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OBLIGATIONS

*Bruce V. Schewe**

During the past year, the reported decisions covered the span of the law of obligations, including classification of contracts,[1] offer and acceptance,[2] implied terms of agreements,[3] solidary obligations,[4] parol evidence,[5] interpretation of contracts,[6] breach of agreements,[7] specific

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1. E.g., Hageman v. Foreman, 539 So. 2d 678, 680 (La. App. 3d Cir. 1989) (The court set forth three factors to distinguish a contract to build from a contract of sale.) (Quoting Duhon v. Three Friends Homebuilders, 396 So. 2d 559 (La. App. 3d Cir. 1981).).

2. E.g., Harleaux v. Wood, 542 So. 2d 747, 752 n.7 (La. App. 4th Cir. 1989) (The "[a]cceptance need not be by the same act or instrument.") (citations omitted); Schulingkamp v. Aicklen, 534 So. 2d 1327 (La. App. 4th Cir. 1988).

3. E.g., Morphy, Makofsky & Masson, Inc. v. Canal Place 2000, 538 So. 2d 569 (La. 1989).

4. E.g., Lee v. Missouri Pacific R.R., 540 So. 2d 287 (La. 1989).

5. E.g., Burford v. Burford, 541 So. 2d 341 (La. App. 2d Cir. 1989); Cheek v. Uptown Square Wine Merchants, W.F., Inc., 538 So. 2d 663, 666 (La. App. 4th Cir. 1989) (A party may "not use parole evidence . . . to show an allegedly different agreement was made."); Grant v. Ouachita Nat'l Bank, 536 So. 2d 647 (La. App. 2d Cir. 1988); Pelican Homestead & Sav. Ass'n v. Airport Mini-Warehouses, Inc., 531 So. 2d 524, 527 (La. App. 5th Cir. 1988) ("[A]ntecedent verbal agreements which are in conflict with a written agreement cannot be proved by parole evidence. *Parlay Enterprises, Inc. v. R-B-Co., Inc. of Bossier*, 504 So. 2d 660 (La. App. 2d Cir. 1987), writ den., 508 So. 2d 819 (La. 1987); *Mott v. Phillips*, 372 So. 2d 223 (La. App. 3d Cir. 1979)."); Shreveport Great Empire Broadcasting, Inc. v. Chicoine, 528 So. 2d 633, 635 (La. App. 2d Cir. 1988) ("Parole evidence is . . . admissible, between the parties to a written act, to prove want or failure of consideration. *Scafidi v. Johnson*, 420 So. 2d 1113 (La. 1982); *Gulf States Finance Corporation v. Airline Auto Sales, Inc.*, 248 La. 591, 181 So. 2d 36 (1965).").

6. E.g., Frischhertz Elect. Co. v. Housing Auth. of New Orleans, 534 So. 2d 1310, 1314 (La. App. 4th Cir. 1988), writ denied, 536 So. 2d 1236 (1989) ("In contract cases, custom should be relevant only if the contract is silent on the issue.") (citing La. Civ. Code arts. 2053-2056; Mississippi River Grain Elevator, Inc. v. Bartlett & Co., 659 F.2d 1314, 1318 (5th Cir. 1981); Fontenot's Rice Drier, Inc. v. Farmer's R. Mill Co., 329 So. 2d 494, 498 (La. App. 3d Cir.), cert. denied, 333 So. 2d 239 (1976)).

7. E.g., Stewart v. Wal-Mart Stores, Inc., 542 So. 2d 1166, 1168 (La. App. 2d Cir. 1987) ("Anticipatory breach of contract, while actionable . . ., is not applicable where the contract has expired or terminated of its own accord.").

performance,[8] remission,[9] compromise,[10] novation,[11] and unjust enrichment.[12] The following discussion reviews the more significant of these opinions.

The Infirmities of Irrevocable Offers

Article 1809 of the Louisiana Civil Code of 1870[13] recognized that an offer of contract may allow a period for acceptance during which it may not be withdrawn. Thus, under old article 1809, "if an offer contains an expression of willingness to give the offeree a time for acceptance, or the circumstances of the case give rise to the presumption that such is the offeror's intention, the offer will be irrevocable. . . ."[14] The jurisprudence, however, did not reflect the intention of the legislation; the courts were "reluctant to give article 1809 its historical meaning and effect."[15]

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8. E.g., Sizeler Property Investors, Inc. v. Gordon Jewelry Corp., 544 So. 2d 53 (La. App. 4th Cir.), aff'd in part and rev'd in part, 550 So. 2d 237 (La. App. 4th Cir.), writ granted, 548 So. 2d 1215, order dissolved, 552 So. 2d 372.

9. E.g., Lee v. Missouri Pacific R.R., 540 So. 2d 287, 294 (La. 1989) (citing La. Civ. Code art. 1803).

10. E.g., Rhodes v. Nalencz, 545 So. 2d 638 (La. App. 5th Cir. 1989); Travelers Indem. Co. v. Anderson, 533 So. 2d 118, 120 (La. App. 4th Cir. 1988), writ denied, 535 So. 2d 744 (1989) ("[C]ompromises are favored in the law and the burden of proving the invalidity of the compromise is on the party attacking it. *Saunders v. New Orleans Public Service, Inc.*, 387 So. 2d 603 (La. App. 4th Cir. 1979) writ den., 394 So. 2d 614 (La. 1980)."); C. Bel for Awnings, Inc. v. Blaine-Hays Constr. Co., 532 So. 2d 830 (La. App. 4th Cir. 1988)).

11. E.g., City of Donaldsonville v. Thiac, 542 So. 2d 1111, 1116 (La. App. 1st Cir. 1989) (citing La. Civ. Code arts. 1879-1881; Huval Tractor, Inc. v. Journet, 413 So. 2d 978 (La. App. 3d Cir.), writ denied, 420 So. 2d 446 (1982)).

12. E.g., FPS, Inc. v. Continental Contractors, Inc., 537 So. 2d 831, 834 (La. App. 5th Cir.), writ denied, 540 So. 2d 328 (1989) (citing Minyard v. Curtis Products, 251 La. 624, 205 So. 2d 422 (1967)).

13. La. Civ. Code art. 1809 (1870):

> The obligation of the contract not being complete, until the acceptance, or in cases where it is implied by law, until the circumstances, which raise such implication, are known to the party proposing; he may therefore revoke his offer or proposition before such acceptance, but not without allowing such reasonable time as from the terms of his offer he has given, or from the circumstances of the case he may have supposed to have intended to give to the party, to communicate his determination.

For brevity, the writer will use the shorthand notations of "old article" when referring to the Code of 1870 and "new article" in the context of the Civil Code as revised by Act 331 of 1984.

14. Smith, An Analytical Discussion of the Promise of Sale and Related Subjects, Including Earnest Money, 20 La. L. Rev. 522, 531 (1960) (footnote omitted); Comment, Duration and Revocability of an Offer, 1 La. L. Rev. 182, 189 (1938).

15. Smith, supra note 14, at 531 (citing Miller v. Douville, 45 La. Ann. 214, 12 So.

In an effort to articulate more forcefully the ideas contained in old articles 1802[16] and 1809,[17] the Legislature, as a part of the revision of the law of obligations,[18] has provided the following principles:

> An offer that specifies a period of time for acceptance is irrevocable during that time. When the offeror manifests an intent to give the offeree a delay within which to accept, without specifying a reasonable time, the offer is irrevocable for a reasonable time.[19]

As specifically crafted as is the phrasing of these two standards of irrevocability, there is at least one scenario not addressed: when an offer states a period for acceptance that proves, under the circumstances, too long to be reasonable. A court facing this question would be called upon either to invoke the plain language[20] of the first sentence of the legislation (consequently forcing the offeror to hold the offer open for acceptance for an unreasonable period) or to reason its way into the latter formula (with the result of permitting the offeror to withdraw his proposal before the stated time of irrevocability). *Schulingkamp v. Aicklen*[21] resolved this dilemma satisfactorily.

Mrs. Schulingkamp commenced a lawsuit on a promissory note made by Mr. and Mrs. Aicklen and delivered with an offer to purchase immovable property.[22] In their offer, dated November 15, 1984, Mr. and Mrs. Aicklen stated that it was "binding and irrevocable 'thru and

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132 (1893); Blanks v. Sutcliffe, 122 La. 448, 47 So. 765 (1908); Vermillion Sugar Co. v. Valee, 134 La. 661, 64 So. 670 (1914); Miller v. Oden, 149 La. 771, 90 So. 167 (1929); Glover v. Abney, 160 La. 775, 106 So. 735 (1926); Albert v. R.P. Farnsworth & Co., 176 F.2d 198 (5th Cir. 1949)).

16. La. Civ. Code art. 1802 (1870):

> He is bound by his proposition, and the signification of his dissent will be of no avail, if the proposition be made in terms, which evince a design to give the other party the right of concluding the contract by his assent; and if that assent be given within such time as the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow.

17. See La. Civ. Code art. 1928, comment (a).

18. 1984 La. Acts No. 331.

19. La. Civ. Code art. 1928.

20. Article 9 of the Civil Code provides that "[w]here a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."

21. 534 So. 2d 1327 (La. App. 4th Cir. 1988).

22. Mr. and Mrs. Aicklen "submitted a written offer dated November 15, 1984 to purchase plaintiff's property . . . . At the same time . . . [they] gave plaintiff a promissory note in the amount of $10,500.00." Id. at 1329. The note carried the inscription that it "would be changed to a note for $7,500.00, and $3,000.00 cash 'as soon as the contract had been signed by the seller.'" Id.

until the Act of Sale was to be passed.' "[23] The offer contained at least one material condition—that Mrs. Schulingkamp cause the Parish of Jefferson to grant a certain variance for planned construction. Thirty-six days thereafter, on December 21, 1984, Mr. and Mrs. Aicklen sent a telegram to Mrs. Schulingkamp, reading in part as follows:

> [W]e made an offer on November 15, 1984 to purchase 2932 Johnson Street and side lot. No acceptance ever received as of December 21, 1984. We withdraw our offer to purchase property.[24]

On December 26, 1984, Mrs. Schulingkamp purported to accept the offer by affixing her signature to the document evidencing it; her attorney then sent the papers to Mr. and Mrs. Aicklen on January 2, 1985, and they received it on January 9, 1985. The lawyer for Mrs. Schulingkamp also advised Mr. and Mrs. Aicklen that the property had been surveyed for a resubdivision in connection with Mrs. Shulingkamp's forthcoming request to Jefferson Parish to grant the variance at issue. Mrs. Schulingkamp's lawyer further stated that "he anticipated an act of sale on February 15, 1985."[25] Although the Parish of Jefferson approved the resubdivision, it did not approve any variance and, significantly, the parties did nothing further.

At trial, the commissioner of the civil district court concluded that Mrs. Schulingkamp did not accept the offer to buy prior to its withdrawal; hence, Mr. and Mrs. Aicklen were not responsible for their promissory note—the cause for its making no longer existing. The district court accepted and approved the commissioner's recommendations. On appeal, the fourth circuit affirmed.

Simply put, the appellate panel determined that, while Mr. and Mrs. Aicklen's offer stated it remained acceptable and irrevocable until the act of sale (presumably some time after acceptance), under the circumstances "there existed a reasonable period of time in which plaintiff could have accepted . . . . However, after thirty-six days that time period became unreasonable, thus making the offer revocable."[26] This determination is not inconsistent with the purpose of irrevocable offers: protection of persons reasonably attempting to accept. Further, from a practical perspective, the court certainly must have been swayed by the existence of a condition in the offer for the prospective vendor to secure

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23. Id. "The act of sale was to take place 15 days after clear title to the lot was obtained, and after the procurement of a five-foot side yard variance from Jefferson Parish in order to build on the lot." Id.

24. Id.

25. Id.

26. Id. at 1331.

a variance and that "[d]uring this thirty-six day period very little, if anything, had been done towards satisfying"[27] this requirement.

On Choosing Words: Offers of Settlement and Attempted Acceptances

Article 3071 of the Louisiana Civil Code defines a compromise as "an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent." To "ensure proper proof,"[28] the contract "must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding."[29] In addition, settlements "regulate only the differences which appear clearly to be comprehended in them by the intention of the parties."[30] *Rhodes v. Nalencz*[31] demonstrates the degree of written specificity the Code and the courts exact from the parties negotiating a transaction, regardless of their probable, but unstated, intentions.

Carmel Rhodes filed an action against Richard Nalencz, d/b/a McDonald's Restaurant, and Lumberman's Mutual Casualty Company, arising out of an alleged personal injury. After Mr. Rhodes' attorney and the counsel for the defendants discussed the matter, Mr. Rhodes orally authorized his lawyer to accept an offer of $27,500 to settle his demand.[32] The following day, Mr. Rhodes entertained second thoughts about the planned compromise and unsuccessfully tried to contact his attorney. When Mr. Rhodes ultimately reached his counsel, the lawyer already had mailed to the attorney for the defendants a letter that recited, in part, the following:

> This is to confirm our telephone conversation today in which my client, Mr. Carmel Rhodes, has given me the authority to accept the sum of $27,500 in full settlement of his claim against *McDonald's Corporation* and its insurer, Lumberman's Mutual Casualty Company.
> Please furnish me with your clients [sic] response at your earliest convenience.[33]

The attorney for the defendants prepared and posted, on the same day as the date of the correspondence from Mr. Rhodes' counsel, a

27. Id.
28. Troxclair v. Parish of St. Charles, 450 So. 2d 759, 760 (La. App. 5th Cir. 1984).
29. La. Civ. Code art. 3071.
30. La. Civ. Code art. 3073.
31. 545 So. 2d 638 (La. App. 5th Cir. 1989).
32. Id. at 639.
33. Id. at 640 (emphasis added).

letter saying, among other things, the following: "This . . . reduces our settlement agreement in this case to writing. *We* have settled for $27,500.00 payable to Mr. Rhodes and you."[34] When Mr. Rhodes refused to execute the documents evidencing a compromise, the defendants moved the district court to order the plaintiff to sign a dismissal and a release in exchange for $27,500. The trial court granted the requested relief. On review, the fifth circuit court of appeal reversed.

The appellate panel correctly identified the confusion in the quoted correspondence regarding the identity of the parties to the intended settlement. Although both letters contemplate Mr. Rhodes relinquishing his claims, it is not certain, *from the writings*, whether or not there was a concurrence concerning the persons to be released. First, the letter from Mr. Rhodes' counsel mentions "McDonald's Corporation," but it was not a party to the suit. Second, the transmittal does not reference Richard Nalencz, a named defendant in the litigation. Finally, the correspondence from the lawyer for Mr. Nalencz and Lumberman's Mutual Casualty Company is ambiguous, stating that "We" have accepted the proposal.

In order to be binding, a transaction must possess the essentials of any other contract: capacity of the parties, consent, cause, and a lawful object.[35] Consent concerning the parties to the agreement is the element missing in *Rhodes v. Nalencz*. From the crossing letters it is not certain that the plaintiff and the defendants reached a mutual understanding. Thus, the fifth circuit properly reversed the decision of the district court.

The result is not unjust even though Mr. Rhodes likely intended to authorize his counsel to settle with the defendants to the lawsuit irrespective of McDonald's Corporation. While settlements are judicially favored,[36] compromises should be the result of careful consideration; they must also be definite and in writing. If a writing, or a set of writings,[37] purporting to evidence a transaction is so unclear that it is

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34. Id. (emphasis added).

35. E.g., Nugent v. Hartford Accident & Indem. Co., 467 So. 2d 623, 627 (La. App. 3d Cir. 1985). See Hornsby v. Travelers Indem. Co., 128 So. 2d 280, 284 (La. App. 1st Cir. 1962); Chopin v. Federal Transp. Co., 70 So. 2d 189, 193 (La. App. 1st Cir. 1953).

36. Travelers Indem. Co. v. Anderson, 533 So. 2d 118, 120 (La. App. 4th Cir. 1988), writ denied, 535 So. 2d 744 (1989) (citing C. Bel for Awnings, Inc. v. Blaine-Hays Constr. Co., 532 So. 2d 830 (La. App. 4th Cir. 1988); Saunders v. New Orleans Pub. Serv., Inc., 387 So. 2d 603 (La. App. 4th Cir. 1979), writ denied, 394 So. 2d 614 (1980)).

37. Because the compromise must be written and signed by both parties "does not necessarily mean that the agreement must be contained in one document. . . . [W]here two instruments, when read together, outline the obligations each party has to the other and evidence each party's acquiescence in the agreement, a written compromise . . . has been perfected." Jacobson v. Harris, 503 So. 2d 540, 542 (La. App. 4th Cir.), writ denied, 503 So. 2d 1019 (1987) (citing Felder v. Georgia Pacific Corp., 405 So. 2d 521 (La. 1981)).

difficult to determine the identity of the parties to it or affected by it, then a court should accord it no more weight than an oral, out of court agreement of settlement—none.[38]

Squinting Between the Lines and So-Called Implied Terms

New article 1906 defines a contract as "an agreement by two or more parties whereby obligations are created, modified, or extinguished."[39] The essentials of the bargain are capacity of the parties,[40] consent of the parties,[41] an object of their agreement,[42] and a lawful cause or purpose[43] supporting their promises or performances. Once struck, the contract is the "law for the parties."[44] It is not necessary, however, for the persons contracting to specify every detail of their arrangement. If the parties have not addressed a topic, the Civil Code or other parts of the law may supplement their agreement and add the missing provisions.[45]

Another matter altogether is the propriety of the judiciary to infer or construct material terms of a purported agreement. When the Legislature has set forth the fundamental elements of the contracts of sale and lease—and has included price in each[46]—it is troubling for the bench, in an effort to achieve an ostensibly fair result in an isolated lawsuit, to rule that price is not truly a necessary ingredient of the consent of the parties. Nevertheless, the decade of the 1980s waxed[47] and waned[48] with the Supreme Court of Louisiana doing just that.

In the case of *Benglis Sash & Door Co. v. Leonards*,[49] decided in 1980, the court dealt with the following scenario: Leonards placed an order for windows with Benglis Sash & Door Co. ("Benglis"); Benglis

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38. La. Civ. Code art. 3071.

39. Old article 1761 read, fundamentally, the same way: "A contract is an agreement, by which one person obligates himself to another to give, to do or permit, or not to do something, expressed or implied by such agreement."

40. See La. Civ. Code arts. 1918-1926.

41. See La. Civ. Code arts. 1927-1947.

42. See La. Civ. Code arts. 1971-1977.

43. See La. Civ. Code arts. 1966-1970.

44. La. Civ. Code art. 1983.

45. For instance, new article 1868 designates an order of the imputation of payments when the parties have not agreed to one. The examples of suppletive laws, indeed, are numerous. Most are of this nature. See Garro, Codification Technique and the Problem of Imperative and Suppletive Laws, 41 La. L. Rev. 1007 (1981). Significantly, only "laws enacted for the protection of the public interest" may be varied. La. Civ. Code art. 7.

46. La. Civ. Code arts. 2464 & 2671.

47. Benglis Sash & Door Co. v. Leonards, 387 So. 2d 1171 (La. 1980).

48. Morphy, Makofsky & Masson, Inc. v. Canal Place 2000, 538 So. 2d 569 (La. 1989).

49. 387 So. 2d 1171 (La. 1980).

informed Leonards that it would deliver the windows in eight to ten weeks; neither Leonards nor Benglis mentioned either the price per window or the price of the full order. After Benglis received the windows, Leonards refused to accept delivery and Benglis stored the windows and sued Leonards for the "purchase price."[50]

The trial court ruled in favor of Benglis, but the third circuit court of appeal reversed, concluding that the parties had not agreed upon a price for the windows.[51] Subsequently, the supreme court reinstated the decision of the district court, determining that persons may consent to a contract of sale without specifying price:

> [I]t is not essential that the specific sum of the sales price be stated at the time of contracting. The parties can agree that the price may be ascertained by computation or that the price may be fixed by arbitration. *Or the parties can consent to buy and to sell a certain thing for a reasonable price, and when they do, the contract of sale has been perfected.* The essential thing is that there be a meeting of the minds (as opposed to a disagreement) as to price.[52]

Amazingly, the court referred to no authority for its view. Justice Marcus, however, in dissent, pointed to a likely source of inspiration for the majority's opinion: "Section 2-305 of the Uniform Commercial Code provides . . . that the parties may conclude a contract for sale even though the price is not settled. . . . However, the Louisiana Legislature did not adopt this section of the Uniform Commercial Code."[53]

Notwithstanding the court's attempts to align its sentiments with the plain wording of article 2464 of the Louisiana Civil Code,[54] and its requirement of a certain price in a contract of sale, the method, the text, and the result of the opinion are dubious at best.[55] Thankfully,

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50. 378 So. 2d 992, 993 (La. App. 3d Cir. 1979).

51. Id. at 994.

52. 387 So. 2d at 1173 (emphasis added).

53. 387 So. 2d at 1174 (Marcus, J., dissenting).

54. Article 2464 of the Civil Code, in part, reads as follows: "The price of the sale must be certain, that is to say, fixed and determined by the parties."

55. Only one commentator, John M. Norwood of the College of Business Administration, Louisiana State University, defended and welcomed the case. Norwood, Certainty of Price in Sales Contracts: Benglis Sash & Door Co. v. Leonards, 27 Loy. L. Rev. 457 (1981). Professor Norwood addressed the questions raised by Justice Marcus—that the Legislature has not enacted Article 2 of the Uniform Commercial Code and that the court should enforce the Civil Code as it is written—as follows:

> Two responses are appropriate: (1) The legislature has refused to adopt Article 2 of the U.C.C. as a whole, but this does not imply a legislative rejection of each of the concepts embodied in Article 2; and (2) the judiciary is permitted, *even expected*, to mold the law to conform to modern realities, so long as it

the case produced little fanfare, and to date, it apparently has not opened a Pandora's box of specious contract litigation. Unfortunately, however, the court resurrected and reinforced the ideas of *Benglis Sash & Door Co.* during the past term.

In *Morphy, Makofsky & Masson, Inc. v. Canal Place 2000*,[56] the supreme court faced this situation: Canal Place 2000 ("Canal Place") contracted with RTKL for architectural, engineering, and consulting services in connection with the construction of a mall and hotel complex; RTKL, in turn, entered into a subcontract with CBM Engineers, Inc. ("CBM") for structural engineering services (including foundation engineering and design); and at the behest of Canal Place, CBM agreed to have Morphy, Makofsky, and Masson, Inc. ("Morphy") "design and perform engineering services for the foundation and first floor of the structure."[57] CBM and Morphy did not execute a written contract or concur about the method or terms of payment,[58] and Morphy performed the tasks assigned. When CBM and Morphy did not agree upon the amount due, Morphy filed a lawsuit.

The commissioner of the civil district court decided that Morphy had never contracted with CBM or anyone else, but that "an equitable award 'under quasi-contract or de in rem verso, an action in unjust enrichment' was in order."[59] The district court accepted the recommendation of the commissioner and cast CBM in judgment for $45,000, but not the $78,613 Morphy had demanded via invoice. On appeal, the fourth circuit affirmed,[60] grounding its decision upon *Minyard v. Curtis Products, Inc.*,[61] *Brignac v. Boisdore*,[62] and *Edmonston v. A-Second Mortgage Co.*[63] For tenuous reasons, the supreme court reversed and proclaimed that "Morphy has a substantive claim in contract, and the

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does not directly contradict legislative mandates.

Id. at 465-66 (emphasis added). With respect to the final proposition, Professor Norwood's approach to statutory construction is novel and illogical. Nowhere in the law of Louisiana is there any support for the statement that Article 2 of the Uniform Commercial Code is applicable or enforceable, insofar as not inconsistent with the Civil Code or other laws. Regarding the latter postulate, even accepting that the bench holds a policy-making function in contract (as distinguished from tort) litigation, Benglis Sash & Door Co. does "directly contradict legislative mandates."

56. 538 So. 2d 569 (La. 1989).

57. Id. at 570.

58. The Civil District Court Commissioner determined that Morphy "was a 'subcontractor,' to CBM, although working *without* a 'contract.'" Id. at 571 (emphasis in original).

59. Id.

60. 522 So. 2d 1223 (La. App. 4th Cir. 1988).

61. 251 La. 624, 205 So. 2d 422 (1967).

62. 288 So. 2d 31 (La. 1974).

63. 289 So. 2d 116 (La. 1974).

existence of a claim or an express or implied contract precludes application of *actio de in rem verso*."[64]

Invoking old article 1779[65]—because the matter developed prior to the effective date of Act 331 of 1984 (the revision of the law of obligations)—which described the elements of a valid agreement, the court judged that "[a]ll of these requisites were met in the present case."[66] Additionally, the court announced that the failure of CBM and Morphy to agree upon "the amount of compensation Morphy was to receive for his [sic] services . . . [did] not vitiate the contract, *for the law in this situation implies a provision that Morphy would be paid a reasonable sum for his services*."[67] In support of its position, the court cited old article 1903.[68] Accordingly, on the basis of quantum meruit—"as much as he deserves"[69]—the supreme court ruled that the evidence justified an award to Morphy in the amount it had invoiced CBM for the services in question, "namely, $78,613.00."[70]

The fundamental flaw in the court's approach is its insistence on applying the general principles of contract formation, irrespective of the specific demands of the Civil Code governing the nominate agreement CBM and Morphy sought to confect. From the facts recited in the supreme court's opinion, it seems certain that CBM desired to lease Morphy's labor or industry,[71] specifically to work by the job.[72] Thus,

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64. 538 So. 2d 569, 572 (La. 1989).

65. La. Civ. Code art. 1779 (1870):

Four requisites are necessary to the validity of a contract:

1. Parties legally capable of contracting.
2. Their consent legally given.
3. A certain object, which forms the matter of agreement.
4. A lawful purpose.

66. 538 So. 2d at 573. Justice Calogero, writing for the court, further stated the following:

> At the very least an implied in fact contract existed between the parties. An implied in fact contract is one which rests upon consent implied from facts and circumstances showing mutual intention to contract. *V-8 Taxi Cab Service, Inc. v. Hayes*, 322 So. 2d 442 (La. App. 2d Cir. 1975). Such implied in fact contracts are not different in their legal effect from express, written agreements. Comment, *Actio De in Rem Verso* in Louisiana: *Minyard v. Curtis Products, Inc.*, 43 Tul. L. Rev. 263, 298 (1969).

Id. at 573 (footnote omitted).

67. 538 So. 2d at 574 (emphasis added) (footnote omitted).

68. Old article 1903 read as follows: "The obligation of contracts extends not only to what is expressly stipulated, but also to everything that, by law, equity or custom, is considered as incidental to the particular contract, or necessary to carry it into effect."

69. 538 So. 2d at 574 n.9 (quoting Black's Law Dictionary 1119 (5th ed. 1979)).

70. Id. at 575.

71. Article 2673 of the Civil Code delineates two species of lease: "1. The letting out of things. 2. The letting out of labor or industry."

72. Labor may be let out in three ways:

to complete their agreement, the Civil Code demands that CBM and Morphy reach a consensus about price.[73] Inexplicably, the court did not focus upon this essential element, consent to price. *Benglis Sash & Door Co.* evidenced the same error.

When the court writes that "Morphy's remedy at law was to sue on the contract and have the court determine the remuneration he [sic] should receive for the services he [sic] rendered to CBM,"[74] it creates three difficulties: (i) it departs, for reasons it does not articulate, from its accepted, long-held role as a referee policing issues that arise from and out of completed agreements and assumes the position of an arbitrator *assisting* the parties to perfect bargains; (ii) it does not discourage sloppy draftsmanship in contract negotiations and formations; and (iii) it invites parties, basically, to litigate their way to contract terms. These are not the results the court should promote. The certainty of contracts would be well-served through a reappraisal by the court of *Benglis Sash & Door Co.* and *Morphy, Makofsky & Masson, Inc. v. Canal Place 2000.*

Limitations of the Remedy of Specific Performance

The Louisiana Civil Code of 1870 drew distinctions, according to each object,[75] regarding obligations to do, obligations not to do,[76] and obligations to give.[77] More particularly, with respect to nonperformance, the legislation provided that "[o]n the breach of any obligation to do, or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option."[78]

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72. Labor may be let out in three ways:
1. Laborers may hire their services to another person.
2. Carriers and watermen hire out their services for the conveyance either of persons or of goods and merchandise.
3. Workmen hire out their labor or industry to make buildings or other works.
La. Civ. Code art. 2745. See La. Civ. Code arts. 2756-2777.

73. Article 2669 of the Civil Code states that lease is a contract "by which one party gives to the other the enjoyment of a thing, or his labor, *at a fixed price.*" (Emphasis added.) In addition, "[t]o build by a plot, or to work by the job, is to undertake a building or a work *for a certain stipulated price.*" La. Civ. Code art. 2756 (emphasis added).

74. 538 So. 2d at 574.

75. La. Civ. Code art. 1761 (1870); see A. Levasseur, Precis in Conventional Obligations: A Civil Code Analysis 4-6 (1980); Schewe, On Obligations to Pay Money with a View Toward Stipulated Remedies and Usury, 44 La. L. Rev. 151, 153 (1983).

76. La. Civ. Code arts. 1926-1928, 2756, 2940 (1870). The Revised Civil Code continues the categorization. La. Civ. Code art. 1986.

77. La. Civ. Code art. 1905 (1870).

78. La. Civ. Code art. 1926 (1870).

Several years ago, in *J. Weingarten, Inc. v. Northgate Mall, Inc.*,[79] the supreme court, although it ultimately declined to grant the relief, rejected "the literal reading"[80] of the Code "that the general rule . . . is that the breach of a contract entitles the party aggrieved only to damages; and specific performance may only be obtained where damages would be inadequate compensation."[81] Instead, the court, agreeing with the view espoused by Dr. Litvinoff,[82] proclaimed that "Articles 1926 through 1929 [of the Louisiana Civil Code of 1870] were intended to give first rank to the obligee's right to performance in specific form."[83] The supreme court, however, carved out the following exceptions to a policy of specific performance:

> when it is impossible, greatly disproportionate in cost to the actual damage caused,[84] no longer in the creditor's interest, or of substantial negative effect upon the interests of third parties.[85]

Sizeler Property Investors, Inc. v. Gordon Jewelry Corp.,[86] decided last year, is helpful in understanding the case-by-case weighing of the factors set forth in *J. Weingarten, Inc.* In 1979, the predecessor in interest of Sizeler Property Investors, Inc. ("Sizeler") leased a portion of Houma's Southland Mall to Leonard Krower & Son, Inc. ("Krower"),

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79. 404 So. 2d 896 (La. 1981).

80. Id. at 900.

81. Id.

82. 2 S. Litvinoff, Obligations §§ 162-68, in 7 Louisiana Civil Law Treatise (2d ed. 1975).

83. 404 So. 2d at 900. The court, however, noted that the bench is "empowered to withhold specific performance in some exceptional cases even when . . . [it] is possible." Id. at 901. Tribunals in France have denied requests for specific performance in the following situations:

> whenever the inconvenience of such forced execution would exceed the advantage, as when the cost of performing in kind is disproportionate to the actual damage caused, or when it is no longer in the creditor's interest, or when it would have a negative effect upon the interest of third parties.

Id. at 901 (citing S. Litvinoff, supra note 82, at § 166; 2 M. Planiol, Treatise on the Civil No. 171A, at 103 (11th ed. La. St. L. Inst. trans. 1959); Szladits, The Concept of Specific Performance in Civil Law, 4 Am. J. Comp. L. 208, 217 (1955)).

84. This notion should not be viewed differently from the analogous idea at common law of the prohibition of "economic waste." See Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235 (1939) (the performance of the promise to grade sand and sand pit would cost $60,000 while the property, after the restoration, would be worth only $12,000); J. Calamari & J. Perillio, The Law of Contracts § 14-29, at 560-62 (2d ed. 1977); E. Farnsworth & W. Young, Cases and Materials on Contracts 617-18 (3d ed. 1980); Birmingham, Damage Measures and Economic Rationality: The Geometry of Contract Law, 1969 Duke L.J. 49.

85. 404 So. 2d 896, 901 (1981).

86. 544 So. 2d 53 (La. App. 4th Cir.), aff'd in part and rev'd in part, 550 So. 2d 237 (La. App. 4th Cir.), writ granted, 548 So. 2d 1215, order dissolved, 552 So. 2d 372 (1989).

at the time a subsidiary of Gordon Jewelry Corporation ("Gordon"). Krower subsequently assigned its interests in the lease to BCS, Inc./ United Jewelers & Distributors, Inc. ("United Jewelers"). In 1988, United Jewelers, while continuing "to pay timely rent,"[87] ceased operations at the Southland Mall. Sizeler, relying on a "continuous operations" clause in the lease, sued Gordon and United Jewelers, demanding, in essence, the "reopening and operating [of] the store in question."[88] The district court granted Sizeler's request for the issuance of a preliminary injunction compelling the specific performance of the continuous operations provision of the lease.

In reversing, the fourth circuit referred to new article 1986[89] and the exception of impossibility of specific performance, noted in *J. Weingarten, Inc.* Although the appellate panel appropriately determined that Sizeler was not entitled to specific performance of the continuous operations clause of the lease, its rationale for the decision may be off the mark.[90] There are at least three valid reasons, however, why the trial court should not have ordered specific performance.

First, the text of new article 1986 supplies a solution. The object of the agreement to continuous operations of the business upon the leasehold is an obligation *to do*. Accordingly, "[u]pon a failure to perform an obligation . . . to do, the granting of specific performance

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87. 544 So. 2d at 54.

88. Id.

89. La. Civ. Code art. 1986:

> Upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument, the court shall grant specific performance plus damages for delay if the obligee so demands. *If specific performance is impracticable, the court may allow damages to the obligee.*
>
> Upon the failure to perform an obligation that has another object, such an obligation to do, the granting of specific performance is at the discretion of the court.

(Emphasis added.)

90. To illustrate, the court wrote that "[d]ue to the circumstances of this case, we find specific performance to be virtually impossible." 544 So. 2d at 55. The court's choice of words is unfortunate, for the impossibility exception to the policy of specific performance should be considered in the same manner as impossibility is treated as a mode of extinguishing obligations. La. Civ. Code arts. 1872-1878. Specifically, the impossibility contemplated by article 1873 of the Civil Code is absolute. Comment (d) to article 1873 intends to make this point: "To relieve an obligor of liability the eas fortuit must make the performance truly impossible. See 7 Planiol et Ripert, Traite pratique de droit civil francais 168-72 (2d ed. Esmein 1954). The Louisiana jurisprudence has so held." (Citing Eugster & Co. v. Joseph West & Co., 35 La. Ann. 119 (1883).) Certainly, the court did not declare the performance by Gordon of the continuous operations part of the lease to be absolutely impossible; it deemed the actions, instead, to be virtually impossible. In all likelihood, the court desired to say that the enforcement of the continuous operations clause was impracticable.

is at the discretion of the court."[91] Sizeler, thus, was not *entitled* to an order granting its request for specific performance. The fourth circuit was not required to find an exception to a policy of specific performance, because the principle was inapposite. In short, the panel could have reasoned that the trial court incorrectly perceived Sizeler to be entitled to the relief it sought and that, in its discretion, specific performance was not in order.

Second, assuming for purposes of discussion that the circumstances granted Sizeler a right to compel Gordon's specific performance, the evidence Gordon presented to the trial court strongly suggested that the costs it would expend to operate the business at Southland Mall would be "greatly disproportionate in cost to actual damage caused"[92] Sizeler by the breach of this part of the lease. Gordon asserted that the business requires a unique type of inventory, special contacts in the industry, and particular display equipment that, all told, would be far greater in expense for it to secure than the benefits Sizeler would receive.[93] With this type of evidence, the appellate panel could have decided that, even if Sizeler otherwise would have prevailed in its claim for specific performance, in this case the factors of *J. Weingarten, Inc.* favored Gordon.

Third, in addition to seeking an order requiring Gordon to operate the business, Sizeler demanded an award of $500,000 based upon a liquidated damages section of the lease. The Civil Code recognizes the secondary obligation of a contractual stipulation of money damages in the event of "nonperformance, defective performance, or delay in performance."[94] A creditor, like Sizeler, however, may not demand both the stipulated damages and performance.[95] Thus, completely aside from the tests for specific performance recited in new article 1986 and jurisprudentially developed in *J. Weingarten, Inc.*, the fourth circuit would have been on firm ground reversing the judgment of the district court because of the competing prayers.

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91. La. Civ. Code art. 1986. Comment (c) further explains this limitation:
> If the obligation which the obligee has failed to perform is an obligation to do, the granting of specific performance lies with the discretion of the court, to be exercised in a manner consistent with the principle that the obligor's personal freedom ordinarily may not be encroached upon. See 7 Planiol et Ripert, Traite pratique de droit civil francais 95-96 (2nd ed. by Esmein, 1954). See also 2 Litvinoff, Obligations 312-313 (1975).

92. J. Weingarten, Inc. v. Northgate Mall, Inc., 404 So. 2d at 901.

93. Gordon presented evidence to the district court that it would cost it more than $2,000,000 to reopen the business, a figure four time the liquidated damages claimed by Sizeler.

94. La. Civ. Code art. 2005.

95. La. Civ. Code art. 2007.