Louisiana Law Review

Volume 19 | Number 1
Legislative Symposium: The 1958 Regular Session
December 1958

A Comparison of Redhibition in Louisiana And the Uniform Commercial Code

Sidney D. Fazio

parties buying from the seller will be protected in a claim by the buyer, whether the agreement is a perfected sale or not, since the seller has retained possession.[56] It is evident from the above analysis that both buyer and seller in the lay-away agreement will be amply protected against a breach of obligation by the other.

CONCLUSION

Several Louisiana cases would seem to furnish authority for holding that ownership might transfer in "lay-away sales" as of the time of agreement as to thing, price, and consent. Such does not appear, however, to be consonant with the probable intention of the parties. Nor is such a conclusion necessitated by the present Louisiana Code system. Payment of the purchase price should serve as a suspensive condition to the transfer of ownership, if the parties so intend, at least where the seller retains possession. The court's attitude toward the cash sale and contracts to sell immovable property supports this position. If ownership is not suspended in the lay-away agreement, risk of loss will be shifted to the buyer, although the seller retains possession and is in a better position to protect himself by a regular insurance policy. As regards remedies available, both buyer and seller will be amply protected in the face of a breach, whether ownership has transferred immediately or not. In the final analysis the lay-away plan of purchasing goods is but a modern security device, serving the needs of contemporary credit buying. As in any contractual arrangement, absent contrary public policy, the intention of the parties should be controlling.

Stephen J. Ledet, Jr.

A Comparison of Redhibition in Louisiana And the Uniform Commercial Code

The Uniform Commercial Code,[1] which has now been adopted in three states,[2] attempts to cover the entire field of commercial

56. *Id.* art. 1922.

1. All references in this Comment to the Uniform Commercial Code (hereafter abbreviated UCC) are to the UNIFORM COMMERCIAL CODE, OFFICIAL TEXT WITH COMMENTS (1957).

2. Ky. Law 1958, c. 77; MASS. ANN. LAWS c. 106 (1957); PA. STAT. ANN. tit. 12A (1954).

transactions, including parts covered by nine previous uniform acts.[3] Article 2 of the UCC[4] covers the field of sales, and displaces the Uniform Sales Act. It represents the latest attempt of the National Conference of Commissioners on Uniform State Laws to provide a law of sales acceptable to all states. Louisiana has not adopted the Uniform Sales Act, presumably because of basic differences between the act and the Louisiana law of sales. It is possible that in the future Louisiana may want to consider acceptance or rejection of the UCC. Some study of the UCC is necessary so that if that occasion should arise an intelligent decision could be made.

This Comment undertakes one small part of that task by comparing the Louisiana law on warranty against redhibitory vices and defects to the corresponding provisions of the UCC. No effort is made to recommend acceptance or rejection of the UCC, but areas of difference which seem particularly significant are pointed out and an attempt is made to show how adoption of the UCC would affect existing Louisiana law. The Comment is divided into three sections, Sections I and II treating Louisiana law and the UCC respectively, and Section III drawing a comparison.

I. LOUISIANA

General Principles

The Louisiana law of warranty is based upon the principle that the buyer is entitled to receive goods which are free from hidden vices or defects that render them unfit for the use intended or their use so inconvenient it must be supposed that the buyer would not have bought had he known of the defects.[5] If the goods contain hidden defects, the buyer did not get that for which he bargained, or to use civilian terms, there was a failure of the cause which prompted him to buy. The buyer in such a situation should not be required to keep the defective goods nor

3. Uniform Sales Act, Uniform Negotiable Instruments Law, Uniform Bills of Lading Act, Uniform Warehouse Receipts Act, Uniform Stock Transfer Act, Uniform Conditional Sales Act, Uniform Trusts Receipts Act, Uniform Written Obligations Act, Uniform Fiduciaries Act.

4. The UCC is divided into ten articles: (1) General Provisions; (2) Sales; (3) Commercial Paper; (4) Bank Deposits and Collections; (5) Letters of Credit; (6) Bulk Transfers; (7) Warehouse receipts, Bills of Lading and other documents of title; (8) Investment Securities; (9) Secured Transactions, Sales of Accounts, Contract Rights and Chattel Paper; (10) Effective Date and Repealer. This Comment is concerned only with Article 2 — Sales.

5. LA. CIVIL CODE art. 2520 (1870).

should the seller be entitled to keep the purchase money, even when in good faith. This principle is part of the broader civilian doctrine of error.[6] However, instead of being treated under the general rules relating to error, it is given special treatment in the section of the Code on redhibitory vices and defects. This distinction between redhibitory vices and defects and error has some importance. Error gives rise to the action of nullity which prescribes in ten years;[7] the redhibitory action prescribes in one.[8] In the redhibitory action damages are not available against the vendor in good faith. For breach of contract damages are available even against a good faith seller.

---

6. The Roman law from which the Louisiana law is derived seems not to have considered the basis of redhibition as error, but rather was concerned only with the utility of the thing sold. See MOYLE, CONTRACT OF SALE IN THE CIVIL LAW 188-210 (1892). Under French civilian law the availability of redhibition would seem to rest on the conviction that the buyer would not have consented to buy or would have bought only at a lesser price had he known of the defect. His consent is thus founded on a false motive or cause. See 1 BEUDANT, COUR DE DROIT CIVIL FRANÇAIS n° 260 (1938).

7. LA. CIVIL CODE art. 2221 (1870); "In all cases, in which the action of nullity or of rescission of an agreement, is not limited to a shorter period by [a] particular law, that action may be brought within ten years.

"That time commences . . . in case of error or deception from the day on which either was discovered . . . ."

8. *Id.* art. 2534: "The redhibitory action must be instituted within a year, at the farthest, commencing from the date of the sale.

"This limitation does not apply where the seller had knowledge of the vice and neglected to declare it to the purchaser.

"Nor where the seller, not being domiciliated in the State, shall have absented himself before the expiration of the year following the sale; in which case the prescription remains suspended during his absence."

The presence of redhibitory vices may cause the seller to retake the goods and return the purchase price, or to suffer a diminution of the price through the action quanti minoris.

Id. art. 2531. The general rule is that return of the thing is a requisite to a successful redhibitory action. Ehrlich v. Roby Motors Co., 166 La. 557, 117 So. 590 (1928) (sale of the car made return of the thing impossible; thus rescission could not be allowed); George v. Shreveport Cotton Oil Co., 114 La. 498, 38 So. 432 (1905) (return of cotton seed cake necessary for redhibitory action); Richardson v. Johnson, 1 La. Ann. 389 (1846) (slave had been taken to Texas and law forbade bringing slaves back into the Union; redhibition not allowed). See J. B. Beaird Co. v. Burris Bros., 216 La. 655, 44 So.2d 693 (1950); Henderson v. Leona Rice Milling Co., 160 La. 597, 107 So. 459 (1926); Ledoux v. Armor, 4 Rob. 381 (La. 1843). However, the court has recognized an exception to this rule where the thing no longer exists because of the vices or defects. See Richards & Alfred v. Burke, 7 La. Ann. 242 (1852) (decaying potatoes); Castellano v. Peillon, 2 Mart.(N.S.) 466 (1824) (runaway slave could not be found). In addition there are cases which indicate that not only is return of the thing necessary, but it must be returned in essentially the same condition. See Poor v. Hemenway, 221 La. 770, 60 So.2d 310 (1952) (boat had been practically rebuilt, could not be returned in same condition as received); Tucker v. Central Motors, 220 La. 510, 57 So.2d 40 (1952) (automobile had been driven over 1,000 miles after discovery of the defect). *But see* Reech v. Coco, 223 La. 346, 65 So.2d 790 (1953) (court found buyer was justified in keeping and driving the car for nine months after discovery of the defect as he was attempting during that time to have it remedied and most of the mileage was accumulated driving to and from seller's repair shop).

Redhibition Defined

Article 2520[9] lays down the basic rule when it provides that *redhibition* is the avoidance of a sale on account of some vice or defect in the thing sold which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it had he known of the vice. If at the time of the sale the defects were apparent the buyer may be considered at fault for not having discovered them, or willing to take them with the defects. Consequently Article 2521[10] provides that redhibiton will not lie for apparent defects, such as the buyer might have discovered by simple inspection.

A factual distinction exists between defects in the thing sold and the absence of some declared quality. The thing sold may not possess the quality declared by the seller and yet it may not be defective in any respect. Such a false declaration of quality may give rise to an action for rescission based on simple error.[11] To have this effect the error would have to bear on the principle motive for making the contract.[12] It must appear that the buyer's consent was based on his belief in the presence of the declared quality. However, the Louisiana Civil Code, instead of leaving cases of this kind to be dealt with under the rules relating to error, specifically applies to false declarations of quality the rules of redhibition. Thus Article 2529 declares that a declaration made in good faith by the seller that the thing sold has some quality which it is found not to have, gives rise to a redhibition if this quality was the principal motive for making the purchase.

According to the Code, to succeed in a redhibitory action the buyer must prove that the vice existed before the sale was made

9. LA. CIVIL CODE art. 2520 (1870).

10. The Louisiana courts have not interpreted this article as requiring inspection in all cases, but have found that where an inspection could have been made with little inconvenience, and such inspection would have revealed the defect, redhibition was not available. Hossier Realty Co. v. Caddo Cotton Oil Co., 136 La. 328, 67 So. 20 (1915); Fuller v. Cowell, 8 La. Ann. 136 (1853). See Huntington v. Lowe, 3 La. Ann. 377 (1848); Millaudon v. Price, 3 La. Ann. 4 (1848). *But see* McNeil & Higgins Co. v. Martin, 160 La. 443, 107 So. 299 (1926) (plaintiff should have inspected sugar when delivered to see if it was in good condition); Szymanski v. Urquhart, 5 La. Ann. 491 (1850) (defects in rollers were discoverable on simple inspection; plaintiff should have inspected).

11. LA. CIVIL CODE arts. 1820-1833 (1870).

12. *Id.* art. 1825: "The error in the cause of a contract to have the effect of invalidating it, must be on the principal cause, when there are several; this principal cause is called the *motive*, and means that consideration without which the contract would not have been made."

Id. art. 1826: "No error in the motive can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it."

to him.[13] The decisions prior to the case of *Baldwin Sales Co. v. Mitchell*[14] made it clear that the burden was on the buyer to prove the defect existed at the time of the sale.[15] In the *Baldwin* case the court placed the burden on the seller to prove the goods lived up to the specific guarantee given.[16] Since that case there has been no authoritative pronouncement so that the present status of the law in this respect remains in doubt.

Remedies

The successful buyer in a redhibitory action is entitled to restoration of the price and the expenses of the sale.[17] Whether he is entitled to damages, in addition, will turn on the seller's knowledge of the vice or defect.[18] Thus where the seller knows the vice of the thing but fails to declare it, the buyer is entitled to restitution of the price, expenses, and damages.[19] The measure

13. *Id.* art. 2530: "The buyer who institutes the redhibitory action, must prove that the vice existed before the sale was made to him. If the vice has made its appearance within three days immediately following the sale, it is presumed to have existed before the sale."

14. 174 La. 1098, 142 So. 700 (1932).

15. See Peterkin v. Oglesby, 30 La. Ann. 907 (1878) (plaintiff did not show that corn was defective when he purchased it); Hall v. Plassan, 19 La. Ann. 11 (1867) (plaintiff failed to prove wine was sour when he purchased it); Lowe v. Nelson, 7 La. Ann. 646 (1852) (burden was on buyer to prove cotton was damaged at date of the sale); Baker v. Irwin, 5 La. Ann. 588 (1850) (buyer failed to prove boiler was defective when purchased).

16. The court said: "A sufficient defense to plaintiff's [seller's] demand for the purchase price was that the equipment sold defendant and installed in his plant did not fulfill plaintiff's guaranty. Hence the burden of showing that it did so comply was clearly upon plaintiff." 174 La. 1098, 1103, 142 So. 700, 702 (1932). A later case suggested that this rule would only apply where there was an express guaranty. J. B. Beaird Co. v. Burris Bros., 216 La. 655, 44 So.2d 693 (1950) (machine for dehydrating potatoes). See also Crawford v. Abbott Automobile Co., 157 La. 59, 101 So. 871 (1924).

17. LA. CIVIL CODE art. 2531 (1870): "The seller who knew not the vices of the thing is only bound to restore the price, and to reimburse the expenses occasioned by the sale, as well as those incurred for the preservation of the thing, unless the fruits which the purchaser has drawn from it, be sufficient to satisfy those expenses."

18. *Id.* art. 2545: "The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of the price and repayment of the expenses, is answerable to the buyer in damages."

Id. art. 2547: "A declaration made by the seller, that the thing sold possesses some quality which he knows it does not possess, comes within the definition of fraud, and ought to be judged according to the rules laid down on the subject, under the title: *Of Conventional Obligaitons.*"

19. *Id.* art. 2545. The manufacturer or one who makes a business of dealing in the kind of goods sold is presumed to know of any defects in the goods. Tuminello v. Mawby, 220 La. 733, 57 So.2d 666 (1952); Doyle v. Fuerst & Kraemer, 129 La. 838, 56 So. 906 (1911); George v. Shreveport Cotton Oil Co., 114 La. 498, 38 So. 432 (1905). See Henderson v. Leona Rice Milling Co., 160 La. 597, 107 So. 459 (1926) (expert rice dealer presumed to know the rice delivered was not the kind ordered). *But see* Kodel Radio Corp. v. Shuler, 171 La. 469, 131 So. 462 (1930) (manufacturer of radios not presumed to know they would not operate under atmospheric conditions existing at home of buyer).

of damages will depend on the good or bad faith of the seller. If he is guilty of no fraud or bad faith[20] he is liable only for such damages as were contemplated or may reasonably be supposed to have entered into the contemplation of the parties at the time of the sale.[21] But where the seller is guilty of fraud or bad faith, the buyer is entitled to recover all damages that were the immediate and direct consequence of the breach whether or not they were contemplated.[22]

Whether the defect is such as to render the thing useless or altogether unsuited for its purpose, or whether the defect is not of such a nature as to require a complete avoidance of the sale, the buyer may limit his demand to a reduction of the purchase price.[23] This is true whether Article 2520 on vices and defects or Article 2529 on declarations of quality is to be applied.[24] If the buyer does so limit his demand, he may not later maintain a redhibitory action.[25] The court in its discretion may grant a reduction of the price instead of redhibition.[26] In either case the reduction to be allowed in the absence of bad faith is the difference between the price paid and the value of the thing.[27] It may be that when the seller is in bad faith, the buyer, being entitled to damages, would be entitled to the difference between the value of the thing as represented and its actual value.[28]

Exclusion of Warranty

Although the warranty against redhibitory vices is implied in every sale, it is not of the essence of sale and may be excluded or modified by the agreement of the parties.[29] When the

20. LA. CIVIL CODE art. 1934 (1870): "By *bad faith* in this and the next rule is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill will."

21. *Id.* arts. 1934(1), 2545.

22. *Id.* arts. 1934(2), 2547.

23. *Id.* art. 2541.

24. *Id.* art. 2542.

25. *Id.* art. 2543.

26. *Ibid.*

27. Iberia Cypress Co. v. Von Schoeler, 121 La. 72, 46 So. 105 (1908); Peterkin v. Martin, 30 La. Ann. 894 (1878); Fuller v. Cowell, 8 La. Ann. 136 (1853); Foster & Co. v. Baer, 7 La. Ann. 613 (1852); Slaughter v. McRae, 3 La. Ann. 455 (1848); Brown v. Duplantier, 1 Mart.(N.S.) 312 (1823); Morehouse Ice Co. v. Tooke & Reynolds, 154 So. 402 (La. App. 1934). In many construction contracts the measure is the cost of remedying the defects. Wilfamco, Inc. v. Interstate Electric Co., 221 La. 142, 58 So.2d 833 (1952); De Armas v. Gray, 10 La. 575 (1837); Bozeman v. McDonald, 40 So.2d 517 (La. App. 1949).

28. See John Barkley & Co. v. Burguiers, 165 La. 723, 115 So. 915 (1928).

29. LA. CIVIL CODE art. 1764 (1870): ". . . 2. Things which, although not essential to the contract, yet are implied from the nature of such agreement, if no stipulation be made respecting them, but which the parties may expressly modify

intention of the parties is not clear it appears that an express warranty may be interpreted as supplementing, instead of supplanting the implied warranty against redhibitory defects. For example, a specific guaranty may be given prospective application only and consequently be held not to exclude the warranty against defects existing at the time of the sale.[30] Again, it has been held that use of general language like the sale of a thing "as is" does not operate to exclude all warranties but merely puts the buyer on notice that the warranty is modified.[31] The seller still must deliver a thing fit for the purpose intended.

Warranty to Subvendees and Third Persons

Since warranty is part of the sale, the right that arises in favor of the vendee should pass on to his vendee in turn as an accessory of the thing sold. The Louisiana Supreme Court had not recognized the right of the subvendee against the original vendor until the case of *McEachern v. Plauche Lumber & Construction Co.*[32] Although to reach this result the court applied Article 2503 of the Civil Code,[33] which is in the section dealing with warranty against eviction, its disposition of the case certainly seems correct. Since that case the Louisiana Supreme Court has gone much farther. In *LeBlanc v. Coca Cola Bottling Co.*[34] the court held there was an implied warranty from the manufacturer to the consumer that foods or beverages sold in sealed or capped containers would be fit for consumption and free from harmful matter. The case concerned a third party who was not a purchaser of the thing, but only a consumer. As to

or renounce, without destroying the contract or changing its description; of this nature is warranty, which is implied in every sale, but which may be modified or renounced, without changing the character of the contract or destroying its effect . . . ."

30. See Head v. Tri-State Motors, Inc., 190 So. 186 (La. App. 1939); Brown v. Madison Paint Co., 170 So. 353 (La. App. 1936).

31. Kuhlman v. Purpera, 33 So.2d 84 (La. App. 1947) (sale of second hand truck "as is"); Maddox v. Katz, 8 So.2d 749 (La. App. 1942) (sale of antique table "as is"; must still be usable as a table); Fabacher v. Ghisalberti, 18 La. App. 599, 139 So. 70 (1932) (sale of bed "as is" does not remove all warranties); United Motor Car Co. v. Drumm, 3 La. App. 741 (1926) (secondhand automobile sold "as is" must be able to run under its own power). *Contra*, Roby Motors Co. v. Cade, 158 So. 840 (La. App. 1935) (sale of secondhand automobile "as is" invokes common law doctrine of *caveat emptor*).

32. 220 La. 696, 57 So.2d 405 (1952).

33. LA. CIVIL CODE art. 2503 (1870): "The parties may, by particular agreement, add to the obligation of warranty, which results of right from the sale, or diminish its effect; they may even agree that the seller shall not be subject to any warranty.

"But whether warranty be excluded or not the buyer shall become subrogated to the seller's rights and actions in warranty against all others."

34. 221 La. 919, 60 So.2d 873 (1952), 13 LOUISIANA LAW REVIEW 624 (1953).

subvendees this ruling would seem to be correct, but if warranty arises or is transmitted by contract, it is not clear how it can be acquired by third parties, who hold no contractual relationship with the vendor or vendee. Prior to the *LeBlanc* case such situations were dealt with under the law of negligence.[35] Subsequent cases have followed the *LeBlanc* rule, and it now appears to be settled that there is a warranty from the manufacturer to third persons in the case of foods and beverages sold in sealed or capped containers.[36]

II. THE UNIFORM COMMERCIAL CODE

General Principles

The general rule of warranty at common law historically had been *caveat emptor*.[37] In the absence of fraud or an express warranty given with the intention to warrant, the courts refused to allow the buyer either damages or rescission.[38] Exceptions were developed which by the beginning of the twentieth century had practically nullified the rule.[39] The Uniform Sales Act paid lip service to *caveat emptor*, giving it as the general rule, with exceptions that eliminated its effect for all practical purposes.[40]

The Uniform Commercial Code greatly revises the warranty provisions of the Uniform Sales Act. It rejects the rule of *caveat emptor* and sets out three kinds of warranties — express

35. See Mayerhefer v. Louisiana Coca Cola Bottling Co., 219 La. 320, 52 So.2d 866 (1951). *Cf.* Hake v. Air Reduction Sales Co., 210 La. 810, 28 So.2d 441 (1946); Ortego v. Nehi Bottling Works, 199 La. 599, 6 So.2d 677 (1942); Costello v. Morrison Cafeteria Co., 18 La. App. 40, 135 So. 245 (1931).

36. See Morrow v. Bunkie Coca Cola Bottling Co., 84 So.2d 851 (La. App. 1956); Miller v. Louisiana Coca Cola Bottling Co., 70 So.2d 409 (La. App. 1954); Montz v. Louisiana Coca Cola Bottling Co., 64 So.2d 805 (La. App. 1953). *Cf.* Johnson v. Louisiana Coca Cola Bottling Co., 63 So.2d 459 (La. App. 1953). *But see* Arnaud's Restaurant v. Colter, 212 F.2d 883 (5th Cir. 1954) (rule applied by federal court to sale of food in restaurant).

37. BENJAMIN, SALES 627 (8th ed. 1950).

38. 1 WILLISTON, SALES § 228 (rev. ed. 1948).

39. See Collins, *Warranties of Sale Under the Uniform Commercial Code*, 42 IOWA L. REV. 63 (1956).

40. Uniform Sales Act, § 15: "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: . . . ." There follow as exceptions an implied warranty of fitness for a particular purpose when the seller knows that the buyer is relying on him to furnish goods fit for that purpose, and an implied warranty that the goods shall be of merchantable quality when bought by description from one who deals in goods of that description. In addition Section 14 provided an implied warranty that the goods sold in a sale by description shall correspond with the description. Section 16 provides an implied warranty in sales by sample that the goods shall correspond to the sample in quality.

warranties,[41] implied warranties of merchantability,[42] and implied warranties of fitness for a particular purpose.[43]

Express Warranties

Express warranties are created in three ways: (1) any affirmation of fact or promise made by the seller which relates to the goods or becomes part of the basis of the bargain is an express warranty; (2) any description of the goods which is part of the basis of the bargain creates an express warranty that the goods shall conform to the description, (3) any sample or model which forms part of the basis of the bargain creates an express warranty that the bulk of the goods shall conform with the sample or model. It is immediately apparent that the key factor in finding an express warranty is that the affirmation, description or sample form part of the "basis of the bargain." This goes to the determinative reason for making the purchase. No formal words are needed to create an express warranty, nor is an actual intention to warrant necessary.[44]

Implied Warranty of Merchantability

In sales by merchants there is an implied warranty that the goods sold shall be merchantable.[45] In order that this warranty may arise it is essential that the seller be a merchant who deals in the kind of goods sold.[46] Goods to be considered merchantable must meet the tests laid down by the article. Thus they must be such as would pass without objection in the trade under the contract description; if fungible goods they must be of fair average quality within the description; they must be fit for the ordinary purposes of such goods; they must run of even kind, quality, and quantity within each unit and among all units; they must be adequately packaged and labeled as required by the agreement; they must conform to the affirmations on the label, if any. These tests do not exhaust the meaning of merchantable, nor are they intended to be exclusive. The comments of the editors explain that the way is left clear for consideration of other possible attributes of merchantability.[47]

41. UCC § 2-313.
42. UCC § 2-314.
43. UCC § 2-315.
44. UCC § 2-313.
45. UCC § 2-314.
46. *Ibid.*
47. UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE, 1957 OFFICIAL TEXT WITH COMMENTS 91, § 2-314 (1958).

Implied Warranty of Fitness for a Particular Purpose

When the seller has reason to know that the buyer is seeking goods for a particular purpose and is relying on him to furnish such goods, there arises an implied warranty that the goods are fit for that purpose.[48] The particular purpose spoken of here is not the usual purpose to which such goods are put, since this purpose would be covered by the implied warranty of merchantability. The purpose spoken of in this article is some special or unusual purpose.[49] Actual knowledge by the seller is not necessary. It suffices that the seller under the circumstances has reason to realize the purpose and the reliance. It is necessary that the buyer actually rely on the seller.[50]

Other Implied Warranties

The UCC also provides that other implied warranties may arise from the course of dealing or the usage of trade.[51] This is to cover those instances where there is a custom in a particular trade that certain warranties exist. An example would be the obligation to provide pedigree papers to evidence conformity of the animal to the contract in case of a pedigreed dog or blooded bull.[52]

Exclusion or Modification of Warranties

Warranties may be excluded or modified under the UCC.[53] In the case of express warranties, words or conduct which would tend to limit the warranty are inoperative if not reasonably consistent with the express warranty. The implied warranty of merchantability may be excluded, but use of the word merchantability is essential; and if the exclusion is in writing, it must be con-

48. UCC § 2-315.

49. On this point the editors say: "A particular purpose differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing *mountains*." UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE, 1957 OFFICIAL TEXT WITH COMMENTS 94 (1958).

50. UCC § 2-315. The editors' comments make it clear that actual reliance by the buyer is essential. UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE, 1957 OFFICIAL TEXT WITH COMMENTS 93 (1958).

51. UCC § 2-314(3).

52. This is the example used by the editors. See UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE, 1957 OFFICIAL TEXT WITH COMMENTS 92 (1958).

53. UCC § 2-316.

spicuous. In order that the implied warranty of fitness for a particular purpose may be excluded, the exclusion must be in writing and conspicuous. However, use of words like "as is" or "with all faults" will act to exclude all implied warranties. Further, if the buyer has examined the goods before buying, there is no implied warranty as to defects which examination ought to have revealed to him.[54]

Since the UCC makes a distinction between express and implied warranties, conflicts between the two may arise. In case of conflict, the UCC provides that warranties shall be construed as consistent with each other and cumulative, whenever this is reasonable. In other cases the intention of the parties is controlling.[55]

Warranty to Third Persons

The express and implied warranties in favor of the buyer are extended to members of the buyer's family, household, and guests of the buyer in some cases.[56] If it is reasonable to expect that a third party may use, consume, or be affected by the goods, and he is injured by the breach of warranty, the seller is liable as he would be to the buyer. This section by its language is limited to members of the buyer's family, household, and guests. It is not intended to affect the case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.[57]

Remedies

Under the UCC the buyer is entitled to both rescission and damages for breach of warranty. The buyer may reject the goods

54. " 'Examination' as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty." Comments by Editors, UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE, 1957 OFFICIAL TEXT WITH COMMENTS 97 (1958).

55. UCC § 2-317.

56. UCC § 2-318.

57. The editors' comments make this clear when they say: "This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE, 1957 OFFICIAL TEXT WITH COMMENTS 100 (1958).

upon tender of delivery, if they fail in any respect to conform to the contract.[58] If the goods have been accepted by the buyer, he may revoke his acceptance if he was unaware of the breach at the time of acceptance and notified the seller within a reasonable time after he should have discovered the breach.[59] In these cases the buyer may cancel the sale and recover so much of the price as he has paid.[60] In addition he may "cover" and have damages.[61] A buyer "covers" when he makes a good faith purchase of goods in substitution for those of the seller.[62] The damages to which the buyer is entitled include (1) the difference between the cost of the cover and the contract price, (2) incidental damages, i.e., expenses involved in covering and other expenses arising from the breach, and (3) consequential damages, i.e., any loss resulting from general and particular requirements of which the seller at the time of contracting had reason to know and which could not be reasonably prevented by cover or otherwise, and for injury to the person or property proximately resulting from any breach of warranty.[63]

When the goods have been accepted, it is essential that the buyer timely notify the seller of the revocation of the acceptance.[64] If such notification is not made, the buyer's remedy may be limited to the difference between the value of the goods when accepted and the value they would have had if they had been as warranted.[65] This is also the remedy available if the buyer chooses not to return the goods. Even in such a case he may recover incidental and consequential damages if circumstances allow it.[66]

The remedies for fraud include all remedies which are available for non-fraudulent breach.[67] Rescission, rejection or return of the goods on the basis of fraud under the UCC will not bar a claim for damages or other remedy.[68]

58. UCC § 2-601.
59. UCC § 2-608.
60. UCC § 2-711.
61. *Ibid.*
62. UCC § 2-712.
63. UCC § 2-715.
64. UCC § 2-608.
65. UCC § 2-714.
66. *Ibid.*
67. UCC § 2-721: "Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy."
68. *Ibid.*

III. Comparison of Louisiana Law and the UCC

From the preceding discussion it appears that the basic principle on which warranty rests, both in Louisiana and under the UCC, is that the buyer should get goods free from redhibitory defects and of the quality for which he bargained. This being true, the differences in the results achieved by the two systems should be few and should arise mostly from different applications of the principle. This section will discuss those differences which seem particularly significant and will attempt to show how adoption of the UCC would affect existing Louisiana law.

Express Warranties

The scope of express warranties under the UCC seems sufficiently broad to cover not only Article 2529 of the Louisiana Civil Code on false declarations of quality which relate to the principal motive for making the purchase, but also many situations now controlled by the general law of conventional obligations. Section 2-313 of the UCC provides that any affirmation of fact and any description of the goods which is made part of the basis of the bargain gives rise to an express warranty. Since the section covers *any* affirmation of fact and *any* description of the goods it is broader than Article 2529, which refers only to declarations of quality as to the particular thing sold. Presumably this article refers only to declarations of quality concerning specifically identified goods, i.e., particular goods which have already been identified rather than goods identified only by description. For example, a buyer who is seeking a teakwood desk chooses a certain desk and inquires if it is teakwood. The seller, in good faith, declares that it is a teakwood desk. If the desk is not teakwood, the seller has made a false declaration of quality and the buyer is entitled to redhibitory action. The declaration of quality, although still relating to the principal cause, is collateral to the primary obligation which is to deliver the desk. It is not clear that Article 2529 is designed to cover the case where the goods have not been specifically identified, but are to be identified by the presence of the declared quality. For example, if the buyer, coming into a store, tells the seller he wants to buy a teakwood desk and the seller agrees to sell him one, the desk the seller delivers must be a teakwood desk or he has not fulfilled his primary contractual obligation. In the case where the goods have not been particularized the failure of the vendor to deliver goods

of the quality he has contracted to deliver may well constitute a breach of his primary contractual obligation and would be treated under the general rules of conventional obligations rather than redhibition. Because the prescriptive periods and remedies in Louisiana are different for redhibition and breach of contract, the distinction is an important one. The UCC, however, provides the same remedies whether the breach is considered a breach of contract or a breach of warranty, consequently the distinction between the two is not important. If the UCC were adopted in Louisiana, the express warranty provisions would extend to some cases now considered under the general rules of conventional obligations. The effect would be to change the remedies available for the breach. This will be discussed hereafter in the section on remedies.

Implied Warranties

If the UCC were adopted in Louisiana it seems that the broad warranty against hidden defects provided by Article 2520 of the Louisiana Civil Code would be covered in part by the implied warranties of merchantability[69] and fitness for a particular purpose.[70] In some respects the implied warranties in the UCC do not appear to be as broad as redhibition in Louisiana, and in other respects they appear to be broader.

In the UCC the warranty of merchantability is restricted to sales by merchants. In sales by non-merchants the only implied warranty existing would be that of fitness for a particular purpose. This distinction between sales by merchants and non-merchants is not made in Louisiana.[71] If adoption of the UCC by Louisiana would entirely supplant existing laws on redhibition, the result would be that in sales by non-merchants the only implied warranty would be a warranty of fitness for a particular purpose, and this warranty would exist only when the buyer was relying on the seller to furnish goods fit for the particular purpose and the seller knew or should have known of the reliance.[72]

69. LA. CIVIL CODE art. 2520 (1870); UCC § 2-314.

70. UCC § 2-315.

71. Neither Article 2520 nor Article 2529 contain language which would indicate such a distinction. Article 2520 provides: "*Redhibition* is the avoidance of a sale on account of some vice or defect in the thing sold. . . ." Article 2529 provides: "A declaration made in good faith *by the seller*. . . ." (Emphasis added.)

72. It is not clear whether or not the adoption of the UCC would entirely supplant existing Civil Code provisions and case law on redhibition. If this was its effect, the only warranties present in a sale would be those provided by the UCC. If Louisiana law should not be supplanted in its entirety, present Louisiana warranties, neither provided for nor prohibited by the UCC, should continue to exist.

To this extent the implied warranties in the UCC are not as broad as redhibition in Louisiana.

The UCC lays down certain tests which must be met if the goods are to be considered merchantable.[73] It does not follow, however, that failure to meet all of the tests would mean the goods would contain redhibitory vices or defects within the meaning of Article 2520 of the Louisiana Civil Code. For example, goods which did not run of even kind, quality and quantity within each unit and among all units involved[74] would not necessarily contain hidden vices and defects which render the goods absolutely useless or their use so inconvenient it must be supposed the buyer would not have bought them had he known of the defects.[75] The same could be said of the requirement that the goods be adequately labeled as the agreement may require.[76] Thus it can be seen that the implied warranty of merchantability would be more extensive than the warranty against hidden vices or defects. On the other hand the redhibitory action might be deemed applicable in such cases because of the provisions of Article 2529 that a false declaration of quality will give rise to redhibition if the declared quality was the principal motive for making the purchase.[77] Thus if the failure to run of even kind and quality[78] should be deemed to involve a false declaration of quality which was the principal motive for making the purchase, redhibition would be available. It is also possible that any failure of the thing to meet the requirements mentioned in Section 2-314 might constitute a simple failure on the part of the seller to discharge his primary contractual obligation.[79] Thus the adoption of the UCC would apparently mean that in the situations mentioned above which did not involve redhibitory defects but

It could be argued that the UCC concerns itself with commercial transactions only and does not cover isolated sales by non-merchants, so that the Civil Code articles on redhibition would still apply in such cases. But since the implied warranty of fitness for a particular purpose covers all sales, it would seem that the UCC is intended to cover all transactions including isolated sales by non-merchants and thus might supplant entirely the Civil Code articles in this area in the absence of specific language to the contrary.

73. UCC § 2-314(2). The tests are set out in Section 2 of this Comment in the subsection on express warranties.

74. UCC § 2-314(2)(d).

75. LA. CIVIL CODE art. 2520 (1870).

76. UCC § 2-314(2)(e).

77. LA. CIVIL CODE art. 2529 (1870).

78. UCC § 2-314(2)(d).

79. LA. CIVIL CODE art. 2475 (1870): "The seller is bound to two principal obligations, that of delivering and that of warranting the thing which he sells." The primary contractual obligation spoken of here is the obligation to deliver the thing sold.

were covered by the tests of merchantability, there would be a breach of warranty rather than a breach of contract. As pointed out above, it would make no difference under the UCC whether such situations are considered breach of warranty or breach of contract, because the prescriptive period and the remedies available are the same in either case. In Louisiana the prescriptive period for breach of contract is ten years;[80] for redhibition, one year.[81] For breach of contract damages are available against the vendor in good faith;[82] for redhibition damages are available only when the vendor is guilty of bad faith or fraud,[83] or omits to declare a defect of which he has knowledge.[84]

The implied warranty of fitness for a particular purpose is not restricted to sales by merchants,[85] and would therefore cover some situations not covered by the implied warranty of merchantability.[86] The Louisiana courts have found that in situations where the buyer has relied on the seller to furnish goods fit to do certain work, a failure of the goods to do the work intended gives the buyer a right to maintain a redhibitory action.[87] The basis of this warranty under the provisions of the Civil Code has never been explained. It seems clear that it is not provided by Article 2520, since the failure of the thing sold to fulfill a particular purpose might not necessarily be the result of a vice or defect. Again, however, the principle of Article 2529 covering false declarations of quality, which relate to the principal motive for making the purchase, might be applicable. Thus, if the buyer has a particular purpose in mind and the seller is aware both of the purpose and the buyer's reliance on the seller to furnish goods which will fit that purpose, there may arise from the delivery of the goods an implied declaration of quality which will give rise to redhibition. In any event, it appears that the Louisiana courts have recognized such a warranty, and that the adoption of the UCC would not make a change in this respect.

80. LA. CIVIL CODE art. 2221 (1870).
81. *Id.* art. 2534.
82. *Id.* art. 1934: "1. When the debtor has been guilty of no fraud or bad faith he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract."
83. *Id.* art. 2547.
84. *Id.* art. 2545.
85. UCC § 2-315.
86. UCC § 2-314.
87. See Stewart v. Scott, 6 La. App. 744 (1927); Brown-Roberts Hardware & Supply Co. v. Mounger, 5 La. App. 479 (1927). See also Dreyfous v. Lourd & Co., 111 La. 21, 35 So. 369 (1903).

Remedies

In Louisiana the seller who is in good faith is liable only for the expenses of the sale and return of so much of the purchase price as has been paid.[88] Under the UCC the seller is liable for damages regardless of his good faith.[89] Thus the adoption of the UCC by Louisiana may have the effect of making good faith sellers liable for damages for breach of warranty.

In measuring damages Louisiana draws a distinction between the seller who knows the vices of the thing and omits to declare them[90] and the seller who declares that the thing has some quality which he knows it does not possess.[91] In the former case the seller is liable for such damages as were contemplated or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract.[92] In the latter case the seller is guilty of fraud and is liable, in addition, for all damages that are the immediate and direct consequence of the breach of warranty.[93] The UCC makes no distinction between the seller who fails to declare a known vice and one guilty of fraud, but provides that the seller is liable for all consequential damages.[94] Consequential damages are those contemplated which cannot be reasonably prevented by "covering," plus damages for any injury to person or property proximately resulting from any breach of warranty.[95] It appears that the latter provision may permit the recovery of damages which are the immediate and direct consequence of the breach of warranty, without the necessity of showing that they were within the contemplation of the parties. If that is the case, there would seem to be no difference between consequential damages provided by the UCC and damages for breach in Louisiana when the seller is guilty of fraud or bad faith. Thus it appears that the adoption of the UCC by Louisiana would end the distinction between the vendor who simply omits to declare a known vice and the vendor who is guilty of fraud. Its adoption would also change Louisiana law by permit-

88. LA. CIVIL CODE art. 2531 (1870).
89. Section 2-711 of the UCC, which gives the general rule of buyers' remedies for breach of contract, makes no mention of good or bad faith. As previously pointed out, the UCC does not distinguish breach of contract and breach of warranty. The same provisions apply to both. See also in this respect UCC § 2-721 on the remedies for fraud.
90. LA. CIVIL CODE art. 2545 (1870).
91. *Id.* art. 2547.
92. *Id.* art. 1934(1).
93. *Id.* art. 1934(2).
94. UCC § 2-711.
95. *Ibid.*

ting the recovery of damages, in addition to restitution of the price and the expenses of the sale, against a seller in good faith.

Prescription

When the seller in Louisiana is in good faith, the redhibitory action must be instituted within one year of the date of the sale.[96] When the seller knows of a vice but omits to declare it, the redhibitory action must be instituted within one year from the time the vice is discovered.[97] When the seller declares the thing has some quality which he knows it does not possess, he is guilty of fraud and the action prescribes in ten years.[98] The UCC does not make any of these distinctions, but provides that an action for breach of any contract for sale must be commenced within four years after the cause of action accrues, which is when the breach occurs.[99] Here, as in other areas, no distinction is made between the breach of contract and the breach of warranty. Thus the adoption of the UCC would change the prescriptive period for bringing the redhibitory action to four years and, in those instances where under present law an action for breach of contract would lie, would reduce the prescriptive period to four years.

Exclusion of Warranties

Both Louisiana and the UCC recognize the right of the parties to exclude warranties if they so desire.[100] Differences arise as to what constitutes a manifestation of intent to exclude. While the Louisiana Supreme Court has not passed on the point, the courts of appeal have agreed that the use of general words like "as is" does not act to exclude all warranties, but merely puts the buyer on notice that the warranty is restricted.[101] The UCC declares that use of words like "as is" will act to exclude all war-

96. LA. CIVIL CODE art. 2534 (1870).
97. *Id.* art. 2546.
98. *Id.* arts. 2221, 2547.
99. UCC § 2-725: "(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
"(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."
100. LA. CIVIL CODE art. 1764(2) (1870); UCC § 2-316.
101. See cases cited in note 31 *supra*.

ranties.[102] Although adoption of the UCC would have the effect of reversing the court of appeal decisions, the basic principle of exclusion of warranties would remain the same.

Warranties to Third Persons; Subvendees

Both Louisiana law and the UCC provide for a warranty to third persons outside the contractual relationship.[103] Differences exist between the two as to the extent and application of its coverage. Louisiana, under the rule of *LeBlanc v. Louisiana Coca Cola Bottling Co.*[104] restricts the warranty to third persons to cases involving sales of foods and beverages in sealed and capped containers; the UCC makes no distinction as to the kind of goods involved. On the other hand, the UCC restricts the warranty to members of the buyer's family, household, and guests, whereas the *LeBlanc* rule extends the warranty to anyone consuming the product. The UCC does not define the terms family, household, and guests, and thus the terms might be interpreted to extend the warranty to persons covered by the *LeBlanc* rule. One further distinction between the Louisiana and the UCC warranty to third persons must be discussed. While the *LeBlanc* rule specifically covers the manufacturer of foods and beverages, the UCC article on this subject refers only to the seller. It would appear that under the UCC the manufacturer would not be liable in warranty unless he was also the seller. But the editors of the UCC are careful to point out that the article of the UCC is entirely neutral on this point and is not intended to affect existing case law of whether the protection of the seller's warranty given to the buyer and his family, household, and guests extends to other persons in the distributive chain.[105] It would seem that the adoption of the UCC by Louisiana would not limit the *LeBlanc* rule in this respect.

Since the case of *McEachern v. Plauche Lumber & Construction Co.*[106] Louisiana has recognized a warranty from the original vendor to subvendees. The UCC is silent on this point. This silence is apparently intentional, since the editors point out that the UCC is neutral on whether the seller's warranties given to his

102. UCC § 2-316.
103. See LeBlanc v. Louisiana Coca Cola Bottling Co., 221 La. 919, 60 So.2d 873 (1952); UCC § 2-318.
104. LeBlanc v. Louisiana Coca Cola Bottling Co., 221 La. 919, 60 So.2d 873 (1952).
105. UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE, 1957 OFFICIAL TEXT WITH COMMENTS 100 (1958).
106. 220 La. 696, 57 So.2d 405 (1952).

buyer who resells extend to others in the distributive chain.[107] This being so, the adoption of the UCC should not affect the Louisiana law in this regard.

CONCLUSION

From this discussion it appears that while there are differences between the two systems in the treatment of some situations, the basic principle behind both is the same. The differences which exist seem to result from different applications of the principle.

Sidney D. Fazio

107. UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE, 1957 OFFICIAL TEXT WITH COMMENTS 100 (1958).