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dispositive⁵² of the case as fitting within the scope of the standard of review that allows him to accept, reject, or modify the magistrate's findings,⁵³ and therefore falling outside of the scope of the "clearly erroneous" rule. This would comport with the scheme of the court decisions, follow the intent of the statute, and reduce the number of problems that may result from application of the "clearly erroneous" rule.

Sera H. Russell, III

INCIDENTS TO REDHIBITORY ACTIONS UNDER
CIVIL CODE ARTICLE 2531

Two controversial 1973 Louisiana decisions dealing with redhibition significantly altered the relative positions of consumers, retail sellers and manufacturers.¹ The supreme court, in *Prince v. Paretti Pontiac Co.*,² held, "There is no requirement that a purchaser who seeks redhibition must first give his vendor the opportunity to repair the thing sold,"³ thus resolving any doubts which may have existed due to contrary indications in the jurisprudence.⁴ Additionally, the court detailed the prerequisites to

52. Subparagraph (b)(1)(A) lists eight pretrial motions that would be ultimately dispositive of a case and excepts them from the "clearly erroneous" standard. These motions are to be decided under the standard of review set out in subparagraph (b)(1)(C) where the judge can accept, reject, or modify the magistrate's recommendations.

53. See the text at notes 49 & 50, *supra*. The amendment reads that a "judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations . . . and . . . may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate . . . and may also receive further evidence or recommit the matter to the magistrate with instructions." 28 U.S.C. § 636(b)(1)(C) (1976).

1. Campbell, *The Remedy of Redhibition: A Cause Gone Wrong*, 22 LA. B.J. 27 (1974); Robertson, *Manufacturers' Liability For Defective Products In Louisiana Law*, 50 TUL. L. REV. 50, 94-99 (1975).

2. 281 So. 2d 112 (La. 1973).

3. *Id.* at 116.

4. The court stated that these doubts resulted from inferences drawn from cases in which the buyer had in fact given the seller an opportunity to repair before filing his redhibition suit. *Id.* at 116. Language supporting the inference that an opportunity to repair is a prerequisite to a redhibition suit is found in the following cases: *Kodel Radio Corp. v. Shuler*, 171 La. 469, 472, 131 So. 462, 463 (1930) ("The defendant, therefore, after making timely complaint, and giving the plaintiff ample

an effective waiver of the buyer's statutory warranty:⁵ a writing in clear and unambiguous language contained in the sale and chattel mortgage document,⁶ either brought to the attention of the buyer or fully explained to him.⁷ Soon thereafter, in *Anderson v. Bohn Ford, Inc.*,⁸ the Fourth Circuit Court of Appeal applied the *Prince* standards and found a retail dealer had effectively waived the statutory warranty obligation owed to him by the manufacturer.⁹

opportunity to remedy the defects in the radios, was justified in returning them and demanding a rescission of the sale.''); *Shultz Belting Co. v. W.K. Henderson Iron Works & Supply Co.*, 134 La. 263, 267, 63 So. 897, 898 (1914) ('Defendant does not allege that plaintiff has failed or refused to repair or replace the belting that was not satisfactory in any instance, and it makes no claim for such in its reconventional demand.');

Woodward-Wight & Co. v. Engel Land & Lumber Co., 123 La. 1093, 1105, 49 So. 719, 723 (1909) ('[P]laintiff having sold the machines as capable of rendering certain service, and defendant having found them comparatively useless, it was for the plaintiff, not defendant, to ascertain and remove their incapacity, and this it has failed to do, though afforded the amplest opportunity.'). In the latter case, some question exists whether the court was interpreting the statutory warranty or an express one. See also *Standard Motor Car Co. v. St. Amant*, 18 La. App. 298, 305, 138 So. 461, 462 (1st Cir. 1931); *Radio Shoppe, Inc. v. Thompson*, 10 La. App. 742, 122 So. 909 (Orl. Cir. 1929); Comment, *Warranty of Quality in Louisiana: Nature and Proof of the Implied-in-Law Warranty*, 23 TUL. L. REV. 96, 110-11 (1948). *Contra*, *Junius Hart Piano House v. Tauzin*, 5 La. App. 495 (2d Cir. 1927).

5. LA. CIV. CODE art. 1764(2) provides in part that "warranty . . . is implied in every sale." *Id.* art. 2475 provides: "The seller is bound to two principal obligations, that of delivering and that of warranting the thing which he sells." *Id.* art. 2476 provides: "The warranty respecting the seller has two objects; the first is the buyer's peaceable possession of the thing sold, and the second is the hidden defects of the thing sold or its redhibitory vices."

6. The one document involved contained both the act of sale and the chattel mortgage. The decision does not clearly indicate whether the court would require the waiver to appear in separate acts of sale and chattel mortgage. 281 So. 2d at 116-17.

7. The court could have made certain that the buyer's waiver was intelligently given by requiring that the seller both bring the waiver to the buyer's attention and fully explain it to him; however, the court used disjunctive language and later courts have followed this requirement. See *Hendricks v. Horseless Carriage, Inc.*, 332 So. 2d 892, 894 (La. App. 2d Cir. 1976). The distinction may have no practical effect in that no court has ever found an effective warranty waiver by a consumer buyer. See note 54, *infra*.

8. 291 So. 2d 786 (La. App. 4th Cir. 1973), *cert. denied*, 294 So. 2d 829 (La. 1974).

9. *Id.* at 788-91. The court found the following waiver language in the contract to be pertinent: "There shall be NO OTHER WARRANTY, express or implied, including any implied warranty of MERCHANTABILITY OR FITNESS, . . ." This language was sufficient even though it contained no direct reference to Louisiana's redhibition statutes. The court presumed that businessmen are aware of the contents of their contracts. The court also found that the consumer/buyer had

Apparently responding to these two decisions,¹⁰ the Louisiana Legislature amended Civil Code article 2531 in 1974 to effectively overrule the judicial denial of an opportunity to repair, and to nullify the effect of warranty waiver agreements between manufacturers and retail dealers in certain instances.¹¹ This note will examine the current problems of interpretation, construction and application of article 2531.

In light of Civil Code articles 17 and 18,¹² a full understanding of article 2531 necessitates a consideration of its position in the Code and its relationship to surrounding articles, as well as the circumstances which prompted legislative action. Under the Civil Code, a buyer of a defective product has three potential remedies, depending upon the nature of the defect and the knowledge of the seller. Articles 2520 through 2540 contain the prerequisites for actions based on defects known neither to buyer nor seller and provide the remedy for such defects.¹³ Articles 2541 through 2544 discuss non-redhibitory but actionable defects, providing reduction of the price as the remedy.¹⁴ Remedies for vices actually known to the

not waived his warranty against the dealer because the waiver was in the buyer's order form rather than the act of sale and because no evidence indicated that the waiver had been brought to the buyer's attention or explained to him.

10. The timing of the decisions and the subsequent legislative action suggest that the legislature was motivated by these decisions. *Certiorari* was denied in *Anderson* on May 24, 1974, and one justice indicated that the issues raised by the case were better suited to legislative action. 294 So. 2d at 829. See Barham, *Redhibition: A Comparative Comment*, 49 TUL. L. REV. 376, 388 (1975); Robertson, *supra* note 1, at 98.

11. La. Acts 1974, No. 673, § 1, amending LA. CIV. CODE art. 2531. See *Highlights of the 1974 Regular Session—Civil Code Amendments*, 35 LA. L. REV. 639, 639-44 (1975).

12. LA. CIV. CODE art. 17 provides: "Laws *in pari materia*, or upon the same subject matter, must be construed with reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another." *Id.* art. 18 provides: "The universal and most effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the Legislature to enact it."

13. A redhibitory defect must be such a defect that it makes the use of the thing so inconvenient and imperfect that "it must be supposed that the buyer would not have purchased it, had he known of the vice." *Id.* art. 2520. The defect must be non-apparent (*id.* art. 2521), undeclared to the buyer (*id.* 2522) and extant before the sale (*id.* art. 2530). The remedy is avoidance of the sale (*id.* art. 2520) repair and return of the purchase price and certain incidental expenses (*id.* art. 2531).

14. Even if the thing purchased has a redhibitory defect, the buyer may nevertheless decide to keep it and demand merely a reduction in price. *Id.* art. 2541. The defect in the thing or the declared quality which the thing lacks may not be important enough to warrant redhibition and the buyer may only be able to demand a reduction in price. *Id.* arts. 2541, 2543.

seller appear in articles 2545 through 2548.¹⁵ Despite the language of article 2544 that indicates that actions for a reduction of price are governed by the same conditions as redhibitory actions,¹⁶ a proper exegetical analysis demands that article 2531 be limited to redhibitory actions for defects known by neither buyer nor seller.¹⁷ Thus, the requirement of an opportunity to repair should apply neither to actions for a reduction of price nor to redhibitory actions based upon defects known to the seller.

Primarily due to an ambiguous reference to article 2521, the wording of article 2531 presents problems of interpretation. The current text provides, in part:

The seller who knew not the vices of the thing is only bound to repair, remedy or correct the vices as provided in Article 2521, or if he be unable or fails to repair, remedy or correct the vice, then he must restore the purchase price, and reimburse the reasonable expenses occasioned by the sale, as well as those incurred for the preservation of the thing, subject to credit for the value of any fruits or use which the purchaser has drawn from it.

The author of the bill to amend article 2531 introduced a companion bill to fulfill the reference to article 2521; however, the House of Representatives failed to pass the latter.¹⁸

By providing that only those defects which a seller fails to remedy by adjustment, replacement or repair could be considered redhibitory, the

15. These remedies include restitution of the purchase price and repayment of expenses including attorney's fees and damages. *Id.* art. 2545.

16. *Id.* art. 2544 provides: "The action for a reduction of price is subject to the same rules and to the same limitations as the redhibitory action." Certainly the language "[t]he seller who knew not the vices . . ." in article 2531 is broad enough to include non-redhibitory defects, and requiring an opportunity to repair in actions for reduction of price is consistent with the policy of providing the buyer with a repaired thing rather than a lawsuit; however, this strained interpretation is not consistent with exegetical analysis. Since purchasers generally bring redhibitory actions rather than actions for reduction in price in order to have more potential remedies, the issue is more theoretical than practical.

17. If the article were to be applied either to actions for a reduction of price or to actions against sellers with knowledge, as well as to actions against sellers with no knowledge, the differentiation between the three types of actions would be lost. The Code clearly sets out three separate actions, and if the legislature intended to modify all three, it would have done so more clearly than by amending only one of the three actions.

18. Senate Bill No. 547, as amended by the House of Representatives, failed to pass the House by a vote of 44 to 40. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA, July 11, 1974 at 146, 147 (37th Reg. Sess.) [hereinafter cited as PROCEEDINGS].

defeated bill would have changed the method of determining the nature of redhibitory defects from a consideration of impaired usefulness to that of repairability.¹⁹ The bill would also have required that the seller be given notice of the defect and a reasonable opportunity to repair; in addition, buyers would have been entitled to attorney's fees as an element of recovery.²⁰ As a consequence of the failure to amend article 2521, doubts have arisen with regard to the meaning and application of article 2531. So far, only one appellate court has frankly dealt with these problems.²¹ The Third Circuit, in the 1976 case of *Jordan v. LeBlanc and Broussard Ford, Inc.*,²² decided that in order to effectuate legislative intent, it would treat the reference to article 2521 as surplusage. The court continued, stating:

Until the legislature provides specific rules concerning the terms and conditions of the right to repair, there is no alternative in the judiciary but to decide each case on its peculiar circumstances with due regard being given to the competing interests of the consuming public and the retailers and manufacturers.²³

Perhaps any doubts concerning application were unwarranted since article 2531 implicitly contains provisions relating to notice and reasonable opportunity to repair.²⁴

19. The text of La. S.B. 547 stated:

"Article 2521. Apparent defects, that is, such as the buyer might have discovered by simple inspection, are not among the number of redhibitory vices.

A defect that can be remedied by adjustment, replacement or repair is not to be considered as redhibitory unless the seller shall fail to remedy it after notice and after being given reasonable opportunity to remedy the defect so claimed. The notice shall generally state the alleged defect.

If a buyer takes legal action to assert his rights under redhibition, the buyer shall be entitled to reasonable attorney's fees as an element of his recovery."

The House added the wording "at the seller's own expense" after "so claimed." PROCEEDINGS, *supra* note 18, at 14 (July 5, 1974).

20. *Id.* At present, attorney's fees are awarded only if the buyer proves that the seller had knowledge of the defects at the time of the sale. LA. CIV. CODE art. 2545.

21. Article 2531, as amended in 1974, was apparently applied in *Busenlener v. Peck*, 316 So. 2d 27, 31 (La. App. 1st Cir. 1975), and in *Wiltz v. Dixie Auto Sales, Inc.*, 315 So. 2d 811, 814 (La. App. 3d Cir. 1975). Several cases have referred to the effective date of application without referring to the effective language. See *First Nat'l Bank v. Miller*, 329 So. 2d 919, 924 (La. App. 2d Cir.), *cert. denied*, 333 So. 2d 243 (La. 1976); *Bermes v. Facell*, 328 So. 2d 722, 726 n.1 (La. App. 1st Cir. 1976); *Smith v. Max Thieme Chevrolet Co.*, 315 So. 2d 82, 85 n.1 (La. App. 2d Cir. 1975). See also *Moreno's Inc. v. Lake Charles Catholic High Schools, Inc.*, 315 So. 2d 660, 663 (La. 1975).

22. 332 So. 2d 534 (La. App. 3d Cir. 1976).

23. *Id.* at 538.

24. *Cf.* LA. CIV. CODE art. 2026.

The willingness of the judiciary to give effect to article 2531 despite its ambiguities²⁵ presents several problems. While clearly applying to sellers without actual knowledge, the article does not indicate whether it also applies to sellers with mere constructive knowledge. Additionally, though the article imposes an obligation to repair, it fails to supply a definition of "repair." Finally, judicial proceedings themselves have posed ancillary questions regarding the proper procedural mechanisms for presenting sellers' defenses to buyers' actions.

The desire of the judiciary to protect consumers has led to an ongoing expansion of the contractual duty of warranty to include the duty of reasonable care.²⁶ This expansion has led to an imputation of knowledge to sellers who "should have known"²⁷ of the defects, thereby fictionally

25. See note 21, *supra*.

26. The "expansion" has been neither clearly defined nor systematically applied. In May 1972, the Louisiana Supreme Court, in *Media Prod. Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 90, 262 So. 2d 377, 381 (1972), stated bluntly, "Louisiana has aligned itself with the consumer-protection rule, by allowing a consumer without privity to recover, whether the suit be strictly in tort or upon implied warranty." Later the same year, the Federal Court of Appeals for the Fifth Circuit, called upon to decide a wrongful death action based on a defective product, found the law of Louisiana unclear and declined to decide whether the theory of recovery should be in negligence or redhibition. The court held, "In our view the Louisiana courts have left the door open for a purchaser or third party to recover against a vendor under either theory. We conclude that in Louisiana, upon proper proof, a vendor may be held liable for injuries caused by a defective product if he knew or *should have known* of the defect at the time of sale." *Ross v. John's Bargain Stores Corp.*, 464 F.2d 111, 115 (5th Cir. 1972) (emphasis by the court). Two 1974 Louisiana Supreme Court cases employed tort language in determining the contractual liability of retail sellers. In *Rey v. Cuccia*, 298 So. 2d 840, 847 (1974), the court reversed both the trial and appellate courts, holding, "the retailer Cuccia, who ordered the installation of the trailer hitch as part of his sale of the product, is *presumed to know* of the defect in this installation." (Emphasis added). In *Spillers v. Montgomery Ward & Co.*, 294 So. 2d 803, 807 (La. 1974), the court found that the seller was not liable because "[t]here is no evidence in the record from which we could conclude that Reliable Motors or its employees *knew or should have known* that this wheel and rim were defective." (Emphasis added). See Crowe, *The Fishbone in the Pelican's Throat or "The Same Damn Place You Got That Battleship,"* 19 LOY. L. REV. 357 (1973); Robertson, *supra* note 1, at 72-96. See generally Note, 18 LOY. L. REV. 216 (1972). Cf. 2 S. LITVINOFF, OBLIGATIONS § 252 in 7 LOUISIANA CIVIL LAW TREATISE 477 (1975).

27. The First Circuit Court of Appeal in *Wade v. McKinnis-Peterson Chevrolet, Inc.*, 307 So. 2d 798, 803 (La. App. 1st Cir. 1975), summarized the knowledge issue, holding, "To recover attorney's fees the buyer must prove knowledge of the defect by the seller. He need not prove wilful misrepresentation. It is sufficient for the buyer to prove actual or constructive knowledge by the seller. Thus, if the seller knew or should have known of the defect and failed to declare it to the buyer, the seller is liable additionally for reasonable attorney's fees." See note 28, *infra*.

moving them from the article 2531 "without knowledge" category to the article 2545 "with knowledge" category.²⁸ Jurisprudence since the amendment to article 2531, though not extending the doctrine of constructive knowledge as far as the broad knowledge imputed to professional vendors in France,²⁹ clearly indicates a willingness to extend the seller's knowledge under article 2545 to include not simply "patent and obvious" defects,³⁰ but additionally all defects reasonably discoverable in the exer-

28. LA. CIV. CODE art. 2545 provides: "The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of the price and repayment of the expenses, including reasonable attorney's fees, is answerable to the buyer in damages."

29. The concept derives from Pothier, who described the responsibility as follows:

"La raison est qu'un ouvrier, par la profession de son art, *spondet peritiam artis*. Il se rend envers tous ceux qui contractent avec lui, responsable de la bonté de ses ouvrages, pour l'usage auquel ils sont naturellement destinés. Son imperitie ou défaut de connaissance dans tout ce qui concerne son art, est une faute qui lui est imputée, personne ne devant professer publiquement un art, s'il n'a toutes les connaissances nécessaires pour le bien exercer: *Imperitia culpa annumeratur*; L. 132, ff. *de Reg. jur.*

Il en est de même du marchand fabricant ou non fabricant. Par la profession publique qu'il fait de son commerce, il se rend responsable de la bonté des marchandises qu'il débite, pour l'usage auquel elles sont destinées." 3 OEUVRES DE POTHIER § 213 at 88-89 (Bugnet ed. 1861).

The reason is that a craftsman, by the practice of his trade, represents himself as skilful in his craft. He makes himself answerable to all those who contract with him for the quality of his works, for the use to which they are naturally intended. His unskilfulness or lack of knowledge in all that which concerns his trade, is a fault which is imputed to him; no one should practice publicly a trade if he does not have all the knowledge necessary to perform it well: Want of skill is reckoned as a fault. L. 132, ff. *de Reg. jur.* It is the same whether the dealer is a manufacturer or not. By publicly declaring that he is engaged in a certain business, he makes himself answerable for the quality of the goods that he sells, for the use to which they are destined (translation by the author).

Justice Barham proposed the adoption of a professional vendor status in his concurring opinion to the writ denial in *Peltier v. Seabird Indus., Inc.*, 304 So. 2d 695 (La. App. 3d Cir. 1974), *cert. denied*, 309 So. 2d 343 (La. 1975).

30. An example of this standard is found in *Simon v. Ford Motor Co.*, 256 So. 2d 725, 730 (La. App. 1st Cir. 1971), in which the court held, "The law imposes no duty upon the vendors of new automobiles, however, to discover any defects except those that are patent and obvious." The supreme court affirmed in part and reversed in part at 282 So. 2d 126, 129 (La. 1973), finding that the defects could not be discovered during the routine maintenance operation and that it was unwilling at that time to apply the doctrine of strict liability or liability without fault. In *Peltier v. Seabird Indus., Inc.*, 304 So. 2d 695, 699-700 (La. App. 3d Cir. 1974), *cert. denied*, 309 So. 2d 343 (La. 1975), the court summarized this approach, holding: "There is no rule of law in Louisiana which imputes to the seller of new products (such as the boat herein or an automobile) knowledge of latent vices and defects, where the

cise of ordinary care.³¹ One court of appeal has gone farther by imputing knowledge of a defect not reasonably discoverable to a seller who had actual knowledge that other similar products contained the same defect.³² A concomitant desire to protect those who act reasonably prompted two different courts of appeal to reject claims against sellers who had actual knowledge of vices, but had taken reasonable steps prior to the sale to correct the defects and who believed in good faith that the thing had been properly repaired.³³ Thus, a seller's knowledge is to be determined not so

seller is not the manufacturer of the product. Nor is there an obligation to search for hidden defects, the duty of the vendor of such products being fulfilled if he performs the routine, normal inspections in the business upon receipt of the product, checking and discovering those defects which are patent and obvious." See note 31, *infra*.

31. In *Williamson v. Strange*, 323 So. 2d 875, 879 (La. App. 2d Cir. 1975), the court held, "There was no constructive knowledge of the imperfections since these could not be reasonably discovered by defendant in the exercise of ordinary care." This common law standard intruded into Louisiana jurisprudence through decisions like *Barker v. Phoenix Ins. Co.*, 220 So. 2d 720, 724 (La. App. 2d Cir.), *cert. denied*, 254 La. 134, 222 So. 2d 883 (1969), in which the court cited the common law authority of Blashfield's *Cyclopedia of Automobile Law and Practice* and A.L.R.2d to support its use of the ordinary care standard. When the Louisiana Supreme Court decided to extend the liability of manufacturers by imputing knowledge to them, it referred to the doctrine of Laurent, who had followed the doctrine of Pothier, who could trace his idea to Roman Law. The concept that the seller has constructive knowledge of the defects in the thing he sells because he holds himself out as having knowledge of the product, would serve admirably as the basis for extending the seller's liability. This doctrine finds some support in Louisiana jurisprudence by implication and its use would allow for a Louisiana-developed approach to products liability based on civilian principles rather than an attempt to modify and apply a fully developed common law theory. See *Doyle v. Fuerst and Kramer, Ltd.*, 129 La. 838, 56 So. 906 (1911); *George v. Shreveport Cotton Oil Co.*, 114 La. 498, 38 So. 432 (1905); 24 LAURENT, *PRICIPES DE DROIT CIVIL* 289-91 (1877) See note 29, *supra*.

32. In *Palmer v. Anchor Marine, Inc.*, 331 So. 2d 114 (La. App. 1st Cir. 1976), the defective axle bearing was neither apparent nor readily discoverable. The court, however, found "an employee and former employees of the defendant-appellant testified of prior history of defective axle bearings, and thus even though the defect would have been hidden and non-apparent as to the purchaser, once this knowledge was acquired by the seller, we are of the opinion that it then became an apparent defect as to the seller." *Id.* at 117.

33. In *Slay v. Ater*, 305 So. 2d 691 (La. App. 3d Cir. 1974), the court found that the defendant seller was reasonable in believing that the engine he knew to be defective had been repaired by the mechanic he hired for the express purpose of repairing it. The court found no proof that the seller had any problems with the truck between the time of the repair and the sale and concluded that the seller had no knowledge of the defect. In *Busenlener v. Peck*, 316 So. 2d 27, 32 (La. App. 1st Cir. 1975), the court offered a fuller explanation, holding: "The fact that the defendant had knowledge of the defect prior to the sale did not cause him to be liable for attorney's fees under Article 2545. His actions taken prior to the sale to

much by a strict rule of law but by whether he acted reasonably and in good faith.

Differences of opinion will certainly occur in determining both the adequacy of the opportunity to repair and the effectiveness of the repair itself. Even if article 2521 had been successfully amended, it would have provided only for a "reasonable opportunity to repair."³⁴ Construing article 2531 alone, the court of appeal decision in *Jordan* indicates that a single opportunity to repair may be inadequate,³⁵ while dictum in *Edwards v. Port AMC/Jeep, Inc.*³⁶ indicates that one chance is indeed sufficient. An effective repair is surely one which corrects the redhibitory defect by making the thing fit for its intended purpose; however, a repair accomplished by replacement with a rebuilt or used part may frustrate the buyer who desired to possess a new thing. Recognizing the legislature's vagueness, the *Jordan* court formulated its case-by-case application of article 2531.³⁷ Perhaps no single rule of law, whether legislative or judicial, could ever deal adequately with all the complex situations arising in the modern market place.³⁸ Rather than using a system which necessitates judicial action for each dissatisfied buyer, a better solution might be to interpose a third party between purchaser and seller to arbitrate disputes.³⁹

The statutory warranty obligation which every seller incurs at the moment of sale⁴⁰ now includes an obligation to repair redhibitory defects.⁴¹ The return of the purchase price, another aspect of the warranty

remedy the defect were reasonable and he was in good faith in believing the defect was cured."

34. See note 19, *supra*.

35. 332 So. 2d at 539 (La. App. 3d Cir. 1976).

36. 337 So. 2d 276, 280 (La. App. 2d Cir.), *cert. denied*, 339 So. 2d 854 (La. 1976).

37. 332 So. 2d at 538.

38. Louisiana is at a particular disadvantage because much of its commercial law is based upon a civil code written for an agrarian society 150 years ago. Some provisions of the Civil Code of 1825 indicate that a commercial code was contemplated. La. Civ. Code arts. 2798, 2823 (1825) See *Wagner v. Kenner*, 2 Rob. 120, 122-26 (La. 1842).

39. Examples of agencies already serving this function are the Better Business Bureau, the Governor's Office of Consumer Protection and Autocap. The difficulty is that none of these agencies has any kind of enforcement power and must rely on the consent of the parties.

40. The warranty obligation is created by the contract of sale, and may be described as an implied obligation of the sale. LA. CIV. CODE arts. 1764, 1930, 2438, 2475, 2476.

41. The seller's obligation to repair is "conditioned" upon the uncertain occurrence of redhibitory defects and upon the buyer's tender for repair; consequently, the obligation contains a mixed suspensive condition. *Id.* arts. 2023-25. The pro-

obligation, is conditioned upon the seller's failure or inability to repair the defects.⁴² When the buyer institutes an action for the return of the purchase price without first affording the seller an adequate opportunity to repair, the seller faces the procedural problem of deciding which exception, the dilatory exception of prematurity or the peremptory exception of no cause of action, is more appropriate.

An action to enforce an obligation is premature when the time for enforcement has not yet arrived⁴³ or when the obligation depends upon a suspensive condition.⁴⁴ The Code of Civil Procedure indicates that the dilatory exception of prematurity *must* be used if the action falls in the former category and that the peremptory exception *may* be used if the action falls in the latter.⁴⁵ Use of the dilatory exception of prematurity would allow the repair issue to be decided at the trial of the exceptions and permit the introduction of evidence.⁴⁶ The peremptory exception of no cause of action⁴⁷ would similarly require a trial of the exception, but such trial would be limited to an examination of the face of the petition without the use of supporting or controverting evidence.⁴⁸ This trial would necessarily fail to reach the real issues⁴⁹ which would be deferred to the trial on the merits.

posed amendment to article 2531 would have expressly provided for a tender by the buyer as a condition to the seller's repair. Instead, the tender must be implied. *Cf. id.* art. 2026. The tender is really a requirement for enforcement of the warranty obligation, not a condition on the existence of the obligation. See notes 40, *supra* and 42, *infra*. At least one court of appeal so described it, holding, "A tender for repair is required before suit in redhibition can be instituted." *Wiltz v. Dixie Auto Sales, Inc.*, 315 So. 2d 811, 814 (La. App. 3d Cir. 1976).

42. The seller's failure or inability to repair is a mixed suspensive condition. LA. CIV. CODE arts. 2021-25. The condition does not operate to suspend the seller's warranty obligation which he incurred at the time of the sale; rather it operates to suspend the buyer's right to enforce the warranty obligation by demanding the return of the purchase price. *Id.* arts. 1930, 2028, 2043. 3A A. CORBIN, CONTRACTS, § 638 at 48-49 (1960). See notes 40 & 41, *supra*.

43. The time for enforcement arrives when the term for performance expires. LA. CIV. CODE arts. 2048-61; LA. CODE CIV. P. art. 423.

44. LA. CODE CIV. P. art. 423.

45. *Id.*, comment (b).

46. *Id.* arts. 929-30.

47. *Id.* art. 927. If the defendant seller had an objection to the jurisdiction of the court, he would have to file the declinatory exception first and have a judicial determination of the issue before filing his peremptory exception. *Id.* art. 7. The dilatory and declinatory exceptions, on the other hand, may be filed at the same time. *Id.*

48. *Id.* arts. 929, 931.

49. If the petition itself fails to allege that the buyer gave the seller an opportunity to repair or that the seller had not repaired the defects, the seller could

Although the obligation to repair acts as a kind of suspensive condition on the obligation to return the purchase price, the court of appeal in *Jordan* decided that the dilatory exception of prematurity was appropriate.⁵⁰ The Louisiana Supreme Court recently decided that *either* the peremptory exception of no cause of action *or* the dilatory exception of prematurity was appropriate in a case in which the cause of action had not yet come into existence because a prerequisite condition had not been fulfilled.⁵¹ These decisions approving the use of the dilatory exception serve the practical function of allowing a complete and speedier determi-

certainly file an exception of no cause of action. *Id.* art. 927. This defect would be cured by the amendment of the petition. *Id.* art. 934.

50. *Id.* arts. 929, 931. In *Jordan* the court concluded that a decision on the merits would require two trials: one on the nature of the defect itself and another on the nature and existence of the defect after repair. This kind of duplication is anathema to judicial efficiency and would retard a speedy determination of the validity of the buyer's complaint. The court stated, "In most cases, the resolution of the question in limine will be more advantageous to all parties regardless of the outcome." 332 So. 2d at 538-39. Judge Domengeaux dissented, indicating that "no cause of action" was the proper exception and, even if not, the exceptor had failed in his burden of proof. He strongly disagreed with the majority's contention that plaintiff's action, brought under Civil Code article 2545, could be judicially transformed into an action under article 2531 to allow a determination of the repair issue, since he felt that the two articles were totally separate in their application and goal, as reflected in their legislative histories. *Id.* at 540-43.

51. The court held:

"The defense that the plaintiff is not entitled to judicial relief because he has not exhausted his administrative remedies, may be raised to the merits, either by the exception pleading no cause of action, . . . or by answer so pleading it. . . ."

The defense may also be raised, as it was here, by the dilatory exception pleading prematurity, . . . which is determined on the basis of the showing made at the in-limine trial of the exception, including evidence introduced at the trial thereof. . . . The functions of the exception permit raising the issue that the judicial cause of action has not come into existence because some prerequisite condition has not been fulfilled." *Steeg v. Lawyers Title Ins. Corp.*, 329 So. 2d 719, 720 (La. 1976). The court cited 1 H. McMAHON, LOUISIANA PRACTICE 341-49 (1939), even though this treatise deals exclusively with the Code of Practice and the jurisprudence thereunder. Code of Practice articles 14, 158 and 332-34 and the cases cited by Professor McMahon clearly indicate that the description of an action as "premature" did not mean that the exception raised was that of prematurity. The court in *H.B. Clafin Co. v. Feibleman*, 44 La. Ann. 518, 520-21, 10 So. 862, 863 (1892) held that a pleading that "the action is premature, and the debt not due" was by its terms an exception to the cause of action. *See Hart v. Springfield Fire & Marine Ins. Co.*, 136 La. 114, 117, 66 So. 558, 559 (1914). The jurisprudence indicated that the obligation subject to a suspensive condition should be determined at a full trial on the merits. *Halbert v. Klauer Mfg. Co.*, 181 So. 75 (La. App. 2d Cir. 1938) (cited with approval in *Pringle Assoc. Mortgage Corp. v. Eanes*, 211 So. 2d 399, 404-06, (La. App. 1st Cir. 1968)).

nation of the rights of the parties;⁵² however, this disjunctive approach tends to obscure the theoretical nature of these rights. The judiciary should recognize that the repair obligation/condition merely suspends the right to enforce the warranty obligation but does not condition its existence. The buyer has a conditional right or hope of enforcement from the moment of sale;⁵³ his action to assert this right is more correctly described as premature, not non-existent.

The second part of article 2531 now provides:

In any case in which the seller is held liable because of the redhibitory defects in the thing sold, the seller shall have a corresponding and similar right of action against the manufacturer of the thing sold for any losses sustained by the seller, and further provided that any provision of any franchise or manufacturer-seller contract or agreement attempting to limit, diminish or prevent such recoupment by the seller shall not be given any force or effect.

Before this amendment, warranty waivers were theoretically possible between buyers and sellers, buyers and manufacturers,⁵⁴ and sellers and manufacturers.⁵⁵ The amendment does not change these theoretical pos-

52. The trial of the dilatory exception serves, in effect, as a trial on the merits since a determination of the issue of effective repair necessarily entails an examination of the defects which existed before repair, which is the essence of the plaintiff's action. If the judge sustains the dilatory exception, then the plaintiff's action will be dismissed before a full trial determination of the merits of the action. If the exception is dismissed, the defendant will be in the unenviable position of presenting a trial defense on issues which the court has already decided against him. Neither plaintiff nor defendant is really denied any legal process because each is allowed to introduce any evidence that is admissible on the merits at the trial of the exception. See the text at notes 45-49, *supra*. The effect of the trial of the exception is consistent with the legislative intent to give the buyer a legal action *only* if he cannot be given the working, albeit repaired, thing which he intended to buy originally.

53. See 1 M. PLANIOL, CIVIL LAW TREATISE pt. 1, no. 319 at 215-16 (12th ed. La. St. L. Inst. Transl. 1959). The recognition that the hope of enforcement of an incidental obligation exists as long as the contract underlying the incidental obligation exists has recently been applied in *Due v. Due*, 331 So. 2d 858, 860-61 (La. App. 1st Cir. 1976), *aff'd*, 342 So. 2d 161 (La. 1977), in which the court found that a contingency fee obligation was part of a contract to render services and that the attorney at all times possessed the hope of enforcement, such hope being a property right.

54. The standards for the waiver are discussed in text at notes 5 & 6, *supra*. See Note, 49 TUL. L. REV. 484, 490 (1975), where the writer noted that no valid warranty waivers by non-business consumers were found in his research of Louisiana jurisprudence. See also Comment, *Modification or Renunciation of Warranty in Louisiana Sales Transactions*, 46 TUL. L. REV. 894, 895 (1972).

55. *Anderson v. Bohn Ford, Inc.*, 291 So. 2d 786, 788-91 (La. App. 4th Cir. 1973), *cert. denied*, 294 So. 2d 829 (La. 1974).

sibilities;⁵⁶ however, it does abrogate a waiver between manufacturer and seller in cases involving sellers previously held liable in redhibitory actions.⁵⁷ Since the buyer is subrogated to the seller's rights, any waiver between manufacturer and buyer would similarly become ineffective once the seller's liability had been established;⁵⁸ as a result both buyer and seller are assured of recourse against the manufacturer.⁵⁹

Article 2531 clearly places ultimate liability for redhibitory defects upon the manufacturers of defective products; consequently, manufacturers have great incentive to correct redhibitory defects, either by improving production techniques or by supplying retailers with the expertise necessary to make effective repairs. The consumer market bears the cost of these improvements in the form of higher prices.

56. See *Guillory v. Morein Motor Co.*, 322 So. 2d 375 (La. App. 3d Cir. 1975). The court thoroughly analyzed the requirements of warranty waiver, including the buyer's understanding of the waiver, but based its conclusion on the rationale that "[t]he purpose for which one purchases an automobile is that of transportation, be it a used or new vehicle. If an individual wished to purchase a stationary hulk of nuts and bolts with four wheels on it certainly he could do so at a lesser cost than the price paid by plaintiff for the automobile in question." *Id.* at 377-79. This decision illustrates both the judicial cognizance of warranty waiver and the judicial unwillingness to find an effective waiver.

The decision in *Hendricks v. Horseless Carriage, Inc.*, 332 So. 2d 892 (La. App. 2d Cir. 1976), also includes an examination of the buyer's understanding of the warranty waiver. Since sellers will presumably conform their waiver language to the requirements of *Prince*, later decisions will probably inquire into the buyer's understanding of the waiver rather than the form of the waiver itself.

57. Apparently, if the buyer sued the manufacturer directly either without naming the seller as a defendant or securing a judgment against him, any waiver between the manufacturer and seller would remain effective. Since the buyer has only the seller's rights against the manufacturer (which have all been waived), he should be met with a motion for summary judgment.

58. LA. CIV. CODE art. 2503 provides in part: "But whether warranty be excluded or not the buyer shall become subrogated to the seller's rights and actions in warranty against all others." This section applies to the warranty regarding redhibitory defects. *McEachern v. Plache Lumber & Constr. Co.*, 220 La. 696, 703, 57 So. 2d 405, 407 (1952). *But see Peltier v. Seabird Indus., Inc.*, 304 So. 2d 695 (La. App. 3d Cir. 1974), *cert. denied*, 309 So. 2d 343, 344 (La. 1975) (Barham, J., concurring in the writ denial, states that *McEachern* has been overruled *sub silentio*).

59. Even without this provision, Justice Tate's dissent in *Spillers v. Montgomery Ward & Co.*, 294 So. 2d 803, 810 (La. 1974), indicates a willingness to obviate the warranty question entirely by allowing fault recovery under Civil Code article 2315, while Justice Barham's concurrence in *Peltier v. Seabird Indus., Inc.*, 309 So. 2d 343, 344 (La. 1975), indicates that the better plan is to establish a commercial vendor status by which the seller occupies the same position as the manufacturer. See Babst, *Redhibition or Tort! Are They Enough?* 22 LA. B.J. 19 (1974); Robertson, *supra* note 1, at 94-96.

The primary goal of the article is to give the buyer a working and useful product.⁶⁰ Conceptually, this end may be attained if the manufacturer is able to exert significant control over his retailers. For example, in the automobile industry, manufacturers can require their dealers to maintain adequate repair facilities, thus providing the mechanisms necessary for the achievement of the legislative goal.⁶¹ Similar mechanisms do not exist with regard to most other retail sellers who do not enjoy a close relationship with their manufacturers. Even retailers who maintain repair facilities have little reason to attempt to repair defective products, since the article does not give retailers an action to collect repair expenses from the manufacturer. Instead, the retailer is encouraged to make no repairs and to lose the redhibition suit,⁶² since he will be able to collect all his losses,⁶³ including attorney's fees,⁶⁴ from the manufacturer.

The obligations imposed by article 2531 on sellers to repair redhibitory defects and on manufacturers to bear the cost of these defects has led to some confusion, both regarding the nature of the obligations and the proper procedure to be used in dealing with them. The rules currently used by courts are very flexible, thus allowing a just determination of each case but also posing a threat of inconsistency in judicial application.⁶⁵ Commercial transactions are predicated upon certainty and foreseeability of costs; thus, the indefiniteness regarding the extent of the warranty obligation has a detrimental impact upon manufacturers and the economy as a whole.⁶⁶ Those who finance consumer purchases are placed in a similar

60. Effective repair seems to be the primary legislative goal. The secondary goal is to insure that neither the buyer nor the seller will be forced to bear the cost of redhibitory defects, and to impose that cost on the manufacturer.

61. The automobile industry is the largest manufacturing industry in the United States—its output, coupled with that of allied industries, constitutes roughly one sixth of the G.N.P. U.S. Industrial Outlook, 1976, U.S. Dep't. of Commerce 131 (1976) [hereinafter cited as Industrial Outlook]. Since most redhibition suits concern automobiles, the automobile-purchasing public will be the primary beneficiaries of the amendment. See *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Consumer Law*, 35 LA. L. REV. 384, 385 (1975).

62. Presumably, retailers who successfully defend a suit will have to absorb the legal expenses themselves; consequently, such retailers have some incentive to ignore redhibition suits altogether.

63. Robertson, *supra* note 1, at 103-04.

64. Cf. *Gonzales v. Southwest Mobile Homes, Inc.*, 309 So. 2d 780, 785-86 (La. App. 3d Cir.) *cert. denied*, 313 So. 2d 239 (La. 1975) (attorney's fees were awarded to a retailer against the manufacturer by applying article 2545).

65. See the text at notes 35 & 36, *supra*.

66. Manufacturers are certain to pass their costs on to the consumer through higher prices. If their costs are rising but the amount of increase is uncertain, the manufacturers may increase consumer costs more than is really necessary in an

position of uncertainty, since a current Federal Trade Commission rule has subjected them to the buyer's action of redhibition.⁶⁷

The legislature did not solve the many problems concerning redhibition in 1974; instead, it enacted an ambiguously worded statute and left the judiciary to clarify the resulting confusion. Legislation dealing with an area as complex as sales transactions cannot be effective unless it

attempt to ensure that the manufacturers will not have to bear the costs. Any increase in automobile costs is sure to have ripple effect on the overall economy. See *Industrial Outlook*, *supra* note 61, at 131.

67. The Federal Trade Commission Trade Regulation Rule entitled Preservation of Consumers Claims and Defenses, 16 C.F.R. §§ 433.1 *et seq.* (1975) became effective on May 14, 1976. This rule makes it an unfair or deceptive trade practice for a seller to use any consumer credit contract or the proceeds from any purchase money loan (as defined in the rule) unless the contract contains the following notice:

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Some confusion has already arisen regarding the terms of the rule, but no Louisiana case has interpreted its language. See 7 Consumer Credit and Truth-in-Lending Compliance Report, No. 11 at 1-3 (September 1976). The rule was not intended to create any new rights or claims; merely it allows the buyer to assert whatever rights and claims he had under state law against both the seller and the holder of the debt obligation. See Williams, *Helping the Market to Work: Section 5 of the Federal Trade Commission Act and "Holder in Due Course,"* 9 U.C.C. L.J. 137 (1976). The buyer of a product containing redhibitory defects will no longer be required to continue payments to the third party holder of his debt obligation, since his right to seek redhibition for breach of the implied warranty of fitness serves as a defense to the holder's right to demand payment of the debt. See LA. CODE CIV. P. art. 424. The buyer may even assert his redhibition claim directly against the holder, even though his recovery will be limited to the amount he has actually paid to the holder. See 40 *Fed. Reg.* 53524 (1975). The Louisiana legislature repealed subsection A of section 3532 and all of sections 3533 and 3534 of Title 9 in 1976. La. Acts 1976, No. 446. These sections had provided for a thirty-day period after notice by the assignee to the consumer that the consumer's debt had been transferred to the assignee during which the consumer could make any claims or complaints about the thing purchased by notice to the holder of the debt. At the end of the thirty days, the consumer was barred from asserting any claim or defense against the holder by the "holder in due course" status found in LA. R.S. 10:3-305 (1974). This repeal mooted any controversy existing because of the reference in these sections to Title 7, which had been repealed in 1974. La. Acts 1974, No. 92, § 2. The repeal also precluded any possible conflict between the state and federal regulations but left the primary enforcement of this area to federal officials. State officials, however, retain broad power to prevent any unfair trade practice under the provisions of LA. R.S. 51:1401-18 (1972).

is drafted in a comprehensive manner, after due consideration of all interests involved and with a view toward possible ramifications. Piecemeal legislation necessarily leads to the kind of judicial rule-making which legislators and the public so often criticize.

John Miller Shuey, Jr.

ENSURING EFFECTIVE ASSISTANCE OF COUNSEL FOR THE
CRIMINAL CO-DEFENDANT

Joint trials of two or more criminal defendants charged with the same offense may jeopardize their individual constitutional rights to a fair trial¹ and effective assistance of counsel² due to the possibility of a conflict of interests among them.³ Conflicts arise in many contexts and, with few exceptions,⁴ it is to the advantage of one defendant to cast the blame on his co-defendant. The relative culpability of co-defendants is usually an underlying issue. Thus, the individual defendant is often in the position of defending not only against the charges of the prosecution but also against the innuendoes of his co-defendant.⁵

The United States Supreme Court has effectively dealt with one aspect of the situation in which a joint trial infringed on an individual co-defendant's right to a fair trial. In *Bruton v. United States*⁶ the Court held that limiting instructions to the jury are inadequate to protect a non-

1. U.S. CONST. amend. VI.

2. The right to assistance of counsel as secured by the sixth amendment requires *effective aid* in the preparation and trial of the case. *Powell v. Alabama*, 287 U.S. 45 (1932).

3. "Despite what the appearances may be before trial, the possibility of a conflict of interest between two defendants is almost always present to some degree even if it be only in such a minor matter as the manner in which their defense is presented." *Morgan v. United States*, 396 F.2d 110,114-(2d Cir. 1968).

4. For example, if the testimony of co-defendants is reciprocal to the extent that there is no reason for counsel to attack the credibility of either, or restrict his summation as to either, then both might be adequately represented by the same attorney. Also, representation by single counsel would not be ineffective if both defendants seek to blame a third party. *See People v. Mason*, 91 Ill. App. 2d 118, 234 N.E.2d 351 (1968).

5. Whenever the defense hinges on a disassociation of the co-defendants, a conflict of interest arises which will preclude effective representation of all defendants by only one attorney. *See, e.g., People v. Chacon*, 69 Cal. 2d 765, 447 P.2d 106, 73 Cal. Rptr. 10 (1968).

6. 391 U.S. 123 (1968).