

Louisiana Law Review

Volume 48 | Number 3

January 1988

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Repository Citation

Gary B. Tillman, *The Effect of Variable Interest Rates on Negotiability*, 48 La. L. Rev. (1988)

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THE EFFECT OF VARIABLE INTEREST RATES ON NEGOTIABILITY

In recent years, variable or floating interest rate clauses have been written into promissory notes and other instruments with increasing prominence. In 1984, approximately 80% of new mortgages and 60% of total loans outstanding had variable rate clauses.¹ One Fifth Circuit opinion commented that these clauses are common in business loans and that there are thousands or tens of thousands outstanding.²

A variable interest rate, as opposed to one that is fixed, is tied to an extrinsic source. "Chase Manhattan Bank Prime Rate + 2%" exemplifies the variable interest rate. A variable interest rate is commercially useful because it is a mechanism to closely tailor the interest on a loan to the actual cost of money. Banks and other lenders prefer them because the lender is not locked into a low rate as the market rate rises. Borrowers prefer them because the borrower enjoys a lower rate as the market rate falls.

The first type of variable interest rate litigation involved the question of whether the obligation underlying a note with a floating interest rate clause was sufficiently definite to be contractually enforceable. The courts held the notes enforceable to the extent the lender's power to vary the rate was not subject to its whim, but rather was limited by the market place and required periodic redetermination, in good faith and in the ordinary course of business.³ The next issue was the effect of the variable rate on the instrument's negotiability.

The negotiability of an instrument is a prerequisite to the applicability of the Commercial Laws, Louisiana's version of the Uniform Commercial Code ("U.C.C.")⁴ When the Commercial Laws apply, the holder can acquire the status of a "holder in due course."⁵ A holder in due course has greater rights and is subject to fewer defenses⁶ than one who is not

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1. Hiller, *Negotiability and Variable Interest Rates*, 1985 Com. L.J. 277.

2. *In re LeBlanc*, 622 F.2d 872, 878-79 (5th Cir. 1980).

3. *Constitution Bank & Trust Co. v. Robinson*, 179 Conn. 232, 237, 425 A.2d 1268, 1270-71 (1979); *St. Louis Realty Fund v. Mark Twain S. County Bank* 21, 651 S.W.2d 568, 572-73 (Mo. Ct. App. 1983). See also La. R.S. 9:3504 (1983 & Supp. 1987); La. Civ. Code art. 1770; *LeBlanc*, 622 F.2d 872.

4. La. R.S. 10:3-104 (1983) and Official U.C.C. Comments.

5. La. R.S. 10:3-302 (1983). A holder in due course takes the instrument for value, in good faith, and without notice that it is overdue, has been dishonored, or is subject to a claim or defense. See also La. R.S. 10:3-201 (1983).

6. La. R.S. 10:3-305 (1983). A holder in due course is free from personal and contractual defenses and any other defenses a party to an instrument may assert except real defenses. Examples of real defenses include infancy, incapacity, duress, illegality, misrepresentation, and discharge in bankruptcy.

a holder in due course.⁷ The holder in due course also gives less liberal warranties.⁸ Negotiable instruments also receive different treatment for purposes extrinsic to the Commercial Laws. These include limitations on jury trials,⁹ limitations on the use of redhibition as a defense,¹⁰ a relatively low burden of proof required to obtain a default judgment,¹¹ a shorter prescriptive period¹² and application of state banking laws.¹³

The negotiability of an instrument is determined by reference to Louisiana Revised Statutes 10:3-104(1).¹⁴ The following are the requisites of negotiability:

Any writing to be a negotiable instrument *within this Chapter* must (a) be signed by the maker or drawer; and (b) contain an unconditional promise or order to pay a *sum certain in money* and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Chapter; and (c) be payable on demand or at a definite time; and (d) be payable to order or to bearer.¹⁵

If these requirements are not met, the instrument is not negotiable for the purposes of the Commercial Laws.¹⁶

The "sum certain" requirement¹⁷ is the issue in determining whether an instrument with a floating rate of interest is negotiable. Section 3-

7. La. R.S. 10:3-306 (1983). One who is not a holder in due course is subject to all defenses, including real defenses.

8. La. R.S. 10:3-417, 4-207 (1983). A holder in due course seeking payment or acceptance does not warrant to his transferee that the signature of the maker or drawer is authorized or that the instrument is free of material alteration. One who is not a holder in due course gives these warranties. Both warrant good title.

9. La. Code Civ. P. art. 1732(2). Jury trials are available only if the defense is forgery, fraud, error, or want or failure of consideration.

10. La. Code Civ. P. art. 424. The defense of redhibition may not be used if it has prescribed. However, other prescribed obligations may be asserted as a defense to a claim on a negotiable instrument.

11. La. Code Civ. P. art. 1702. When attempting to secure a default judgment, an affidavit of correctness is prima facie proof and the signatures need not be proved. No oral testimony is required.

12. La. Civ. Code art. 3498. The prescriptive period is five years rather than the ten year period applicable to most personal obligations.

13. See, e.g., La. R.S. 6:559 (1986). The State Bank Commissioner has the authority to issue only negotiable bonds, notes or other obligations.

14. La. R.S. 10:3-104(1) (1983).

15. *Id.* (emphasis added).

16. However, if a source outside the Commercial Laws, such as jurisprudence or another statute, conferred negotiability on an instrument, even though the Commercial Laws would not apply to such instrument, nothing would prevent the application of advantages outside of the Commercial Laws. See *supra* notes 9-13 and La. R.S. 10:3-104 (1983) Official U.C.C. Comment 1.

17. La. R.S. 10:3-104(1)(b) (1983).

106(1)¹⁸ amplifies the sum certain requirement by listing illustrations:

The sum payable is a sum certain even though it is to be paid (a) with stated interest or by stated installments; or (b) with stated different rates of interest before and after default or a specified date; or (c) with a stated discount or addition if paid before or after the date fixed for payment; or (d) with exchange or less exchange, whether at a fixed rate or at the current rate; or (e) with costs of collection or an attorney's fee or both upon default.¹⁹

Official U.C.C. Comment 1 to that section explains in part, "The computation must be one which can be made from the instrument itself without reference to any outside source, and this section does not make negotiable a note payable with interest 'at the current rate.'"²⁰ The purpose of these requirements is to insure the paper's marketability. Whenever paper is sold, it is discounted and the rate of interest ultimately to be paid must be known at the specific point in time of the sale.

With this statutory background in mind, an Illinois federal district court squarely addressed the issue in *Northern Trust Co. v. E.T. Clancy Export Corp.*²¹ The court held that interest payable on a note which cannot be computed without reference to a specific bank's variable prime interest rate renders the sum payable uncertain and the instrument non-negotiable.²² The result in *Northern Trust* was the predictable culmination of a series of cases deciding tangential issues and resolving them against negotiability. Clauses held to be uncertain included interest at "the maximum legal rate,"²³ "at bank rates,"²⁴ and "at variable rates" where

18. La. R.S. 10:3-106(1) (1983 & Supp. 1987).

19. *Id.*

20. La. R.S. 10:3-106(1) (1983 & Supp. 1987) Official U.C.C. Comment 1.

21. 612 F. Supp. 712 (N.D. Ill. 1985).

22. 612 F. Supp. at 715. It is interesting to note that these instruments are still popular despite this decision. One reason may be that they are seldom negotiated. Transfers which do occur may be unplanned; for example, a loan participation arrangement may be split into multiple obligations when the lead bank becomes insolvent. Another reason may be that most holders are secured real estate lenders to whom negotiability is of little importance. Also, some notes may be transferred only once, and to federal agencies, which have a solvent lender to proceed against. The Louisiana statutory scheme, to be discussed later in this paper, also may have encouraged the use of such paper. Therefore, negotiability may be totally irrelevant in many circumstances. However, as stated supra in text accompanying note 1, 60% of total loans outstanding have floating rates, and these are not limited to real estate loans. Additionally, the *Northern Trust* case was not decided until mid-1985, and commercial practices may adjust in the future.

23. *Woodhouse, Drake & Carey, Ltd. v. Anderson*, 61 Misc. 2d 951, 952-53, 307 N.Y.S.2d 113, 116-17 (1970).

24. *A. Alport & Son, Inc. v. Hotel Evans, Inc.*, 65 Misc. 2d 374, 376-77, 317 N.Y.S.2d 937, 940 (1970).

the lender would advance additional money on the note as requested by the borrower.²⁵

Since one of the purposes of the U.C.C. is to promote uniformity of the law among all states,²⁶ *Northern Trust* will likely be the final expression on the issue. However, the question is *res nova* in Louisiana. The Louisiana Legislature has enacted statutes outside of the Commercial Laws conferring negotiable status on these instruments.²⁷ Additionally, the quality of jurisprudential analysis has not been high. The remainder of this comment will discuss these matters.

Louisiana Legislation

In 1969, Louisiana began enacting a series of statutes regulating investment in real estate mortgages.²⁸ Various state retirement systems invested in these loans, and rising interest rates endangered the investments as becoming usurious.²⁹ Later amendments added sections allowing the use of floating interest rates.³⁰ The current statutes provide that variable interest rate provisions will not be deemed potestative nor shall they destroy the note's negotiability.³¹ In 1982, Louisiana Revised Statutes 9:3509.1 was enacted.³² That statute reads as follows:

A. Notwithstanding any other provisions of the law to the contrary, any person borrowing funds for commercial or business purposes, or deferring payment of an obligation for commercial or business purposes, may agree that the interest rate that is charged on the indebtedness may vary from time to time in accordance with the provisions of either the promissory note or other evidence of the indebtedness. Such conditions in either the promissory note or other evidence of the indebtedness shall not be deemed to be potestative *nor shall such conditions destroy the negotiability* of the promissory note or other evidence of the indebtedness.

B. All debts created pursuant to the provisions of this Section shall comply with the provisions of R.S. 9:3504(D)(3) through

25. *Farmers Prod. Credit Ass'n v. Arena*, 145 Vt. 20, 22-23, 481 A.2d 1064, 1065 (1984).

26. La. R.S. 10:1-102(2)(c) (1983). See also *Cromwell v. Commerce & Energy Bank*, 464 So. 2d 721, 729-30 (La. 1985).

27. La. R.S. 9:3504 and 9:3509.1 (1983 & Supp. 1987). This analysis is also applicable to similar statutes. For an example which relates solely to state banks, see La. R.S. 6:242(A)(2) (1986).

28. La. R.S. 9:3504-9:3509.1 (1983 & Supp. 1987).

29. 1969 La. Acts No. 28, § 1.

30. 1982 La. Acts No. 424, § 1.

31. La. R.S. 9:3504(D)(4) (1983 & Supp. 1987).

32. La. R.S. 9:3509.1 (1983 & Supp. 1987).

(9), and the provisions contained therein shall be applicable to all transactions created pursuant to this Section.

C. All adjustable rate loans made prior to September 3, 1984 shall be valid and enforceable.³³

The statute is not without uncertainty, primarily caused by its physical location. It is physically located in the Civil Code Ancillaries rather than among the Commercial Law statutes. Part A of the statute is enabling. It permits parties to contract variable interest rate loans and applies only to loans with a "commercial or business" purpose; however, these terms are not defined. It continues that the loans will not be deemed potestative, which refers to the contract enforceability issue mentioned above.³⁴ Finally, it provides, as an afterthought, that such conditions will not *destroy* the negotiability of a promissory note. Part (B) requires that the debt comply with Louisiana Revised Statutes 9:3504(D)(3) through (D)(9).³⁵ This reference creates another ambiguity because the cited subsections refer to real estate mortgages, which seems to impose an additional requirement on section 9:3509.1.

The present analysis will focus on the phrase "will not destroy the negotiability" of the instrument. A literal reading would suggest that in order to destroy negotiability, a note would first have to be negotiable. Under the prevailing interpretation of the U.C.C., notes with floating rates are not negotiable.³⁶ However, this more recent jurisprudential interpretation would render the statutory phrase meaningless, violating the rule of construction that each phrase of a statute must have meaning.³⁷ The statute appears to be an attempt to confer negotiable status on these notes, a legislative option left open by the drafters of the U.C.C.³⁸

This legislation, however, will not make a note negotiable for the purpose of the Commercial Laws. Three points must be addressed in this regard.

First, section 3-104(1)³⁹ restricts the application of the Commercial Laws to instruments which satisfy the elements set forth therein. Legislatively bestowed negotiability does not satisfy these requirements.

Second, the legislative provision enacting section 9:3509.1 states in part: "All laws or parts of laws in conflict herewith are hereby re-

33. *Id.* (emphasis supplied).

34. See *supra* cases cited in note 3.

35. La. R.S. 9:3504(D)(3)-(9) (1983 & Supp. 1987).

36. See *supra* notes 22-26.

37. *Woodfork v. Marine Cooks & Stewards Union*, 642 F. 2d 966, 970-71 (5th Cir. 1981).

38. La. R.S. 10:3-104 (1983) Official U.C.C. Comment 1.

39. La. R.S. 10:3-104(1) (1983). See, e.g., *Brazos River Auth. v. Carr*, 405 S.W.2d 689 (Tex. 1966).

pealed."⁴⁰ This provision could be construed literally to repeal conflicting laws, including the Commercial Laws, but such an interpretation would repeal the sum certain requirement of section 3-104(1) and is therefore inconsistent with legislative intent. Accordingly, it should be avoided. A proper interpretation would be that it repeals only those conflicting statutes extrinsic to the Commercial Laws.

Third, one could argue that section 9:3509.1, which was enacted more recently, directly conflicts with the sum certainty requirement of section 3-104, and operates as an implied repeal. However, this violates the principle that the Commercial Laws are a body of general laws intended as a unified coverage of its subject matter, and therefore no part of it shall be deemed impliedly repealed by subsequent legislation if such construction can reasonably be avoided.⁴¹

The issue of implied repeal of laws was decided in *Pacific Wool Growers v. Draper & Co.*⁴² which is cited in the Official U.C.C. Comments.⁴³ Two parties purchased the same lot of wool from the same person. The first purchaser claimed superior title through an agreement under the Oregon Co-Operative Marketing Act.⁴⁴ The second purchaser claimed superior title as a bona fide purchaser under the Uniform Sales Act.⁴⁵ The two statutes gave the parties equal title. The court held that the former statute, although enacted later, would yield to the rights of a bona fide purchaser, reasoning that the Uniform Sales Act was not subject to implied repeal.⁴⁶

A compliment of the prohibition of implied repeal is the principle requiring the application of other Louisiana laws unless displaced by the particular provisions of the Commercial Laws.⁴⁷ Civilian jurisdictions assign great importance to these two principles.⁴⁸ They were recently

40. 1982 La. Acts No. 361, § 4.

41. La. R.S. 10:1-104 (1983) and Official U.C.C. Comments.

42. 158 Or. 1, 7-8, 73 P.2d 1391, 1393-94 (1937). This case is the leading authority. The precise issue has never been raised in Louisiana.

43. La. R.S. 10:1-104 (1983) Official U.C.C. Comment 1.

44. Or. Rev. Stat. §25-801 to §25-827 (1930).

45. Or. Rev. Stat. §64-409 (1930).

46. See also *Sterling Acceptance Co. v. Grimes*, 194 Pa. Super. 503, 509, 168 A.2d 600, 603 (1961) (title certificate provisions could not defeat the rights of a buyer of a car under the U.C.C.). In accord is *Scott v. Continental Ins. Co.*, 259 So. 2d 391, 394 (La. App. 2d Cir. 1972), which is also an illustration of later specific legislation not overruling the general provisions of the Civil Code. In *Scott*, insurance coverage was predicated upon the passing of title translatable of ownership. The Civil Code articles governing the sale had been satisfied; however, the provisions of the Vehicle Certificate of Title Law had not been fulfilled.

47. La. R.S. 10:1-103 (1983).

48. 1 W. Hawkland, *Uniform Commercial Code Series* § 1-102:05 (1984).

used to resolve a conflict between the Commercial Laws and the Civil Code. In *Succession of Jones*,⁴⁹ the *de cuius*, shortly before her death, wrote a check payable to her friend, and the check was cashed. The issue was the validity of the donation *inter vivos*. The Civil Code requires transfer by authentic act,⁵⁰ while the conflicting provisions of the Commercial Laws require only negotiation.⁵¹ The court held that the Commercial Laws governed the form of the transfer, while the Civil Code would address any substantive issue which arose.⁵²

Because section 3-104(1) restricts the application of the Commercial Laws to instruments which satisfy the elements set forth therein and because the legislature has conferred negotiable status on instruments not satisfying the requirements of negotiability, both laws must be read in *pari materia*⁵³ and in a manner avoiding implied repeal of the Commercial Laws. One meritorious construction is that the Commercial Laws dictate the substantive requirements of negotiability. A note meeting those requirements would receive the benefit of that body of law, as well as its extrinsic advantages.⁵⁴ A note made negotiable by section 9:3509.1 would receive the limited advantages extrinsic to the Commercial Laws.⁵⁵ This construction is consistent with the physical location of the statute, for if the legislature intended for section 9:3509.1 to apply to the Commercial Laws, it would have placed the statute within that body. Because the Commercial Laws are a body of general law intended as a unified coverage of its subject matter, and are protected from implied repeal by subsequent legislation, this is a just and reasonable construction. The interpretation suggested will allow the Commercial Laws to stand as a unified body of law.

A Civilian Analysis Of Negotiability

A well established rule of construction is that the adoption of another jurisdiction's statute includes all of its authoritative interpretations and constructions.⁵⁶ However, courts are not bound in this regard where the view is inconsistent with a civilian system of law.⁵⁷ Given these principles of construction and given that the effect of variable interest rates on

49. 505 So. 2d 841, 844 (La. App. 2d Cir. 1987).

50. La. Civ. Code arts. 1523, 1526, 1530 and 1536.

51. La. R.S. 10:3-201 (1983).

52. Accord *Succession of Davis*, 496 So. 2d 549, 554 (La. App. 1st Cir. 1986).

53. La. Civ. Code art. 13.

54. See *supra* notes 4-13.

55. See *supra* notes 9-13.

56. *Standard Oil Co. v. Collector of Revenue*, 210 La. 428, 437, 27 So. 2d 268, 271 (1946).

57. *Cooper v. Blanck*, 39 So. 2d 352, 359 (La. App. Orl. 1923).

negotiability is *res nova* in Louisiana, cases decided in other states must be examined in light of Louisiana law.

The note at issue in *Northern Trust Co. v. E.T. Clancy Export Corp.*⁵⁸ provided that the interest rate would be one-half percent above the Northern Trust Company's prime floating interest rate. The court denied negotiability, holding that an interest rate which cannot be computed without reference to a bank's variable prime rate renders the sum payable uncertain. The case cited as its primary authority U.C.C. sections 3-104 and 3-106. Reference was then made to the Official U.C.C. Comment to section 3-106 which states that sum certainty requires the ability to calculate the value of the note from the face of the instrument,⁵⁹ and the court noted that Illinois had adopted that comment, a fact which weighed heavily in the decision. A Louisiana court need not place undue emphasis on a comment in deciding a case because comments are not regarded as law.⁶⁰

Also cited in *Northern Trust* was the work of Professors Hart and Willier.⁶¹ On the topic of "Sum Certainty," these commentators argue that a variable interest rate cannot be used if the instrument is to be negotiable, citing as their authority the Official U.C.C. Comments. In the same work, however, in the section on "Provisions for Interest,"⁶² the same authorities argue that sound commercial reasons exist for having a provision allowing interest to vary with market conditions. There is little difficulty in evaluating the value of a note containing such a provision, and it should be negotiable. The court's use of this work contradicted its position.

The third and final source of authority cited was the treatise written by Chancellor Hawkland and Professor Lawrence.⁶³ The reference was to a synthesis of *A. Alport & Son, Inc. v. Hotel Evans, Inc.*,⁶⁴ which held a note "with interest at bank rates" to be non-negotiable. Although the result of the case and the synthesis of the commentators are correct, the case does not support the *Northern Trust* court's position. There is a theoretically sound distinction between a note calling for interest at "bank rates" and a note calling for interest at a floating rate tied to a specific extrinsic source named in the note. The sum certain requirement

58. 612 F. Supp. 712 (N.D. Ill. 1985).

59. See La. R.S. 10:3-106 (1983 & Supp. 1987) Official U.C.C. Comment 1.

60. La. R.S. 1:13 (1973); La. R.S. 10:1-109 (1983).

61. 2 F. Hart & W. Willier, Commercial Paper Under the Uniform Commercial Code § 2.11[1], at 2-98 to 2-99 (1985).

62. *Id.* § 2.11[2], at 2-103 to 2-104.

63. 4 W. Hawkland & L. Lawrence, Uniform Commercial Code Series, § 3-106:03 at 95 and n.5 (1984).

64. 65 Misc. 2d 374, 376-77, 317 N.Y.S.2d 937, 940 (1970).

developed at a time when, unlike the present, there were no mass communication facilities offering ready access to such sources. When the specific source is named, one can easily ascertain the interest rate by newspaper, telephone, or computer. Bankers work daily with these rates. When calculating the value of a note, there is little difference between looking on a computer terminal for a rate and looking at a calendar for a date.

Another relevant case is *Woodhouse, Drake & Carey, Ltd. v. Anderson*⁶⁵ in which the court correctly held negotiable a note calling for interest at "eight and one-half percent or at the maximum legal rate." The court did not rely on the Official U.C.C. Comments as authority. The judicial interest rate was used as the maximum legal rate, and the statute in effect in New York allowed the state banking board to change that rate every quarter in accordance with the market. There is no theoretical or practical difference between the note in this case and the one in *Northern Trust*; both rates vary with the market, and both require one to refer to extrinsic sources in order to ascertain the interest rates.

The final case relevant to the issue is *Farmers Production Credit Association v. Arena*,⁶⁶ which involved a note calling "for interest at variable rates" and "for future advances to be made by the lender from time to time." The court correctly held the note to be non-negotiable. First, the interest rate was not tied to a specific source ascertainable from the instrument; it only called for "variable rates." Second, the court was most concerned with the fact that the note served as a line of credit, and accordingly, the balance could not be determined from the instrument's face.

The *Northern Trust* decision is poorly reasoned, and the authority cited does not support the court's position. Instead of utilizing sound analysis, the court simply listed authorities without any discussion or evaluation. The case should not be used as authority.⁶⁷ The other decisions fail to conclusively resolve the issue of variable interest rates in a satisfactory manner. Louisiana principles should be used to derive a well-reasoned result.

Notes with variable interest rates have only recently gained widespread commercial acceptance. Where a new type of commercial paper develops, courts are free to confer negotiable status on them if war-

65. 61 Misc. 2d 951, 952-53, 307 N.Y.S.2d 113, 116-17 (1970).

66. 145 Vt. 20, 22-23, 481 A.2d 1064, 1065 (1984).

67. 1 W. Hawkland, Uniform Commercial Code Series, § 1-102:10 (1984).

ranted.⁶⁸ By analogy, the Commercial Laws specifically allow one type of variable rate: one in fluctuating foreign currency.⁶⁹ It is unlikely that the Uniform Law Commissioners envisioned variable rates in 1962, when the U.C.C. was written. They did not intend Official Comment 1 of section 3-106 to inhibit the development of paper, which, in this writer's opinion, has been the result. That comment, relied on by most courts, refers to a "current rate." This should be distinguished from a situation where the extrinsic source of the interest rate is named on the face of the note. Such an interest rate would be readily ascertainable by computer or telephone, and it is erroneous to rely on the comment in such an instance. The Commercial Laws do not require a stated rate of interest, but only that an interest provision be stated.⁷⁰ Exceptions are made for the sum certain requirement, and absolute certainty is not required.⁷¹ There is no requirement in the *text* of the Commercial Laws that the value of a negotiable promissory note be determined from the face of the instrument.

A note can be written to specify interest at the legal or judicial rate, and such a note is negotiable.⁷² Louisiana recently changed the judicial rate of interest, by amending the Civil Code, to one which is variable.⁷³ The new judicial rate is set at one percentage point above an average prime rate and is published annually in the Louisiana Register. The average prime rate is computed by taking the average prime rates established by five major financial institutions, listed in the statute, for their most favored corporate clients. Thus a variable interest rate can now be indirectly written into a note by merely specifying "interest at the judicial rate." There are no sound reasons why it cannot also be written directly. The commercial need to enable parties to include variable interest rate provisions outweighs the uncertainty created by them.⁷⁴ Should a Louisiana court face this issue, it should hold a note with a variable interest rate provision to be negotiable.

68. La. R.S. 10:3-104 (1983) Official U.C.C. Comment 1. The Louisiana Supreme Court has recently used this rule to extend the law of letters of credit. *Cromwell v. Commerce & Energy Bank*, 464 So. 2d 721, 729-30 (La. 1985).

69. La. R.S. 10:3-106(1)(d) and 10:3-107 (1983). See also La. R.S. 10:1-201 (1983), defining "money."

70. 2 F. Hart & W. Willier, *Commercial Paper Under the Uniform Commercial Code* § 2.11[2], at 2-101 (1985).

71. La. R.S. 10:3-106 (1983 & Supp. 1987), 10:3-107 and 10:3-109 (1983).

72. La. R.S. 10:3-118(d) (1983).

73. 1987 La. Acts No. 883, § 1 (amending La. Civ. Code arts. 2000 and 2924).

74. See 4 W. Hawkland & L. Lawrence, *Uniform Commercial Code Series* § 3-106:03, at 94 (1984).

Conclusion

Louisiana has a declared public policy of encouraging the free flow of money into the state to enable it to compete in the national money market.⁷⁵ To further that policy, the legislature enacted a statutory scheme which allows parties to contract to have interest rates vary with the market for money, and which also confers negotiability on these instruments. However, an instrument must meet the express requirements of the Commercial Laws to be negotiable. The only reasonable construction of these new policy-oriented statutes is that they confer negotiable status on notes only for the limited purposes extrinsic to the Commercial Laws and that those notes are not negotiable in the traditional sense.

The current law in other states is that variable interest rate notes are non-negotiable. However, the cases are unpersuasive and the analysis in the opinions is not of high quality. The issue is *res nova* in Louisiana, and there are sound bases for a Louisiana court to confer negotiable status on these notes.

Tennessee is the only jurisdiction which has dealt with this issue statutorily.⁷⁶ Tennessee amended its version of U.C.C. sections 3-104 and 3-106 so that its intention was clear. Louisiana should likewise amend the Commercial Laws in the following manner:

§ 3-104. Form of negotiable instruments; draft; check; certificate of deposit; note

(1) Any writing to be a negotiable instrument within this Chapter must (a) be signed by the maker or drawer; and (b) contain an unconditional promise or order to pay: (i) a sum certain in money; (ii) a sum in money which is determinable by a formula as provided in the writing, whether or not such formula requires the use of extrinsic criteria; or (iii) a sum of money the amount of which is subject to renegotiation upon either the passage of time or the occurrence of an event; (c) be payable on demand or at a definite time; and (d) be payable to order or to bearer.

* * *

§ 3-106. Sum certain.

(1) The sum payable is a sum certain even though it is to be paid: (a) with stated interest or by stated installments; or

75. La. R.S. 9:3502 (1983).

76. Tenn. Code Ann. §§ 47-3-104(b) and 47-3-106(1)(f), (g) (Supp. 1987).

(b) with stated different rates of interest before and after default or a specified date; or (c) with a stated discount or addition if paid before or after the date fixed for payment; or (d) with exchange or less exchange, whether at a fixed rate or at the current rate; or (e) with costs of collection or an attorney's fee or both upon default; *or (f) with a renegotiable or variable rate of interest; or (g) with renegotiable, variable, graduated, annuity or price-level adjusted payments.*⁷⁷

The legislature should not leave to a court the responsibility of deciding the issue. Only by amending the Commercial Laws will the legislature be able to confer negotiability on a note for the purpose of obtaining the advantages conferred by our version of the U.C.C.

Gary B. Tillman

77. These statutes are La. R.S. 10:3-104 and 10:3-106, with the recommended Tennessee amendment incorporated and indicated by italics.