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Obligations

Bruce V. Schewe

Debra J. Hale

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*Bruce V. Schewe**
*Debra J. Hale***

INTRODUCTION

During the past year, the law of obligations was in the limelight in several significant reported opinions. The decisions addressed a number of issues, including offer and acceptance,[1] implied terms of agreements,[2] error,[3] solidarity,[4] subrogation,[5] interpretation of agreements,[6] parol evidence,[7] fraud,[8] revocatory actions,[9] redhibitory claims,[10] proof of agree-

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* Lecturer in Civil Law, Loyola University School of Law (New Orleans); member, New Orleans, Louisiana State, and American Bar Associations.

** Member, New Orleans, Louisiana State, and American Bar Associations.

1. *E.g.*, Knecht v. Board of Trustees for State Colleges & Univs., 591 So. 2d 690, 694-96 (La. 1991) (explaining that when the party's subjective intent differs inadvertently from the declared intent, the party may be bound for more than was intended) (citing 1 Saul Litvinoff, *Obligations* § 135, at 227, in 6 Louisiana Civil Law Treatise (1969)).

2. *E.g.*, Allen v. Thigpen, 594 So. 2d 1366, 1370 (La. App. 3d Cir.) (entering into an oral contract with a travel agent to perform specific functions does not imply contract to provide consulting services), *writ denied*, 596 So. 2d 555 (1992).

3. *E.g.*, Monte v. Harvey, Inc., 596 So. 2d 278, 283 (La. App. 3d Cir.) ("Error induced by fraud need not concern the cause of the obligation to vitiate consent, but must concern a circumstance that has substantially influenced that consent.") (quoting La. Civ. Code art. 1955), *writ denied*, 600 So. 2d 640 (1992).

4. *E.g.*, King v. Employers Nat'l Ins. Co., 928 F.2d 1438, 1446-47 (5th Cir. 1991) (involving solidary obligors' liability for judicial interest).

5. *E.g.*, Nicholes v. St. Helena Parish Police Jury, 604 So. 2d 1023 (La. App. 4th Cir. 1992).

6. *E.g.*, Avatar Exploration, Inc. v. Chevron, U.S.A., Inc., 933 F.2d 314, 317-18 (5th Cir. 1991); City of Eunice v. Sunland Properties, Inc., 597 So. 2d 1198, 1201 (La. App. 3d Cir. 1992); Wallace v. Huber & M&M, 597 So. 2d 1247, 1249 (La. App. 3d Cir. 1992) ("[C]ourt will not supply an ambiguity or allow recovery 'under the pretext of interpreting an ambiguity where none exists.'") (quoting Morrison *ex rel.* Morrison v. Miller, 452 So. 2d 390, 392 (La. App. 3d Cir. 1984)).

7. *E.g.*, Central Bank v. Simmons, 595 So. 2d 363, 367 (La. App. 2d Cir. 1992) ("Parol evidence is not admissible to show a prior or contemporaneous agreement to vary the terms of a note in ordinary form.") (citing Security Bank v. Frost, 524 So. 2d 937 (La. App. 2d Cir. 1988)); Cowley Corp. v. Shreveport Packing Co., 440 So. 2d 1345 (La. App. 2d Cir.), *writ denied*, 444 So. 2d 122 (1984); Billingsley v. Bach Energy Corp., 588 So. 2d 786, 790 (La. App. 2d Cir. 1991); *City of Eunice*, 597 So. 2d at 1201.

8. *E.g.*, Bennett v. Allstate Ins. Co., 950 F.2d 1102, 1106-07 (5th Cir. 1992) (involving insurance fraud); Calcasieu Marine Nat'l Bank v. Grant, 943 F.2d 1453, 1460 (5th Cir.

ments,[11] assumption of debts,[12] reformation of contracts,[13] notice of default,[14] fiduciary relationships,[15] dation en paiement,[16] third-party beneficiaries,[17] damages,[18] specific performance,[19] prescription,[20] and intentional interference with contract rights.[21] The following discussion highlights a few of the noteworthy cases.

1991) (involving fraudulent misrepresentation) (citing Abell v. Potomac Ins. Co., 858 F.2d 1104, 1131 n.33 (5th Cir. 1988)).

9. *E.g.*, *Central Bank*, 595 So. 2d at 365 ("It is no longer necessary that fraud be shown in order to succeed in a [revocatory] action.") (citing La. Civ. Code art. 2036, comments (a) & (b)); Sicily's, The Pizza Place, Inc. v. LDA, Inc., 592 So. 2d 490, 492 (La. App. 5th Cir. 1991) ("[T]he Bulk Sales Act applies only to the sale of businesses engaged in merchandising.") (citing LaBorde v. W.W. II, Inc., 509 So. 2d 816 (La. App. 1st Cir. 1987)).

10. Monte v. Harvey, Inc., 596 So. 2d 278, 281-85 (La. App. 3d Cir.), *writ denied*, 600 So. 2d 640 (1992); Waguespack v. Prosperie, 592 So. 2d 460 (La. App. 5th Cir. 1991), *writ denied*, 597 So. 2d 1031 (1992).

11. Petrocana, Inc. v. William H. Kenny Consultants, 595 So. 2d 384, 385 (La. App. 3d Cir. 1992) (stating that mineral rights are immovables and require a writing to prove their existence); Riddle v. Simmons, 589 So. 2d 89, 92 (La. App. 2d Cir. 1991) (stating that a joint venture may be formed by an oral agreement, and the conduct of the parties, as well as other circumstances, may prove its terms), *writ denied*, 592 So. 2d 1316 (1992) (citing Grand Isle Campsites v. Cheek, 262 La. 5, 262 So. 2d 350 (La. 1972)).

12. *E.g.*, Toye v. Telephone Servicers, 593 So. 2d 1364 (La. App. 4th Cir.), *writ denied*, 600 So. 2d 658 (1992).

13. *E.g.*, King v. Employers Nat'l Ins. Co., 928 F.2d 1438, 1446 (5th Cir. 1991) (citing Phillips Oil Co. v. OKC Corp., 812 F.2d 265, 274 (5th Cir.), *cert. denied*, 484 U.S. 851, 108 S. Ct. 152 (1987)); Blevins v. Manufacturers Record Publishing Co., 235 La. 708, 105 So. 2d 392 (1957) (explaining that reformation is generally unavailable to those who assert rights arising from an agreement to which they are not parties).

14. *E.g.*, General Elec. Capital Corp. v. Southeastern Health Care, Inc., 950 F.2d 944 (5th Cir. 1991).

15. *E.g.*, Trans-Global Alloy Ltd. v. First Nat'l Bank, 583 So. 2d 443 (La. 1991).

16. *E.g.*, Twin City Savs., FSA v. G.J. Rouse Co., Inc., 595 So. 2d 323, 324-25 (La. App. 1st Cir. 1991) (citing Taylor v. Taylor, 208 La. 1053, 1055, 24 So. 2d 74, 75 (1945)), *writ denied*, 600 So. 2d 610 (1992); Succession of Burns, 199 La. 1081, 1094, 7 So. 2d 359, 363 (1942).

17. *E.g.*, Nathaniel Shipping, Inc. v. General Elec. Co., Inc., 932 F.2d 366, 367-68 (5th Cir. 1991); Avatar Exploration, Inc. v. Chevron, U.S.A., Inc., 933 F.2d 314, 318 (5th Cir. 1991) (stating that third party beneficiaries have no greater rights than the contracting parties); *King*, 928 F.2d at 1442.

18. *E.g.*, Young v. Ford Motor Co., Inc., 595 So. 2d 1123 (La. 1992); *Trans-Global Alloy, Ltd.*, 583 So. 2d at 457-59; Monte v. Harvey, Inc., 596 So. 2d 278, 285 (La. App. 3d Cir.), *writ denied*, 600 So. 2d 640 (1992).

19. *E.g.*, Knecht v. Board of Trustees for State Colleges & Univs., 591 So. 2d 690, 696-97 (La. 1991).

20. *E.g.*, Gerdes v. Estate of Cush, 953 F.2d 201, 205 (5th Cir. 1992); Dixie Bldg. Materials Co., Inc. v. Bob L. Whittington & Assocs., 588 So. 2d 78 (La. 1991) (holding that buyer's prescribed demand was incidental to seller's claim for payment, and he could use it as a defense); Waguespack v. Prosperie, 592 So. 2d 460 (La. App. 5th Cir. 1991), *writ denied*, 597 So. 2d 1031 (1992).

21. *E.g.*, Everything on Wheels Subaru, Inc. v. Subaru South, Inc., 593 So. 2d 1269

I. OF MENTAL PAIN AND ANGUISH—A LONG SOUGHT SOLUTION?

More than six years ago, the Louisiana Supreme Court addressed whether actions in redhibition, concerning defective products but without personal injuries, may support an award of damages for mental anguish.[22] The court, however, did not resolve the matter, and the intermediate appellate courts have split on the issue.[23] In *Young v. Ford Motor Co., Inc.*,[24] the supreme court may have put the dispute to rest by ruling that a plaintiff/creditor may recover nonpecuniary damages when (1) he intended to gratify a significant nonpecuniary interest via the agreement (and the nature of the contract supports this intention) and (2) the debtor/defendant either knew or should have known that his failure to perform would cause nonpecuniary loss to the plaintiff/creditor.[25]

Redhibition has its roots in Roman law. It evolved to protect purchasers from corrupt dealers.[26] When buyers discovered "latent defects"—in the form of disease, propensity to run away, kicking, or difficulty in riding[27]—Roman law remedied their complaints by returning the parties to their positions before the sale: a restoration of the *status quo*.[28] Thus, the Roman vendor had to accept the return of the thing from the purchaser as well as refund to the buyer the price of the

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(La. App. 1st Cir. 1991), *writ granted*, 594 So. 2d 1305 (1992). *See* Bruce V. Schewe, *Obligations, Developments in the Law, 1989-1990*, 51 La. L. Rev. 361, 368-69 (1990).

22. Lefleur v. John Deere Co., 491 So. 2d 624 (La. 1986).

23. *E.g.*, Whitener v. Clark, 356 So. 2d 1094 (La. App. 2d Cir.), *writ denied*, 358 So. 2d 638 (1978); Catalanotto v. Hebert, 347 So. 2d 301 (La. App. 4th Cir. 1977). *See* Gary P. Graphia, Comment, *Nonpecuniary Damages: A Guide to Damage Awards Under Louisiana Civil Code Article 1998*, 50 La. L. Rev. 797, 798 (1990). In *Catalanotto v. Hebert*, the fourth circuit flatly denied mental anguish damages allegedly resulting from a breach of a contract to build a home. The court noted that a contract to build a home is not one which has as its object intellectual enjoyment. *Catalanotto*, 347 So. 2d at 303. Conversely, in *Whitener v. Clark*, the second circuit upheld an award of nonpecuniary damages for breach of a contract to build a home, stating tersely, "We do not interpret [the issue] as did Catalanotto." *Whitener*, 356 So. 2d at 1098.

24. 595 So. 2d 1123 (La. 1992).

25. *Id.* at 1133. Article 1998 of the Civil Code deals with nonpecuniary damages:

> Damage for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation of the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.
>
> Regardless of the nature of the contract, these damages may be recovered also when the obligor intended through his failure, to aggrieve the feelings of the obligee.

26. Leonard Oppenheim, *The Law of Slaves—A Comparative Study of the Roman and Louisiana Systems*, 14 Tul. L. Rev. 384, 399 (1940).

27. *See* Clarence J. Morrow, *Warranty of Quality: A Comparative Study*, 14 Tul. L. Rev. 327, 354 (1940).

28. *Id.* at 355.

goods with interest, plus any costs the buyer sustained in preserving the thing.[29]

The law of Louisiana received this system of implied warranty against latent defects and vices.[30] Thus, the purpose of the action in redhibition in Louisiana is to restore the buyer and the seller to their respective positions before the completion of the contract.[31] This, as commentators stress, includes not only compensation for pecuniary[32] loss, but non-pecuniary loss—termed *dommage moral.*[33] Accordingly, the jurisprudence in Louisiana has labelled mental anguish damages as compensatory.[34]

> Obviously, therefore, the distinction between the law of this state and that of most of the other jurisdictions, . . . is found in the kind and character of the elements to be considered in the assessment of damages. In Louisiana consideration is to be given not only to pecuniary factors but also to intellectual or mental elements, in connection with the last of which recovery for humiliation and embarrassment is allowed, these constitute actual and legal damages. The prevailing common-law rule, on the other hand, does not recognize mental suffering from humiliation as an element of damage.[35]

The jurisprudential rift on nonpecuniary damages in the absence of physical loss began in the much-discussed case of *Meador v. Toyota of Jefferson, Inc.*[36] In that suit, an eighteen-year-old plaintiff deposited with a dealership for repair her first car, damaged in a collision. The defendant contended that, in order for the plaintiff to recover nonpe-

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29. *Id.* at 356. From an historical standpoint, the civil law always has recognized and sought to remedy the problem of latent defects. In contrast with Roman and civilian principles, the doctrine of *caveat emptor* long had reigned in the common law tradition. Only in the nineteenth century did an implied warranty of merchantability find its way into the common law. Id. at 334-35.

30. Oppenheim, *supra* note 26, at 399.

31. John Hardie Baldwin, Jr., Comment, *Warranty of Quality in Louisiana: Extent of Recovery Under the Implied-in-Law Warranty*, 23 Tul. L. Rev. 130, 131 (1948); *see* Savoie v. Snell, 213 La. 823, 827, 35 So. 2d 745, 746 (1948).

32. Webster defines "pecuniary" as follows: "1: consisting of or measured in money," or "2: of or relating to money." Webster's Eighth New Collegiate Dictionary 837 (1979).

33. La. Civ. Code art. 1998, comment (b) (citing Saul Litvinoff, *Moral Damages*, 38 La. L. Rev. 1 (1977) (commenting that moral damage designates damage inflicted to interests or assets that are not patrimonial, or damage to an interest for which a current market value cannot be readily obtained)).

34. *E.g.*, Vogel v. Saenger Theaters, Inc., 207 La. 835, 846, 22 So. 2d 189, 192 (1945); Jiles v. Venus Community Ctr. Benevolent Mut. Aid Ass'n, 191 La. 803, 812-13, 186 So. 342, 345 (1939); Graham v. Western Union Tel. Co., 109 La. 1069, 34 So. 91 (1903); Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903).

35. *Vogel*, 207 La. at 845, 22 So. 2d at 192.

36. 332 So. 2d 433 (La. 1976). In *Meador*, the court interpreted article 1934(3) of the Civil Code of 1870, the predecessor to article 1998 of the current Civil Code.

cuniary loss for its failure to perform as promised, the object of the contract (in this instance, to repair the automobile) must be exclusively that of intellectual enjoyment,[37] rather than partially intellectual and partially physical enjoyment. In language that prior courts had interpreted inconsistently,[38] the court in *Meador* said the following:

> Thus, we would interpret Article 1934(3)[39] as follows: Where an object, *or the exclusive* object, of a contract, is physical gratification (or anything other than intellectual gratification) nonpecuniary damages as a consequence of nonfulfillment of that object are not recoverable.
>
> On the other hand, where a principal *or exclusive object* of a contract is intellectual enjoyment, nonpecuniary damages resulting from the nonfulfillment of that intellectual object *are* recoverable. Damages in this event are recoverable for the loss of such intellectual enjoyment as well as for mental distress, aggravation, and inconvenience resulting from such loss, or denial of intellectual enjoyment.[40]

In the situation before it, the court concluded that the plaintiff was not entitled to recover mental anguish damages because she failed to prove that her deprived intellectual enjoyment, stemming from the seven-month loss of her car, was "a principal object of the contract to have the car repaired."[41] The court, however, did not flatly announce that

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37. Article 1998 of the Civil Code, as revised by Act 331 of 1984, identifies intellectual loss as nonpecuniary and characterizes physical loss as pecuniary.

38. *See, e.g.*, H. Alston Johnson, III, *Obligations, The Work of the Louisiana Appellate Courts for the 1976-1977 Term*, 38 La. L. Rev. 345, 346 (1978) (stating that nonpecuniary damages are appropriate when at least one of the principal objects of the contract is some "intellectual enjoyment"); *cf.*, Grafia, *supra* note 23, at 798 (commenting that recovery of nonpecuniary damages is limited to situations when the exclusive object of the contract is intellectual gratification).

39. The requisites for recovering nonpecuniary damages were embodied in article 1934(3) of the Civil Code of 1870. It read as follows:

> Although the general rule is, that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on pecuniary loss, or the privation of pecuniary gain to the party. Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.

40. *Meador*, 332 So. 2d at 437 (first and second emphasis added).

41. *Id.*

intellectual enjoyment must be the only object of the contract for a disappointed creditor/plaintiff to prosecute this claim.[42]

The omnibus revision of the law of obligations, culminating in Act 331 of 1984, sparked heated debate on the question of nonpecuniary damages.[43] While some argued for the availability of nonpecuniary damages for all types of contractual breaches,[44] the redactors ultimately rejected that view.[45] The result is that article 1998 of the Civil Code incorporates the multiple objects or interests concept but restricts recovery to cases when the nature of the agreement reflects that the creditor intended to gratify a nonpecuniary interest.[46] Furthermore, the nonpecuniary interest must be significant—more than "an incidental or inferred contemplation of the contracting parties."[47]

In *Young v. Ford Motor Co.*, the supreme court reviewed the following set of circumstances. The plaintiff, a forty-nine-year-old service station owner, purchased a new pickup truck that soon exhibited all the signs of a true "lemon."[48] The trial court characterized the problem

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42. The ambiguity was fueled by the word "or" in the phrase "[w]here an object, or the exclusive object." *Meador*, 332 So. 2d at 437. The court's use of the disjunctive "or" was not used to express "a choice of one among two or more things," but in its alternate sense, "to clarify what has already been said," "in other words," or "that is to say." Young v. Ford Motor Co., Inc., 595 So. 2d 1123, 1130 n.10 (La. 1992). Black's defines "or" as follows:

> A disjunctive particle used to express an alternative or to give a choice of one among two or more things. It is also used to clarify what has already been said, and in some cases, means "in other words," "to-wit," or "that is to say." Peck v. Board of Dir. of Pub. Schools, 137 La. 334, 68 So. 2d 629, 630; Travelers' Protective Ass'n v. Jones, 75 Ind. App. 29, 127 N.E. 783, 785.

Black's Law Dictionary 987 (5th ed. 1979). Thus, "exclusive" may define the type of object or it may provide another situation when nonpecuniary damages are available.

43. *See* Minutes of the June and September 1981 Louisiana State Law Institute Council Meetings.

44. *Id.* at 8.

45. *Id.* at 6, 8-11. The revisioners' fears may have been misplaced. Mental anguish damages are compensatory in nature—not punitive. Mental anguish damages compensate the creditor for a real loss, and the creditor must prove them just like any other loss. Litvinoff, *supra* note 33, at 27. Punitive damages, by contrast, are not typically available in Louisiana and, moreover, are not designed to make whole any particular plaintiff/creditor. Their purpose is to deter conduct on the part of the defendant/debtor and others similarly situated.

46. *Young*, 595 So. 2d at 1133.

47. *Id.* at 1132 (quoting Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433, 437 (1976)).

48. The problems first surfaced as an engine knock. Over the next three months, the seller replaced an engine switch and two air pollution pumps, repaired peeling hood paint and defective brakes, and engaged in major engine repair work. Subsequently, the seller replaced a missing spring in the steering column, upon which the plaintiff returned with complaints of a grinding vibration. The plaintiff complained that the truck was

as a breach of contract without personal injury.[49] Notwithstanding the court's view, the jury returned an award in favor of the plaintiff for the purchase price, rental charges, attorney's fees, and $3,750 for mental anguish. As proof, the plaintiff's doctor testified that the truck's condition had caused the plaintiff to have difficulty sleeping and concentrating and had caused the plaintiff to become depressed. The doctor stated that he had prescribed medication to combat the plaintiff's tension and frustration.[50] In striking the award for mental anguish, the court of appeal stated that "the record supports the . . . finding that plaintiff suffered emotional distress as a result of the hassles [sic] associated with this defective truck,"[51] but did not identify a significant nonpecuniary interest in the sale.

The supreme court affirmed, stating that the nonpecuniary aspects of the plaintiff's contract to purchase a truck were not substantial.[52] The court noted that, while nonpecuniary interests may relate to the enjoyment and the personal preference of owning and driving the vehicle, the nature of the bargain was primarily pecuniary because the purchase was designed to satisfy the need for transportation. The court contrasted the purchase of a new truck with that of an antique automobile, the latter representing a buyer's desire to own or show a distinctive antique.[53]

Although the plaintiff testified that he had purchased the truck in question because he wanted a larger cab in which to sleep on recreational trips, that desire was outweighed by his use of the vehicle for his business (to haul tires and to transport customers). Even his professed recreational use of the vehicle on fishing trips was enmeshed with the pecuniary interest of transporting his boat.[54]

The supreme court's focus on the individual factors of a given situation plainly shows that the courts will address the question of nonpecuniary losses in contract cases on a case-by-case basis. That seems appropriate. One aspect of the decision in *Young*, however, appears to be unusual. Wealthy persons, with tastes and means for exotic and unique goods, likely will stand a much better chance of recovering for their intellectual disappointments than poorer individuals who, for the most part, will not enter into these types of arrangements.

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sluggish and smelled of gasoline. Within one month after purchase, the plaintiff had the truck serviced/repaired no less than eight times and four additional times in the following two months.

49. *Young*, 595 So. 2d at 1124.

50. *Id.* at 1125.

51. Young v. Ford Motor Co., 574 So. 2d 557, 558 (La. App. 3d Cir. 1991), *aff'd*, 595 So. 2d 1123 (1992).

52. *Young*, 595 So. 2d at 1134.

53. *Id.* at 1133. The court compared the traditional new car purchase to the contract to purchase a specially-designed, custom-built vehicle.

54. *Id.*

II. PUTTING IN DEFAULT, RENOTIFICATION, AND A LEASE OF A MOVABLE—THE CIVILIAN TRADITION

In *General Electric Capital Corp. v. Southeastern Health Care, Inc.*,[55] the United States Fifth Circuit Court of Appeals examined the civil law tradition of legislative supremacy and attempted to divine what the Supreme Court of Louisiana would say about the case before it. The court entered into the unchartered territory of renotification in the context of a putting in default involving the contract of a lease of movables. The lessee had entered into a ten-year lease of an aircraft. During the initial years of the agreement, the lessee met its obligations. When, ultimately, the lessee defaulted, the lessor formally notified the lessee that it had "elected to institute the provisions of default" under the contract.[56] The lessee responded by stating that it fully intended to comply with the terms of the lease within the year—as soon as its cash flow problems abated. It encouraged the lessor to try to "work something out." Then, the lessee forwarded two checks representing two delinquent month's rental.[57] The lessor did not immediately cash or deposit for collection the two checks but, instead, arranged a meeting between its representatives and the lessee. This meeting ended in a stalemate, with the lessor demanding the return of the aircraft and depositing for collection the two checks.[58] The lessee returned the aircraft.

When the lessor filed suit seeking the past due sums under the terms of the lease, plus interest and attorney's fees, the district court dismissed the case, ruling that the lessor had not notified the lessee of its default in accordance with the Civil Code. In finding that the lessee's partial payments constituted compliance with the notice, the trial court decided that the lessor should have renoticed the lessee of any default.[59] The lessor appealed.

Although not a matter addressed specifically in the Civil Code, the courts in Louisiana have invoked the principle of renotification for many years.[60] The courts, however, have not applied the doctrine to the

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55. 950 F.2d 944 (5th Cir. 1991).

56. *Id.* at 947. The lessee was behind in monthly rental payments and had not paid property taxes (for two years), sales taxes, late charges, and insurance premiums—all charges under the terms of the lease.

57. *Id.* Amounts to cover the delinquent tax payments, the next subsequent month's rent—(by then past due), and other sums called for in the notice were not in the two checks. The lessor said nothing about the failure to pay for these sums.

58. *Id.*

59. *Id.*

60. *E.g.*, Arms v. Rodriguez, 232 La. 951, 95 So. 2d 616, 618 (1957) (holding that acceptance of partial rent constitutes waiver of prior notice and forgiveness as to any and all previously committed infractions); Thompson v. Avenue of Ams. Corp., 499 So. 2d 1093 (La. App. 3d Cir. 1986); Adam, Inc. v. Dividend, Inc., 447 So. 2d 80 (La.

contract of a lease of movables.[61] The courts developed renotification to counter the harsh consequences to a tenant when a landlord seeks summary eviction upon relinquishing a partial rental payment from a lessee that lulled a tenant into a sense of security, thinking that the landlord had dropped the threatened action.[62] In the situation of a lease of a movable, the court in *General Electric Capital Corp. v. Southeastern Health Care, Inc.* surmised that this protection was not needed and, further, that the Supreme Court of Louisiana would not require renotification.[63]

In reaching its decision, the Fifth Circuit canvassed the Civil Code. Finding no cohesive set of principles governing the timing or the content of notice,[64] the court turned to the general provisions of conventional obligations. And, as the Fifth Circuit correctly noted, as a part of the comprehensive revision of the law of obligations in 1984, the legislature reduced the role of putting the debtor in default almost to the point of extinction.[65]

A creditor seeking damages for *delay* in performance may recover only from the time he places the obligor in default.[66] By contrast, a creditor may recover compensatory damages from the time the obligor fails to perform.[67] As the comments to article 1989 reveal, the legislature modified the meaning of default to require "an obligee to put his obligor in default *only when the obligee seeks damages for delay, or moratory*

App. 4th Cir. 1984); Passalaqua v. Mendez, 388 So. 2d 1172 (La. App. 4th Cir. 1980); Murphy Oil Corp. v. Gonzales, 316 So. 2d 175 (La. App. 4th Cir.), *writ refused*, 320 So. 2d 558 (1975).

61. *E.g.*, *Arms*, 95 So. 2d at 617.

62. *General Elec. Capital Corp.*, 950 F.2d at 949.

63. *Id.* Due to the absence of definitive authority from the Supreme Court of Louisiana, the court had to predict what the Supreme Court would say regarding renotification and leases of movables. *See* Galindo v. Precision Am. Corp., 754 F.2d 1212, 1217 (5th Cir. 1985). As a consequence, the court studied the relevant portions of the Civil Code and the jurisprudence to reach its decision.

64. Article 2691 of the Civil Code calls for notice of termination of lease when the agreement is silent as to duration. And Article 2691 further provides the following: "[W]hen notice has been given, the tenant although he may have continued in possession, cannot pretend that there has been a tacit renewal of lease." The Civil Code, however, appears to apply to immovables only on this issue. Specifically, article 2739 of the Civil Code admonishes that a purchaser of leased property that "wishes to use the right reserved by the lease is moreover bound to give previous notice to the tenant according to article 2686."

65. *General Elec. Capital Corp.*, 950 F.2d at 951.

66. La. Civ. Code art. 1989.

67. *Id.* For an analysis of the notion of default and its purposes under the Civil Code of 1870, *see* 2 Saul Litvinoff, *Obligations* § 274, at 516, in 7 Louisiana Civil Law Treatise (1975); J. Denson Smith, *The Cloudy Concept of Default*, 12 Min. L. Inst. 3 (1965).

damages."[68] The notice of default simply marks a point from which delay damages begin.[69] Accordingly, absent a stipulation in the contract of notice of default as a prerequisite to a creditor's action, the creditor need not warn the debtor that he is not performing as agreed or that he should perform.[70]

In the case of the contract of lease, a lessor has two mutually exclusive choices available: (1) to institute a lawsuit to recover accelerated rental payments, plus amounts pending or due in the future; or (2) to cancel the agreement, recover the thing leased, and pray for other damages.[71] Louisiana Revised Statutes 9:3319 establishes that recovery of accelerated rental payments is accomplished by a lawsuit, which requires no formal putting in default as a prerequisite to its commencement.[72] On the other hand, Louisiana Revised Statutes 9:3320 spells out the second remedy—lease cancellation.[73] The lessor of a movable choosing to terminate the lease agreement may do so extra-judicially, simply by delivering written notice "to that effect" to the lessee.[74] The legislation does not suggest any intent to negate any of the lessor's choices because the lessee has tendered to the lessor part or all of the past due performance or performances due under the lease.

As a consequence, the Fifth Circuit concluded that a lessor need not notify the lessee of its lack of performance (or default) as a prerequisite to commencing legal action to collect earned but unpaid rent

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68. La. Civ. Code art. 1989, comment (a) (emphasis added). "Moratory damages," as the comment continues, "presupposes a performance actually rendered, although delayed." La. Civ. Code art. 1989, comment (b).

69. La. Civ. Code art. 1989, comment (f).

70. General Elec. Capital Corp. v. Southeastern Health Care, Inc., 950 F.2d 944, 952 (5th Cir. 1991).

71. La. R.S. 9:3318 (1991). *See* Charles S. McCowan, Jr. & John Dale Powers, *The Law of Movable Leases—Void Being Filled*, 28 La. Ba. J. 123 (1980).

72. La. R.S. 9:3319 (1991) reads as follows:

> A. If the lessor . . . elects to recover accelerated future rental payments and additional amounts that are then due and owing under the lease following the lessee's default, as provided under R.S. 9:3318(A)(1), the lessor shall commence an ordinary collection proceeding against the lessee as provided under the Louisiana Code of Civil Procedure. . . .

73. La. R.S. 9:3320 (1991) states this:

> A. If the lessor elects to cancel the lease following the lessee's default as provided in R.S. 9:3318(A)(2), the lessor shall forward a written notice to the lessee to that effect, which notice may either be personally delivered to the lessee or mailed to him by registered or certified mail at his address as shown in the lease agreement or at the address mutually agreed upon in writing by the parties, or if there is no such address, then at the lessee's last known address.

74. The lessee must relinquish the leased property within five days of the notice. La. R.S. 9:3321 (1991). If the lessee fails to deliver the property within this period, the lessor may begin summary proceedings to force him to surrender the property.

and other sums due under the lease. Renotification was not required because the lease already had been cancelled.[75] Because the lessor successfully had elected its remedy of lease cancellation,[76] the Fifth Circuit held that it was entitled to the monetary damages that accompany the remedy[77]—regardless of the partial payments remitted after notice.[78] The Fifth Circuit should be commended for its ability to grasp the heart of Louisiana's civilian tradition.

III. Loyalty, Negligence, Time Bars, and an Attorney's Obligations

The "Deal of the Century" was "too good to be true" for a Louisiana attorney. For the purposes of prescription, the law of Louisiana distinguishes a breach of loyalty that accompanies an attorney's mandatary contract from an action for malpractice. That was an important distinction in *Gerdes v. Estate of Cush*.[79]

Rudolph Gerdes, a Dutch citizen owning immovable property in Louisiana, hired a lawyer in Louisiana, Maynard Cush, and vested him with the authority to sell the property.[80] Pursuant to that mandate, Mr. Cush partially orchestrated a deal to transfer the property to Jack Martin.

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75. General Elec. Capital Corp. v. Southeastern Health Care, Inc., 950 F.2d 944, 953-54 (5th Cir. 1991). The lessee had asserted that the notice was the lessor's method to alert him of his failure to perform under the contract—or face consequences.

76. The court noted that the lessor's notice accomplished lease termination even if it was "somewhat inartfully" drawn. *Id.* at 956. The notice "elected to institute the provisions of default" and to "accelerate the account balance in accordance with the terms of the lease." *Id.* at 947. The "acceleration" was not for future rental payments, in accordance with the lease remedy under La. R.S. 9:3320, but for the account balance, which included the total delinquency or past due amounts. These amounts included delinquent monthly rental installments for February and March of 1987, property taxes due under the lease for calendar years 1986 and 1987, the monthly installment due on April 6, sales tax on rental and on property taxes, late charges, and the aircraft's so-called "Casualty Value"—a term of art under the lease. *Id.*

77. Under the terms of the lease, the lessor could regain possession of the plane, sell it on the open market, and then seek from the lessee any remaining sums not covered by the sales proceeds as damages. *Id.* at 956-57. Damages further included costs incurred by the lessor in repossessing the plane, costs in preparing the plane for resale, legal fees, court costs, inspection charges, and others. *Id.* at 957.

78. *Id.* at 954. The court recognized that the legislation concerning notice and default was merely suppletive. Thus, the parties could agree to contractual terms dictating more or less notification. *Id.* at 951. *See* La. Civ. Code art. 1983 ("Contracts have the effect of law for the parties . . ."). The terms of the agreement in question, however, mirrored the suppletive statutes. *General Elec. Capital Corp.*, 950 F.2d at 954-55.

79. 953 F.2d 201 (5th Cir. 1992).

80. La. Civ. Code art. 2985: "A mandate, procuration, or letter of attorney is an act by which one person gives power to another to transact for him and in his name, one or several affairs."

In return for the property, Mr. Martin agreed to assume Mr. Gerdes' mortgages and to execute a $1,358,000 promissory note, secured by a mortgage on property located in Oklahoma.[81]

Shortly after the deal closed, Mr. Gerdes learned that Oklahoma authorities had arrested Mr. Martin on a charge of attempting to hire a hitman to eliminate, among others, himself, Mr. Cush, and Mr. Cush's associate and secretary.[82] An investigation revealed that the property in Oklahoma, securing Mr. Martin's note, was not an operating gravel pit but was essentially worthless. Mr. Gerdes thereafter brought suit against Mr. Cush's estate (Mr. Cush had died a few months earlier), alleging that Mr. Cush had committed legal malpractice and had breached his fiduciary duty as an agent.[83] Prior to trial, the district court dismissed, as prescribed, the claims based on negligent actions of an attorney serving as an agent. The fifth circuit affirmed.[84]

The Civil Code imposes a variety of obligations and duties upon a mandatary.[85] An agent may be responsible to his principal not only for damages stemming from his nonperformance or unfaithfulness but also for fault or neglect.[86] The mandatary's duty of loyalty, flowing from his position of trust, characterizes the fiduciary relationship.[87]

Although a mandatary is a fiduciary of his principal, not all claims that a principal may have against his agent sound in contract, with the accompanying period of prescription of ten years.[88] Actions for negligence—including legal malpractice—prescribe in one year.[89] The claim predicated upon the negligence of a mandatary is an ordinary delictual action, and, as the court concluded in *Gerdes*, governed by the one-year standard.[90] In the present context, the court further determined that there was no evidence of a breach of a fiduciary duty.[91]

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81. *Gerdes*, 953 F.2d at 202. Mr. Martin represented that the property, a gravel pit, was operational and generated about $34,000 in revenue per month.

82. *Id.* at 203. A jury ultimately convicted Mr. Martin of solicitation of murder.

83. *Id.* The claims were premised on the attorney's failure to obtain information about Mr. Martin's creditworthiness and to inspect the gravel pit.

84. *Id.* at 203-04.

85. *See* A.N. Yiannopoulos, *Brokerage, Mandate, and Agency in Louisiana: Civilian Tradition and Modern Practice*, 19 La. L. Rev. 777, 795 (1959).

86. La. Civ. Code art. 3003: "The attorney is responsible, not only for his unfaithfulness in his management, but also for his fault or neglect."

87. *Gerdes*, 953 F.2d at 205. *See* Plaquemines Parish Comm'n Council v. Delta Dev. Co., 502 So. 2d 1034, 1040 (La. 1987). A cause of action for breach of fiduciary duty requires proof of fraud, breach of trust, or proof of an action outside the limits of the fiduciary's authority. *Gerdes*, 953 F.2d at 205.

88. La. Civ. Code art. 3499. A ten-year prescriptive period governs an attorney's breach of fiduciary duty.

89. La. Civ. Code art. 3492.

90. *Gerdes*, 953 F.2d at 205; *see* Batiste v. Security Ins. Group, 416 So. 2d 279 (La.

IV. THE PERILS OF TRAVELLING

The extent of a travel agent's obligations to his customers was a subject of contention in the intermediate courts of appeal.[92] In *Allen v. Thigpen*,[93] two affluent world travellers contacted an agency and made travel plans. Mr. and Mrs. Allen asked their agent to book airline tickets, hotel rooms, and a rental car. They, however, saw an early end to their European vacation when they were denied boarding passes on the plane to France.[94]

Irritated with the agency, Mr. and Mrs. Allen sued ASI-Elite Travel, Inc. and its employee, Ms. Thigpen, for reimbursement of their expenses and for injury to their reputation. The trial court rejected these demands, and the third circuit affirmed.[95] Although Mr. and Mrs. Allen had an engagement/contract with their travel agent, the scope of Ms. Thigpen's responsibilities were limited. She was not a consultant on travel but simply booked specific travel accommodations.[96] Since she had not failed to complete these tasks, Mr. and Mrs. Allen had no recourse against her or ASI-Elite Travel.

The role of the travel agent in *Philippe v. Lloyd's Aero Bolivano*[97] differed sharply. The agency arranged a packaged deal with "portal-to-portal" care and accommodations.[98] The trip, unfortunately, turned out poorly for one customer. While flying at a high altitude, an elderly tourist suffered a brain injury on the tour organized, promoted, arranged, and conducted by the agent. Because of the broad representations of the agency and the nature of the comprehensive travel plans, the second circuit held that the agent had the duty to warn of possible medical risks during the flight.[99]

App. 3d Cir.) (involving negligence of insurance/broker mandatary), *writ denied*, 421 So. 2d 909 (1982); Manion v. Pollingue, 524 So. 2d 25 (La. App. 3d Cir.), *writ denied*, 530 So. 2d 572 (1988) (holding that tort claims against attorney as mandatary subject to a one-year period of prescription).

91. The court quoted from the district judge's opinion:

> "I don't think there is any evidence that [the attorney] placed his interests above the plaintiff's in this particular case. Maybe he didn't do his job properly, but he didn't put his interests over [the principal]." The fact that Martin tried to have both . . . killed suggests that they had nothing to gain (and quite a bit to lose) from failing to do their jobs properly.

Gerdes, 953 F.2d at 206.

92. Allen v. Thigpen, 594 So. 2d 1366 (La. App. 3d Cir.), *writ denied*, 596 So. 2d 555 (1992); Philippe v. Lloyd's Aero Boliviano, 589 So. 2d 536 (La. App. 1st Cir. 1991), *writ denied*, 590 So. 2d 594 (1992).

93. 594 So. 2d 1366 (La. App. 3d Cir.), *writ denied*, 596 So. 2d 555 (1992).

94. *Id.* at 1367-68.

95. *Id.* at 1368.

96. *Id.* at 1371.

97. 589 So. 2d 536 (La. App. 1st Cir. 1991), *writ denied*, 590 So. 2d 594 (1992).

98. *Philippe*, 589 So. 2d at 544.

99. *Id.* at 546.

V. BANKING BLUES AND CREDITOR ACCOUNTABILITY

Amidst the rubble and decay of the lending industry, the supreme court has taken a bold step toward lender accountability. In *Trans-Global Alloy Limited v. First National Bank of Jefferson Parish*,[100] the court departed from its long-standing view that a debtor and a creditor stand at arms-length, with no fiduciary duty of care owed by the lender.[101] In certain situations, the court announced, a customer may hold a bank in trust or may rely on a bank for financial advice and counseling.[102] Thus, the court affirmed an award of one-half million dollars, plus interest.[103]

The decision found support in authority from other jurisdictions, including *High v. McLean Financial Corp.*[104] The federal district court for the District of Columbia concluded that a bank may owe a duty to a customer simply by virtue of the customer's loan application, processing fees, and the bank's promises that it would make a loan.[105]

Other courts have suggested far-reaching fiduciary duties.[106] *Barnett Bank of West Florida v. Hooper*[107] set forth a lender's duty to disclose information peculiarly within the bank's knowledge when (1) it enters into a transaction with a customer and (2) the bank stands to benefit at the customer's expense.[108] *Baylor v. Jordan*[109] emphasized that a bank may be a fiduciary when the customer places trust in it and the customer relies on the bank for financial advice.

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100. 583 So. 2d 443 (La. 1991).

101. *See* Thomas N. Bucknell, Jr., Stephen A. Goodwin & Marshall C. Stoddard, Jr., Lender Liability: Theory and Practice § 1.2.

102. *Trans-Global*, 583 So. 2d at 452 (citing Baylor v. Jordan, 445 So. 2d 254, 256 (Ala. 1984)).

103. *Id.* at 445.

104. 659 F. Supp. 1561 (D.D.C. 1987).

105. *Id.* at 1568. The court refused to dismiss the complaint that the customers filed when they learned from a third-party that the bank had rejected their loan application.

106. *E.g.*, Barnett Bank v. Hooper, 498 So. 2d 923, 925 (Fla. 1986) (citing Tokarz v. Frontier Fed. Sav. and Loan Ass'n, 656 P.2d 1089 (Wash. App. 1982); Klein v. First Edina Nat'l Bank, 196 N.W.2d 619 (Minn. 1972); Baylor v. Jordan, 445 So. 2d 254, 256 (Ala. 1984)).

107. *Barnett Bank*, 498 So. 2d 923.

108. *Id.* at 925. The plaintiff, Dr. Hooper, made several investments with Joe Hosner, a major customer of the bank, financing the transactions at the bank. The bank learned that Mr. Hosner was involved in fraudulent activities but continued to loan money to Dr. Hooper, knowing that he would use the funds for additional investments. In this situation, the court held the bank liable for failing to disclose Mr. Hosner's fraudulent activities to Dr. Hooper. *Id.* at 924. In addition, the court did not see as problematic the bank's disclosing to Dr. Hooper its knowledge of Mr. Hosner's activities, even though Mr. Hosner was another customer of the bank. *But see* Milohnich v. First Nat'l Bank of Miami, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969).

109. 445 So. 2d 254 (Ala. 1984).

The dispute in *Trans-Global Alloy Limited* grew out of this scenario: Trans-Global Alloy Limited ("Trans-Global") intended to import oil field products manufactured in China at prices much lower than those available in the United States. Trans-Global made arrangements with the First National Bank of Jefferson Parish ("Bank") for operational expenses and initial purchases, secured by an irrevocable, revolving letter of credit[110] in the amount of $190,000, drawn on the Bank, which automatically would be restored to the original amount fifteen days after each shipment. Two months after executing the import contract, Trans-Global entered into an agreement to sell to Pel-Star Couplings, Inc. ("Pel-Star") the first year's supply of the oil field products for $3,042,000, and Pel-Star promised to post an irrevocable revolving letter of credit issued by First National Bank of Lafayette, securing its payments to Trans-Global. Pel-Star also promised to pledge this letter of credit to the bank to secure Trans-Global's debt. Things, however, did not work smoothly.

The first shipment from China was late in arriving, and the Bank refused to advance further amounts under Trans-Global's letter of credit, needed to pay for the shipment. This further delayed a second shipment from China. Pel-Star pulled out of the deal. Additionally, Pel-Star's letter of credit expired while the bank was holding it.[111] Although Trans-Global eventually was able to secure financing from a source other than the Bank, it lost Pel-Star as a buyer for its goods. In the intervening period, Trans-Global went into bankruptcy.

Trans-Global then sued the Bank for breach of contract, failing to advance amounts in accordance with the letter of credit, and allowing the pledged letter of credit to expire. The trial court, pursuant to a jury verdict, entered a judgment against the Bank and two of its individual officers and directors. On the Bank's motion for a new trial, a mistrial, or a judgment notwithstanding the verdict, the trial court reduced the amount of the award and vacated it as against the individual officers.[112] The fifth circuit reversed the district court's reduction of the

110. The parties disagreed whether the bank had committed to a revolving letter of credit or to ten consecutive letters of credit conditioned on performance. Trans-Global Alloy Ltd. v. First Nat'l Bank of Jefferson Parish, 583 So. 2d 443, 446 (La. 1991). Ultimately, this was not significant.

111. Trans-Global and the Bank earlier had sued Pel-Star's bank, the First National Bank of Lafayette, to enforce the terms of the pledged letter of credit. Following protracted litigation, the third circuit ruled that the letter of credit had expired, absolving the First National Bank of Lafayette of liability. Trans-Global Alloy, Ltd. v. First Nat'l Bank of Lafayette, 490 So. 2d 769, 771-72 (La. App. 3d Cir. 1986).

112. Trans-Global also moved the court to amend the judgment—for legal interest from the date of the breach. *Trans-Global*, 583 So. 2d at 444. The court denied Trans-Global's motion.

award.[113] The Bank sought review at the supreme court on this issue.

When the supreme court addressed the case, it proclaimed that the creditor-debtor relationship may include fiduciary elements.[114] To decide the matter before it, the court, however, did not paint with a broad brush. It delicately premised its identification of the Bank as a fiduciary on the Bank's status as a pledgee of the letter of credit issued by First National Bank of Lafayette, Pel-Star's lender.[115] The fiduciary duty of the pledgee is firmly established in the Louisiana Civil Code and in the jurisprudence separate and apart from any fiduciary obligation of a bank.

> [F]rom the very nature of the transaction there arises a trust relationship between the pledgor and pledgee with attendant duties to protect the debt of the obligation and the collateral. The pledgee is presumed to act for the pledgor's interest as well as for his own, although their interests are not identical.[116]

The letter of credit had expired in the hands of the Bank, and, as a result, Trans-Global had suffered. Since the Bank had intimate knowledge of the transaction, had on numerous occasions given assurances that financing would be available, had virtually dictated the terms of the pledged letter of credit, and had understood that it would finance the arrangement and act as pledgee, it was the Bank's fault that the

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113. Trans-Global Alloy Ltd. v. First Nat'l Bank of Jefferson Parish, 564 So. 2d 697, 711 (La. App. 5th Cir. 1990), *rev'd*, 583 So. 2d 443 (1991). The fifth circuit upheld the trial court's dismissal of the claims against the individual officers and denial of prejudgment interest.

114. The court distinguished Busby v. Parish Nat'l Bank, 464 So. 2d 374 (La. App. 1st Cir.), *writ denied*, 467 So. 2d 1132 (1985), in which the first circuit had rejected the idea of a bank as its customer's fiduciary. The plaintiffs in *Busby* contended that a fiduciary relationship arose by virtue of the bank's superior knowledge and its awareness that others were relying on its advice. This claim the first circuit dismissed: "[t]he relationship between the parties does not fall into any of those situations in which a fiduciary duty is imposed by law." *Id.* at 379. The court in *Trans-Global* saw *Busby* as inapposite because the plaintiffs in *Busby* had, in reality, not relied upon the bank's advice and counsel. *Trans-Global*, 583 So. 2d at 453.

115. *Trans-Global*, 583 So. 2d at 453.

116. *In re* Pan Am. Life Ins. Co., 88 So. 2d 410, 415 (La. App. 2d Cir. 1956). *See* La. Civ. Code art. 3167: "The creditor is answerable agreeably to the rules which have been established under the title: *Of Conventional Obligations*, for the loss or decay of the pledge which may happen through his fault." *See also* Commercial Nat'l Bank v. Parsons, 144 F.2d 231 (E.D. La. 1944) (stating that nature of transaction between pledgor and pledgee gives rise to a trust relationship with consequent duty of the pledgee to protect the collateral), *cert. denied*, 145 F.2d 191 (5th Cir.), *cert. denied*, 323 U.S. 796, 65 S. Ct. 440 (1945).

letter of credit issued by First National Bank of Lafayette expired.[117]

The supreme court's decision does not resolve the question of the parameters of a bank's potential fiduciary relationship with its customers. The language of the opinion likely will encourage other courts in Louisiana to recognize additional duties. The decision, however, may not extend beyond its circumstances—situations when a fiduciary duty exists outside the banking context. Time will tell.[118]

VI. More on Waivers and Service of Suit Clauses

The United States Fifth Circuit Court of Appeals in *McDermott International, Inc. v. Lloyds Underwriters of London*[119] recently qualified its liberal statement that a "service of suit" clause automatically operates as a "waiver" of certain rights. Five months earlier, the court had held that a "service of suit" clause, which required an insurance company "to submit to the jurisdiction of any Court of Competent jurisdiction within the United States," effectively waived the insurer's right to remove an action from state to federal court.[120] This opinion had characterized a "service of suit" endorsement as a "forum selection" clause.[121]

The court in *McDermott International* faced virtually identical language in a service of suit clause.[122] In both cases, the service of suit clause did not mention removal. Unlike the previous case, however, the insurance agreement at issue in *McDermott International* was ambiguous;

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117. The pledgee is not at fault if the pledged item loses value as a result of market trends or conditions over which it has no control. *E.g.*, Naquin v. American Bank, 347 So. 2d 332 (La. App. 4th Cir. 1977), *writ denied*, 367 So. 2d 1184 (1979). *See* Ralph Slovenko, *Of Pledge*, 33 Tul. L. Rev. 59 (1958).

118. At least one appellate court, however, has signalled its willingness to embrace the fiduciary theory. In Badalamenti v. Jefferson Guar. Bank, 589 So. 2d 633, 636 (La. App. 5th Cir. 1991), the court commented that Louisiana's courts "have ignored a fiduciary duty between a bank and its borrower."

119. 944 F.2d 1199 (5th Cir. 1991).

120. City of Rose City v. Nutmeg Ins. Co., 931 F.2d 13, 14-15 (5th Cir. 1991). See Bruce V. Schewe, *Obligations, Developments in the Law, 1990-1991*, 52 La. L. Rev. 707, 715-18 (1992).

121. *City of Rose City*, 931 F.2d at 15. The court placed great emphasis on the insurance agreement at issue, underscoring that "ambiguities in contracts of insurance are to be construed against the drafter of the policy." *Id.* (citing Capitol Bank & Trust Co. v. Association Int'l Ins. Co., 576 F. Supp. 1522, 1525 (M.D. La. 1984)).

122. The "service of suit" clause provided the following in pertinent part:

> It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured will 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.

McDermott Int'l, 944 F.2d at 1200.

it contained two clauses—the service of suit language and an arbitration provision—that the court could construe as forum selection language.[123] In addition, in *McDermott International* both the insurer and the insured participated in drafting the contract, thereby negating the general interpretation against the insurer as the drafter of the policy.[124]

Another critical distinction between the cases is the international background in *McDermott International*.[125] In 1970 Congress ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") so that American companies could secure from foreign governments predictable enforcement of arbitral contracts made in this and other signatory nations.[126] Because the United States could require signatory countries to honor the Convention only if the courts of the United States likewise followed its mandates,[127] Congress promulgated the Convention Act of 1970 to establish procedures for courts in the United States to implement the Convention.[128] *McDermott International* recognized that removal to federal court facilitates compliance with the Convention, particularly since many state courts have exhibited hostility toward arbitration agreements.[129] Moreover, the terms of the

123. *Id.* at 1207. The contract in question in *City of Rose City* had only one potential forum selection provision—the service of suit clause. In contrast, in *McDermott International*, the court stated the following: "If the service of suit clause is a forum selection clause, the arbitration clause is a co-equal forum selection clause." *Id.* at 1205. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629, 105 S. Ct. 3346, 3355 (1985) (recognizing that an arbitration clause reflects a forum choice). Thus, the fifth circuit interpreted the apparent conflict by first requiring the parties to submit the contract coverage dispute to arbitration. The service of suit clause's "failure to pay a claim" provision is consistent with the arbitration clause if applied to suits subsequently instituted to enforce the arbitration award. *McDermott Int'l*, 944 F.2d at 1205; *see also* Hart v. Orion Ins. Co., 453 F.2d 1358, 1361 (10th Cir. 1991); NECA Ins. Ltd. v. National Union Fire Ins. Co., 595 F. Supp. 955, 958 (S.D.N.Y. 1984).

124. *McDermott Int'l*, 944 F.2d at 1207; Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1261 (5th Cir. 1976) (stating that construction against the insurer does not apply when "[i]n substance the authorship of the policy is attributable to both parties alike"), *cert. denied*, 431 U.S. 967, 97 S. Ct. 2926 (1977); *In re* Delta Am. Re Ins. Co., 900 F.2d 890, 892 n.4 (6th Cir.), *cert. denied*, 111 S. Ct. 233 (1990).

125. *City of Rose City* involved American companies.

126. 21 U.S.T. 2517, T.I.A.S. 6997, *reprinted following*, 9 U.S.C.A. § 201 (West Supp. 1991).

127. Convention art. XIV.

128. 9 U.S.C. § 201 (1970). The court in *McDermott International* rejected the insurer's argument that the Act granted it an absolute right to removal. *McDermott Int'l*, 944 F.2d at 1208-09.

129. *See* Leonard V. Quigley, *Assession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1074 n.108, 1081 (1961); Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1145 n.12 (5th Cir. 1985) (commenting that common law hostility toward arbitration stems from jurisdictional jealousy); Sigal v. Three K's, Ltd., 456 F.2d 1242, 1243 (3d Cir. 1972).

Convention arguably do not apply to state courts, and some states have enacted laws that undermine its enforcement.[130] Removal to federal court encourages uniform laws on arbitration: "Disunity is directly proportional to the number of authorities speaking on any subject."[131] Due to the importance of removal in the context of international arbitration agreements, the court in *McDermott International* concluded that a party must expressly and explicitly waive the ability to remove a case in the context of the Convention Act.[132] The wording of the service of suit clause at issue fell short of this stringent demand.[133]

McDermott International also stressed that numerous federal courts have refused to find a contractual waiver of removal rights absent a "clear and unequivocal" expression of intent to waive those rights.[134] *McDermott International* is a well-reasoned decision. The court's rationale is consistent with the traditional principle that, to waive rights contractually, a person must act knowingly and clearly.[135] Thus, a service of suit clause should waive only objections to personal jurisdiction unless it clearly indicates otherwise.

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130. *See, e.g.*, Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 109 S. Ct. 1248 (1989); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 27 n.36, 103 S. Ct. 927, 942 n.36 (1983). Specific state procedural mechanisms can undermine the policies of the Convention. A state adverse to arbitration could force parties to litigate before permitting review of a trial court's arbitrability decisions. *See, e.g.*, General Elec. Supply Co. v. Warden Elec., Inc., 528 N.E.2d 195, 198 (Ohio 1988). In federal court, an order denying arbitration is immediately appealable. *Sedco*, 767 F.2d at 1149.

131. *McDermott Int'l*, 944 F.2d at 1212.

132. *Id.* at 1209. The court's bright-line test further promoted swift resolution and honored the parties' desire to keep the dispute out of court. *Id.* at 1213; *see also Moses H. Cone Memorial Hosp.*, 460 U.S. at 27, 103 S. Ct. at 942; Imperial Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334, 335 (5th Cir. 1976).

133. *McDermott Int'l*, 944 F.2d at 1213.

134. *Id.* at 1206, 1212. ("At least one court has recognized that the same service of suit clause at issue here could be read to waive only objections to personal jurisdiction.") (citing *In re* Delta Am. Re Ins. Co., 900 F.2d 890, 893 (6th Cir. 1990)). *See* Regis Assocs. v. Rank Hotels, Ltd., 894 F.2d 193, 195 (6th Cir. 1990); Weltman v. Silna, 879 F.2d 425, 427 (8th Cir. 1989); Links Design, Inc. v. Lahr, 731 F. Supp. 1535, 1536 (M.D. Fla. 1990); John's Insulation, Inc. v. Siska Constr. Co., Inc., 671 F. Supp. 289, 294 (S.D.N.Y. 1987); Morgan Dallas Corp. v. Orleans Parish Sch. Bd., 302 F. Supp. 1208, 1209 (E.D. La. 1969); *accord* James Wm. Moore & Brett A. Ringle, 1A Moore's Federal Practice, ¶ 0.157 [9] at 152.

135. *See* Schewe, *supra* note 120, at 715-18.