

57. Id. (citing La. Civ. Code art. 1826; Southern Farm Bureau Cas. Ins. Co. v. Sonnier, 406 So. 2d 178 (La. 1981); Carter v. Bordelon, 370 So. 2d 113 (La. App. 1st Cir. 1979); Legendre v. Rodrigue, 358 So. 2d 665 (La. App. 1st Cir.), writ denied, 359 So. 2d 1293 (1978)).

A then is subrogated to B's rights[58] against C (in order to proceed against C for indemnification[59]). This is as it should be. C, the wrongdoer, ultimately pays $50,000 (the total loss), A is fully compensated, and B loses nothing. But suppose that C pays $10,000 and A pays B $20,000. In that case, B, though he has sustained a loss of $50,000, will have received only $30,000 from both A and C. Thus, A should have no claim against C until either A *or* C pays B another $20,000. This is the result dictated by article 1826 of the Civil Code.[60] Of course, a different situation altogether is presented if A pays B $20,000 and C pays B $50,000. Then C has satisfied B's demand and A should be entitled to the return of $20,000 from B. In light of these hypotheticals, it appears that the decision in *Smith v. Manville Forest Products Corp.* is both fair in its result and sound in its reasoning.

Defenses to Performance

The case of *Hanover Petroleum Corp. v. Tenneco, Inc.*[61] is noteworthy because the Louisiana Third Circuit Court of Appeal, in the context of a "take-or-pay"[62] gas contract dispute, refused to adopt either

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58. The insurer must be wary, however, particularly if the insured has released the tortfeasor. "Subrogation is subrogation . . . whether conventional or legal, it does no more than place the person subrogated into the position of the original creditor." Jilek v. Covert, 465 So. 2d 102, 103 (La. App. 4th Cir. 1985) (citations omitted). See Reliance Ins. Co. v. Tadlock, 420 So. 2d 548, 549 (La. App. 2d Cir. 1982) ("It is well settled that a subrogee can have no greater rights than the subrogor and acquires only those rights held by the subrogor as of the time of payment.").

59. La. Civ. Code art. 1804:

> Among solidary obligors, each is liable for his virile portion. If the obligation arises from a contract or quais-contract, virile portions are equal in the absence of agreement or judgment to the contrary. If the obligation arises from an offense or quasi-offense, a virile portion is proportionate to the fault of each obligor.
>
> A solidary obligor who has rendered the whole performance, though subrogated to the right of the obligee, may claim from the other obligors no more than the virile portion of each.
>
> If the circumstances giving rise to the solidary obligation concern only one of the obligors, that obligor is liable for the whole to the other obligors who are then considered only as his sureties.

60. In part, article 1826 states that "[a]n original obligee who has been paid only in part may exercise his right for the balance of the debt in preference to the new obligee." Amplifying upon this notion, comment (e) to article 1826 provides the following: "If the subrogee pays only a part of the obligor's debt, the original obligee retains the right to be paid the balance by the obligor. This right takes precedence over that of the subrogee to collect the portion that he paid. . . ."

61. 521 So. 2d 1234 (La. App. 3d Cir.), writ denied, 526 So. 2d 800 (1988).

62. The appellate panel quoted from the opinion of the district court in this matter in describing the nature of the agreement:

the French theory of imprevision or the common law doctrine of commercial impracticability in order to reform the contract.[63] Both of these concepts deserve a brief review.

The theory of imprevision has its origins in the public law of France, developed through the administrative tribunals shortly after the outbreak of World War I. In the seminal matter, the Conseil d'Etat afforded a utility company relief from certain terms in a contract with a municipality that had been entered into prior to the War, based upon the drastic turn of events.[64] The tribunal, reasoning that the utility company should not be held to the provisions of the agreement as long as the extraordinary situation existed, granted the petition. Accordingly, the administrative court ordered the municipality to defray a portion of contractual charges that otherwise would have been due.

Since its debut in France, the theory of imprevision has been used only by administrative panels and has been limited to public law contracts, typically agreements between utilities and municipalities. The Cour de Cassation, the chief French judicial body (or court of law), has refused to extend the boundaries of the doctrine.[65] Several scholars have noted why the Cour de Cassation has refused to invoke imprevision in nonadministrative matters, including the following: the judicial courts may be concerned that the excuse of imprevision would encourage bad faith behavior of contracting parties and, therefore, result in an aggravation of the economic life of the community; because of the drastic intrusion of the courts into contractual affairs inherent in the application of the doctrine and because the relief is contrary to general civilian principles, the judicial courts believe that only the legislature should authorize this type of defense; and the doctrine is contrary to the civil law tradition of respecting the intentions of the parties as expressed

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Historically Louisiana jurisprudence has recognized these type of requirements contracts which have been viewed as a veritable constitution between the parties to govern future sales. See 6 S. Litvinoff, Louisiana Civil Law Treatise § 119 n.32, § 284 n.47 (1969); Hopkins, 49 Tulane Law Review 605 (1975). In fact, take-or-pay provisions are commonplace in the natural gas industry and are not unconscionable or unfair. Sid Richardson Carbon & Gasoline Co. v. Internorth, Inc. 595 F. Supp. 497 (N.D. Tex. 1984). The Seller's obligation is twofold: (1) insuring that the buyer receives all the goods he requires and (2) supplying the goods at the fixed contract price regardless of market fluctuations. The buyer thereby is assured of his supply and is insulated from increases in the market price. In return, he assures the seller a ready market for his goods at a fixed price.

521 So. 2d at 1239.

63. Id. at 1240.

64. Comp. General d'Eclairage de Bordeaux v. Ville de Bordeaux, Cons. d'Etat, 30 Mars 1916, D. 1916 111.25.

65. Smith, Impossibility of Performance as an Excuse in French Law: The Doctrine of Force Majeure, 45 Yale L.J. 453, 457-58 (1936).

through their agreements.[66] In short, the theory of imprevision has not been extended because the public interest demands that respect for agreements lawfully confected be fortified, not diminished.

Like the courts of law in France, the judiciary in Louisiana has refused to receive the doctrine of imprevision. No court in Louisiana has used the doctrine to modify or revise a contract. Indeed, before *Hanover*, it had been mentioned only twice—by former Justice Tate in his dissent in *Cryer v. M & M Manufacturing Co.*,[67] and in *Armour v. Shongaloo Lodge No. 352 Free and Accepted Masons*.[68]

Furthermore, the court's refusal in *Hanover* to apply the theory of imprevision for the purpose of modifying or revising contracts is proper because the theory is in diametrical conflict with Louisiana Civil Code articles 1983[69] and 2046.[70] The bargain of the parties to a contract forms

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66. M. Planiol, G. Ripert & P. Esmein, Droit Civil Français at 527-35 (2d ed. 1952).

67. Cryer v. M & M Mfg. Co., 273 So. 2d 818, 830 (La. 1972) (Tate, J., dissenting). In that case, the majority of the the court recognized the validity of a contract of sale involving the manufacturing rights to a heater that also included an agreement (i) to manufacture at least 5,000 heater units and (ii) to pay a royalty on each unit manufactured. In his dissent to the initial majority opinion, Justice Tate dissected the agreement into two separate obligations: the sale of the manufacturing rights; and the duties involved in manufacturing 5,000 units and paying a royalty on each. Justice Tate argued that the second obligation should be rescinded because of an error operating on the cause. In his dissent to the per curiam decision on rehearing, Justice Tate again restated his concurrence with the majority's decision with regard to the contract of sale but added an additional reason for his dissent with regard to the royalty agreement—that it was a conditional obligation, the existence of which was dependent upon an event yet to occur. In addition, Justice Tate mentioned this in passing:

> *Some* reliance *might* also be placed upon the modern civilian *theorie de l'imprevision*—the power of the courts to hold negated an obligation when change of circumstances or impossibility voids the presuppositions or reasonable expectations of the parties although not expressed, which formed an underlying basis for the agreement.

Id. at 830 (emphasis added). Not only did the majority of the supreme court disagree, but Justice Tate's own advocacy of this theory, in view of the nature of his comments, is at best speculative.

68. 342 So. 2d 600 (La. 1977). In *Shongaloo Lodge*, the supreme court, without agreeing on the grounds for its ruling, upheld the validity of a contract in the nature of a lease and granted a reconventional demand for specific performance. In its discussion regarding the rejection of the demands of the plaintiff, the court enumerated the various contentions:

> We have considered the *arguments* made, including lack of serious consideration, prescription against the action in nullity, and the classification of the contract as a loan for use. We have also considered the applicability of the theory of imprevision, the judicial revision of contracts.

Id. at 601 (emphasis added). This certainly is short of anything resembling an embrace of imprevision.

69. La. Civ. Code art. 1983:

> Contracts have the effect of law for the parties and may be dissolved only

their law, and courts should not interfere with freely confected agreements to attempt to fashion a seemingly fair result in a particular instance.

The doctrine of "commercial impracticability," like the theory of imprevision, is of relatively recent vintage. Unlike the French theory, however, this doctrine has received legislative sanction, though not in Louisiana; nevertheless, because the concept is periodically urged in the courts of Louisiana a discussion of it and the court's refusal to import it is appropriate.

Article 2-615 of the Uniform Commercial Code provides that performance may be suspended when it "has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid." However, as the official comments to article 2-615 provide, increased costs alone do not excuse performance unless those costs are due to an "unforeseen contingency altering the essential nature of . . . performance."[71] Further, "a rise or collapse in the market itself" provides no excuse since "that is exactly the type of business risk which business contracts made at fixed prices are intended to cover."[72] The rationale for these limitations has been explained as follows:

> The strictness of this rule is based on a number of considerations: the fact, for example, that the very purpose of a fixed price agreement is to place the risk of increased cost on the promissor (and the risk of decreased cost on the promisee). Further, enforcing the bargain struck encourages parties to attempt to foresee cost variations, and structure their agreements accordingly.[73]

Commercial impracticability differs fundamentally and irreconcilably from the concept of force majeure, the mechanism of the Civil Code

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through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith.

70. La. Civ. Code art. 2046:

> When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent.

71. U.C.C. § 2-615, Official Comment 4 (1988).

72. Id.

73. In re Westinghouse Elec. Corp., 517 F. Supp. 440, 453 (E.D. Va. 1981). See Bernina Distrib., Inc. v. Bernina Sewing Mach. Co., 646 F.2d 434 (10th Cir. 1981); Gulf Oil Corp. v. FPC, 563 F.2d 588 (3d Cir. 1977), cert. denied, 434 U.S. 1062, 98 S. Ct. 1235 (1978); Schafer v. Sunset Packing Co., 256 Or. 539, 474 P.2d 529, 530 (1970) ("A mere showing of unprofitability without more, will not excuse the performance of a contract.").

excusing the failure of a debtor "when it is caused by a fortuitous event that makes performance impossible."[74] Article 2-615 abandons physical impossibility of performance as the test for excusing performance and substitutes for it the notion of "impracticability." Because this standard is wholly foreign to the law of Louisiana, the court in *Hanover Petroleum Corp. v. Tenneco Inc.* correctly rejected it.

Oral Modification and Revocation of Writings

In *Frank v. Motwani*[75] the supreme court had the opportunity to resolve what should be settled: whether an agreement that must be evidenced in writing may be modified or revoked orally. Although the court addressed this issue no less than ten times in the past, it had failed to provide a definitive answer.[76] Unfortunately, the matter still is not free from confusion. Rather than resolving the question completely, the court drew a distinction between modifications and revocations, addressed the latter, ignored the former, and left the subject muddled.

The cloudiness in this area stems from the case of *Salley v. Louviere*[77] and the query whether a lessor or lessee can prove that a written contract of lease has been cancelled by oral communications. The intermediate appellate court concluded that admitting evidence of a subsequent oral cancellation of a written lease would violate the parol evidence rule set forth in article 2276 of the Civil Code of 1870.[78] In properly rejecting this view, the supreme court stated that "[i]t is well settled that this article of the Civil Code does not forbid the proving by parol evidence of a subsequent agreement to modify or to revoke a written agreement."[79] The court's misstep occurred when it made this similar but slightly different remark:

> This article of the Code [2276] is not to be construed so as to forbid the proving by parol evidence of a subsequent agreement

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74. See La. Civ. Code art. 1873.

75. 513 So. 2d 1170 (La. 1987).

76. E.g., Kaplan v. University Lake Corp., 381 So. 2d 385 (La. 1979); Torrey v. Simon-Torrey, Inc., 307 So. 2d 569 (La. 1974) (original hearing); Di Christina v. Weiser, 215 La. 1115, 42 So. 2d 868 (1949); Davidson v. Midstates Oil Corp., 211 La. 882, 31 So. 2d 7 (1947); Tholl Oil Co. v. Miller, 197 La. 976, 3 So. 2d 97 (1941); Arkansas Louisiana Gas Co. v. R. O. Roy & Co., 196 La. 121, 198 So. 768 (1940); Investors Homestead Ass'n v. Anglada, 193 La. 596, 192 So. 69 (1939); Conklin v. Caffal, 189 La. 301, 179 So. 434 (1938); Parlor City Lumber Co. v. Sandel, 186 La. 982, 173 So. 737 (1937); Salley v. Louviere, 183 La. 92, 162 So. 811 (1935).

77. 183 La. 92, 162 So. 811 (1935).

78. Id. at 97-98, 162 So. at 813. See La. Civ. Code art. 2276 (1870):

> Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since.

79. 183 La. at 98-99, 162 So. at 813.

> modifying or abrogating a written contract *of a character which the law does not require to be in writing.*[80]

The difficulty is that the prepositional phrase "of a character which the law does not require to be in writing" is susceptible of two different interpretations. First, this language may be read to state that the subsequent agreement must be in writing only if the original agreement is of a kind required by law to be in writing. On the other hand, the quoted words may imply that the subsequent agreement must be in writing only if *it* is of a kind that the law requires to be written. Unfortunately, the backdrop of *Salley v. Louviere* is of little assistance in determining the correct view; in that case the court addressed an agreement of lease, a contract that need not be in writing.[81] Nor have later courts resolved the question, for both perspectives of the quoted portion of the opinion in *Salley* find support in the jurisprudence.

In an excellent exposition of the parol evidence rule, the Orleans appeals court adopted the second interpretation, and wrote the following:

> There is nothing sacrosanct about a paper writing which invests it with solemnity and prevents its modification under some prescribed formalism. It may not be opposed unilaterally by parol. . . . It cannot be contradicted by oral evidence. . . . But oral testimony may be admitted to prove a subsequent agreement modifying or abrogating its terms. In that case the question is whether the subsequent convention or agreement is in proper form and if so it is admissible not to vary the written contract but as proof of another contract. The principle of law controlling the situation has no relation to the parol evidence rule but is based upon estoppel. A privy to an agreement cannot be heard to deny his connection therewith.[82]

To illustrate its view, the court set out a scenario in which A sells a movable to B via a written agreement. Subsequently, B, seeking to avoid the contract, receives A's oral assent to the dissolution of the sale and the return of the movable to A. This second transaction is, in the view of the court, valid because an agreement transferring title to a movable need not be in writing, irrespective of its negation of the written contract that originally existed between A and B. Thus, the court adopted a position that parol evidence is admissible to show a subsequent agreement so long as the second agreement need not be in writing to be effective, and that corresponds to the second interpretation of the statement in *Salley*.

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80. Id. at 98, 162 So. at 813 (emphasis added).
81. La. Civ. Code art. 2683.
82. Harvey v. Mouncou, 3 La. App. 231, 233 (Orl. 1925).

In the original hearing of *Torrey v. Simon-Torrey, Inc.*,[83] on the other hand, the supreme court apparently embraced the first view of *Salley*, namely, that proof of an oral agreement to modify or revoke a written contract is inadmissible, at least when the original agreement is one that must be in writing.[84] Complicating the picture, however, is the granting by the court of a rehearing to examine the issue more closely. And in the second opinion, the court declined to address the issue at all,[85] leaving in doubt the weight of its remarks on original hearing.

Without sure guidance from the supreme court, the first circuit court of appeal confronted the question squarely in *Arceneaux v. Adams*[86] and decreed that the parol evidence rule does not apply at all to subsequent agreements. The court, as a consequence, declared that an oral agreement to cancel a written contract to buy immovable property was valid, because there is no requirement that a subsequent agreement of this nature must be in writing.[87]

In *Kaplan v. University Lake Corp.*,[88] announced the year following *Arceneaux*, the supreme court employed similar reasoning. Without mentioning the parol evidence rule, the court determined that the parties to a written purchase agreement concerning immovable property could cancel the contract orally.[89] In support of this proposition the court relied upon article 1901 of the Civil Code of 1870: "Agreements legally entered into have the effect of law on those who form them. They cannot be revoked *unless by mutual consent of the parties*, or for causes acknowledged by law. . . ."[90]

Against this jurisprudential background, *Frank v. Motwani* involved a purported oral cancellation of an agreement to purchase immovable property. The buyer urged, in defense to an action demanding a forfeit of the deposit, that the contract to buy had been terminated with the consent of all of the parties. In ruling favorably upon a motion for summary judgment presented by the vendors, the district court held that the defense of the buyer was not "viable . . . as a matter of law . . .

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83. 307 So. 2d 569 (La. 1974).

84. Id. at 573 (on original hearing).

85. 307 So. 2d at 580 (on rehearing).

86. 366 So. 2d 1025 (La. App. 1st Cir. 1978).

87. Id. at 1028.

88. 381 So. 2d 385 (La. 1979).

89. Id. at 388. The court reasoned that "[a]lthough the promise to sell an immovable must be in writing, La. Civ. Code art. 2462, there is no requirement that the parties' mutual consent to revoke a written contract be in writing. La. Civ. Code art. 1901." Id. at 388 n.6.

90. La. Civ. Code art. 1901 (1870) (emphasis added). Old article 1901 has been reenacted, without substantive change, as Louisiana Civil Code article 1983.

"[91] The court of appeal affirmed, stating that evidence of "defendant's claim of an oral agreement to cancel the written purchase agreement is not admissible,"[92] and the supreme court "granted certiorari to review the correctness of that decision."[93]

In reviewing the decisions of the trial and the intermediate appellate courts, the supreme court could have resolved the matter on the basis of these established precepts:

> (i) that the parol evidence rule does not apply to subsequent agreements (unless, of course, the subsequent agreement must be written);
>
> (ii) that it is of no moment whether the original agreement is required to be in writing;
>
> (iii) that a subsequent agreement to cancel an earlier agreement to purchase an immovable is not required to be in writing; and
>
> (iv) that, therefore, a subsequent oral agreement (if proven) is sufficient to cancel an agreement to purchase an immovable, notwithstanding the evidence in writing of the former.

In *Frank*, an opinion that supports the notion that the parol evidence rule applies to *modifications* but not to revocations, the supreme court stated propositions (iii) and (iv), but omitted (i) and (ii). The court may have drawn this distinction in an effort to avoid addressing the fourth circuit's attempted resurrection[94] of the original opinion in *Torrey*.[95]

In explaining its decision in *Frank*, the supreme court hinged its analyses upon *Kaplan* and the revised wording of the parol evidence rule in article 1848 of the Civil Code. First, the court stated that the principles of *Kaplan* controlled and therefore that proof of a subsequent oral cancellation of a written purchase agreement is *admissible*—an agreement to cancel a contract to purchase is not of a nature required to be in writing.[96] Rather than directly rejecting the fourth circuit's argument based on *Torrey*, however, the supreme court concluded that

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91. 513 So. 2d at 1171.

92. 503 So. 2d 590, 591 (La. App. 4th Cir. 1987).

93. 513 So. 2d at 1171.

94. 503 So. 2d at 591.

95. The fourth circuit concluded, in reliance on the original opinion in *Torrey*, that the parol evidence rule prevented the oral revocation of an agreement required to be in writing. Torrey v. Simon-Torrey, Inc., 307 So. 2d at 573; see supra notes 83-85 and accompanying text. In this, the appellate panel erred; the supreme court pronounced in *Kaplan* that the validity of a subsequent oral agreement is to be based solely on its nature, without respect to the parol evidence rule or the formalities demanded of the original contract.

96. 513 So. 2d at 1172.

the parol evidence rule was inapplicable on its face.[97] Second, the court considered article 1848:

> Testimonial or other evidence may not be admitted to negate or vary the contents of an authentic act or an act under private signature. Nevertheless, in the interest of justice, that evidence may be admitted to prove such circumstances as a vice of consent, or a simulation, or to prove that the written act was modified by subsequent invalid oral agreement.

Applying a purely exegetical approach, the court emphasized the words "negate," "vary," and "modified" in the legislation:

> [I]t addresses the question of whether parol evidence may be used to prove a verbal modification of a contract. It does not address the question of whether parol evidence may be used to prove a verbal cancellation of a contract. Therefore, art. 1848 does not apply here because this case only involves an alleged verbal cancellation, not a modification.[98]

Though it reached the correct result, based upon *Kaplan*, the court's treatment of the parole evidence rule is troubling. The text of article 1848 does not compel the conclusion that it governs only modifications and not revocations. Further, the court's reasoning is not dictated by earlier jurisprudence, which does not distinguish between modifications and revocations.[99] Admittedly, the supreme court's approach permitted it to avoid discrediting whatever remains of *Torrey*, at least in situations that involve a revocation, but the court should have offered a clearer explanation of its rationale for upholding the oral cancellation of the contract. As a consequence of the court's lack of perspicuity, it remains uncertain whether modifications of agreements that must be in writing are controlled by the "rule" of *Torrey* or by that of *Kaplan* and *Frank*.

Perhaps the best guide for future adjudication is provided by Justice Lemmon's concurrence in *Frank*. According to Justice Lemmon, the admissibility of proof of an oral contract that purportedly modifies or cancels a prior written contract should depend on the requirements of form for the modification or cancellation:

> The question here is whether a contract to extinguish or modify a previous contract to sell immovable property must also be in writing to be enforceable.

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97. The court did not mention *Torrey*.

98. 513 So. 2d at 1172.

99. E.g., Salley v. Louviere, 183 La. 92, 98-99, 162 So. 811, 813 (1935) ("It is well settled that [La. Civ. Code art. 2276 (1870)] does not forbid the proving by parol evidence of a subsequent agreement to *modify or to revoke* a written agreement. . . .") (citations omitted) (emphasis added).

> In the case of a modification which changes the terms of the original contract, the answer depends on whether the modification . . . would be required to be in writing if it were the original contract.[100]

Justice Lemmon bolsters his position with an example involving a written contract to purchase two tracts of land. If this agreement is modified to transfer three lots, it, of course, would have to be evidenced by a writing—not because the original contract was written but because the subsequent agreement calling for the sale of a third immovable would not be enforceable unless in writing. The bench and the bar should use this cogent argument, not inconsistent with the majority's view, in order to steer future decisions on a straighter path.

Compromises and Formality

A contract of transaction or compromise, if not recited in open court, must be reduced to writing.[101] The corollary to this requirement, added by the courts, is that all of the parties to the agreement must sign the writing.[102] As a general matter, this jurisprudential rule is sensible, if for no other reason than to impress upon the parties the significance and the finality of their actions.[103] Similarly, the Civil Code provides, as a part of the law of obligations, that although written agreements need not be prepared by the parties, they "must be signed by them."[104] Nevertheless, there is an exception to this general directive: a written agreement may be valid, though signed by but one party, when the conduct of the nonsigning party demonstrates an acceptance of the benefits of that agreement.[105] The courts have applied this exception even to contracts that, by law, must be in writing.[106]

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100. 513 So. 2d at 1173 (Lemmon, J., concurring).

101. La. Civ. Code art. 3071:

> A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.
>
> This contract must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding. The agreement recited in open court confers upon each of them the right of judicially enforcing its performance, although its substance may thereafter be written in a more convenient form.

102. E.g., Felder v. Georgia Pac. Corp., 405 So. 2d 521, 523 (La. 1981).

103. A compromise has the effect of a judgment. La. Civ. Code art. 3078.

104. Id. art. 1837.

105. E.g., Dobbins v. Hodges, 23 So. 2d 26, 28 (La. 1945); Saunders v. Bolden, 155 La. 136, 140, 98 So. 867, 869 (1923). See La. Civ. Code art. 1837 comment (b).

106. E.g., Neblett v. Placid Oil Co., 257 So. 2d 167, 170 (La. app. 3d Cir. 1971) (transfer of immovable property); Succession of Jenkins, 91 So. 2d 416, 419 (La. App. 2d Cir. 1956) (same).

The enforcement of an obligation evidenced by a writing that has not been signed by all of the parties has been predicated on various theories: tacit acceptance;[107] estoppel;[108] and confirmation or ratification.[109] Although each of these grounds appear to justify enforcement of a transaction or compromise that has been signed by only one party, the first circuit's decision in *Willett v. Price*[110] is to the contrary.

Willett involves the second lawsuit arising out of a property dispute between Joe Johnson and the children of his former wife. In the first action, the parties confected a compromise: Mr. Johnson would relinquish his claims of ownership in the property and the children, in return, would discontinue the litigation and grant him a usufruct over the property for life. All parties, except two of the four children, signed the agreement. After the death of Mr. Johnson, his own children sought to retain possession of the property. The trial court held that they were bound by their father's compromise, even though two of the opposing parties had not signed the writing. Apparently, the trial court found that all the parties to the compromise had abided by its terms and had fulfilled their respective obligations,[111] and then based its decision on estoppel or ratification or confirmation.[112] On appeal, the first circuit reversed, citing the maxim that all parties must sign a transaction or compromise.[113] According to the court, the cases supporting this rule were indistinguishable from the matter before it, and the Civil Code articles dealing with ratification and confirmation simply were inapplicable.[114]

Unfortunately, the facts recounted in the *Willett* opinion do not convey enough information about the actions taken by the nonsigning parties after the compromise to permit an accurate determination of whether the result is just. Nevertheless, the court's short shrift of the possibility of confirmation or ratification is lamentable. An obligation that is unenforceable because of a relative nullity may nevertheless be made effective by a confirmation or ratification.[115] Actually, the proper

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107. *Neblett*, 257 So. 2d at 170.

108. E.g., Succession of Ferrill, 166 La. 479, 485, 117 So. 562, 564 (1928); Central Surety & Ins. Corp. v. Canulette Shipbuilding Co., 195 So. 114, 116 (La. App. 1st Cir. 1940).

109. E.g., Culverhouse v. Marx, 39 La. Ann 809, 2 So. 607, 608 (1887).

110. 515 So. 2d 477 (La. App. 1st Cir. 1987), writ denied, 516 So. 2d 367 (1988).

111. Id. at 479.

112. Id.

113. Id. at 478-79 (citing Felder v. Georgia Pac. Corp., 405 So. 2d 521 (La. 1981)); Guidry v. Bowers, 458 So. 2d 933 (La. App. 1st Cir. 1984); Allan E. Amundson, Inc. v. Hoppmeyer, 442 So. 2d 1254 (La. App. 5th Cir. 1983); Union Producing Co. v. Schneider, 131 So. 2d 133 (La. App. 2d Cir. 1961)).

114. Id. at 479 (citing La. Civ. Code arts. 1842 (confirmation) & 1843 (ratification)).

115. La. Civ. Code arts. 1842 & 1843.

term in this situation is confirmation, not ratification; the former deals with all relative nullities, while the latter concerns only the nullity that arises when an obligation is incurred on another's behalf without authority.[116] A confirmation may result even tacitly, for example, from a voluntary performance of the obligation.[117] By contrast, a party may not confirm a contract that suffers from a defect rendering it absolutely null.[118] With these standards in mind, implicit in *Willett v. Price* is the decision that the failure of all parties to sign a transaction or compromise leaves it an absolutely null document.

This implication, however, is inconsistent with the legislation. According to article 2030 of the Civil Code, "[a] contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral." In contrast, article 2031 provides that "[a] contract is relatively null when it violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made." The lack of a signature on a transaction or compromise agreement does not implicate any rule of public order. Fundamentally, the writing requirement for transactions is evidentiary; it does not render the transaction "[a] solemn contract for which the writing is an essential formality."[119] Thus, the writing requirement, like other demands of proof, should be viewed as a rule "intended for the protection of the private parties," in the words of article 2031 of the Civil Code. To illustrate, although a transfer of immovable property that is not perfected in writing is "null,"[120] the defect is merely relative; the parties may validate the agreement by certain confirming acts.[121]

Moreover, the jurisprudence does not support the conclusion that a compromise not signed by one of the parties is an absolute nullity. In none of the cases cited by and relied upon by the court in *Willett* was there evidence that the nonsigning parties actually accepted the

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116. Id. Although the court referred to the inapplicability of ratification, its mention of both articles 1842 and 1843, and its citation to former article 2272 of the Civil Code of 1870 (encompassing both confirmation and ratification), indicates that the panel actually rejected both concepts.

117. La. Civ. Code art. 1842.

118. Id. art. 2030.

119. 2 M. Planiol, Traité Élémentaire de Droit Civil No. 2291 (La. St. L. Inst. trans. 1959); see Felder v. Georgia Pac. Corp., 405 So. 2d 521, 523 (the writing requirement "is placed in the code to insure proper proof of extra-judicial agreements").

120. La. Civ. Code art. 2440.

121. Id. art. 1839:

> A transfer of immovable property must be made by authentic act or by act under private signature. Nevertheless, an oral transfer is valid between the parties when the property has been actually delivered and the transferor recognizes the transfer when interrogated on oath.

benefits of the purported compromise and abided by its terms.[122] In addition, the court overlooked two analogous decisions: *Succession of Ferrell*[123] and *Culverhouse v. Marx*.[124] In both instances the supreme court held that a compromise, not authorized by or signed by one of the parties, may be, nonetheless, ratified or confirmed.[125] In *Ferrell* the court specifically rejected the argument that the failure of one party to authorize her signature rendered the compromise "an absolute nullity."[126]

Although *Willett* is analytically unsound, courts may follow it because of the clear-cut simplicity of its holding: if all necessary signatures are not included on the writing evidencing the transaction, there is no compromise. That would be unfortunate.

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122. See *Willett*, 515 So. 2d 477. Indeed, in Guidry v. Bowers, 458 So. 2d 933 (La. App. 1st Cir. 1984), and in Allan E. Amundson, Inc. v. Hoppmeyer, 442 So. 2d 1254 (La. App. 1st Cir. 1983), the reported facts suggest that the parties had not achieved *agreements* of compromise, much less a perfection or completion of any transaction.

123. 166 La. 479, 117 So. 562 (1928).

124. 39 La. Ann. 802, 2 So. 607 (1887).

125. *Ferrell*, 166 La. at 484-85, 117 So. at 564; *Culverhouse*, 39 La. Ann. at 811, 2 So. at 608.

126. 166 La. at 484, 117 So. at 563.