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Obligations

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Over the past year, the reported opinions covered a range of subjects, including redhibition,[1] specific performance,[2] subrogation,[3] indemnity,[4] proof of agreements,[5] interpretation of contracts,[6] compromises,[7] third-party purchasers,[8] abuse of rights,[9] error,[10] stipulations pour autri,[11] unjust enrichment,[12] public contracts,[13] contribution,[14] repossession,[15] ca-

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1. E.g., Cates v. Sears, Roebuck & Co., 928 F.2d 679, 687 (5th Cir. 1991); Conmaco, Inc. v. Southern Ocean Corp., 581 So. 2d 365 (La. App. 4th Cir. 1991); Beth Israel v. Bartley, Inc., 579 So. 2d 1066, 1070 (La. App. 4th Cir. 1991).
2. E.g., Morris v. People's Bank & Trust Co., 580 So. 2d 1029 (La. App. 3d Cir. 1991).
3. E.g., Illinois Cent. Gulf R.R. v. Deaton, Inc., 581 So. 2d 714 (La. App. 4th Cir. 1991).
4. E.g., Ransom v. Camcraft, Inc., 580 So. 2d 1073 (La. App. 4th Cir. 1991).
5. E.g., Morris v. People's Bank & Trust Co., 580 So. 2d 1037 (La. App. 3d Cir. 1991); Crain v. Doré, 578 So. 2d 555 (La. App. 3d Cir. 1991); Petrocana, Inc. v. Margo, Inc., 577 So. 2d 274, 277 (La. App. 3d Cir. 1991); C.T. Traina Plumbing & Heating v. Palmer, 580 So. 2d 525 (La. App. 4th Cir. 1991).
6. E.g., Avatar Exploration, Inc. v. Chevron, U.S.A., Inc., 933 F.2d 314 (5th Cir. 1991); City of Rose City v. Nutmeg Ins. Co., 931 F.2d 13 (5th Cir. 1991); Lindsey v. Poole, 579 So. 2d 1145 (La. App. 2d Cir. 1991).
7. E.g., Davis v. Huskipower Outdoor Equip. Corp., 936 F.2d 193 (5th Cir. 1991); Cutrer v. Illinois Cent. Gulf R.R., 581 So. 2d 1013, 1017 (La. App. 1st Cir. 1991); Succession of Morvant, 578 So. 2d 549 (La. App. 3d Cir. 1991).
8. E.g., American Legion v. Morel, 577 So. 2d 346 (La. App. 1st Cir. 1991).
9. E.g., American Waste and Pollution Control Co. v. Sanitary Landfill Comm'n, 578 So. 2d 541 (La. App. 3d Cir. 1991).
10. E.g., Adler v. Parkerson, 581 So. 2d 1073 (La. App. 5th Cir. 1991).
11. E.g., King v. Employers Nat'l Ins. Co., 928 F.2d 1438, 1441-42 (5th Cir. 1991).
12. E.g., Louisiana Nat'l Bank v. Belello, 577 So. 2d 1099 (La. App. 1st Cir. 1991).
13. E.g., Gibson Roofers v. Terrebonne Parish, 577 So. 2d 362 (La. App. 1st Cir. 1991); Terral Barge Line, Inc. v. Port Comm'n, 577 So. 2d 787 (La. App. 2d Cir. 1991).
14. E.g., Lirette v. State Farm Ins. Co., 581 So. 2d 265, 271 (La. App. 1st Cir. 1991); Valet v. City of Hammond, 577 So. 2d 155, 160 (La. App. 1st Cir. 1991).
15. E.g., Jones v. Petty, 577 So. 2d 821 (La. App. 2d Cir. 1991).

pacity,[16] fraudulent conveyances,[17] and quasi contracts.[18] The following discussion covers a few of the highlights.

"Fraudulent" Conveyances and Timely Revocations

Prior to January 1, 1985, the law of Louisiana provided a creditor a device to annul any contract made in fraud of his rights—the revocatory action.[19] The procedural scheme for this action allowed the creditor to wait to file his suit until he liquidated his claim against the debtor. Thus, the one year prescriptive period governing the revocatory action did not begin to run until the creditor received a judgment against the debtor.[20]

In 1984, the legislature, as part of the comprehensive revision of the law of obligations,[21] modified the revocatory action. Under the new law, the underlying cause for revocation is not limited to fraud; it includes *any act* of the debtor that causes or increases the debtor's insolvency.[22] Further, the legislature revised the prescriptive period so that the one year window for the creditor's institution of the action commences to run from the time the creditor has actual or constructive knowledge of the relevant act or omission of the debtor, with a maximum time of three years.[23]

In *Thomassie v. Savoie*,[24] the first circuit court of appeal addressed the question whether to apply retroactively the new formula of prescription. Jerry Thomassie, Jr. suffered permanent and disfiguring injuries as a result of a gunshot wound inflicted by Jerry Savoie in 1982. Within six months of the shooting, Mr. Savoie made an inter vivos

16. E.g., In re Adoption of Smith, 578 So. 2d 988 (La. App. 4th Cir. 1991).

17. E.g., Thomassie v. Savoie, 581 So. 2d 1031 (La. App. 1st Cir. 1991).

18. E.g., Commercial Union Ins. Co. v. Turner, 577 So. 2d 1219 (La. App. 3d Cir. 1991); New Orleans Pub. Serv., Inc. v. Vanzant, 580 So. 2d 533 (La. App. 4th Cir. 1991).

19. La. Civ. Code art. 1969 (1870) read, in part, as follows: "[E]very act done by a debtor with the intent of depriving his creditor of the eventual right he has upon the property of such debtor, is illegal, and ought, as respects such creditor, to be avoided." Further, La. Civ. Code art. 1970 (1870) said this: "The law gives to every creditor . . . an action to annul any contract made in fraud of their rights."

20. La. Civ. Code art. 1994 (1870): "The action . . . is limited to one year; if brought by a creditor individually, to be counted from the time he has obtained judgment [on the underlying action] against the debtor . . . ."

21. 1984 La. Acts No. 331.

22. La. Civ. Code art. 2036: "An obligee has a right to annul an act of the obligor, or the result of a failure to act of the obligor, made or effected after the right of the obligee arose, that causes or increases the obligor's insolvency."

23. La. Civ. Code art. 2041: "The action of the obligee must be brought within one year from the time he learned or should have learned of the act, or the result of the failure to act, of the obligor that the obligee seeks to annul, but never after three years from the date of that act or result."

24. 581 So. 2d 1031 (La. App. 1st Cir. 1991).

donation conveying an undivided one-half interest in community-owned real estate to his legally separated spouse. The act of donation provided that it was a full and final property settlement between the spouses. In July of 1982, Mr. Thomassie filed a suit based upon his personal injuries against Mr. Savoie. In February of 1988, the district court entered a judgment in favor of Mr. Thomassie and against Mr. Savoie for more than $500,000.00. Four months later, Mr. Thomassie filed a revocatory action seeking to annul the 1982 donation by Mr. Savoie to Mrs. Savoie. Based on the amended prescriptive period, the trial court concluded that Mr. Thomassie's claim had prescribed because he had not filed it within one year from the time he had actual or constructive knowledge of the act of donation.[25]

The first circuit reversed, disagreeing with the retroactive application of the amended prescriptive scheme. The court of appeal relied upon the substantive/procedural distinction in the jurisprudence on statutory construction[26] in deciding the issue. When a statute is substantive in nature (i.e., creates, confers, defines or destroys rights, liabilities, causes of action or legal duties), it should not be invoked retroactively.[27] By contrast, courts generally apply procedural measures retroactively.[28]

In the instant matter, the court of appeal determined that the legislature's revision of the revocatory action was largely substantive—creating liabilities where none existed before.[29] While acknowledging the procedural nature of the change to the prescriptive period, the court stated that "it is inextricably intertwined with Article 2036, which created a new obligation and which is substantive."[30] Thus, in the words of the court, "If a statute which is remedial or procedural also has the effect of making a change in the substantive law, it must be construed to operate prospectively only."[31]

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25. The district court also ruled that the donation was not a simulated transfer and that the donation was not a nullity on the basis of a prohibited substitution. Id. at 1033.

26. E.g., Landry v. Board of Levee Comm'rs, 477 So. 2d 672 (La. 1985); State v. Alden Mills, 202 La. 416, 12 So. 2d 204 (1943); Young v. American Hoechst Corp., 527 So. 2d 1102 (La. App. 1st Cir. 1988); Hawn Tool Co. v. Crystal Oil Co., 514 So. 2d 636 (La. App. 2d Cir. 1987); Manuel v. Carolina Casualty Ins. Co., 136 So. 2d 275 (La. App. 3d Cir. 1961). See Reichenphader v. Allstate Ins. Co., 418 So. 2d 648 (La. 1982); Lott v. Haley, 370 So. 2d 521 (La. 1979); State v. Landry, 568 So. 2d 1125 (La. App. 5th Cir. 1990). For another interesting view, see Note, Proportionate Prescription—An Alternative for Applying Changes in Liberative Prescriptive Periods, 43 La. L. Rev. 777 (1983).

27. *Thomassie*, 581 So. 2d at 1034 (citations omitted).

28. Id. (stating that "Procedural acts describe methods of enforcing, processing, administering, or determining rights, liabilities or status." (citation omitted)).

29. Id.

30. Id.

31. Id. (citing Manuel v. Carolina Casualty Ins. Co., 136 So. 2d 275 (La. App. 3d Cir. 1961)).

Although correct in result, the methodology of the court in *Thomassie v. Savoie* is overly confusing. In 1982, Professor Hargrave offered a more cogent and concise approach to this problem. It is worth recalling:

> The problem is not one of "prospective" or "retroactive" application of a statute; indeed, confusion could be lessened by ceasing to use those terms. The Louisiana Constitution, in article III, section 19, specifies the effective date of statutes. That provision applies to all statutes—procedural or substantive, remedial or non-remedial—and that provision must be given effect. If the statute specifies a standard of conduct, the standard applies as of the effective date. If the statute governs court procedure, it applies to procedures occurring as of the effective date. If a statute establishes a period of limitation, the statute applies as of its effective date . . . . This rather simple analysis . . . applies *unless* some other constitutional provision intervenes. That other constitutional provision, of course, is the due process clause which carries with it a flexible prohibition against unreasonable deprivations of reasonable expectations.[32]

Identifying Beneficiaries: Reclaiming Payments Not Due

The Louisiana Civil Code recognizes the existence and the enforceability of "quasi contracts."[33] There are two principal kinds of acts that give rise to these obligations: the transaction of another's business[34] and the payment of a thing not due.[35]

In *Commercial Union Insurance Co. v. Turner*,[36] the third circuit confronted the latter type of quasi contract. Commercial Union Insurance Company ("Commercial Union") issued a check payable to the order of Brenda Turner and Ford Motor Credit Company ("Ford Motor Credit") ultimately to pay for repairs to Ms. Turner's automobile that had been damaged in an accident. Commercial Union mistakenly believed that Ms. Turner held a valid policy with it, covering this loss. Ms. Turner, however, had cancelled her policy prior to the crash and was not insured by Commercial Union. Ford Motor Credit held a lien on the automobile and appeared on an endorsement to Ms. Turner's lapsed insurance policy. Ms. Turner received the check and presented it to one

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32. Hargrave, Louisiana Constitutional Law, Developments in the Law, 1980-1981, 42 La. L. Rev. 596, 601-02 (1982) (emphasis in original) (footnotes omitted).

33. La. Civ. Code art. 2293: "Quasi contracts are the lawful and purely voluntary act of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties."

34. La. Civ. Code arts. 2295-2300.

35. La. Civ. Code arts. 2301-2313.

36. 577 So. 2d 1219 (La. App. 3d Cir. 1991).

of Ford Motor Credit's representatives for endorsement. The representative signed on behalf of Ford Motor Credit as follows: "Without recourse or warranty of prior endorsement."[37] Thereafter, Ms. Turner entered her endorsement on the check and gave it to the shop that had repaired her car. After discovering that Ms. Turner's policy was not in force, Commercial Union filed suit against her and Ford Motor Credit for the amount of the check it had erroneously issued.[38] Ford Motor Credit subsequently filed a motion for summary judgment, asserting that it had merely endorsed the check as a convenience to Ms. Turner and that it had not applied any portion of the check to Ms. Turner's debt to it.[39] The trial court ruled in favor of Ford Motor Credit.[40]

In affirming, the appellate court adopted the district court's reasons for judgment.[41] While recognizing that a person who has paid money to another by mistake, thinking he owed a debt, may reclaim what he has paid, the court said that the recovery is from the one who received the payment or the benefit.[42] In this instance, according to the district and the intermediate appellate courts, Ford Motor Credit did not receive anything by endorsing the check. Commercial Union's claim was solely against Ms. Turner.

The decision is questionable. Ford Motor Credit *did* receive a benefit by endorsing the check and playing a role in Commercial Union's paying for the repairs to Ms. Turner's car. Ford Motor Credit undoubtedly required Ms. Turner and Commercial Union to list it on the lienholder's endorsement to the insurance policy—so that it would have a greater degree of control over its collateral, Ms. Turner's automobile. Ford Motor Credit's interests were served by Commercial Union's paying for the repairs. If Ms. Turner were to default on her obligations to Ford Motor Credit, the likely course of events would include Ford Motor Credit suing her and seeking possession/ownership of the vehicle. Ford Motor Credit certainly would be, in that situation, in a better position if the automobile were in good condition, rather than wrecked.

In *New Orleans Public Service, Inc. v. Vanzant*,[43] the fourth circuit court of appeal addressed the claim of a judgment debtor, brought

37. Id. at 1220. Further, the Ford Motor Credit representative restricted the payment to Acadian Body Shop, the outfit that repaired Ms. Turner's vehicle.

38. Commercial Union sought to recover $2,566.55.

39. 577 So. 2d at 1220.

40. The trial court reasoned "that Ford Motor Credit did not receive anything that was not due it and, therefore, . . . was not liable to Commercial Union." Id.

41. Id. Moreover, the appellate panel stated as follows: "We agree . . . that recovery for a debt not due must be made from the one who received the payment or benefit. We also agree . . . that Ford Motor [Credit] did not receive any payment or benefit . . . ."

42. Id.

43. 580 So. 2d 533 (La. App. 4th Cir.), writ denied, 584 So. 2d 1168 (1991).

against both the judgment creditor and his attorneys, that it overpaid a judgment. In a suit involving a streetcar/automobile accident, the trial court awarded the plaintiff damages and interest.[44] The judgment debtor (New Orleans Public Service, Inc. ("NOPSI")) ultimately paid in excess of $2 million by a draft naming the judgment creditor and his attorneys as payees. Afterwards, NOPSI determined that the interest demanded by the judgment creditor's attorneys (and paid by NOPSI) was overstated by more than $100,000.00. NOPSI filed a suit to recover the overpayment. The trial court entered a judgment against the judgment creditor and in favor of NOPSI for the amount of the overpayment but sustained an exception of no cause of action filed on behalf of the attorneys.[45] On appeal, NOPSI argued that it was entitled to recover from the judgment creditor's lawyers. The attorneys contended that they were disclosed agents of their principal and that the funds transmitted by NOPSI were owned solely by the judgment creditor. As a consequence, they urged that they were third persons who did not "receive" the alleged overpayment within the meaning of article 2031 of the Civil Code.[46]

The court of appeal reversed, resolving that NOPSI had stated a cause of action against the attorneys.[47] When NOPSI listed the attorneys and the judgment creditor as joint payees on the draft, NOPSI paid a thing not due to both the lawyers and their client. The attorneys were not third persons as they had urged.[48]

While not clear cut, the two noted cases suggest the following: when the maker of a negotiable instrument names a co-payee merely as a conduit for payment to the other co-payee, the former does not likely benefit and will not be held liable for reimbursement if the payment was not due; when, however, a co-payee receives, transmits, partially

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44. The compensatory amount was $808,212, and interest exceeded $1 million. Id. at 534.

45. Id. at 534.

46. La. Civ. Code art. 2301: "He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it."

47. In so ruling, the fourth circuit declined to follow contrary authority from the second and third circuits. Louisiana Health Serv. & Indem. Co. v. Cole, 418 So. 2d 1357 (La. App. 2d Cir. 1982); Great American Indem. Co. v. Dauzat, 157 So. 2d 308 (La. App. 3d Cir. 1963).

48. Because of the posture of the case, reviewing the district court's granting of the attorney's exception of no cause of action, the fourth circuit did not have any evidence before it that the lawyers had represented the judgment creditor on a contingency fee arrangement. Nevertheless, the court ventured the following: "[I]f there was an attorney client contract whereby the attorneys acquired an interest in the suit, La. R.S. 37:218 applies and not only has NOPSI stated a cause of action against these defendants, they may even be necessary parties to the lawsuit. La.C.C.P. Art. 642." New Orleans Public Service, Inc. v. Vanzant, 580 So. 2d at 536.

controls, and has an interest in a payment, he will be held liable with his fellow co-payee for reimbursement if the payment was not due.

Proof of Agreements—More About Writings

Chapter 8 of Title 10 of the Louisiana Revised Statutes is a portion of the Uniform Commercial Code that the legislature adopted in 1978.[49] Louisiana Revised Statutes 10:8-319[50] is the "Statute of Frauds" applicable to the sale of securities. Prior to the decision of the Louisiana Third Circuit Court of Appeal in *Morris v. People's Bank & Trust Co.*,[51] no Louisiana court had interpreted this statute. In this case, Huey P. Morris alleged, among other things, that Sam J. Friedman, a director at People's Bank & Trust Co., breached an *oral* agreement to purchase Mr. Morris' bank stock upon his retirement as president of the bank.[52] The trial court granted Mr. Friedman's motion for summary judgment, predicated upon the statutory requirement of a writing for the purchase/sale of securities, and stated: "The motion seems well founded in the law because LSA-R.S. 10:8-319 clearly requires a writing . . . ."[53] The court of appeal affirmed, adopting the reasons of the district court.[54]

Because of the lack of jurisprudence in Louisiana construing Revised Statutes 10:8-319, the district court followed the directive of the supreme

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49. 1978 La. Acts No. 165, § 1.

50. La. R.S. 10:8-319 (1983):

> A contract for the sale of securities is not enforceable by way of action or defense unless
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> (a) There is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or
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> (b) Delivery of the security has been accepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment; or
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> (c) Within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under Paragraph (a) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within ten days after its receipt, or
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> (d) The party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price.

This statute was rewritten by 1989 La. Acts No. 135, § 6.

51. 580 So. 2d 1037 (La. App. 3d Cir. 1991).

52. Paragraph 18 of Mr. Morris' petition alleged that in June and July of 1987, Mr. Friedman "agreed to buy the stock owned by petitioner on or before August 5, 1987. Friedman's obligation pursuant to this agreement has not been fulfilled." Id. at 1038.

53. Id. at 1039.

54. Id. at 1038.

court[55] and examined the case law in other jurisdictions interpreting that part of the U.C.C. These authorities have greater meaning when examined in the context of Mr. Morris' claims.

Mr. Morris argued that the legislation in question does not apply to private sales of securities or to private agreements to sell securities. Citing *Young v. Simpson*,[56] the courts disagreed. Mr. Morris was no more successful in urging that the statute does not apply to transactions involving shares of financial institutions. The Supreme Court of Kansas had squarely ruled to the contrary in *Midfelt v. Lair*.[57] Finally, the district court and the third circuit rejected Mr. Morris' assertion that the legislature did not intend Louisiana Revised Statutes 10:8-319 to supersede or restrict the portions of the Civil Code concerning oral agreements to buy and sell corporeal and incorporeal movables.[58] With the axiom that the bench should construe several apparently conflicting statutes so as to give them all effect, the courts stated that Civil Code article 1832[59] controlled—"that oral agreements to sell corporeal or incorporeal movables are enforceable *except in cases where other law requires a written form*."[60]

Gulf American Industries v. Airco Industrial Gases[61] is instructive, particularly with respect to the court's treatment of the issues of the admissibility of parol evidence and the elements of a knowing waiver of warranty. Usually, a litigant may introduce parol evidence to show that a contract, in this case a lease evidenced by a writing, was modified or altered by a subsequent agreement. That litigant, however, may not rely upon parol evidence "pertaining to matters which *preceded* the written lease . . . ."[62] In this suit, Gulf American Industries ("Gulf")

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55. Cromwell v. Commerce & Energy Bank, 464 So. 2d 721, 730 (La. 1985): "The U.C.C. was adopted in Louisiana in an effort to harmonize the commercial law of Louisiana with that of the other states. We should, therefore, examine the jurisprudence of other states interpreting [corresponding statutes]."

56. 607 F. Supp. 67, 69 (E.D. Tex. 1985).

57. 221 Kan. 557, 564, 561 P.2d 805, 812 (1977).

58. La. Civ. Code arts. 473, 1759, 2441, 2449, 2456, 2457, and 2463.

59. La. Civ. Code art. 1832: "When the law requires a contract to be in written form, the contract may not be proved by testimony or by presumption, unless the written instrument has been destroyed, lost, or stolen."

60. Morris v. People's Bank & Trust Co., 580 So. 2d 1037, 1042 (La. App. 3d Cir. 1991) (emphasis added).

61. 573 So. 2d 481 (La. App. 5th Cir. 1990).

62. Id. at 487 (emphasis in original) (citing Campesi v. Marino, 506 So. 2d 177 (La. App. 5th Cir. 1987)). Furthermore, "[T]he Louisiana courts have long held that parol evidence is *admissible* when there are allegations of fraud, error, or mistake, to show that the instrument is not the expression of the actual intention of the parties." 573 So. 2d at 487 (emphasis in original) (citing Daigle & Assoc., Inc. v. Coleman, 396 So. 2d 1270 (La. 1981); First Financial Bank, FSB v. Austin, 514 So. 2d 281 (La. App. 5th Cir.), writ denied, 515 So. 2d 1112 (1987)).

sought to prove through testimony that the written lease was not the whole arrangement between it and Airco Industrial Gases ("AIG"), particularly with regard to a waiver of warranty. Gulf was successful in this effort. "Parol evidence *is* admissible to show that the parties did not intend to substitute one written contract for all of their prior negotiations and agreements and that the . . . [writing] was not assented to as [a] complete integration."[63] Regarding the waiver, the court recited the standard known well by the bar: "In order for a waiver of implied warranty to be effective, it must be 1) written in clear and unambiguous terms; 2) contained in the written contract; and 3) brought to the attention of the buyer or explained to him."[64] Language in the contract of lease read as follows: "AIG makes no representations or warranties with respect to the Equipment other than that it shall meet the description thereof set forth elsewhere in this Agreement."[65] The court considered this insufficient to rise to the level of a waiver simply because Gulf executed the contract; it is "so vague and misleading that it is worthless . . . ."[66]

Waiving Matters Not Mentioned—Interpretation of Agreements

City of Rose City v. Nutmeg Insurance Co.[67] presented the United States Fifth Circuit Court of Appeals the question whether an endorsement to a certain policy of insurance issued by the Nutmeg Insurance Company ("Nutmeg"), styled "Service of Suit," constituted Nutmeg's waiver of its right to remove to federal court an action filed against it.[68] In *Capital Bank & Trust Co. v. Associated International Insurance Co.*,[69] the United States District Court for the Middle District of Louisiana decided in 1984 that a virtually identical endorsement precluded an

63. 573 So. 2d at 487 (citing Burton v. Lumbermens Mutual Casualty Co., 152 So. 2d 235 (La. App. 4th Cir.), writ refused, 244 La. 895, 154 So. 2d 767 (1963)).

64. 573 So. 2d at 488 (citing Prince v. Paretti Pontiac Co., 281 So. 2d 112 (La. 1973); Hendricks v. Horseless Carriage, Inc., 332 So. 2d 892 (La. App. 2d Cir. 1976); Reilly v. Gene Ducote Volkswagen, Inc., 549 So. 2d 428 (La. App. 5th Cir. 1989)).

65. 573 So. 2d at 488.

66. Id. at 489.

67. 931 F.2d 13 (5th Cir. 1991).

68. The endorsement states, in part, as follows:

> [I]n the event of our failure to pay any amount claimed to be due under your policy, we, at your request agree to submit to the jurisdiction of any Court of Competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court . . . . [I]n any suit instituted against us upon this contract, we will abide by the final decision of such Court or any Appellate Court in the event of any appeal.

69. 576 F. Supp. 1522 (M.D. La. 1984).

insurer from removing the action from state court,[70] for the endorsement "restricts the defendant to the court in which suit is first begun against it, be it federal or state."[71] This past term, the Fifth Circuit agreed with this view and reversed the order of the district court denying the City of Rose City's motion to remand.[72]

In so ruling, the court rejected Nutmeg's reliance upon *In re Delta America Re Insurance Co.*[73] According to the panel, that case involved defendants who were "reinsurance companies which were foreign corporations not otherwise subject to the jurisdiction of any court in the United States . . . ."[74] In contrast, the defendant in *City of Rose City v. Nutmeg Insurance Co.* was a domestic insurer. Thus, it did not make sense to the Fifth Circuit for the policy holder to bargain with the insurer for a provision in the contract of insurance requiring Nutmeg to submit to the jurisdiction of a court in the United States.[75] This much of the court's reasoning is not novel or unusual. There is, however, a troubling aspect to the opinion—the slant that the language in the "Service of Suit" clause operated as a "waiver" of rights as a matter of law.[76] Courts have traditionally required evidence that a person has knowingly and clearly contractually waived rights.[77] Certainly the endorsement in question did not contain any expression of Nutmeg's

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70. Id. at 1524.

71. General Phoenix Corp. v. Malyon, 88 F. Supp. 502, 503 (S.D.N.Y. 1949) (cited in Capital Bank & Trust Co. v. Associated Int'l Ins. Co., 576 F. Supp. at 1524).

72. In addition to Capital Bank & Trust Co. v. Associated Int'l Ins. Co., 576 F. Supp. 1522 (M.D. La. 1984), the Fifth Circuit cited with approval Perini Corp. v. Orion Ins. Co., 331 F. Supp. 453 (E.D. Cal. 1971), and General Phoenix Corp. v. Malyon, 88 F. Supp. 502 (S.D.N.Y. 1949).

73. 900 F.2d 890 (6th Cir.), cert. denied, 111 S. Ct. 233 (1990).

74. City of Rose City v. Nutmeg Ins. Co., 931 F.2d 13, 15 (5th Cir. 1991).

75. [T]here was no question that Nutmeg would have to submit to the jurisdiction of some court in the United States. Nutmeg is a Connecticut corporation with its principal place of business in Hartford, Connecticut. Although the question is not before us, so that we do not decide it, it seems quite likely that Nutmeg has minimum contacts with Texas, and probably with other states as well. See International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed 95 (1945). It would have made no sense for a policyholder to bargain . . . for a clause requiring only that Nutmeg would submit to the jurisdiction of some court in the United States.

Id. at 15-16.

76. The court acknowledged that while the endorsement "does not . . . mention the right of a defendant to remove . . . the language of the clause makes clear that the policyholder shall enjoy the right to choose the forum in which any dispute will be heard." Id. at 15.

77. E.g., Regis Associates v. Rank Hotels, Ltd., 894 F.2d 193 (6th Cir. 1990); Kiddie Rides U.S.A., Inc. v. Elektro-Mobiltechnik GMBH, 579 F. Supp. 1476 (C.D. Ill. 1984); Capital Bank & Trust Co. v. Associated Int'l Ins. Co., 576 F. Supp. 1522 (M.D. La. 1984).

relinquishment of its choice to remove to federal court a suit filed against it in state court.[78] The Fifth Circuit may well have overreached in justifying its conclusion.

The court should have distinguished the "Service of Suit" clause from a forum-selection provision in a contract. The United States Supreme Court has ruled that courts should enforce the choices contained in forum-selection clauses unless doing so would be unreasonable under the circumstances.[79] "Service of Suit" clauses, however, are not forum-selection devices.[80]

In this regard, the case of *Weltman v. Silna*[81] is helpful. Harry Weltman brought an action in the circuit court for the City of St. Louis against several persons who were involved with the Spirits of St. Louis basketball club's seeking a share of the settlement proceeds resulting from the 1976 merger agreement between the American and National Basketball Associations. The defendants removed the action to the United States District Court for the Eastern District of Missouri, invoking diversity of citizenship as the basis for jurisdiction. Mr. Weltman contested the removal, alleging that the defendants had waived their right to remove the suit by reason of a provision in the partnership agreement whereby the defendants consented to his filing suit in state court.[82] The district court rejected this argument and denied Mr. Weltman's motion to remand. The Eighth Circuit affirmed. The agreement "did not address removal. Waiver of the right to remove must be 'clear and unequivocal,' . . . and thus the district court properly rejected Weltman's claims that the appellees waived their right to remove."[83]

Similarly, *Regis Associates v. Rank Hotels, Ltd.*[84] dealt with the following scenario. Regis Associates ("Regis") contracted with Rank Hotels, Ltd. ("Rank") for Rank to manage the Hotel St. Regis in Detroit, Michigan. As part of their agreement, Regis and Rank included a provision whereby they agreed to submit any differences "to the

78. See supra note 68.

79. M/S BREMEN v. Zapata Off-Shore Co., 407 U.S. 1, 92 S. Ct. 1907 (1972).

80. E.g., In re Delta American Re Ins. Co., 900 F.2d 890 (6th Cir.), cert. denied, 111 S. Ct. 233 (1990); Regis Associates v. Rank Hotels, Ltd., 894 F.2d 193 (6th Cir. 1990); Weltman v. Silna, 879 F.2d 425 (8th Cir. 1989); Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390 (2d Cir. 1985); Keaty v. Freeport Indonesia, Inc., 503 F.2d 955 (5th Cir. 1974); Links Design, Inc. v. Lahr, 731 F. Supp. 1535 (M.D. Fla. 1990); City of New York v. Pullman, Inc., 477 F. Supp 438 (S.D.N.Y. 1979); Wright v. Continental Casualty Co., 456 F. Supp. 1075 (M.D. Fla. 1978).

81. 879 F.2d 425 (8th Cir. 1989).

82. Id. at 427.

83. Id. (citing 1A J. Moore, B. Ringle & J. Wicker, Moore's Federal Practice ¶ 0.157[9] (2d ed. 1987)).

84. 894 F.2d 193 (6th Cir. 1990).

jurisdiction of the Michigan Courts."[85] When a dispute arose, Regis filed a lawsuit in the Wayne County (Michigan) Circuit Court. Rank removed the action to federal court, prompting Regis to move the court to remand the action. Regis alleged that the above-quoted part of their arrangement constituted Rank's waiver of the right to remove. The trial court agreed with Regis and granted its motion. On appeal, the Sixth Circuit reversed[86] and made several interesting observations. First, "Although the right to remove can be waived, the case law makes it clear that such waiver must be clear and unequivocal."[87] Second, "The only evidence that Rank waived the right to removal . . . is that it did not explicitly set forth the right of removal in the forum selection clause. *We find this to be of no evidentiary significance* under the facts of this case."[88] Third, the intent of the parties, "and particularly Regis, was to make sure any litigation could be brought in Michigan so they would not have to travel to England to litigate. The focus was never on which Court (state or federal) in Michigan, but, rather in the broader sense, which country would be the forum for litigation."[89] Thus, the court detected nothing that suggested any intent on the part of either party to waive the right of removal. In addition, the court considered it important that it was a concession on the part of Rank to submit to the jurisdiction of the courts of Michigan, eliminating "any question of personal jurisdiction that might have been implicated in litigation involving a party incorporated in a foreign country."[90]

The Fifth Circuit may well reconsider its sweeping pronouncements in *City of Rose City v. Nutmeg Insurance Co.*[91] That would be an eventuality favorable to a more reasoned approach to contractual waivers.

Formalities of the Contract of Compromise

No one disputes the proposition that a transaction or a contract of compromise is not perfected until it is reduced to writing.[92] The written evidence of the transaction does not have to be one document or in any particular form;[93] one or two (or more) letters may be sufficient.

85. Id. at 194.
86. Id.
87. Id. at 195 (citations omitted).
88. Id. (emphasis added).
89. Id.
90. Id. at 196.
91. 931 F.2d 13 (5th Cir. 1991). McDermott Int'l, Inc. v. Lloyd's Underwriters of London, No. 91-3568 (5th Cir.) also involves this question. The parties have argued the case and are awaiting a decision. The author is one of the counsel for the appellants.
92. La. Civ. Code art. 3071 ("This contract must be . . . reduced into writing . . . .").
93. E.g., Audubon Ins. Co. v. Farr, 453 So. 2d 232 (La. 1984).

Nevertheless, as the third circuit pointed out in *American Bank & Trust Co. v. Hannie*,[94] "the requirement that the agreement be reduced to writing necessarily implies that the agreement be evidenced by documentation signed by both parties,"[95] and "there must be a meeting of the minds."[96] The two factors mentioned by the court are part and parcel of one of the necessities to any convention—consent.[97] In other words, the parties to the contract of compromise must agree to its terms and conditions. And they express their consent by signing the writing that evidences the transaction.

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94. 568 So. 2d 216 (La. App. 3d Cir. 1990), writ denied, 572 So. 2d 64 (1991).

95. Id. at 219 (citing Felder v. Georgia Pacific Corp., 405 So. 2d 521 (La. 1981); Singleton v. Bunge Corp., 364 So. 2d 1321 (La. App. 4th Cir. 1978)).

96. 568 So. 2d at 219 (citing Succession of Magnini, 450 So. 2d 972 (La. App. 2d Cir. 1984)).

97. La. Civ. Code art. 1927.