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Unconscionability: The Approach of the Louisiana Civil Code

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UNCONSCIONABILITY: THE APPROACH OF THE LOUISIANA CIVIL CODE

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INTRODUCTION

In 1975 Louisiana became the fiftieth state to enact the Uniform Commercial Code, but unlike its sister states, Louisiana omitted several UCC articles. As of 1983, UCC articles 2, 6, and 9 remain unadopted in Louisiana, and only article 6 remains under serious consideration for adoption by the Louisiana State Law Institute. For the present, articles 2 and 9 appear to be dead-letters in Louisiana, the apparent reason for inaction being a perception that the two articles are incompatible with Louisiana's underlying Civil Code principles.[1] By not enacting article 2 of the UCC, Louisiana remains, with California, a jurisdiction without section 2-302[2]—not the most important section in the UCC, perhaps, but by far the most interesting one.

The UCC section 2-302 comment advises that the section is, in essence, a grant of power to the courts to "police" contracts within the UCC's ambit and, in the court's discretion, to refuse to enforce

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1. *See* Charlton, *Louisiana's Civil Law Renaissance; A Bar to Adoption of the U.C.C.?*, 18 AM. BUS. L.J. 1, 10-12 (1980); Mashaw, *A Sketch of the Consequences for Louisiana Law of the Adoption of "Article 2: Sales" of the Uniform Commercial Code*, 42 TUL. L. REV. 740 (1968); Sachse, *Report to the Louisiana Law Institute On Article Nine of the Uniform Commercial Code*, 41 TUL. L. REV. 505 (1967).

2. § 2-302. Unconscionable Contract or Clause

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

(1978 Official Text).

any clause or group of clauses found to be unconscionable[3] or, indeed, to refuse to enforce the contract as a whole. The comment suggests that section 2-302 now permits courts in UCC states to do directly what in the past often was done by indirection, that is, the comment suggests that courts historically have policed unfair contracts and clauses by adverse construction of the contract language, by manipulation of the rules of offer and acceptance, or by resort to the always-available ideas of "public" policy. But, it may be wondered, what contracts require such policing in the first place and why did the most advanced society in the world, by a "vote" of forty-eight to two, decide very nearly at the time of its bicentennial that such "above-the-board" judicial policing was necessary? The answer to both inquiries is found in common law jurisprudence.

Historically, the common law courts have assumed that, as a matter of inherent equitable power, the enforcement of unfair contracts or clauses could be refused if the contract or clause was so onerous, oppressive, or one-sided that a reasonable person, not suffering a delusion, would not have freely given his consent to it.[4] In earlier and

3. Common law courts have not hesitated to apply the principle of unconscionability to cases beyond the ambit of § 2-302, recognizing that the adoption of UCC § 2-302 is an expression of legislative will on a matter having public policy implications that go beyond the scope of the UCC. *See, e.g.*, Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971); C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975); Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967). Courts also have held that bailments come under UCC article 2's ambit of "transactions in goods," Mieske v. Bartell Drug Co., 9 Wash. 2d 40, 593 P.2d 1308 (1979), as do leases of goods, *see, e.g.*, Fairfield Lease Corp. v. Pratt, 6 Conn. Cir. Ct. 537, 278 A.2d 154 (1971); Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enter., Inc., 58 A.D.2d 482, 396 N.Y.S.2d 427 (1977); Baker v. City of Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971). Still other decisions have applied the principle of § 2-302 by analogy to checking account agreements, David v. Manufacturers Hanover Trust Co., 55 Misc. 2d 1080, 287 N.Y.S.2d 503 (Civ. Ct. 1968), *rev'd on other grounds*, 59 Misc. 2d 248, 298 N.Y.S.2d 847 (App. Term. 1969), to an enrollment agreement for a "computer programmer" course, Educational Beneficial, Inc. v. Reynolds, 67 Misc. 2d 739, 324 N.Y.S.2d 813 (Civ. Ct. 1971), to a contract for the hiring of a party room, Lazan v. Huntington Town House, Inc., 69 Misc. 2d 1017, 332 N.Y.S.2d 270 (Dist. Ct. 1969), and to an apartment lease, Seabrook v. Commuter Housing Co., 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972), *aff'd on other grounds*, 79 Misc. 2d 168, 363 N.Y.S.2d 566 (App. Term 1973). As an aid to the analysis of the unenforceability of unfair contracts under the Civil Code of Louisiana, sellers, lenders, lessors, and contractors of work, labor, and services will be referred to collectively as "suppliers," while buyers, borrowers, lessees, and those who contract for the performance of work, labor, and services will be referred to as "consumers," unless the context otherwise requires.

4. The idea that a contract "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other" should not be enforced typically is traced to Earl of Chesterfield v. Janssen, 2 Ves. Sec. 125, 156, 28 Eng. Rep. 82, 100 (1750). The idea germinated in certain decisions of the United States Supreme Court; *see* United States v. Bethlehem Steel Corp.,

simpler times, perhaps such one-sided contracts or clauses were not common, but neither was the mass production and merchandising of goods and services. With mass merchandising inevitably comes mass contracting and the standardization of transactions—and the resulting decline of negotiation and bargaining as the manner of forming contracts. Given the volume of transactions involved—commercial and noncommercial—standardized contracting is perhaps the only orderly method by which goods and services can be distributed in the United States today.[5] Unavoidably, the terms of standard-form contracts are dictated by the distributors of goods and services, and terms unfairly advantageous to the distributor are the predictable result. A legal system in which goods and services are distributed upon the premise of caveat emptor perhaps can dispense justice only upon a case-by-case resort to "adverse construction of language," "manipulation of the rules of offer and acceptance," or by determinations that certain clauses or contracts are contrary to public policy.[6]

For the forty-eight states which enacted section 2-302, unconscionability is now the judicial device of choice by which the fairness of standard form contracts of adhesion is judged and adjusted. The policy of section 2-302 was eloquently stated by the New Jersey Supreme Court in *Ellsworth Dobbs, Inc. v. Johnson*:[7]

> Courts and legislatures have grown increasingly sensitive to imposition, conscious or otherwise, on members of the public by persons with whom they deal, who through experience, specialization, licensure, economic strength or position, or membership in associations created for their mutual benefit and education, have acquired such expertise or monopolistic or practical control in the business transaction involved as to give them an undue advantage. Grossly unfair contractual obligations resulting from the use of such expertise or control by the one possessing it, which result in assumption by the other contracting party of a burden which is at odds with the common understanding of the ordinary and untrained member of the public, are considered unconscionable and therefore unenforceable. . . . The perimeter of public policy is an ever increasing one. Although courts continue to recognize that

315 U.S. 289, 305 (1942); Hume v. United States, 132 U.S. 406, 411 (1889); Scott v. United States, 79 U.S. (12 Wall.) 443, 445 (1870). Of course, pre-UCC decisions exemplifying use of the principle may be found in many states. *See, e.g.*, Morrill v. Amoskeag Sav. Bank, 90 N.H. 358, 365, 9 A.2d 519, 525 (1939); Perkins v. Spencer, 121 Utah 468, 243 P.2d 446 (1952).

5. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. OF PA. L. REV. 485, 504 (1967).

6. UCC § 2-302, comment 1 (1978 draft).

7. 50 N.J. 528, 553-54, 236 A.2d 843, 856-57 (1967) (citations omitted).

> persons should not be unnecessarily restricted in their freedom to contract, there is an increasing willingness to invalidate unconscionable contractual provisions which clearly tend to injure the public in some way.

Because the notion of caveat emptor presupposes a parity of bargaining power[8] between contractants which does not exist in the modern marketplace, there can be no realistic presumption in the courts that ostensibly one-sided contractual terms were consented to. Instead, the principle of unconscionability permits, but does not compel, the presumption that a disparity of bargaining power has resulted in contractual terms that were not consented to. Unconscionability is simply a defect of consent, that is, the absence of a free and deliberate exercise of the will.

In the absence of a common law tradition, it should follow that the rule of caveat emptor has not stood as an antiquated barrier to the dispensation of justice in civil obligations matters in Louisiana courts. Yet, the terms of standardized contracts can be just as one-sided in Louisiana as in any other state. Neither section 2-302 nor any notion of inherent common law judicial power can be brought to bear on the unfair contract in Louisiana. The purpose of this article is to analyze the approach of the Louisiana Civil Code and the Louisiana courts to those contracts or clauses that elsewhere in the United States could be referred to as "unconscionable."[9] The Louisiana Civil Code, as interpreted and applied by the courts, will be the focal point, but to facilitate what inevitably must be an exercise in comparative law, Civil Code principles will be applied to the facts of selected unconscionability cases in an effort to determine whether Louisiana citizens, particularly consumers, would benefit by the adoption in Louisiana of section 2-302.

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8. Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 140, 302 N.Y.S.2d 390, 393 (Civ. Ct. 1969); Star Credit Corp. v. Molina, 59 Misc. 2d 290, 293, 298 N.Y.S.2d 570, 574 (Civ. Ct. 1969).

9. The term "unconscionability" has surfaced many times in Louisiana jurisprudence, but the principle has never been linked to the Civil Code of Louisiana or recognized as a legitimate judicial power. *See* Roberson v. Maris, 266 So. 2d 488 (La. App. 4th Cir. 1972); J.H. Jenkins Contractor, Inc. v. City of Denham Springs, 216 So. 2d 549 (La. App. 1st Cir. 1968); McKelvy v. Milford, 37 So. 2d 370 (La. App. 2d Cir. 1948); Standard Accident Ins. Co. v. Fell, 2 So. 2d 519 (La. App. 2d Cir. 1941); *see also* Lama v. Manale, 218 La. 511, 50 So. 2d 15 (1950); Succession of Gilmore, 157 La. 130, 102 So. 94 (1924); Lazarus v. McGuirk, 42 La. Ann. 194, 8 So. 253 (1890); Louisiana Power & Light Co. v. Mecom, 357 So. 2d 596 (La. App. 1st Cir. 1978); Dennis Miller Pest Controls, Inc. v. Wells, 320 So. 2d 590 (La. App. 4th Cir. 1975); Johnson v. Heller, 33 So. 2d 776 (La. App. 2d Cir. 1948); Fleming v. Sierra, 14 Orl. App. 168 (1917). Louisiana does apply the principle of unconscionability in consumer credit transactions coming within the Louisiana Consumer Credit Law. *See* LA. R.S. 9:3551 (Supp. 1972); Community Acceptance Corp. v. Kinchen, 417 So. 2d 22 (La. App. 1st Cir. 1982).

If one combines with the UCC section 2-302 jurisprudence[10] the cases said by the comments to section 2-302 to have results "illustrative" of the underlying basis of section 2-302, the cases similarly cited by the comment to Uniform Consumer Credit Code section 5.108 as illustrative of prior application of the doctrine of unconscionability in a consumer setting, and the cases which adopt the principle of section 2-302 in cases beyond the scope of that section,[11] an aggregate is created of some sixty-five cases refusing to enforce contracts or clauses.[12] It will be demonstrated that in the clear majority of these "unconscionability cases," the result yielded by application of section 2-302 or of its principle would be, and would have been, the same if decided under the Civil Code of Louisiana.

The unconscionability cases, as a general matter, fall into three categories: (1) about twenty of the cases in which unconscionability was found involved an attempt by a supplier to disclaim or modify an implied warranty or other implied obligation; (2) about fifteen cases involved terms providing for forfeitures, penalties, and stipulated damages; and (3) another fifteen or so cases involved the enforceability of contracts entered into by a relatively sophisticated supplier and a consumer hampered by a serious disadvantage, such as language difficulties, ignorance, illiteracy, or a peculiar susceptibility to supplier "overreaching." The remaining cases can be categorized only under a "miscellaneous" heading.

Not all of the unconscionability cases contain a clear holding that the contract or a clause therein is unconscionable; in several cases, unconscionability is offered as an alternative ground for nonenforcement. In virtually all the cases, however, a standard form contract, offered on a take-it-or-leave-it basis, is expressly or implicitly involved. None of the cases give a clear indication that any serious bargaining as to terms took place.[13]

THE ENFORCEABILITY OF "UNCONSCIONABLE" CLAUSES AND CONTRACTS UNDER THE LOUISIANA CIVIL CODE

Stipulations Considered Noncontractual in Nature

The Civil Code of Louisiana offers certain general principles and provisions as to the formation of contracts that are germane to the issue of enforceability of conventional obligations. A contract in Loui-

10. The "section 2-302 jurisprudence" includes, for purposes herein, some UCC § 2-719 cases concerning unconscionable limitation of remedies. *See* UCC § 2-719, comment.

11. See note 3, *supra*.

12. See Appendix Table 1.

13. See Appendix Table 2.

siana is an agreement by which one person obligates himself to another to give, to do, or to permit something or not to do something, expressed or implied by such agreement.[14] No contract is valid or complete, however, without the consent of both parties.[15] In a bilateral or reciprocal contract,[16] consent, being the concurrence of intention in the parties with regard to a matter understood by them and resulting from a free and deliberate exercise of the will[17] of both parties, is not to be presumed, but must be expressed[18] in some manner that causes it to be understood as such by both parties.[19] Something must be proposed by one party and agreed to by the other.[20] But, "[n]ot always are contracts formed through a process of negotiation and bargaining, [for] necessities of modern life have gradually developed a kind of contract one of the parties to which is not free to bargain."[21] Standard-form contracts containing unbargained-for terms govern virtually all contractual relationships today. Because the supplier dictates the terms of such standard-form contracts, they likely are advantageous to him and often are unfairly so.

A Washington decision, *Mieske v. Bartell Drug Co.*,[22] recently applied the concept of unconscionability to the unbargained-for terms of a receipt-like document. A consumer, having contracted for the performance of services for the purpose of splicing some twenty-two reels of developed home movies, was given a receipt on which appeared the following language: "We assume no responsibility beyond retail cost of film unless otherwise agreed in writing." There was, of course, no such written agreement "otherwise," and no discussion of the exclusionary language on the receipt had occurred. The consumer denied having read the words. The exclusionary language was found to be unenforceable because it was unconscionable; hence the drug company was subjected to liability for loss of the films.

A virtually identical issue arose in Louisiana less than a year after

14. LA. CIV. CODE art. 1761. Article 1762 cautions:
The contract must not be confounded with the instrument in writing by which it is witnessed. The contract may subsist, although the written act may, for some defect, be declared void; and the written act may be good and authentic, although the contract it witnesses be illegal. The contract itself is only void for some cause or defect determined by law.

15. LA. CIV. CODE arts. 1766, 1779.

16. *See* LA. CIV. CODE art. 1765.

17. LA. CIV. CODE art. 1819.

18. LA. CIV. CODE art. 1766.

19. LA. CIV. CODE art. 1797. Assent to a contract can be implied. *See* LA. CIV. CODE arts. 1811, 1818.

20. LA. CIV. CODE art. 1798.

21. 1 S. LITVINOFF, OBLIGATIONS § 194 in 6 LOUISIANA CIVIL LAW TREATISE 346 (1969) [hereinafter cited as LITVINOFF].

22. 92 Wash. 2d 40, 593 P.2d 1308 (1979).

the *Mieske* decision. In *Bowes v. Fox-Stanley Photo Products, Inc.*,[23] the consumer contracted with a photograph processor for the developing of films taken on vacation. The receipt given to the consumer included an exclusionary clause similar to that in *Mieske*, limiting to replacement the processor's liability for lost film. But, Louisiana jurisprudence has long held that unless such language in a receipt or receipt-like document is explained or brought to the consumer's attention, the consumer is entitled to treat the slip of paper as nothing more than what it appears to be—a receipt—so that the consumer is not bound by the purported limitation of liability.[24]

In Louisiana, the small, receipt-like but term-laden piece of paper generated in everyday transactions does not necessarily constitute a contract document at all. Louisiana courts have so held for many years. The rationale of this approach is clear: Not one in a thousand consumers receiving such a piece of paper is aware of the contents of the language printed thereon; to permit such to constitute a part of the bargain struck would allow the supplier to limit most, if not all, of the duties and obligations it owed to the consumer, without either the knowledge or consent of the latter—a result inconsistent with the nature of consent in the Civil Code.[25] While the same legal principle is involved, the outcome is likely to be different if the customer is a knowledgeable or commercially sophisticated party.[26] Likewise, the *Mieske* language probably would not have been found to be unconscionable had the customer been a commercially sophisticated party

23. 379 So. 2d 844 (La. App. 4th Cir. 1980).

24. Vogel v. Saenger Theatres, Inc., 207 La. 835, 22 So. 2d 189 (1945) (admission ticket to movie theatre, containing language reserving "right" of theatre management to refuse admission); Roppolo v. Pick, 4 So. 2d 839 (La. App. Orl. 1941) (rent receipt releasing lessor from liability); Marine Ins. Co. v. Rehm, 177 So. 79 (La. App. Orl. 1937); *see also* S.E. Hornsby & Sons Sand & Gravel v. Checkmate Ready Mix Concrete, Inc., 390 So. 2d 213 (La. App. 3d Cir. 1980) (language on an invoice regarding interest and attorney's fees); Clofort v. Matmoor, Inc., 370 So. 2d 1305 (La. App. 4th Cir. 1979) (rent receipt stipulating that tenant was responsible for defects in the premises); Wilda, Inc. v. Devall Diesel, Inc., 343 So. 2d 754 (La. App. 3d Cir. 1977) ("not responsible for downtime" clause on an invoice not binding on a corporation contracting for repair services on a marine engine); Lawes v. New Orleans Transfer Co., 11 La. App. 170, 123 So. 144 (1929) (clause on receipt issued by a common carrier did not bind customer); *cf.* Saunders Leasing Sys., Inc. v. Neidhardt, 381 So. 2d 979 (La. App. 4th Cir. 1980) (discussing the liability of an automobile interior cleaning services contractor).

25. *See* LA. CIV. CODE arts. 1766, 1819; LITVINOFF, *supra*, note 21, § 195 at 351; *see generally* Note, *Automobiles—Parking Lots—Letting of Services for Hire—Effectiveness of Limitation of Liability Printed on Claim Check*, 12 TUL. L. REV. 458 (1938).

26. *See* Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92 (La. 1979); Southern States Equip. Co. v. Jack Legett, Co. 379 So. 2d 881 (La. App. 4th Cir. 1980); Louisiana Power & Light Co. v. Mecom, 357 So. 2d 596 (La. App. 1st Cir. 1978).

accustomed to the trade usage of exclusionary clauses,[27] perhaps even using such clauses in dealings with its own customers. *Bowes* represents what is meant by the Civil Code requirement that consent must be freely and deliberately given as to a matter understood by both parties.[28]

Consent Produced by Error

To become a party to a valid and, therefore, enforceable contract in Louisiana, the contract must be "legally entered into,"[29] which under the Civil Code means that the parties' consent must be "legally given."[30] As consent is the concurrence of intention in both parties concerning a matter understood by both and resulting in each party from a free and deliberate exercise of the will, it is not "legally given" where it has been produced by error[31]—ignorance of that which really exists or a mistaken belief in the existence of that which has no existence.[32] Not every error invalidates the consent of a contracting

27. The existence of a trade usage with respect to exclusionary clauses was proved in *Mieske*, but only as *among* film processors, not as between commercial film processors and their retail customers. 92 Wash. 2d at 49, 593 P.2d at 1313. *See* UCC § 1-205(2) (1978); LA. R.S. 10:1-205(a) (Supp. 1974). Still, it seems that a sophisticated commercial customer would be held more likely to know of such trade usage than a relatively unsophisticated and unsuspecting consumer. *See* Deutschmann v. Standard Fur Co., 331 So. 2d 219 (La. App. 4th Cir. 1976); Leithman v. Dolphin Swimming Pool Co., 252 So. 2d 557 (La. App. 4th Cir.), *cert. denied*, 259 La. 1055, 254 So. 2d 464 (1971); Lawes v. New Orleans Transfer Co., 11 La. App. 170, 123 So. 144 (1929).

28. In David v. Manufacturers Hanover Trust Co., 55 Misc. 2d 1080, 287 N.Y.S.2d 503 (Civ. Ct. 1968), *rev'd on other grounds*, 59 Misc. 2d 248, 298 N.Y.S.2d 847 (App. Term. 1969), an unconscionability decision similar to *Mieske*, the court refused to enforce a waiver of jury trial clause in a bank's checking account "signature card." The court's own remarks demonstrate the applicability of Louisiana Civil Code principles as applied in *Bowes*:

> [T]here is nothing to show that [the consumer] was at all aware of the terms of the "contract" which he signed or that he intended to sign a "contract" at all. Neither [of the two signature cards signed] called attention to the fact that its purpose was to create duties and obligations between the parties, enforceable in a court of law. . . . [The card] failed to give the slightest indication that the bank considered his signature an element in the formation of a contract of any kind. For all that . . . [the] depositor knew he was executing a form generally required by banks to be signed by a depositor . . . so that the bank would have on file a specimen of his signature for use in handling his account.

55 Misc. 2d at 1083, 287 N.Y.S.2d at 506. The New York Supreme Court, Appellate Term, reversed the decision, however, finding no unconscionability. David v. Manufacturers Hanover Trust Co., 59 Misc. 2d 248, 298 N.Y.S.2d 847 (App. Term. 1969).

29. LA. CIV. CODE art. 1901.

30. LA. CIV. CODE art. 1779. The parties, of course, must have legal capacity to contract, and the purpose of the contract must be certain and lawful. *Id.*

31. LA. CIV. CODE arts. 1819-1822.

32. LA. CIV. CODE art. 1821 (error of fact).

party in Louisiana. First, the error must be as to the principal cause or motive for the contract, that consideration without which the contract would not have been made;[33] second, the principal motive must have been known to be such by the other party or, from the nature of the transaction, he must be presumed to have known it to be such.[34] Such principal motives need not be expressed or stipulated, but may be apparent.[35] The Civil Code also provides that consent is invalidated where there is error as to the nature of the contract,[36] error as to the substance or some substantial quality of the thing that is the subject of the contract,[37] or error as to any quality of the thing that was the principal motive for the contract.[38]

The common law likewise regards error or mistake as a defect of consent, and given a mutual mistake as to a material fact or a unilateral mistake known by the other party or such knowledge chargeable to him, the equitable powers of the common law courts could be invoked for a rescission or reformation of the contract.[39] In deference to the statement of section 2-302's comment that, in the past, the policing of unconscionable contracts or clauses was accomplished by manipulation of the rules of offer and acceptance or by determination that the offensive clause was contrary to the dominant purpose of the contract, one may conclude that common law principles of mistake were inadequate tools with which to achieve just results in contract disputes. In any event, there exists an impressive body of case law in Louisiana demonstrative of Civil Code flexibility in the area of consent produced by error.

Error will invalidate a contract in Louisiana only when the error is as to a principal cause for making the contract, which may be either as to the motive for the contract, the person with whom it is made, or the subject matter of the contract itself.[40] Error in the motive and error as to the subject matter of the contract are treated differently in the Civil Code: "No error in the *motive* can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it";[41] but "if the object . . . be supposed

33. LA. CIV. CODE arts. 1823-1825.

34. LA. CIV. CODE art. 1826. *See* Delta School of Business, Baton Rouge, Inc. v. Shropshire, 399 So. 2d 1212 (La. App. 1st Cir. 1981).

35. LA. CIV. CODE arts. 1827-1829.

36. LA. CIV. CODE art. 1841.

37. LA. CIV. CODE arts. 1842-1844.

38. LA. CIV. CODE art. 1845.

39. A recent expression of the mistake rule is found in Loeb Rhoades, Hornblower & Co. v. Keene, 28 Wash. App. 499, 624 P.2d 742 (1981).

40. LA. CIV. CODE art. 1823.

41. LA. CIV. CODE art. 1826 (emphasis added).

by one or both the parties to be an ingot of silver, and it really is a mass of some other metal that resembles silver, there is an error bearing on the *substance* of the object."[42] A number of cases illustrate the flexibility of the Civil Code in regard to error.[43]

A business person in Louisiana, as an expert in his trade (relative to the layman-consumer, at any rate), must be diligent to spot any potential misunderstandings and make such disclosures as will avoid the same. In *Deutschmann v. Standard Fur Co.*,[44] for example, the consumer's known motive in the contract was for the fabrication of a fur coat made with "continuous," not "pieced together," furs. The furrier did not reveal to the consumer that in his trade, a "V-type"

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42. LA. CIV. CODE art. 1843 (emphasis added).

43. In Jones v. DeLoach, 317 So. 2d 240 (La. App. 2d Cir. 1975), a homeowner offered her home for sale under terms which included payments of $295 per month. Plaintiff's offer, accepted by the homeowner, included payments of $225 per month. Neither party realized that such an amount was insufficient to cover interest and principal. One might presume that there was no error as to the substance of the contract and assume that in any such case the respective principal motives of seller and buyer are the price and acquisition of the thing. The court, however, found an error in consent:

> In this day and time when most sales of residences are made with maximum financing, either by the seller or by a lending institution, the terms of the financing are often the primary consideration of the transaction. The buyer often is more concerned with the amount of the monthly payment than with the total amount of the price of the property or the total amount of the loan.

Id. at 243. The consumer in Pollard v. Ingram, 308 So. 2d 860 (La. App. 4th Cir. 1975), contracted for a three-week European tour, believing that the travel would be primarily by air—an important consideration for him because he suffered from a chronic heart disorder. In fact, the tour included some 2,400 miles of travel by bus. The consumer, as a result, could tolerate no more than seven days of the tour before being forced to return home due to ill health. The tour contractor had not misrepresented the travel arrangements, had not known of the consumer's motivation (the source of the error apparently was another party booked on the tour), and understandably sued for the full contract price of the tour. The contractor was not successful, the court ruling that the mode of travel is as important to a traveler as where he is going. *Pollard v. Ingram* is perhaps a better example of an error as to the substance of the contract, LA. CIV. CODE art. 1843, than of an error in principal motive, because it is difficult to understand how the tour contractor could have known that predominant air travel was the principal motive; less difficult to understand is how the substance of the tour contract turned out to be of a "totally different nature" from that which the consumer intended within the meaning of LA. CIV. CODE art. 1843.

It can be presumed in some cases "from the nature of the transaction," LA. CIV. CODE art. 1826, that a particular motive is the principal cause of the agreement. An example is seen in Gour v. Daray Motor Co., 373 So. 2d 571 (La. App. 3d Cir. 1979). Both General Motors and its dealer concealed all indications that would have suggested to prospective buyers that certain Oldsmobiles were equipped with engines manufactured by the Chevrolet division of General Motors. Concealment before the fact gave rise to the presumption that the dealer and General Motors knew "from the nature of the transaction" that the consumer's principal motive was to obtain an Oldsmobile equipped with an Oldsmobile engine.

44. 331 So. 2d 219 (La. App. 4th Cir. 1976).

seam was an acceptable method of joining fur pieces and was not considered as "piecing together." But, the furrier had not made the consumer aware of that trade usage; his failure to do so was held to have caused an error of fact as to the consumer's principal motive, invalidating her consent. "It was his responsibility to communicate to [the consumer] information which . . . would have avoided the confusion."[45]

Three of the unconscionability cases arguably would have been decided favorably to the consumer in Louisiana on the basis of consent produced by error. One such case, *Andrews Brothers v. Singer & Co.*,[46] is a UCC section 2-302, comment 1 "illustrative results" case. The contract in *Andrews* called for the seller to deliver to the buyer a new "Singer" automobile; what the seller delivered was an automobile which, while not previously sold, had been driven some 550 miles by another prospective purchaser. Seller took the position that the thing delivered was not "defective" and that, even if it was, the company had excluded all implied warranties. In Louisiana, the issue of the obligation of the seller respecting defects and waiver of responsibility therefor would not have been reached in *Andrews*, because the consent of the buyer would have been considered as having been produced by error.[47] The seller in *Andrews* knew from the nature of the transaction, within the meaning of Civil Code article 1826, that the buyer's principal motive was a new automobile;[48] most

45. *Id.* at 221.

46. [1934] 1 K.B. 17 (C.A. 1933).

47. *See* Gour v. Daray Motor Co., 373 So. 2d 571 (La. App. 3d Cir. 1979) (Oldsmobile equipped with a Chevrolet engine); Ouachita Air Conditioning, Inc. v. Pierce, 270 So. 2d 595 (La. App. 2d Cir. 1972) (homeowner ordered a "York" air conditioning unit; seller installed an "Amana" unit); Atlantic-Gulf Supply Corp. v. McDonald, 175 So. 2d 6 (La. App. 4th Cir. 1965) (purchase of a 7 1/2-ton air conditioning unit represented to be a 10-ton unit); Bartolotta v. Gambino, 78 So. 2d 208 (La. App. Orl. 1955) (thing not "new" and "unused" as represented); Violette v. Capital City Auto Co., 4 La. App. 465 (1st Cir. 1926) (auto represented to have a 1923 engine had a 1921 engine); *cf.* Carpenter v. Skinner, 224 La. 848, 71 So. 2d 133 (1954) (purchase of a house represented to be in a "white" neighborhood); Beyer v. Estopinal, 224 La. 516, 70 So. 2d 109 (1954) (1942 model automobile represented as a 1946 model); Gates v. Dykes, 338 So. 2d 1190 (La. App. 2d Cir. 1976) (truck equipped with a 283 cubic inch engine instead of a 350 cubic inch engine as represented); Dieball v. Bill Hanna Ford Co., 287 So. 2d 595 (La. App. 2d Cir. 1973) (purchase of pickup truck to be suitable for carrying a camper of specified dimensions); Campo Appliance Co. v. Hurst, 256 So. 2d 317 (La. App. 1st Cir. 1971) (1967 model TV represented to be a 1969 model).

48. The agreement between Andrews Brothers and the Singer Company appointed Andrews Brothers as Singer's sole dealer in a named area "for the sale of new Singer cars." Additionally, the express warranty addressed "new vehicles manufactured by us." Nothing in the case suggests that Singer dealt in second-hand vehicles.

Another UCC § 2-302 "illustrative results" case, Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922), appears to have involved an error in prin-

probably, the seller knew in fact of such motive. It even can be assumed that the seller believed in good faith that a previously unsold car could be considered a "new car."[49]

A factual background similar to *Andrews* is presented in a more recent unconscionability case, *Butcher v. Garrett-Enumclaw Co.*,[50] in which a warranty disclaimer clause was held invalid. By use of a brochure and by tests on a prototype, the buyer was led to believe that he was to receive the "first production model" of a portable sawmill, capable of full-time commercial operation. What the buyer received, without his knowledge or consent, was a second prototype not capable of full-time commercial usage, in short, an entirely different machine. The validity of the disclaimer clause would not be an issue reached by a court in Louisiana, in that the consent of the buyer in *Butcher* was produced through an error of fact known to the seller.

A contract to purchase, for $67,000, jade carvings worth less than half that amount was found to be unconscionable in *Vom Lehn v. Astor Art Galleries, Ltd.*[51] While there is scant jurisprudential evidence in Louisiana that great price-value disparity, without more, would permit a court to deny enforcement of the contract,[52] enforceability of the contract in *Vom Lehn* could be denied on the basis of error-produced consent. Unlike in *Andrews*, however, the buyer's principal motive and the seller's knowledge of it are not so clear in *Vom Lehn*. While the facts are slightly convoluted, it seems fairly inferable that the Vom Lehns were wealthy and educated persons, interested generally in the acquisition of fine works of art. The seller displayed to them and they purchased twenty hand-carved items of varying jade or near-jade classifications.[53]

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cipal motive similar to that of the *Andrews* case. The buyer's principal motive in *Meyer* arguably was to acquire a rebuilt Packard truck advertised to be "practically as serviceable and efficient" as a new one and "carrying the same warranty." What buyer received was a truck requiring $900 in repairs. The litigation arose over payment for those repairs.

49. If it could be shown that the seller knew that the car could not be considered a "new" car, buyer's consent would be invalidated in Louisiana on the basis of fraud. LA. CIV. CODE arts. 1832, 1847. See text at notes 73-74, *infra*.

50. 20 Wash. App. 361, 581 P.2d 1352 (1978).

51. 86 Misc. 2d 1, 380 N.Y.S.2d 532 (Sup. Ct. 1976).

52. See text at notes 448-503, *infra*.

53. The Vom Lehns initially purchased $20,000 of the jade carvings from Astor, but they subsequently were pursuaded by one of Astor's salesmen to renege on that purchase and deal with the Hartley Gift Shop and its owner, Levy (referred to herein as the seller). Levy came to the Vom Lehns' home and, disparaging the Astor goods, displayed the twenty items around which the case revolves. The Vom Lehns testified that the seller misrepresented the items as "Ming Dynasty" jade, obtainable by him only from Europe. The seller testified that he told the Vom Lehns that nine of the

The outcome would not be considered an assured one, but certainly it would be possible to apply the principle of error if the *Vom Lehn* case were in Louisiana. The seller knew, for instance, that all of the carvings were of contemporary, twentieth-century creation, and he knew that the Vom Lehns were wholly unfamiliar with the quality and value of the items purchased.[54] The lack of familiarity with the items tends to dilute the credibility of an assertion by the Vom Lehns that their principal motive was the acquisition of "priceless Ming Dynasty" jade, but it could be credibly argued that in view of the price, their motive was to acquire pre-twentieth century or antique works of art. Viewed objectively, the seller certainly must have known that the Vom Lehns supposed the items to be works of antiquity (when they were really items that only resembled works of antiquity) or "from the nature of the transaction it must be presumed" that the seller was apprised that such was the principal cause of the agreement.[55] Relevant to *Vom Lehn* in this regard is the admonition of the *Deutschmann* case: "[I]t was his responsibility to communicate to [the consumer] information which. . . would have avoided the confusion."[56] The furrier in *Deutschmann* made no false representations; rather, knowing in fact the customer's principal motive, he was required to come forward with information as to the fabrication and substantial qualities of the contemplated work. *Vom Lehn* is not significantly dissimilar.[57]

Williams v. Walker-Thomas Furniture Co.[58] contains only dicta regarding unconscionability, yet it is as well-known and often-cited

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items were hand-carved "Serpentine" (a semi-precious stone), making no mention of any age or period, and that subsequently he displayed the nine jade carvings, describing them as "hand-carved Chinese jade of fine quality," again making no mention of age or period. The New York court dismissed the Vom Lehns' fraud count, holding that they had failed to proved fraud by a fair preponderance of the credible evidence. The Vom Lehns had not asserted mistake of fact in their petition. The court no doubt felt that certain "oddities" in the facts detracted from the plaintiffs' fraud allegations. For instance, there was no allegation of duress, coercion, or high-pressure selling; neither the bill of sale nor a subsequent written appraisal by the seller (obtained for the purpose of future civil and criminal actions) described the items as "Ming Dynasty" or as antiques; and the Vom Lehns' paid $49,000 after getting the "feeling that something was wrong" and that some of the items were only "Serpentine."

54. 86 Misc. 2d at 5 & 11, 380 N.Y.S.2d at 536 & 541.

55. LA. CIV. CODE arts. 1826, 1843-1845. It can be presumed in some cases "from the nature of the transaction" (article 1826) that a particular motive is the principal cause of the agreement. An example is seen in *Gour v. Daray Motor Co.*, discussed at note 43, *supra.*

56. 331 So. 2d at 221, discussed in text at notes 44-45, *supra.*

57. *Vom Lehn* also is amenable to the Louisiana notion of fraudulently produced consent, the New York court's dismissal of the fraud count notwithstanding. See discussion in text accompanying notes 67-138, *infra.*

58. 350 F.2d 445 (D.C. Cir. 1965).

as any unconscionability case. The buyer, a person whose education, commercial sophistication, and financial capabilities were limited, purchased during the period of 1957 to 1964 about $1,800 in merchandise from Walker-Thomas. With each purchase, a contract form was signed in which it was stipulated in fine print that title would remain in Walker-Thomas until the item purchased was paid in full, and that each payment would be credited pro rata on all purchases. Apparently no verbal explanation was given as to the payment allocation clause. In 1964, at a time when the buyer's outstanding balance was about $160—with none of the items previously purchased deemed "paid" under the payment allocation clause—the buyer was permitted to incur an additional $500 debt. Shortly thereafter, she defaulted in her payments, and as a result of this default, Walker-Thomas sought to repossess everything she had purchased since 1957, seven years of payments notwithstanding. The United States Court of Appeals for the District of Columbia Circuit remanded the case for evidentiary hearings, expressing in unmistakable terms its doubt that such a contract or series of contracts could be free of unconscionability.

It is quite possible that the buyer's consent in *Williams* was produced by error. A principal cause of each of the contracts was, at the very least, the acquisition of ownership of the various items Mrs. Williams acquired from Walker-Thomas over the years; what she obtained in fact was temporary use of those items, indistinguishable from the use enjoyed by a mere lessee. But, as two Louisiana cases, *Jones v. DeLoach*[59] and *Pollard v. Ingram*[60] instruct, classifying the acquisition of the thing sold or of rights to a contractor's performance as the consumer's determining motive can be simplistic, for often the consumer's principal concern is not where the contract leads him, but the manner in which the contract will get him there.[61] Such a motive of ownership is arguably one which from the nature of the transaction it must be presumed that the supplier knew.[62]

Williams also may fall within Civil Code article 1841's example of an error as to the *nature* of the contract: "Thus, if the party receives property, and from error or ambiguity in the words accompanying the delivery, believes that he has purchased, while he who delivers intends only to pledge, there is not [*sic*] contract." Relevant to *Williams* also is Civil Code article 2163, by which a debtor may declare

59. 317 So. 2d 240 (La. App. 2d Cir. 1975), discussed at note 43, *supra.*

60. 308 So. 2d 860 (La. App. 4th Cir. 1975), discussed at note 43, *supra.*

61. *See also* Hartsell v. Pipes Auto Shop, Inc., 318 So. 2d 627 (La. App. 2d Cir. 1975); Dieball v. Bill Hanna Ford Co., 287 So. 2d 595 (La. App. 2d Cir. 1973); Gibert v. Cook, 144 So. 2d 683 (La. App. 4th Cir. 1962).

62. LA. CIV. CODE art. 1826.

which of several debts he means to discharge by his payment.[63] When the debtor accepts a receipt by which the creditor has made the imputation, however, Civil Code article 2165 declares that the debtor no longer has the right to declare a different imputation himself, "unless there have been fraud or surprise on the part of the creditor."[64] Can it be doubted that Mrs. Williams would have been surprised to learn in 1964 that the bed in which she had nightly reposed since 1957 had been, for all those years, hers merely on temporary loan from Walker-Thomas pending the outcome of her payment history, the final chapter of which story might well have to await her death? Because the Civil Code does not recognize the common law conditional sale,[65] *Williams* could not arise in Louisiana in precisely its original posture, but the result very likely would be the same as that alluded to by the Court of Appeals—a series of contracts the enforceability of which is highly doubtful.[66]

It seems clear that, as indicated by Appendix Table 1, many of the unconscionability cases could have been decided in the same manner under a Civil Code error-in-consent analysis.

Consent Produced by Fraud

The emergence of standard-form contracts, offered on a "take-it-or-leave-it" basis and too often characterized by fine print, esoteric legal jargon, and inordinate length, unquestionably played a role in the development of unconscionability as a legitimized obligation-avoidance principle. But the failure of fraud to have evolved as a common law protective principle also may have played a role in the development of unconscionability. Misrepresentation of material facts readily produces a vitiation of consent, but in a caveat emptor tradition, representations as to facts may only follow the buyer's specific inquiry, without which inquiry there may be no affirmative duty to disclose. For example, the common law would not require the seller

63. *See also* Ford Motor Credit Co. v. Hogg, 351 So. 2d 1324 (La. App. 2d Cir. 1977).

64. LA. CIV. CODE art. 2166 is also relevant:

> When the receipt [if there be one] bears no imputation [of the payment], the payment must be imputed to the debt, which the debtor had at the time most interest in discharging, of those that are equally due; otherwise to the debt which has fallen due, though less burdensome than those which are not yet payable.
>
> If the debts be of a like nature, the imputation is made to the debt which has been longest due; if all things are equal, it is made proportionally.

65. *See, e.g.*, Thomas v. Philip Werlein, Ltd., 181 La. 104, 158 So. 635 (1935); Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 So. 193 (1908); Claude Neon Federal Co. v. Angell, 153 So. 581 (La. App. 2d Cir. 1934); Comment, *The Conditional Sale in Louisiana*, 2 LA. L. REV. 338 (1940).

66. See text at notes 329-334, *infra*.

to disclose to the prospective buyer a known latent defect such as termite damage or infestation.[67] By contrast, the buyer's consent in such a case in Louisiana would be considered as produced by fraud.[68] The same conclusion arguably applies to nineteen of the unconscionability cases.

Under the Louisiana Civil Code, fraud is "the cause of an error bearing on a material part of the contract, created or continued by *artifice*, with design to obtain some unjust advantages to the one party, or to cause an inconvenience or loss to the other."[69] Unlike the case with simple error, fraud-produced error need not be as to the principal cause of the contract, that is, that consideration without which the contract would not have been made,[70] but need be merely as to a material part thereof, that is, a part of the contract that reasonably may be presumed to have influenced the party in making it.[71] By "artifice" is meant an assertion of that which is false or a suppression or concealment of that which is true as to a material part of the contract or any other means calculated to produce a belief of what is false or an ignorance or disbelief of what is true.[72]

Andrews[73] provides a factual background which demonstrates the relationship between simple error and fraud under the Louisiana Civil Code. Andrews Brothers believed it would receive only new automobiles under its contract with Singer & Company and that "new" meant more than just "not previously sold." If the "new" quality was the principal cause or motive of Andrews Brothers and this was known to Singer & Company, the error would have invalidated the contract in Louisiana. If, however, Singer & Company had caused the error or continued it by artifice with a design to obtain some unjust advantage, the "new" quality would need be only a material part of the contract for fraud to be found.[74] The principles of simple error would seem applicable to most cases of fraud.

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67. *See* Swinton v. Whitinsville Sav. Bank, 311 Mass. 677, 42 N.E.2d 808 (1942); Obde v. Schlemeyer, 56 Wash. 2d 449, 353 P.2d 672 (1960).

68. LA. CIV. CODE arts. 1819, 1832 & 1847.

69. LA. CIV. CODE art. 1847 (emphasis added).

70. LA. CIV. CODE art. 1825.

71. LA. CIV. CODE art. 1847(2).

72. LA. CIV. CODE arts. 1832, 1847(5), (6). By numbered paragraphs 7 and 8, article 1847 further explains that the artifice must be *designed* to obtain either an unjust advantage for the one carrying it out or a loss or inconvenience to the one against whom it is practiced, although attended with advantage to no one; in fact, it is not necessary that an advantage or an inconvenience or loss results, so long as such would be the effect of the contract if the artifice were actually performed.

73. Andrews Bros. v. Singer & Co., [1934] 1 K.B. 17 (C.A. 1933).

74. The knowing sale of a "used" thing, upon the declaration or representation that it is "new" or that it is newer than in fact it is, has been held in numerous cases

Although unnecessary for affirmance, an Illinois appellate court approved the trial court's finding of unconscionability in *American Buyer's Club v. Grayling*,[75] a case, similar to *Andrews*, that could be decided in Louisiana on the basis of error, most probably error created by artifice under Civil Code article 1847. The club proclaimed that through bulk buying, its members could save substantial amounts with respect to many items of merchandise. In fact, prices for merchandise obtained through the club did not yield the promised savings—a clear error in the principal motive of each buyer, known to be such by the club. Members of the club were required to execute promis-

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to constitute fraud within the meaning of Civil Code article 1847. *See, e.g.*, Chauvin v. La Hitte, 229 La. 94, 85 So. 2d 43 (1956) (used automobile sold as "new"); Sunseri v. Westbank Motors, 228 La. 370, 82 So. 2d 43 (1955) (used automobile sold as "new"); Beyer v. Estopinal, 224 La. 516, 70 So. 2d 109 (1954) (1942 model truck represented to be a 1946 model). The cases of Barnidge v. Cappel Motor Co., 125 So. 778 (La. App. 2d Cir. 1930) and Albert Switzer & Assoc. v. Dixie Buick, Inc., 265 So. 2d 313 (La. App. 4th Cir. 1972), most closely resemble the facts of *Andrews Brothers*. In *Barnidge*, an automobile sold as "new" had been owned previously by another party who had returned it to the seller as unsatisfactory. The automobile sold as "new" in *Dixie Buick* was in fact a "demonstrator" vehicle. The courts found fraud in both cases. *See also* Killeen v. Ducote, 405 So. 2d 1281 (La. App. 4th Cir. 1981) (previously unsold automobile on which extensive repairs had been made was fraudulently sold as "new"); Wheat v. Boutte Auto Sales, 355 So. 2d 611 (La. App. 4th Cir. 1978) (automobile misrepresented as "not previously wrecked"); Tauzin v. Sam Broussard Plymouth, Inc., 283 So. 2d 266 (La. App. 3d Cir. 1973) (previously unsold automobile that had been extensively damaged and repaired was sold as "new"; buyer's consent was held to have been produced by fraud); Kiefer v. Bernie Dumas Buick Co., 210 So. 2d 569 (La. App. 4th Cir. 1968) (automobile rendered completely defective by exposure to salt water was fraudulently represented as "new and undamaged"); Johnson v. Heller, 33 So. 2d 776 (La. App. 2d Cir. 1948) (1936 model motorcycle represented to be a 1939 model); Cockrell v. Capital City Auto Co., 3 La. App. 385 (Orl. 1925) (1918 automobile represented to be a 1919 model); *cf.* Gour v. Daray Motor Co., 373 So. 2d 571 (La. App. 3d Cir. 1979) (buyer of an Oldsmobile did not consent to purchase an Oldsmobile equipped with a Chevrolet engine; the type of engine provided was intentionally concealed by the seller); Violette v. Capital City Auto Co., 4 La. App. 465 (1st Cir. 1926) (the consent of the buyer of an automobile equipped with a 1921 engine, but represented as a 1923 model engine, was produced by simple error).

Not always are the year, model, and equipment of automobiles and other things considered *material* under Civil Code article 1847. *See* Ganucheau v. Greff, 181 So. 2d 854 (La. App. 4th Cir. 1966) (a 1953 model automobile sold as a "1956" model, but no showing that buyer necessarily would have declined to purchase had he known the truth); Port Fin. Co. v. Campbell, 94 So. 2d 891 (La. App. 1st Cir. 1957) (Mercury automobile with a Ford engine); King v. Moore, 61 So. 2d 253 (La. App. 2d Cir. 1952) (1949 Packard sold as a "1950," but no difference in price); Dupuy v. Blotner Bros. Auto Parts, 6 So. 2d 560 (La. App. 2d Cir. 1942) (sale of a Chrysler automobile with a Plymouth engine; court held the engines of the two makes of cars were interchangeable); *cf.* Castille v. Champ Auto Sales, 92 So. 2d 131 (La. App. 1st Cir. 1957) (a 1951 model automobile represented to be a 1952 model, but good faith representation of model year held not a per se Civil Code article 2529 redhibition case).

75. 53 Ill. App. 3d 611, 368 N.E.2d 1057 (1977).

sory note payable in installments that totaled almost $500. Moreover, the agreement signed by each club member was found to be obscure and to have been purposely written so as to evade federal truth-in-lending requirements and to conceal the fact that the "members" actually received no benefits at all from the club,[76] but were members of a club in name only. Such intentional concealment and use of obscurity and obfuscation comes under the heading of fraud in Louisiana.[77]

Two similar cases, *Kugler v. Romain*[78] and *State v. ITM, Inc.*,[79] are considered to be unconscionability cases herein, but in fact, either case could have been decided on traditional common law fraud principles. Both certainly would be fraud cases in Louisiana. The *ITM* facts revolved around what is commonly referred to as the "endless chain" variety of the referral sales scheme,[80] in which products were sold

76. The court noted that the wording of the contract was "obviously intended to conceal from the ordinary consumer that once he [had] signed the contract and promissory note he [was] obligated to continue to make payments without regard to whether he in fact [made] use of club facilities." 53 Ill. App. 3d at 616, 368 N.E.2d at 1061.

77. LA. CIV. CODE arts. 1832, 1847, 2547. *See* Succession of Molaison, 213 La. 378, 34 So. 2d 897 (1949); Smith v. Everett, 291 So. 2d 835 (La. App. 4th Cir. 1974); Chrysler Credit Corp. v. Henry, 221 So. 2d 529 (La. App. 4th Cir. 1969); Carter v. Foreman, 219 So. 2d 21 (La. App. 4th Cir. 1969); Broussard v. Fidelity Standard Life Ins. Co., 146 So. 2d 292 (La. App. 3d Cir. 1962); Griffing v. Atkins, 1 So. 2d 445 (La. App. 1st Cir. 1941). Closest to the facts of *American Buyers* is *Broussard.* In that case, misrepresentations by an insurance agent that large dividends would be paid under the proposed life insurance policy produced an error in consent permitting the buyer to rescind the agreement under article 1847.

78. 58 N.J. 522, 279 A.2d 640 (1971).

79. 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

80. *See generally* State *ex rel.* Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624 (Iowa 1971). A "referral sales scheme" under LA. R.S. 9:3536 (Supp. 1972) involves a giving or the offer to give a rebate or discount or to otherwise give value to the buyer as an inducement for a sale or lease in consideration of the buyer's giving to the seller the names of prospective purchasers or lessees; additionally, the earning of the discount or value is contingent upon the occurrence of an event subsequent to the time of the agreement, *e.g.*, the seller actually following up on the list of prospective buyers or actually using buyer's newly sided or roofed home as a "demonstration" or "showplace" home. Section 3536 is keyed to a "consumer loan, a consumer credit sale, or a consumer lease," each of which transactions is also defined. A "consumer credit sale" is defined by LA. R.S. 9:3516(11) (Supp. 1972) to be the "sale of a thing . . . in which a credit service charge is charged and the purchaser is permitted to defer . . . the purchase price . . . in two or more installments . . . and the thing is purchased primarily for personal, family, household, or agricultural purposes." The purchaser must be a natural person. The concept of "thing" is found in section 3516(29): as used in the credit law, "thing" is "as defined by law and includes . . . goods, or services." Thus, an exterminator, utilizing a referral sales scheme, could be covered by LA. R.S. 9:3536, even though he is not a "seller" for purposes of Civil Code article 2520.

door-to-door following a deceptive introductory sales pitch[81] by which the seller's agents gained admission to the buyer's home. Buyers were told that in view of the commissions to be earned by them, the products (the quality of which was substantially misrepresented) would cost them nothing. Moreover, it was represented to some of the buyers that the commissions would pay off their home mortgages. Not only was there no disclosure or explanation given to the buyers regarding the respective standing of each in the geometric progression of the "pyramid" of buyers,[82] the misrepresentation and concealment were compounded by high pressure sales techniques,[83] with subsequent attempts by the buyers to cancel being met by threats of lawsuits and enforcement of a substantial penalty clause and wage garnishment and loss of job.[84] *Kugler v. Romain* involved the enforceability of door-to-door sales of books and related materials purportedly designed to aid a child's educational development, but, in fact, worthless for that purpose. The sales were consciously aimed at low-income minority groups in urban areas. Amidst misrepresentations which abounded,[85] the seller made no explanation of the obligations incurred or of the contract form signed by the buyer. In each case, the state's attorney general sought an injunction against the seller.

While a ruling of unconscionability certainly would be a convenient approach for courts confronted with cases such as *Kugler* and *ITM*, the application of traditional notions of fraud doubtless would have yielded the same outcome in a suit by one of the individual buyers involved in either of the two cases.[86] Nonenforceability unques-

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81. Seller's agents obtained appointments in the homes of buyers via telephone contacts in which a "money-making plan" was the central item of conversation.

82. *See* State *ex rel.* Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624 (Iowa 1971).

83. When the seller's representatives were asked to leave or to return later, prospective buyers were told, for example, "It's now or never."

84. The evidence disclosed that the seller in fact had utilized invalid "sewer service" and had perjured affidavits to obtain judgments in numerous cases.

85. The seller's agents misrepresented that they were acting pursuant to a federal grant, sometimes mentioning the "Head Start" program, the "Board of Education," the "School System," or a named school. The true price of the books and materials also was misrepresented, as was the privilege of cancellation of the contract and the resultant achievability of a high school equivalency diploma.

86. Both *Kugler* and *ITM* were representative actions by the state's attorney general acting pursuant to consumer fraud statutes. In *ITM*, the "endless chain" sales scheme was held violative of the New York consumer fraud law as a fraudulent act. N.Y. EXEC. LAW § 63(12) (McKinney 1982). Under that law, the concept of fraud includes "unconscionable contractual provisions." The attorney general successfully demonstrated that the price charged, which ranged in individual cases from two to six times the cost to the seller, was an "unconscionable contractual provision" within the meaning of UCC § 2-302 and the New York fraud statute. The importance of *ITM*

tionably would be the outcome under Civil Code articles 1832 and 1847.[87]

Frostifresh Corp. v. Reynoso[88] is an unconscionability case similar

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lies less in the issue of unenforceability than in the jurisdiction and power of the state's attorney general to act on behalf of consumers.

Similarly, *Kugler v. Romain* concerned the power of the state's attorney general acting under the New Jersey Consumer Fraud Act. N.J. STAT. ANN. 56:8-1 to 56:8-25 (West 1964 & Supp. 1982). The trial court had held that the unconscionability of a contract or clause thereof and the remedy therefor was a private issue which could not be asserted representatively by the attorney general, rejecting the contention that the contracts, being unconscionable, were also violative of, and unenforceable under, the Consumer Fraud Act. The Supreme Court of New Jersey permitted the attorney general to act on behalf of all consumers who had signed similar contracts for the educational materials, agreeing with the attorney general that the one illegal aspect of the sales contract that was common to each transaction was the (fixed) price and that the price (about $275, or two and one-half times a reasonable market price for books having no functional value) for the worthless package was so exorbitant as to be unconscionable and, therefore, a fraud under the statute.

87. Civil Code articles 1832, 1847, 1895, and 2547 all seem obviously applicable to the referral sales scheme. *See, e.g.*, Plan Invs., Inc. v. Heflin, 286 So. 2d 511 (La. App. 2d Cir. 1973) (referral sale); Carter v. Foreman, 219 So. 2d 21 (La. App. 4th Cir. 1969); Fidelity Credit Co. v. Bradford, 177 So. 2d 635 (La. App. 3d Cir. 1965) (referral sale); Broussard v. Fidelity Standard Life Ins. Co., 146 So. 2d 292 (La. App. 3d Cir. 1962); *cf.* Alexander Hamilton Inst. v. Hollis, 133 So. 458 (La. App. 2d Cir. 1931) (contract for course of study involved no misrepresentations and plaintiff was not lacking in education or otherwise disadvantaged; held, enforceable); Twentieth Century Co. v. Quilling, 130 Wis. 318, 110 N.W. 174 (1907) (an endless chain scheme characterized as "contra bonos mores"). Both *Kugler* and *ITM* could be decided favorably to the buyers in Louisiana on the basis of consent produced by simple error, in that the obvious principal motive of the buyer (educational development of children, obtaining goods at reduced prices, paying off mortgages) was, to the seller's knowledge, unattainable. *See, e.g.*, Dieball v. Bill Hanna Ford Co., 287 So. 2d 595 (La. App. 2d Cir. 1973); Gibert v. Cook, 144 So. 2d 683 (La. App. 4th Cir. 1962); Rapides Grocery Co. v. Clopton, 15 La. App. 27, 125 So. 325 (1st Cir. 1929).

It perhaps is analytically more difficult to apply the concept of error to the matter of the referral sales scheme, since the *principal* cause may not as readily be viewed as the obtaining of a thing which, in essence, will pay for itself. Consider, for example, the case of Claiborne Butane Co. v. Hackler, 138 So. 2d 234 (La. App. 2d Cir. 1962), in which a merchant's allegation that an ice making machine had been represented as a thing which would pay for itself (even if the allegation be accepted as true) did not constitute a defense of error as to a principal cause. The court did concede that had the representation been incorporated into the agreement as a stipulated condition, a different result could obtain. It would seem that if such an unstipulated profit motive does not avail a merchant, it will not avail the consumer whose agreement is even less likely to so stipulate. Implicit in the *Hackler* opinion also is the element of "puffing," *i.e.*, a salesman is perhaps expected to say his mercantile product will "pay for itself." This, however, is readily distinguishable from the representation that actual "commissions" will be paid to the buyer, and it is probably true that most of the consumer sales induced by a referral sales scheme would not have taken place in the face of a more honest sales pitch.

88. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term. 1967).

to *ITM* in that, when the buyer—who was not fluent in the English language—advised the seller that he had but one week of employment left in his job and could not afford the purchase of a $1,145 freezer, the seller employed a "referral sale" artifice to convince the buyer that the appliance actually would cost him "nothing," because of the $25 commission the buyer would earn on each sale resulting from his referrals of friends and neighbors to the seller. In Louisiana, consent in such circumstances is deemed to be produced by fraud, and therefore it is defective.[89]

Toker v. Perl[90] is a relatively simple case of fraudulent procurement of a consumer's signature on a contract, in which the court offered unconscionability as an alternative ground for nonenforcement. The facts of *Perl* present a vintage artifice. The seller and the buyer discussed the purchase of food on an eighteen-week delivery plan, and the seller falsely represented that a freezer was included in the food plan. When the agreement was reached (which the buyer supposed was as represented), the seller arranged three forms for the buyer's signature so that the top form (the food plan contract) left visible only the signature line of the second form, the second form in turn leaving visible only the signature line of the third form. In this manner the buyer unknowingly signed a financing application and an installment contract for a freezer at a total credit price of $1,092.96.[91] Because the maximum value of the freezer was only $300, the retail purchase price of $800 was held to be unconscionable, an unnecessary ruling in light of the holding that the signature was procured by fraud. It also would be unnecessary to reach the "price unconscionability" issue in Louisiana in view of Civil Code articles 1832 and 1847.[92]

Articles 1832 and 1847 also clearly apply to the unconscionability cases of *Industralease Automated & Scientific Equipment Corp. v. R.M.E. Enterprises, Inc.*,[93] *Majors v. Kalo Laboratories, Inc.*,[94] and *Meyer v. Packard Cleveland Motor Co.*[95] In *Industralease*, the lessee

89. *See* cases cited in note 87, *supra.*

90. 103 N.J. Super. 500, 247 A.2d 701 (1968), *aff'd per curiam on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (1970).

91. The presence of fraud renders inapplicable the general rule that a person signing a contract has a duty to read it or have it read to him. Plan Invs., Inc. v. Heflin, 286 So. 2d 511 (La. App. 2d Cir. 1973).

92. *See, e.g.*, Gautreaux v. Harang, 190 La. 1060, 183 So. 349 (1938) (misrepresentation as to the character of the instrument signed); Plan Invs., Inc. v. Heflin, 286 So. 2d 511 (La. App. 2d Cir. 1973) (same); Fidelity Credit Co. v. Bradford, 177 So. 2d 635 (La. App. 3d Cir. 1965) (unknowing execution of a mortgage on buyer's home). *See also* Exchange Nat'l Bank v. Longino, 168 La. 824, 123 So. 587 (1929). The price unconscionability issue is discussed in text at notes 448-503, *infra.*

93. 58 A.D.2d 482, 396 N.Y.S.2d 427 (1977).

94. 407 F. Supp. 20 (M.D. Ala. 1975).

95. 106 Ohio St. 328, 140 N.E. 118 (1922). The case is cited in UCC § 2-302, comment 1 as an example of a "prior application" of unconscionability.

had signed a lease form (pertaining to rubbish disposal equipment) under which the lessee enjoyed the benefits of the manufacturer's standard express warranty. After the lessee had installed a concrete slab, a fuel tank, and underground wiring in preparation for, but prior to, the delivery of the equipment, the lessee was visited by representatives of the manufacturer-lessor and Industralease. The lessee was convinced by them to execute a new lease upon the artifice that the original lease was "no good" and a new contract was necessary if delivery of the equipment was to be insured. The new lease contained an unqualified disclaimer of all express and implied warranties. Upon installation the equipment did not perform satisfactorily. The disclaimer of warranties in the substituted lease was held unenforceable as unconscionable. Because the existence of warranties normally would be considered a material part of a contract for the lease or sale of equipment costing almost $20,000,[96] articles 1832 and 1847 would deny enforcement of such a disclaimer in Louisiana.[97]

The manufacturer in *Majors* knew that the effectiveness of its soybean innoculant product for the intended purposes was questionable, yet not only was that fact concealed from the buyer, the manufacturer expressly warranted the product as "100%" guaranteed—while limiting consequential damages to a return of the price. Ruling the remedy limitation unconscionable gave the buyer the opportunity to recover consequential damages. Had the validity of buyer's *consent* been put in issue, neither the contract nor the limitation of remedy arguably would have been enforceable in Louisiana.[98]

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96. The "lease," which the court held to be a disguised sale, called for sixty monthly payments of $319.70, plus sales tax.

97. In Plan Invs., Inc. v. Heflin, 286 So. 2d 511 (La. App. 2d Cir. 1973), the artifice consisted of a representation that the papers to be signed—in reality a mortgage and a promissory note—were only a contract to permit the seller to "advertise" their newly-sided home. *Cf.* Fidelity Credit Co. v. Bradford, 177 So. 2d 635 (La. App. 3d Cir. 1965) (fraudulently obtained mortgage).

98. LA. CIV. CODE arts. 1832, 1847, 1934, 2547 & 2548. *See* Aetna Ins. Co. v. General Elec. Co., 362 So. 2d 1186 (La. App. 4th Cir.), *cert. denied*, 365 So. 2d 247 (La. 1978); Aiken v. Moran Motor Co., 165 So. 2d 662 (La. App. 1st Cir. 1964); Southern Iron & Equip. Co. v. Brown & Bevill Gravel Co., 141 So. 413 (La. App. 2d Cir. 1932); Plauche, Locke Sec. v. B. Bazerque & Sons, 139 So. 786 (La. App. 1st Cir. 1932). By Civil Code article 2547, "a declaration made by the seller, that the thing sold possesses some quality which it does not possess, comes within the definition of fraud" under article 1847. The manufacturer in *Majors* knew that there were serious doubts, based on its own tests, as to whether the product would be effective, yet no disclosure of the experimental nature of the product was made. Such knowledge is immaterial to the manufacturer, who is presumed to know of any defects in the products he makes, but if the seller also knew of the doubts as to the product's effectiveness, such knowledge certainly would trigger the nondisclaimer principle of Civil Code article 2548. Because the seller adopted the "satisfaction guaranteed" language appearing on the package, he made a declaration as to quality when he did not know whether the

Similarly, the waiver in *Meyer* of "all promises, verbal understandings or agreements of any kind" in a contract for the purchase of a used truck advertised as "guaranteed," "practically a new truck," and as carrying the same warranty as a new truck would produce consent vitiated by fraud in Louisiana should the thing not possess, to the seller's knowledge, those advertised or declared attributes.[99]

Even if common law fraud ceased at some point to be an effective means of contract avoidance,[100] the same is not true of fraud-produced error in consent under the Louisiana Civil Code, for article 1847 has demonstrated remarkable flexibility over the years. That flexibility can be seen in the "materiality" aspect of Civil Code article 1847,[101] and it is partly responsible for the importance of article 1847 as a modern contract avoidance device.[102] The common law was not necessarily less flexibile or liberal in regard to materiality. Both legal systems also subscribe to the maxim that "fraud is not to be presumed,"[103] but it has long been recognized in Louisiana that an *inference* of fraud may be drawn from the presence of "highly suspicious" circumstances.[104] Since the effect of such an inference is

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declaration was true. This also is arguably a fraud, triggering article 2548. *Cf.* Aetna Ins. Co. v. General Elec. Co., 362 So. 2d 1186 (La. App. 4th Cir.), *cert. denied*, 365 So. 2d 247 (La. 1978) (suggesting that it is fraud within Civil Code article 2548 to make a representation as to a certain quality when it is not known whether the representation is true or false).

99. In addition to the cases collected at note 98, *supra*, see cases collected at note 74, *supra*. *Meyer* also could be categorized as a case of simple error in principal cause under Louisiana Civil Code articles 1819-1826.

100. The stated proposition draws support from the UCC § 2-302, comment 1.

101. See text at notes 69-72, *supra*.

102. Louisiana courts have found fraud, for example, in false representations that a real estate purchaser would have access to property via a "common" driveway, Franklin v. Evans, 315 So. 2d 818 (La. App. 4th Cir. 1975), in false representations that a cottage situated 150 feet from the beach was a "beach cottage," Hauser v. Ladd, 8 La. App. 220 (Orl. 1928), in false representations that property would be near a golf course or near boating, swimming, and picnicking facilities, Turner v. Southland Resorts, Inc., 151 So. 2d 110 (La. App. 1st Cir. 1963) and Van Vracken v. Harry G. Spiro, Inc., 139 So. 2d 89 (La. App. 4th Cir. 1962), in false representations that an automobile was "new," Tauzin v. Sam Broussard Plymouth, Inc., 283 So. 2d 266 (La. App. 3d Cir. 1973) and Albert Switzer & Assoc. v. Dixie Buick, Inc., 265 So. 2d 313 (La. App. 4th Cir. 1972) (see text at note 74, *supra*), in false representations that a vehicle was a newer model than it was, Johnson v. Heller, 33 So. 2d 776 (La. App. 2d Cir. 1948); Cockrell v. Capital City Auto Co., 3 La. App. 385 (Orl. 1925), in false representations that an automobile was in "good running" or mechanical condition, Roby Motors Co. v. Price, 173 So. 793 (La. App. 2d Cir. 1937), and in false representations that an insurance policy would yield a certain amount of dividends, Broussard v. Fidelity Standard Life Ins. Co., 146 So. 2d 292 (La. App. 3d Cir. 1962).

103. LA. CIV. CODE art. 1848.

104. In 1961, the Louisiana Fourth Circuit Court of Appeal said of Civil Code article 1848:

to shift to the defending party the burden of showing the absence of fraud,[105] the willingness of Louisiana courts to find such "highly suspicious" circumstances may explain the continuing viability of fraud as a contract avoidance device when common law fraud arguably ceased at some point to sustain such viability.

There can be no doubt that the lack of education, sophistication, or mental capacity of a "layman" or a consumer will be weighed heavily by a Louisiana court. Very significant examples of the inference of fraud are seen in those cases in which there is a great disparity between the parties as to education or mental ability or where the one party suffers from an impairment or infirmity or where the contract calls for a result that cannot be reasonably assumed was mutually intended by the parties. A sound starting point is *Succession of Molaison*,[106] in which the Louisiana Supreme Court refused to enforce a legatee's renunciation of a succession interest. The legatee, an adopted daughter, had not seen the will and did not understand that she was entitled to an interest in the succession. Not knowing the legal consequences of adoption and no explanation of her rights being given by the other interested (and knowledgeable) parties, she had signed the renunciation under the belief that such was the only way she could obtain anything from the succession. The Louisiana Supreme Court's refusal to enforce the *Molaison* renunciation set a very important standard:

> All the parties involved in this suit except the plaintiff, have

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> The jurisprudence interpretive of this article has consistently reasoned from the major premise that fraud, unlike other allegations in civil cases, must be proved by more than a mere preponderance of the evidence. Since the accusation is a grave one, the courts have required strict proof thereof. However, the inherent difficulty of establishing fraud by direct evidence has also been recognized juristically; therefore, the courts have reasoned that an inference of fraud may be drawn from the existence of highly suspicious conditions or events, in conformity with the rationale of Article 1848.

George A. Broas Co. v. Hibernia Homestead & Sav. Ass'n, 134 So. 2d 356, 360 (La. App. 4th Cir. 1961). This approach is consistent with Civil Code articles 1848 and 1849:

> Art. 1848. Fraud . . . must be proved by him who alleges it, but it may be proved by simple presumptions or by legal presumptions, as well as by other evidence. The maxim that fraud is not to be presumed, means no more than that it is not to be imputed without legal evidence.
>
> Art. 1849. Some circumstances and acts attending particular contracts, are by law declared to be conclusive; and others, presumptive evidence of fraud.

105. *See* George A. Broas Co. v. Hibernia Homestead & Sav. Ass'n, 134 So. 2d 356, 360 (La. App. 4th Cir. 1961).

106. 213 La. 378, 34 So. 2d 897 (1948). The terms "consumer" and "layman" are not synonymous; while most consumers would fit the description "layman," many cases reveal a "layman" in a commercial transaction. Smith v. Everett, 291 So. 2d 835 (La. App. 4th Cir. 1974), is an example.

> had extensive business experience and the plaintiff has had practically none. It may be that much was taken for granted when it was executed, but this does not relieve the situation because the plaintiff had a decided inferior mental capacity to the other parties. We are not prepared to say than an intentional fraud was perpetrated on the plaintiff, but the evidence does show that the opposing parties were cognizant of all the facts and the plaintiff was ignorant of them and laboring under an entirely different impression.
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> Where parties of somewhat equal experience and mental capacity enter into an engagement, the courts are reluctant to disturb it unless there is fraud. However, it is the duty of the courts to carefully and painstakingly investigate the circumstances surrounding transactions between a person of limited mental capacity and one experienced in business affairs, in order that substantial justice might be meted out.[107]

Lack of education and business sophistication has been pointed to time and time again in Louisiana courts as a basis on which to infer fraud so as to relieve the disadvantaged party from the consequences of unfair terms or entire contracts.[108] Exemplary of the line of cases spawned by *Molaison* are *Carter v. Foreman*[109] and *Smith v. Everett.*[110] Mr. Carter, an "unintelligent" man of 67 years of age, who could neither read, write, nor multiply, signed a contract for home im-

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107. 213 La. at 397, 34 So. 2d at 903. *Cf.* LA. CIV. CODE art. 1851.

108. *See* Succession of Aymond, 202 La. 469, 12 So. 2d 233 (1943); Guillory v. Morein Motor Co., 322 So. 2d 375 (La. App. 3d Cir. 1975); Smith v. Everett, 291 So. 2d 835 (La. App. 4th Cir. 1974); Anderson v. Bohn Ford, Inc., 291 So. 2d 786 (La. App. 4th Cir. 1973); Plan Invs., Inc. v. Heflin, 286 So. 2d 511 (La. App. 2d Cir. 1973); Coburn Fin. Corp. v. Bennett, 241 So. 2d 802 (La. App. 3d Cir. 1970); Chrysler Credit Corp. v. Henry, 221 So. 2d 529 (La. App. 4th Cir. 1969); Carter v. Foreman, 219 So. 2d 21 (La. App. 4th Cir. 1969); Broussard v. Fidelity Standard Life Ins. Co., 146 So. 292 (La. App. 3d Cir. 1962); Port Fin. Co. v. Campbell, 94 So. 2d 891 (La. App. 1st Cir. 1957); Griffing v. Atkins, 1 So. 2d 445 (La. App. 1st Cir. 1941); Davis v. Whatley, 175 So. 422 (La. App. 1st Cir. 1937); Segretto v. Menefee Motor Co., 159 So. 345 (La. App. Orl. 1935). In several cases, the "disadvantage" lay not in illiteracy, but in being unaware of the existence of usages of trade or custom among merchants and the effects such usages may have on particular words or phrases. *See, e.g.*, Blum v. Marrero, 346 So. 2d 356 (La. App. 4th Cir. 1977); Maxwell v. Bernard, 343 So. 2d 431 (La. App. 3d Cir. 1977); Larriviere v. Roy Young, Inc., 333 So. 2d 254 (La. App. 3d Cir. 1976); Deutschmann v. Standard Fur Co., 331 So. 2d 219 (La. App. 4th Cir. 1976); Leithman v. Dolphin Swimming Pool Co., 252 So. 2d 557 (La. App. 4th Cir.), *cert. denied.*, 259 La. 1055, 254 So. 2d 464(1971). *Cf.* Thibodeaux v. Meaux's Auto Sales, 364 So. 2d 1370 (La. App. 3d Cir. 1978) (unsophisticated buyer could not be expected to understand legal language). These cases are decided less on the ground of error than as a matter of Civil Code articles 1957, 1958, and 2474.

109. 219 So. 2d 21 (La. App. 4th Cir. 1969).

110. 291 So. 2d 835 (La. App. 4th Cir. 1974).

provements under the terms of which he agreed to pay a total price of $3,250, but total payments of $7,875. The total payments figure was not disclosed to him by the home improvement contractor. The contract was not properly performed by the contractor[111]—itself grounds enough for avoidance of the agreement[112]—but more importantly, the contractor was aware of Carter's educational deficiencies and knew that Carter's income was only $200 per month, primarily derived from Social Security. This produced an inference of fraud and a vitiation of consent.[113]

The inference of fraud in *Smith v. Everett* arose upon the following facts: The buyer learned from the public records that the seller's deceased parents had owned a parcel of land fronting on what was to become an interstate highway service road, with a value of $65,000 to $70,000. The seller, a grade school drop-out, had not opened the appropriate proceedings by which to have title transferred to his name, but after discussion with the buyer, the seller granted the buyer an option to buy the land for $9,200. The buyer agreed to open succession proceedings for the seller's parents in order to place the seller in possession of the property. The seller then retained a lawyer and sued for a declaration of nullity. Since there presumably had occurred no false assertion as to value by the buyer, the decision turned on a theory of concealment or suppression of the truth:

> The disparity between the education and business experience of plaintiff and defendant makes it apparent they could not

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111. The repairs were labelled "worthless." 219 So. 2d at 24. *Cf.* Rapides Grocery Co. v. Clopton, 125 So. 325 (La. App. 1st Cir. 1929) (no real consent where the thing sold is without value).

112. *See* LA. CIV. CODE art. 2046.

113. The court states:

> [T]here is sufficient evidence in the record for the jury to reach the conclusion that Foreman realized [Carter's] deficiencies and intentionally withheld from him the fact that the payments would amount to $7,875.00.
>
> And there was sufficient evidence for the jury to conclude that Foreman never intended to do a "good job" in the first place in that he quoted [Carter] a contract price without making an examination of the premises to determine the amount of work and materials necessary to do the job; in that he did not obtain a building permit which would have subjected the work to inspection by the City; in that he subcontracted the work to a self-styled shoring contractor who had no equipment; and in that only $113.00 of materials were used on the entire job.

219 So. 2d at 25.

The *Carter* opinion does not emphasize Foreman's knowledge of Carter's meager financial resources, but one fairly can draw the inference from *Carter* that knowledge of deficiency in financial resources in an appropriate case can form the basis for an inference of fraud; for example, where the knowledgeable party does not in good faith believe, based on what he knows, that there is a reasonable probability of payment of the contract in full by the debtor. Such a contract is unconscionable under UNIFORM CONSUMER CREDIT CODE §§ 5.108 & 6.111(3) (1968).

> negotiate the sale on an equal footing. . . . Smith's testimony confirms he is an uneducated man who could easily be victimized or intimidated by an unscrupulous businessman.
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> . . . .
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> Even were we to disregard the circumstances under which plaintiff was spirited from his home to the act of sale, the facts concerning location and value as compared to the sale price scream fraud. . . . Had plaintiff known defendant was buying his property for a pittance of its real value, he would not have consented to the contract. And it is clear from the evidence defendant knew full well (or being a realtor should have known) he was buying from Smith for approximately one-seventh of the value of the property. In concealing the information as to true value, defendant obtained plaintiff's assent through fraud.[114]

With deference to Louisiana Civil Code articles 1832, 1847, and 2547 and with particular emphasis directed at the "inference of fraud" jurisprudence under article 1848, exemplified by *Molaison, Carter*, and *Smith*, it is arguable that ten of the unconscionability cases, in addition to those previously discussed in this section, could have resulted in nonenforcement in Louisiana on the basis of fraud, without the need for resort to the principle of unconscionability. The facts of four cases, *Greene v. Gibraltar Mortgage Investment Corp.*,[115] *American Home Improvement, Inc. v. MacIver*,[116] *Murphy v. McNamara*,[117] and *Albert Merrill School v. Godoy*,[118] fall obviously into the *Molaison-Carter-Smith* model. As do *Toker v. Perl*[119] and other unconscionability cases, the *Greene* decision offers unconscionability as a ground of nonenforcement alternative to fraud. The consumer in *Greene* sought a loan in the amount of $3,000 for the purpose of bringing her home mortgage payments up-to-date and to pay for certain repairs to the home. The lender represented to her that the only way the loan could be made was to designate it as a "business loan." That designation not only ostensibly avoided federal truth-in-lending protection for Mrs. Greene but also removed usury limitations. The significance of the designation, however, was not explained to Mrs. Greene. The lender also con-

114. 291 So. 2d at 839-40. Despite the fact that the parties were in litigation over the option, the buyer was able to persuade the seller to pass an act of sale at the office of the buyer's lawyer, as well as to sign papers dismissing the lawsuit and dismissing his own attorney.

115. 488 F. Supp. 177 (D.D.C. 1980).

116. 105 N.H. 435, 201 A.2d 886 (1964).

117. 36 Conn. Supp. 217, 416 A.2d 170 (Super. Ct. 1979).

118. 78 Misc. 2d 647, 357 N.Y.S.2d 378 (Civ. Ct. 1974).

119. 103 N.J. Super. 500, 247 A.2d 701 (1968), *aff'd per curiam on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (1970). See text at notes 90-92, *supra*.

cealed the fact that a $2,800 fee would be charged for brokering the loan.

American Home Improvements, Inc. v. MacIver presented unconscionability as an alternative basis of nonenforcement of a home improvement contract on facts similar to *Carter v. Foreman.* As in *Carter*, the contractor concealed the true cost of credit in an apparent attempt to generate a promissory note which could be subsequently enforced by a finance company as a holder in due course. The artifice violated New Hampshire's truth-in-lending laws, which was policy reason enough to deny enforcement of a contract calling for a total payment of $2,569 for goods and services valued at $960, with an interest charge of $809 and a sales "commission" of $800. The inference of fraud takes shape in the case by virtue of the signing by the homeowner of a promissory note and power of attorney that were blank, undated, and stated no rate of interest and by the fact that within a week of the signing, the contractor had paid the sales commission, but had performed only a negligible amount of contracted services.

Murphy v. McNamara concerned a television rental agreement calling for weekly payments of $16 which if continued for seventy-eight successive weeks would constitute a purchase by the lessee. No disclosure was made to the lessee that $16 multiplied by seventy-eight would yield a credit purchase price of $1,248 for the television. As in *MacIver*, but unlike in *Carter*, the consumer could have made that multiplication based on the figures in the contract. Despite that difference, *Carter* would permit an inference of fraud to arise, in that the lessor's "rent-to-own" plan was violative of the public policy evidenced by the federal truth-in-lending laws and in that the agreement, which was in fact a disguised conditional sale, was imposed upon an obviously unsophisticated consumer.

Albert Merrill School v. Godoy unquestionably involved a more sophisticated artifice than that employed in *Greene*, *Murphy*, or *MacIver*, but the holding of unenforceability due to unconscionability would just as simply be error and probably fraud in Louisiana under the *Molaison-Carter-Smith* jurisprudence. The school routinely gave passing scores to all applicants taking an aptitude test for its course in data processing. This misled applicants, who erroneously believed that the school was selective in admissions and that the test was a valid and reliable indicator of their ability in the data processing course or of success in the data processing field, when in fact no such validity or reliability was demonstrable.[120]

120. *See* Delta School of Business, Baton Rouge, Inc. v. Shropshire, 399 So. 2d 1212 (La. App. 1st Cir. 1981) (school's recruiting practices and advertising raised a presump-

Davis v. Kolb[121] makes an interesting comparison to *Albert Merrill School v. Godoy*. In *Godoy*, the school held itself out as knowledgeable and experienced in the evaluation of aptitude and, therefore, as a knowledgeable and reliable party concerning the value of the student's investment of tuition money. In truth, the school misrepresented the benefit which the student would receive from his investment. In *Davis*, a landowner gave a timber deed to a timber buyer who had misrepresented his experience and knowledge as a timber buyer and who had told the landowner that the timber was worth $10,000 to $20,000, when in fact the value was in excess of $50,000. The deed was set aside on the ground of unconscionability. Viewed as a case of simple error,[122] the deed could be set aside in Louisiana if the price was the seller's principal motive. Viewed in the same light as *Godoy*, the case becomes one of misrepresentation by

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tion that the school knew that plaintiff's principal motive was the school's promise of job placement assistance); *cf.* Sciortino v. Leach, 242 So. 2d 269 (La. App. 4th Cir. 1970) (owner of a beauty school did not maintain certain records he knew were required to qualify students to take state licensing examination—a "failure of consideration"). The *Godoy* plaintiff was not fully conversant in the English language and suffered from a lack of general education—factors which would call for unenforceability in Louisiana under *Molaison, Carter*, and *Smith*. *See also* Plan Invs., Inc. v. Heflin, 286 So. 2d 511 (La. App. 2d Cir. 1973) (illiterate buyers unknowingly signed a mortgage and promissory note); Chrysler Credit Corp. v. Henry, 221 So. 2d 529 (La. App. 4th Cir. 1969) (elderly buyer with impaired vision and only a fourth-grade education did not consent to contract); Community Constr. Co. v. Governale, 211 So. 2d 677 (La. App. 4th Cir. 1968) (illiterate and language-impaired homeowner); Fidelity Credit Co. v. Bradford, 177 So. 2d 635 (La. App. 3d Cir. 1965) (fraud found where sellers employed a "referral sales" scheme and obtained an unknowing execution of a mortgage on buyer's home; there were numerous other purchaser-complaints about unknowing mortgage execution); Broussard v. Fidelity Standard Life Ins. Co., 146 So. 2d 292 (La. App. 3d Cir. 1962) (purchaser of insurance who had "little formal education" did not consent to purchase); Segretto v. Menefee Motor Co., 159 So. 345 (La. App. Orl. 1935) (illiterate buyer).

Students seeking a refund or avoidance of payment of tuition have been unsuccessful in Louisiana courts on several occasions. *See* Guillot v. Spencer Business College, Inc., 267 So. 2d 738 (La. App. 4th Cir. 1972) (plaintiff, suffering no apparent disabilities, failed to prove fraud in connection with the enrollment of his son); Alexander Hamilton Inst. v. Hollis, 133 So. 458 (La. App. 2d Cir. 1931) (student, suffering no apparent disabilities, was bound by his enrollment agreement). *Compare* Penny v. Spencer Business College, Inc., 85 So. 2d 365 (La. App. 2d Cir. 1956) (student's inability to attend school term, because of illness, gave her no right to a return of prepaid tuition, so long as the school permitted her to take the course of study later or transfer her enrollment to a third person) *with* Richardson v. Cole, 173 So. 2d 336 (La. App. 2d Cir. 1965) (a physical disability made it impossible for plaintiff to take the remaining hours of contracted dancing instruction; rescission and recovery of the unearned portion of the amount paid was proper).

121. 263 Ark. 158, 563 S.W.2d 438 (1978).

122. *See* Jones v. DeLoach, 317 So. 2d 240 (La. App. 2d Cir. 1975).

the purchaser for the purpose of obtaining an unfair advantage.[123] In such a case, the fraud has tainted the seller's consent (assuming price to have been a material part of the contract).[124]

It previously was suggested that the unconscionability cases of *Williams v. Walker-Thomas Furniture Co.*[125] and *Vom Lehn v. Astor Art Galleries Ltd.*[126] would be cases of consent produced by simple error in Louisiana.[127] Fraud was not found in either *Williams* or *Vom Lehn*. Still, the facts of each are analogous to those of the *Molaison-Carter-Smith* jurisprudence in that, in both *Williams* and *Vom Lehn*, the seller seemingly took advantage of an obvious lack of buyer sophistication. As such, fraud might be a viable theory of non-

123. In Aetna Ins. Co. v. General Elect. Co., 362 So. 2d 1186 (La. App. 4th Cir. 1978), GE declared that its electric transformer would withstand a certain level of electrical "surge." In truth, GE did not know whether the transformer had the declared quality and only hoped that it did. The court equated such an assertion to *fraud*:

> We deem it an unjust advantage to obtain a sale by misrepresentation. A [party] who in fact does not know of a defect in his product cannot reveal it to the buyer. But [such a party] could have refrained from making an assertion, the truth or falsity of which it did not know.

362 So. 2d at 1187. Because the knowledge that the declared quality was not present can be imputed to the manufacturer in Louisiana, see text at notes 196-227, *infra*, the court was not pressed to *find* actual knowledge of falsity. *Cf.* Smith v. Everett, 291 So. 2d 835 (La. App. 4th Cir. 1974) (buyer knew real value of land).

Davis also comes under the Louisiana Civil Code articles on *lesion*. LA. CIV. CODE arts. 1860-1880. According to Civil Code article 1860, lesion is the injury suffered by one who does not receive "a full equivalent for what he gives" in a commutative contract, *i.e.*, a contract in which what one party does, gives, or promises is considered as equivalent for that done, given, or promised by the other. The Civil Code affords a remedy on the premise that the contract in which equivalents are not present is tainted by error or imposition. However, Civil Code article 1861 restricts the remedy in the case of persons of full age and sound mind to certain cases of partition and to cases in which the vendor of immovable property receives less than one-half of the value of the property. Lesion has been held applicable to the sale of timber in Louisiana. Hyde v. Barron, 125 La. 227, 51 So. 126 (1909); Smith v. Huie-Hodge Lumber Co., 123 La. 959, 49 So. 655 (1909). Standing timber is legislatively deemed subject to the laws relative to immovables. LA. CIV. CODE art. 464.

124. *Cf.* Chemical Cleaning, Inc. v. Brindell-Bruno, Inc., 214 So. 2d 215 (La. App. 4th Cir. 1968) (pipe cleaning company represented itself as having had experience in making estimates on cleaning jobs of the kind undertaken; the defendant had a right to assume that plaintiff's expert estimate would bear some reasonable proportion to the total time required for completion of the job); Smith v. Ponder, 169 So. 2d 683, 684-85 (La. App. 1st Cir. 1964) ("The courts have repeatedly held that a person who holds himself out as skilled in any art, trade or profession is primarily liable for any damage to persons who place themselves or their belongings in his charge, since they are justified in relying on the skill which he holds himself out as possessing. The expert has an obligation to warn of any incidental danger of which he is cognizant due to the particular knowledge of his speciality.").

125. 350 F.2d 445 (D.C. Cir. 1965), *rev'g on other grounds* 198 A.2d 914 (D.C.).

126. 86 Misc. 2d 1, 380 N.Y.S.2d 532 (Sup. Ct. 1976). See note 53, *supra*.

127. See discussion in text accompanying notes 51-66, *supra*.

enforceability in Louisiana. *Vom Lehn* is factually quite similar to *Molaison, Carter*, and *Smith*, but it is also amenable to the holding in *Griffing v. Atkins*,[128] in which a jeweler purchased from an uneducated man a ring at a price he knew to be almost one-tenth of the actual market value, a value he did not disclose. Such concealment was held to be fraud, vitiating the seller's consent.[129] Likewise, *Williams* is reminiscent of *Carter*, in that in neither case was the consumer made aware of the key credit terms. Moreover, there is a certain absurdity to the idea in *Williams* that one would knowingly enter into an agreement that, seven years later, could permit the seller to repossess all items purchased during that period despite monthly payments throughout the period. Such a state of facts might yield a judicial response similar to that of the Louisiana Fourth Circuit Court of Appeal in *Chrysler Credit Corp. v. Henry*,[130] in which an elderly woman, physically unable to read (or drive) and possessing limited financial resources, had signed a promissory note for the purchase of an automobile: "It taxes our credulity to believe that a seventy-year old woman in her physical and economic condition would, without some misrepresentation or fraud, proceed on her own to buy a new automobile."[131]

Perhaps the courts of Louisiana have developed a paternalistic attitude toward those citizens hampered in their contractual dealings by lack of education, literacy, and fluency in the English language and by obvious physical and financial infirmities. The *Molaison-Carter-Smith-Henry* jurisprudence certainly so suggests, and the history of education in the state and the diversity of culture and language arguably justifies such an attitude. In any event, the unconscionability cases of *Brooklyn Union Gas Co. v. Jimeniz*,[132] *Jefferson Credit Corp. v. Marcano*,[133] and *Frostifresh Corp. v. Reynoso*[134] each involved Spanish-speaking purchasers, while the unconscionability cases of *Jones v. Star Credit Corp.*[135] and *Toker v. Westerman*[136] involved the sale of freezers for a total credit price of $1,400 and $1,200, respectively, to purchasers whose financial resources, like those of the buyers in *Murphy v. McNamara* and *Williams v. Walker-Thomas*, were known by the sellers

128. 1 So. 2d 445 (La. App. 1st Cir. 1941).
129. *See also* Succession of Gilmore, 157 La. 130, 102 So. 94 (1924).
130. 221 So. 2d 529 (La. App. 4th Cir. 1969).
131. 221 So. 2d at 533.
132. 82 Misc. 2d 948, 371 N.Y.S.2d 289 (Civ. Ct. 1975).
133. 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969).
134. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term. 1967).
135. 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).
136. 113 N.J. Super. 452, 274 A.2d 78 (1970).

to be so limited as to make them eligible for welfare payments.[137] Is it not absurd to believe that buyers in such obviously weak educational, linguistic, and economic circumstances would have made such purchases without some misrepresentation or fraud?[138]

The Supplier's Obligation to Properly Advise the Consumer

As between the supplier and the consumer, the former is typically more knowledgeable about the nature of the product sold, the space to be leased, or the project to be undertaken. Louisiana Civil Code article 2474 recognizes the normal disparity in knowledge and sophistication between buyer and seller in its requirement that "the seller is bound to explain himself clearly respecting the extent of his own obligations" and that "any obscure or ambiguous clause is construed against him." Louisiana courts have applied the principle of article 2474, by analogy, to contractors, lessors, and other suppliers.[139] Louisiana Civil Code article 1958 likewise recognizes the disparity in the positions of suppliers and consumers by providing that in a supplier-prepared contract, any doubt or obscurity arising for want of a necessary explanation calls for the adoption of the construction most favorable to the consumer. Avoidance of error is the underlying rationale of each article, but the duties of the supplier in Louisiana to avoid error extend beyond merely an explanation of the extent of his own obligations and the use of contract forms that are free of ambiguity.

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137. The buyers in *Jones* and *Murphy* were welfare recepients at the time of sale; in *Westerman* the buyers subsequently sought such assistance.

138. Fraud was said not to be present in Jones v. Star Credit Corp., 59 Misc. 2d at 191, 298 N.Y.S.2d at 266, yet the opinion also remarks: "The very limited financial resources of the purchaser, known to the sellers at the time of sale, is entitled to weight in the balance. Indeed, the [price] value disparity itself leads inevitably to the felt conclusion that knowing advantage was taken of the plaintiffs." 59 Misc. 2d at 192, 298 N.Y.S.2d at 267. The New Jersey court in *Westerman* no doubt felt the same. Similarly, in *Frostifresh*, the seller of a freezer for a credit price of $1,145 knew at the time of sale that the buyer was unemployed and that the buyer himself did not believe he could afford the purchase. However, taking "knowing advantage" of financially, linguistically, and educationally handicapped persons is precisely the conduct labelled "fraud" in the *Molaison-Carter-Smith-Henry* jurisprudence in Louisiana.

139. *See* Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92 (La. 1979); Governor Claiborne Apts. v. Attaldo, 231 La. 85, 90 So. 2d 787 (1956); Gautreau v. Southern Farm Bureau Cas. Ins. Co., 410 So. 2d 815 (La. App. 3d Cir. 1982) (insurance); United Cos. Mortgage & Inv. v. Estate of McGee, 372 So. 2d 622 (La. App. 1st Cir. 1979) (loan company); Blum v. Marrero, 346 So. 2d 356 (La. App. 4th Cir. 1977); Equilease Corp. v. Hill, 290 So. 2d 423 (La. App. 4th Cir. 1974) (leases); Algiers Medical & Surgical Group, Inc. v. Adams, 275 So. 2d 907 (La. App. 4th Cir.), *writ denied*, 279 So. 2d 686 (1973); Community Constr. Co. v. Governale, 211 So. 2d 677 (La. App. 4th Cir. 1968). *See generally* Comment, *Unconscionable Contract Provisions: A History of Unenforceability From Roman Law to the UCC*, 42 TUL. L. REV. 193, 206-07 (1967).

The more knowledgeable supplier often must, in the exercise of good faith, affirmatively act as an advisor to the consumer[140] pointing out to him for example, any construction methods that he knows may yield advantages such as lower insurance rates,[141] warning him of any problem or condition that the supplier knows or should know might cause an unsatisfactory result,[142] even advising him in an appropriate

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140. In Mixon v. Brechtel, 174 So. 283 (La. App. Orl. 1937), the court approved the following statement by the trial judge:

> A [sic] person who undertakes to hold themselves out to the world as skilled in any art, trade or profession and have people put themselves or their cases or belongings in their charge, are perfectly and absolutely justified in relying on the skill and art and science that such a person holds himself out to have in the exercise of such a trade, profession or art and a person so doing is primarily liable for any damage that occurs.

174 So. at 284. *See also* Smith v. Ponder, 169 So. 2d 683 (La. App. 1st Cir. 1964); American Mfgrs. Mut. Ins. Co. v. United Gas Corp., 159 So. 2d 592 (La. App. 3d Cir. 1964).

141. *See* Fire Protection Equip. Co. v. Rabinowitz, 194 So. 733 (La. App. Orl. 1940); *see also* Algiers Medical & Surgical Group, Inc. v. Adams, 275 So. 2d 907 (La. App. 4th Cir.), *writ denied*, 279 So. 2d 686 (1973).

142. Wurst v. Pruyn, 250 La. 1109, 202 So. 2d 268 (1967) (building contractor should have known of a soil defect and should have advised the owner of the need to take corrective action); Spring v. Stevens Ready-Mix Concrete, Inc., 343 So. 2d 256 (La. App. 1st Cir. 1977) (paving contractor had duty to warn customer that concrete should not be poured when there is a high probability of rain); Kunnes v. Bryant, 49 So. 2d 872 (La. App. Orl. 1951) (painting contractor must advise homeowner that painting over a surface previously painted with creosote may not yield a satisfactory result); A.B.C. Oil Burner & Htg. Co. v. Palmer, 28 So. 2d 462 (La. App. Orl. 1946) (air conditioning contractor was under a duty to advise owner that existing water line was insufficient for satisfactory operation of contemplated air conditioning system); Matthews v. Rudy, 4 La. App. 226 (2d Cir. 1926) (building contractor must disclose to homeowner any insufficiency in the foundation soil of which he is aware). *Compare* Dyess v. Weems, 178 So. 2d 785 (La. App. 2d Cir. 1965) *with* Rinaudo v. Treadwell, 212 La. 510, 32 So. 2d 907 (1947) (implied warranty as to potability of well water). The UCC imposes a similar requirement upon the seller with "superior knowledge." *See* Addis v. Bernardin, 226 Kan. 302, 597 P.2d 250 (1979).

In general, if the contracted work is performed in accordance with plans and specifications furnished by the owner, the contractor has no liability for defects that later appear if the plans were proper and, if followed, could produce the desired result, assuming no defect in materials or workmanship. On the other hand, if the contractor has expert knowledge on the subject and has reason to believe that there is a defect in the specifications or plans, it is his duty to examine them carefully and to voice his concern to the owner. *See* Brasher v. City of Alexandria, 215 La. 887, 41 So. 2d 819 (1949); Draube v. Rieth, 114 So. 2d 879 (La. App. Orl. 1959). Thus, the contractor who neither prepared the plans nor possesses or holds himself out as possessing expertise or special knowledge in the field has no duty to inspect the plans for possible insufficiencies. *See, e.g.*, Co-Operative Cold Storage Bldrs., Inc. v. Arcadia Foods, Inc., 291 So. 2d 403 (La. App. 4th Cir. 1974); Lebreton v. Brown, 260 So. 2d 767 (La. App. 4th Cir. 1972); Draube v. Rieth, 114 So. 2d 879 (La. App. Orl. 1959). But plans deficient in some important respect should give rise to a duty on the part of the experienced contractor (as a part of his overall duty under Civil Code article 1958 to avoid ambiguity in the contracting process) to warn the inexperienced layman-consumer thereof.

case that the contemplated project is not economically worthwhile.[143] The supplier also must explain the meaning and implication of any trade usages of which the consumer likely will be ignorant.[144]

The idea that the more knowledgeable supplier should act as an advisor to the consumer would be appealing to a Louisiana court in a case involving language deficiencies, such as *Albert Merrill School v. Godoy*,[145] *Brooklyn Union Gas Co. v. Jimeniz*,[146] *Jefferson Credit Corp. v. Marcano*,[147] and *Frostifresh Corp. v. Reynoso*.[148] Thus, while the seller could have explained in each case the extent of his own obligations (to deliver and warrant) and utilized a nonambiguous contract form, an inference of fraud still could be drawn from the failure of the supplier to act as an advisor to the consumer. The goal of the consumer in *Godoy* to successfully complete the Albert Merrill data processing course, for example, was likely unattainable because of his own lack of language skills and preparatory education. He should have been so advised, just as the homeowner in Louisiana must be advised by the painting contractor that his idea of painting over a previously creosoted surface will not be successful.[149] Likewise, the buyers in *Frostifresh v. Reynoso*, *Jones v. Star Credit Corp.*,[150] *Williams v. Walker-Thomas Furniture Co.*,[151] and *Toker v. Westerman*[152] should have been advised that the contemplated purchase might exceed their limited

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See Larriviere v. Roy Young, Inc., 333 So. 2d 254 (La. App. 3d Cir. 1976). *Compare* Katz v. Judice, 252 So. 2d 532 (La. App. 4th Cir. 1971) *with* Mut v. Newark Ins. Co., 289 So. 2d 237 (La. App. 1st Cir. 1973) (obligation of contractor to construct a building that was safe and in compliance with requirements of local building code). In addition, the contractor may not always rely on appearances. He must determine, in appropriate cases, whether the contemplated project is structually feasible. *See* Peak v. Cantey, 302 So. 2d 335 (La. App. 1st Cir. 1974).

143. The roofing repair contractor, for example, must so advise the owner whenever the roof is unrepairable. U-Test-M of La., Inc. v. Martin, 305 So. 2d 557 (La. App. 2d Cir. 1974).

144. *See, e.g.*, Deutschmann v. Standard Fur Co., 331 So. 2d 219 (La. App. 4th Cir. 1976); Leithman v. Dolphin Swimming Pool Co., 252 So. 2d 557 (La. App. 4th Cir.), *cert. denied*, 259 La. 1055, 254 So. 2d 464 (1971); *cf.* Wilda, Inc. v. Devall Diesel, Inc., 343 So. 2d 754 (La. App. 3d Cir. 1977) (contention that boat owner did not adhere to custom of the marine repair industry); Davis v. Turnbull, 7 Mart. (o.s.) 228 (La. 1819) (plaintiff could not claim interest on an account, according to the custom of merchants, where the defendant was not a merchant).

145. 78 Misc. 2d 647, 357 N.Y.S.2d 378 (Civ. Ct. 1974).

146. 82 Misc. 2d 948, 371 N.Y.S.2d 289 (Civ. Ct. 1975).

147. 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969).

148. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term. 1967).

149. Kunnes v. Bryant, 49 So. 2d 872 (La. App. Orl. 1951).

150. 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

151. 350 F.2d 445 (D.C. Cir. 1965).

152. 113 N.J. Super. 452, 274 A.2d 78 (1970).

financial abilities,[153] with the result that their goal or motive of full ownership and use of the thing would be thwarted. At the very least, such buyers require a clear disclosure, as in *Carter v. Foreman*,[154] of the total credit price and the contemplated allocation of payments.

The Supplier's Demand for Performance Despite His Own Nonperformance

The Louisiana Civil Code describes a resolutory condition of an obligation as one that does not prevent the obligation from taking effect,[155] but which may defeat or revoke the obligation if the event in question happens.[156] A resolutory condition is implied by Civil Code article 2046 in all commutative contracts[157] in Louisiana in case either of the parties fails to comply with his engagements.[158] Several of the unconscionability cases appear to fall within Civil Code article 2046, in that a supplier sought to compel performance despite the fact that his own performance was defective or not in conformity with the contract requirements. In *Andrews*, the seller insisted upon payment, taking the position that the dispute as to the "new" quality of the automobile was a matter of implied warranty and that, even if its disclaimer of warranty was ineffective,[159] the automobile delivered was not "defective." The *Andrews* decision emphasized that if a seller is bound to deliver a new car, that is an express, rather than an implied, obligation and it is not fulfilled by the delivery of something entirely different. The analysis is the same in Louisiana. The failure to comply with the contract description renders immaterial the issue of exclusion or renunciation of implied warranties.[160] For example, where the seller has delivered a different type of diesel fuel than that ordered by the buyer, the buyer's proper action in Louisiana is for

153. *Cf.* Chrysler Credit Corp. v. Henry, 221 So. 2d 529 (La. App. 4th Cir. 1969) (buyer told seller that she "lived on a pension"); Carter v. Foreman, 219 So. 2d 21 (La. App. 4th Cir. 1969) (homeowner told contractor he could not afford any repairs to his home).

154. 219 So. 2d 21 (La. App. 4th Cir. 1969).

155. Such a condition would be a "suspensive" condition. LA. CIV. CODE art. 2021.

156. LA. CIV. CODE arts. 2021, 2045.

157. LA. CIV. CODE arts. 1767, 1768.

158. LA. CIV. CODE art. 2046.

159. See text at notes 46-49, 73-74, *supra*. The seller in *Andrews* was also the manufacturer of the vehicle, and as such he arguably could not avoid implied warranties in Louisiana. See text at notes 184-227, *infra*.

160. *See, e.g.*, Henderson v. Leona Rice Milling Co., 160 La. 597, 107 So. 459 (1926); Shreveport Mill & Elevator Co. v. Stoehr, 139 La. 719, 71 So. 961 (1916); United Suriname Trading Co. v. C.B. Fox Co., 242 So. 2d 259 (La. App. 4th Cir. 1970); Dales Jewelers & Home Furnishers, Inc. v. Jones, 204 So. 2d 126 (La. App. 2d Cir. 1967); Wrenn v. Lafayette Furniture Co., 151 So. 148 (La. App. Orl. 1933); Continental Jewelry Co. v. Augusta, 129 So. 177 (La. App. Orl. 1930).

breach of contract, rather than for breach of implied warranty.[161] The disclaimer of implied warranty would become germane upon a performance that met the contract description or other expressed terms.[162]

Robert A. Munro & Co. v. Meyer,[163] *New Prague Flouring Mill Co. v. Spears*,[164] *Green v. Arcos, Ltd.*,[165] and *F.C. Austin Co. v. J. H. Tillman Co.*,[166] like *Andrews*, are UCC section 2-302 "illustrative results" cases which present essentially the same legal issues against different factual backgrounds. The buyer in *Munro* contracted for a specified quantity of meat and bone meal, with a "guaranteed" analysis as to composition, under a "with all faults"[167] clause. Subsequent analysis revealed that the bone meal had been adulterated by an admixture of cocoa husks average 3.66 per cent of the total. Although the analysis arguably met the contract specification, the court held that the seller's tendered performance nevertheless had not met the description of "meat and bone meal" and that the seller's "with all faults" clause could apply only to goods which in fact answered the trade description. In the absence of a conforming tender, the exclusion clause could not foreclose the overriding implied warranty—accompanying a sale by description—that the goods will conform to the description.

The buyer in *New Prague* contracted for the delivery in separate shipments of "Old Wheat Flour." What he received was flour of inferior quality that was not suitable for his purposes. The seller's position was that, notwithstanding the nonconforming tender, the buyer was required by the terms of the contract to continue to give instructions for the remaining shipments and the seller was entitled, under the contract, to treat the buyer's repudiation of the contract as merely a request to extend the time of performance. The Iowa court did not agree. The court in *Green v. Arcos, Ltd.* similarly refused to enforce a contract under which the buyer's right to reject the goods shipped was waived, purportedly even with respect to a failure of the seller to ship the goods at all or where the seller shipped entirely different goods.

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161. *See* Victory Oil Co. v. Perret, 183 So. 2d 360 (La. App. 4th Cir. 1966).

162. In Dales Jewelers & Home Furnishers, Inc. v. Jones, 204 So. 2d 126 (La. App. 2d Cir. 1967), the refusal of a jeweler to honor a guarantee entitled the buyer to dissolve the contract and obtain a restoration of the price and damages for the breach. The result would be the same in the case of a nonconforming tender. *See* Rapides Grocery Co. v. Clopton, 125 So. 325 (La. App. 1st Cir. 1929).

163. [1930] 2 K.B. 312.

164. 194 Iowa 417, 189 N.W. 815 (1922).

165. 47 T.L.R. 336 (C.A. 1931).

166. 104 Or. 541, 209 P. 131 (1922).

167. The indicated language would constitute a valid disclaimer of all implied UCC warranties. *See* UCC § 2-316(3)(a) (1978). The bone meal was guaranteed as follows: albuminoids 40 to 45 percent, oil and/or fat 10 to 12 percent, and phosphates about 30 percent.

As had seemingly been true in *Andrews, Munro*, and *Green v. Arcos*, the sellers in *Butcher*[168] and *Austin*, in essence, were attempting to use an implied warranty exclusion clause as a shield from the consequences of nonperformance by nonconforming tender.[169] In UCC section 2-302 parlance, the *Andrews-Austin* line of decisions represents the "unfair surprise" notion. In Louisiana, such cases simply would reflect a self-serving attempt by a seller to stretch beyond the limits of tolerance the meaning of key contract language in circumstances in which the seller had not in fact performed.[170]

The *Munro, Green*, and *New Prague* nonenforcement results would be the same in Louisiana under Civil Code article 2046. In *Henderson v. Leona Rice Milling Co.*,[171] for example, the seller tendered as against a contract description of "pure Honduras rice" a mixture of Honduras, Carolina, and Red rice. The Louisiana Supreme Court treated the suit as one for breach of an express warranty, but the court indicated that it made little difference whether the case was labelled as a breach of contract case or as one for breach of the implied warranty of general fitness; the seller's nonperformance made any implied warranty waiver issue irrelevant.[172]

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168. See text at note 50, *supra*.

169. In *Arcos*, a buyer of timber had agreed that he would "not reject the goods . . ., but shall accept or pay for them in terms of the contract." In *Austin*, the buyer of an asphalt-mixing plant had agreed to a return and cancellation as the sole remedy for breach of the contract.

170. The *Arcos* rationale is that the nonrejection clause was inoperative in light of the seller's nonperformance. In addition to the decisions cited at note 160, *supra*, numerous other Louisiana decisions compare quite nicely to *Austin* and *Arcos*. *See, e.g.*, Edington Drilling Co. v. Yearwood, 239 La. 303, 118 So. 2d 419 (1960); Schreiner v. Weil Furniture Co., 68 So. 2d 149 (La. App. Orl. 1953); Meyer v. Southwestern Gas & Elec. Co., 133 So. 504 (La. App. 2d Cir. 1931); *cf.* Tremont Lumber Co. v. Robinson Lumber Co., 160 La. 254, 107 So. 101 (1926) (lumber buyer would have been justified in canceling the contract because of seller's untimely delivery); Owens v. Robinson, 329 So. 2d 766 (La. App. 2d Cir. 1976) (seller failed to deliver as required by the contract); Bartolotta v. Gambino, 78 So. 2d 208 (La. App. Orl. 1955) (air conditioning units misrepresented as new could not be delivered in performance of the seller's obligation); Graves v. Flynn, 63 So. 2d 619 (La. App. Orl. 1953) (stipulation as to delivery not performed, so that late delivery could be refused by the buyer); Perry Mill & Elev. Co. v. D.A. Varnado & Son, 147 So. 510 (La. App. 1st Cir. 1933) (seller noncompliance with shipment stipulation); Turk v. Crnkovic, 144 So. 203 (La. App. 2d Cir. 1932) (seller, obligated to deliver red and white staves, had not performed by late delivery of white staves); John J. Meier & Co. v. Schmidt & Ziegler, 12 La. App. 431, 125 So. 191 (La. App. Orl. 1929) (buyer, under a stipulation for "shipment this week," not obligated to accept a later shipment); T.A.D. Co. v. Saurage, 6 La. App. 570 (1927) (certain free merchandise to buyer of goods was part of the buyer's consideration); Robert Gair & Co. v. Joseph Levy & Bros., 3 Orl. App. 359 (La. App. 1906) (seller noncompliance with shipment stipulation).

171. 160 La. 597, 107 So. 459 (1926).

172. *See also* Shreveport Mill & Elevator Co. v. Stoehr, 139 La. 719, 71 So. 961 (1916) (contract called for "split silk" flour; seller tendered "ambrosia," which he

Another UCC section 2-302 "illustrative results" decision, *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*,[173] likewise presents but a factual variation of *Andrews* and *Munro* and would be amenable to the implied resolutory condition principle of Civil Code article 2046. A seller of catsup provided in its contract form that "all claims other than swells [had to] be made within ten days from receipt," yet it delivered to the buyer catsup that contained a latent defect (mold) discoverable only by microscopic examination. Because a product for human consumption was involved, there would be implicit in such a contract an obligation that the product was fit for consumption.[174] Indeed, such is perhaps inherent in the express description "catsup." In either case, the seller arguably had not met the contract description and had not performed.[175]

The landmark New Jersey Supreme Court decision in *Unico v. Owen*,[176] one of the Uniform Consumer Credit Code section 5.108 "prior application" cases, would probably be decided in Louisiana as a simple matter of Civil Code article 2046. The plaintiff in *Unico* attempted to enforce, as a third party holder in due course or, alternatively, as an assignee protected by a "waiver of claims and defenses" clause, a contract that the assignor-seller itself had not and could not perform.[177] The New Jersey court would not permit enforcement, finding between the seller and the plaintiff a "close connexity" destructive of holder in due course status and ruling that the waiver of defenses clause was unconscionable. A Louisiana court likely would not follow suit on the close connexity issue,[178] but this issue has been

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erroneously supposed would be of the same grade and suitable for buyer's purposes); United Suriname Trading Co. v. C.B. Fox Co., 242 So. 2d 259 (La. App. 4th Cir. 1970) (delivery of the wrong grade of wheat); *cf.* Gauthier v. Bogard Seed Co., 377 So. 2d 1290 (La. App. 3d Cir. 1980) (express warranty as to germination rate of seed); Aetna Ins. Co. v. General Elec. Co., 362 So. 2d 1186 (La. App. 4th Cir. 1978) (declaration as to quality made without knowing whether the declaration was true).

173. 93 Utah 414, 73 P.2d 1272 (1937).

174. Civil Code article 1903 states that 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." Louisiana courts have long held that a food or beverage processor impliedly warrants the wholesomeness of its products. *See* Demars v. Natchitoches Coca-Cola Bottling Co., 353 So. 2d 433 (La. App. 3d Cir. 1977), and cases cited therein.

175. *Cf.* Lyons Milling Co. v. Cusimano, 161 La. 198, 108 So. 414 (1926); Shreveport Mill & Elev. Co. v. Stoehr, 139 La. 719, 71 So. 961 (1916); United Suriname Trading Co. v. C.B. Fox Co., 242 So. 2d 259 (La. App. 4th Cir. 1970).

176. 50 N.J. 101, 232 A.2d 405 (1967).

177. The contract called for the delivery of 140 record albums (with a record player to be received free) for a time-payment price of $820 to be paid in monthly installments. The buyers received only the record player and 12 albums before the seller's insolvency.

178. Hebert, *The Work of the Louisiana Supreme Court for the 1959-1960 Term—A Symposium*, 21 LA. L. REV. 277, 330-334 (1961) (by Dean and Professor Paul M. Hebert);

negated by the Federal Trade Commission's Preservation of Consumer Claims and Defenses Rule,[179] by which third party assignees remain subject to all claims and defenses of the consumer-buyer, including that of Civil Code article 2046.

The previously discussed *Industralease* case[180] and *Nosse v. Vulcan Basement Waterproofing, Inc.*[181] also can be categorized as supplier nonperformance cases. In *Industralease*, the garbage incinerators delivered to the lessee did not work from the moment of installation, yet the supplier sought to force the lessee to make the contractual payments, while asserting its disclaimer of implied warranties. It is difficult to see how a supplier could assert in good faith[182] its disclaimer of warranty under such circumstances. It is doubtful, however, that the delivery of an incinerator that will not incinerate would be considered a satisfactory compliance by the supplier with his express engagements within the meaning of Civil Code article 2046. That principle also would seem to provide relief for the lessee in *United States Leasing Corp. v. Franklin Plaza Apartments, Inc.*,[183] which signed a lease for the rental of certain equipment, agreed to waive all implied warranties as against the lessor, but never received one vital component of the equipment, without which the components delivered were useless. Likewise, the basement waterproofing contractor in *Nosse* failed completely to perform his engagements when, as a result of his initial efforts, the consumer's basement leaked more seriously than it previously had. The issue of the contractor's disclaimer of implied and express warranties in such a case in Louisiana need not be reached.

Failure to perform as a result of the nondelivery of the thing promised must be distinguished from the delivery of a thing which simply does not have a certain quality which the seller in good faith declared it would have and which he knew was the buyer's principal motive for the sale. The two ideas can be difficult to separate in actual practice. Did the seller in *Andrews* deliver the thing sold or something entirely different? Or, did he simply deliver something that did not have the quality of being "new" as he had declared it would have? *Andrews, Munro, Kansas City Wholesale, Arcos, Austin,* and *Meyer* all can be similarly analyzed.

Comment, *Negotiable Instruments Law—"Close Connexity" and the Finance Company as a Holder in Due Course*, 18 LA. L. REV. 322 (1958).

179. *See* 16 C.F.R. § 433 (1982).

180. See text at notes 93-97, *supra*.

181. 35 Ohio Misc. 1, 299 N.E.2d 708 (1973).

182. *See* LA. CIV. CODE art. 1901.

183. 65 Misc. 2d 1082, 319 N.Y.S.2d 531 (Civ. Ct. 1971).

The Manufacturer's Inability to Avoid Implied Warranties

Civil Code articles 2474 and 2475 provide that the seller in Louisiana is bound to two principal obligations: to deliver the thing sold and to warrant it as free of "redhibitory vices."[184] The warranty as to redhibitory vices, implied from the nature of the agreement of sale according to Civil Code article 1764,[185] obligates the seller to deliver a thing that is, according to article 2520, reasonably fit for intended uses; that is, free of any nonapparent[186] defects that render the thing either "absolutely useless" or its use "so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice."[187] Upon proof of a redhibitory defect and its existence at the time of the sale, the seller is obligated to restore (or, in certain cases, reduce) the purchase price.[188] Civil Code articles 11 and 1764(2) clearly indicate that the seller's implied warranty may be modified or renounced.[189] With equal clarity, however, the Civil Code distinguishes between a seller who knew not of the defects and a seller who knew of the defects or who was otherwise in bad faith. The former is afforded an opportunity to repair any such defect and only is bound to restore or reduce the purchase price if he is unable to repair.[190] He theoretically can effectuate a valid renunciation of the implied warranty by the purchaser.[191] The latter is not privileged to renounce the implied warranty, has no right to cure the defect by repair, and is answerable to the purchaser in damages and attorney's fees in addition to restoration of the price.[192]

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184. *See* LA. CIV. CODE art. 2520.

185. Civil Code article 1764(A) reads:

> All things that are not forbidden by law, may legally become the subject of, or the motive for contracts; but different agreements are governed by different rules, adapted to the nature of each contract, to distinguish which it is necessary in every contract to consider:
>
> . . . .
>
> 2. Things which, although not essential to the contract, yet are implied from the nature of such agreement . . ., but which the parties may expressly modify or renounce, without destroying the contract or changing its description; of this nature is warranty, which is implied in every sale, but which may be modified or renounced, without changing the character of the contract or destroying its effect.

186. By Civil Code article 2521, apparent defects such as those which the buyer might have discovered by simple inspection are not considered to be redhibitory defects.

187. LA. CIV. CODE art. 2520.

188. LA. CIV. CODE art. 2531. *See also* LA. CIV. CODE arts. 2541-2544.

189. Civil Code article 1764(A)(2) is set out at note 185, *supra*. *See also* LA. CIV. CODE art. 2503.

190. LA. CIV. CODE art. 2531.

191. The term "theoretically" is used because instances of successful renunciation by the consumer are rare. See text at notes 251-273, *infra*.

192. LA. CIV. CODE arts. 2531, 2545, & 2548.

Civil Code article 2547 provides that a declaration made by the seller that the thing sold possesses some quality which he knows it does not possess constitutes fraud—as would the concealment of a known defect of the redhibitory nature.[193] Civil Code article 2548 declares that the renunciation of warranty by the buyer is not obligatory where there has been fraud on the part of the seller. In Louisiana, manufacturers are considered to be "sellers," and they are, by definition, knowledgeable of any redhibitory defects in their products and, therefore, unable to renounce the implied redhibition warranty.

Fifty-five years prior to the landmark New Jersey Supreme Court decision in *Henningsen v. Bloomfield Motors*[194]—probably the most notorious of all the unconscionability cases—in which a manufacturer's disclaimer of implied warranty was struck down, the Louisiana Supreme Court was laying the foundation of a broad rule of nonenforceability of any and all attempts by manufacturers to disclaim the implied warranty. The Louisiana court determined in *George v. Shreveport Cotton Oil Co.*[195] that when the seller is the manufacturer of the thing sold, the fair presumption is that he is familiar with the raw materials from which the thing is made and understands the process of manufacture, and therefore he should be presumed to know of any defects in the thing sold.[196] Six years after the *George* decision, the court added, in *Doyle v. Fuerst & Kraemer*,[197] definitional guidance: "Every one ought to know the qualities, good or bad, of the things which he fabricates in the exercise of the art, craft, or business of which he makes public profession."[198]

One might have argued convincingly that *George* and *Doyle* were applicable only to the seller who, being in privity of contract with the buyer, happened also to be the manufacturer of the thing.[199] Indeed, the Civil Code's articles "Of Sale" arguably contemplate that no redhibition action can be brought against one not in contractual privity with the buyer.[200] However, despite the theoretical arguments

193. LA. CIV. CODE arts. 1832 & 1847.

194. 32 N.J. 358, 161 A.2d 69 (1960).

195. 114 La. 498, 38 So. 432 (1905).

196. The court cited to Kellogg Bridge Co. v. Hamilton, 110 U.S. 108 (1884).

197. 129 La. 838, 56 So. 906 (1911).

198. 129 La. at 840, 56 So. at 907. *See also* Tuminello v. Mawby, 220 La. 733, 57 So. 2d 666 (1952); Sales Elec. Supply, Inc. v. Emco Inc., 385 So. 2d 873 (La. App. 2d Cir. 1980).

199. *Doyle* itself seemingly so holds. 129 La. at 943, 56 So. at 908 (citing POTHIER, VENTE § 214).

200. Civil Code article 2439, for example, states: "The contract of sale is an *agreement* by which one gives a thing for a price. . ., and the other gives the price." (em-

available to the manufacturer, the recent decisions of the Louisiana Supreme Court in *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*,[201] *Moreno's, Inc. v. Lake Charles Catholic High Schools Inc.*,[202] and *Alexander v. Burroughs Corp.*[203] have made the privity issue moot. In *Media*, Mercedes-Benz had no contract with the purchaser; rather, it was a distributor "standing in the shoes" of the manufacturer. Implied warranties had arisen, of course, when a sale occurred between the purchaser and a subsequently defunct dealer, but had Mercedes-Benz of North America any warranty liability without privity of contract? The Louisiana Supreme Court held that it did.[204]

Moreno's applied the presumption of knowledge of defects by a manufacturer so as to permit a consumer's suit against the manufacturer to be brought under the more liberal prescription rule of Civil Code article 2546 rather than under article 2534.[205] The *Alexander* decision reaffirms the *George* proposition that the manufacturer's presumed

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phasis added). *See* Newman v. Dixie Sales & Serv., 387 So. 2d 1333 (La. App. 1st Cir. 1980).

201. 262 La. 80, 262 So. 2d 377 (1972).

202. 315 So. 2d 660 (La. 1975).

203. 359 So. 2d 607 (La. 1978). *See also* Newman v. Dixie Sales & Serv., 387 So. 2d 1333 (La. App. 1st Cir. 1980).

204. The significance of the decision was noted by the court:

> The equation of no privity, no liability is the traditional rule that held sway for many years. Beginning with the landmark decision of *MacPherson v. Buick Motor Co.* . . . in 1916, however, the privity requirement has been eliminated in product liability cases.
>
> 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.
>
> We see no reason why the rule should not apply to the pecuniary loss resulting from the purchase of a new automobile that proves unfit for use because of latent defects.
>
> . . . By placing automobiles on the market, the supplier represents to the public that the vehicles are suitable for use. The intervention of a franchised dealer should not mitigate that responsibility. The dealer serves only as a conduit for marketing the automobiles.
>
> The pecuniary loss resulting from an unusable vehicle is recoverable when there is an express warranty without privity. [W]e find no adequate reason for not applying the same rule and allowing recovery when there is an implied warranty without privity.

262 La. at 90, 262 So. 2d at 381.

205. Civil Code article 2534 requires that the redhibition action "must be instituted within a year, at the farthest, commencing from the date of the sale," but it excepts that limitation where the seller "had knowledge of the vice and neglected to declare it to the purchaser." In the latter case, articles 2545 and 2546 require that the action be commenced within one year of the *discovery* of the vice. *See also* Radalec, Inc. v. Automatic Firing Corp., 228 La. 116, 81 So. 2d 830 (1955); Tuminello v. Mawby, 220 La. 733, 57 So. 2d 666 (1952).

knowledge of defects in the thing manufactured takes the manufacturer out of the "good faith" seller category so as to be responsible for damages. In short, it appears that the manufacturer in Louisiana, in its relation to the ultimate purchaser, is considered to be a seller presumed to know of any defects in the thing sold. The *Media* and *Moreno's* opinions suggest this theoretical basis for holding a manufacturer liable with the dealer-seller: The manufacturer is the original vendor, and under French law, the dealer-seller would be considered to have transmitted to the consumer his rights to sue the original vendor—a subrogation-like approach.[206]

As a seller presumptively knowledgeable of any redhibitory defects in the thing sold, the manufacturer in Louisiana is liable for damages under Civil Code article 2545, and his concealment of the (imputed) knowledge of defects in the thing sold is arguably bad faith and the equivalent to fraud.[207] That imputed knowledge, if viewed as the equivalent to fraud, brings to bear Civil Code article 2548, under which any purported waiver or renunciation of the implied warranty as to redhibitory vices and defects, no matter how clear and unambiguous, would be ineffective and unenforceable. But while it is presently well established that the manufacturer's presumed or imputed knowledge of redhibitory defects prevents it from asserting a right to attempt to repair the defects under Civil Code article 2531,[208] exposes it to liability for damages and attorney's fees, and so exposes it for a longer period of time,[209] it is less than certain that presumed or imputed knowledge *should* be the equivalent of fraud for purposes

206. *Media*, 262 La. at 89 n.3, 262 So. 2d at 381 n.3; *Moreno's*, 315 So. 2d at 663. *See also* Rey v. Cuccia, 298 So. 2d 840 (La. 1974); Borne v. Mike Persia Chevrolet Co., 396 So. 2d 326 (La. App. 4th Cir. 1981); LA. CIV. CODE art. 2503. *Compare* Anderson v. Bohn Ford, Inc., 291 So. 2d 786 (La. App. 4th Cir. 1973) (distinguishing between manufacturer-dealer and dealer-consumer waivers) *with* LA. CIV. CODE art. 2531 (no effect is given to manufacturer-to-retailer waiver clauses).

207. *See* Alexander v. Burroughs Corp., 359 So. 2d 607 (La. 1978); Gordon v. Bates-Crumley Chevrolet Co., 158 So. 223 (La. App. 2d Cir. 1935); LA. CIV. CODE arts. 1832 & 2547.

208. *See, e.g.*, Newman v. Dixie Sales & Serv., 387 So. 2d 1333 (La. App. 1st Cir. 1980); Riche v. Krestview Mobile Homes, Inc., 375 So. 2d 133 (La. App. 3d Cir. 1979); Laughlin v. Fiat Distribs., Inc., 368 So. 2d 742 (La. App. 3d Cir. 1979); *see also* Benard v. Bradley Automotive, 365 So. 2d 1382 (La. App. 2d Cir. 1978). In Burns v. Lamar-Lane Chevrolet, Inc., 354 So. 2d 620 (La. App. 1st Cir. 1977), it is said that a manufacturer could never be a "seller who knew not of the vice of the thing" within article 2531. *Id.* at 623. *See also* Radalec, Inc. v. Automatic Firing Corp., 228 La. 116, 81 So. 2d 830 (1955).

209. The Louisiana Supreme Court stated in *Alexander* that a manufacturer "is presumed to know of the defects of the thing which it manufactures and therefore is *deemed to be in bad faith.* Hence, article 2545 is applicable." 359 So. 2d at 609 (emphasis added; citations omitted). *See also* Moreno's, Inc. v. Lake Charles Catholic High Schools, Inc., 315 So. 2d 660 (La. 1975); Radalec, Inc. v. Automatic Firing Corp., 228

of article 2548. The Louisiana Supreme Court in *Moreno's* did equate presumed knowledge with fraud for purposes of applying Civil Code articles 2534 and 2546,[210] but application of the imputed or presumed knowledge proposition to a manufacturer who in fact was in subjective good faith, so as to apply article 2548, has been questioned by one commentator.[211] Of course, whenever Civil Code articles 1832, 1847, and 2547 can be applied directly, as in cases of actual knowledge of defects, the issue of the relationship between imputed knowledge of defects and the requisite "fraud" for article 2548 will not arise. The Supreme Court of Louisiana has not squarely addressed the issue, but *Moreno's* and prior high court pronouncements presage absolute nonrenunciation for manufacturers.[212]

La. 116, 81 So. 2d 830 (1955); Tuminello v. Mawby, 220 La. 733, 57 So. 2d 666 (1952). See note 205, *supra*.

210. 315 So. 2d at 663-64.

211. Campbell, *The Remedy of Redhibition: A Cause Gone Wrong*, 22 LA. B.J. 27 (1974).

212. In Radalec, Inc. v. Automatic Firing Corp., 228 La. 116, 81 So. 2d 830 (1955), the court said, in the context of the manufacturer's liability for damages under Civil Code article 2545: "[T]he question of defendant's actual knowledge of the defects is unimportant. It was the manufacturer of the [thing sold], and is therefore presumed to have known of the vices therein." 228 La. at 125, 81 So. 2d at 833. In Rey v. Cuccia, 298 So. 2d 840 (La. 1974), the court seemingly held a manufacturer to the more liberal prescription period of article 2546 because it "failed to declare" a defect of which it had knowledge only by virtue of the presumption attributable to manufacturers. This holding was echoed a year later in *Moreno's*. By 1978, the court moved a step closer to decreeing nonrenunciation when it held a manufacturer liable for damages under article 2545, remarking in the process that, by virtue of the presumed knowledge, a manufacturer "is deemed to be in bad faith." Alexander v. Burroughs Corp., 359 So. 2d 607, 609 (La. 1978); *see also* Marsh v. Winnebago Indus., Inc., 394 So. 2d 670 (La. App. 4th Cir. 1981).

In 1973, a Louisiana court of appeal decision took the view that manufacturers are *conclusively* presumed to know of the defects of things they manufacture. Breaux v. Winnebago Indus., Inc., 282 So. 2d 763 (La. App. 1st Cir. 1973). The 1976 decision in Edwards v. Port AMC/Jeep, Inc., 337 So. 2d 276 (La. App. 2d Cir. 1976), did not involve a manufacturer, but the court did apply the nonrenunciation idea of Civil Code article 2548 to a seller who "knew or should have known of the defects." *Id.* at 280. The seller's "reason to know" of the defect in the thing sold arose in *Palmer v. Anchor Marine, Inc.*, 331 So. 2d 114 (La. App. 1st Cir. 1976) because of a similar defect in a similar thing previously sold, the idea obviously being that once a latent defect in one of like things is discovered, it is, as to the seller, no longer latent with respect to the other similar things—whether or not the seller in fact knows of any such defects in the other things.

In the recent decision in Aetna Ins. Co. v. General Elec. Co., 362 So. 2d 1186 (La. App. 4th Cir.), *writ denied*, 365 So. 2d 247 (La. 1978), no defect, as such, in the product in question was found, but the product would not do what the manufacturer had declared that it would do. Had the seller's declaration (see Civil Code article 2529) been made with knowledge of falsity, fraud would be the conclusion under Civil Code article 2547, as to which the court in *Aetna* said:

> If the confessed fact this manufacturer did not know whether its representa-

The following unconscionability cases involving nonenforcement of a manufacturer's disclaimer of implied warranties could have been decided in Louisiana against the manufacturer under the "presumed knowledge" principle of Civil Code article 2548: *Henningsen v. Bloomfield Motors, Inc.*,[213] *Majors v. Kalo Laboratories, Inc.*,[214] *Walsh v. Ford Motor Co.*,[215] *Collins v. Uniroyal, Inc.*,[216] *Andrews Brothers v. Singer & Co.*,[217] *Eckstein v. Cummins*,[218] *Industralease Equipment Corp. v.*

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tion was true does not suffice as knowledge of its falsity for purposes of Civil Code article 2547, we apply [the reaffirmation by the Louisiana Supreme Court in *Moreno's* of] imputation to charge the manufacturer with knowledge that the declared characteristic was not present. Thus the manufacturer is liable [under article 2545] for the damages.

362 So. 2d at 1187. The *Aetna* court expressly recognized that it might be less than fair to impute such knowledge to a manufacturer as "suppressed" knowledge in a case in which the manufacturer had made no declaration as to the qualities of the thing, but in deference to the second paragraph of Civil Code article 2531, giving the good faith seller who is held liable for redhibitory defects "a corresponding and similar right of action against the manufacturer" (any manufacturer-seller agreements to the contrary notwithstanding), the court admitted that "perhaps a manufacturer can never stipulate against warranty." 362 So. 2d at 1187. The second paragraph of article 2531 establishes that in the event a good faith seller is held liable for redhibitory defects, "the seller shall have a corresponding and similar right of action against the manufacturer of the thing for any losses sustained by the seller, and . . . any provision of any . . . agreement attempting to limit, diminish or prevent such recoupment by the seller shall not be given any force or effect." Added to the Civil Code in 1974, this paragraph apparently overrules Anderson v. Bohn Ford, Inc., 291 So. 2d 786 (La. App. 4th Cir. 1973). The Louisiana Supreme Court declined to review the *Aetna* decision. 365 So. 2d 247 (La. 1978). *See* Banks, *The Magnuson-Moss Warranty Act: An Untapped Adjunct to the Law of Redhibition*, 26 LOY. L. REV. 263, 284 (1980); Barham, *Redhibition: A Comparative Comment*, 49 TUL. L. REV. 376, 387-88 (1975); Comment, *Modification or Renunciation of Warranty in Louisiana Sales Transactions*, 46 TUL. L. REV. 894, 901-02 (1976).

The presumed knowledge rule also denies the manufacturer an opportunity to attempt to repair the alleged rehibitory defect under Civil Code article 2531. See text at note 190, *supra*. This denial is arguably as unfair to the manufacturer as the nonrenunciation rule and, perhaps, less defensible as well, an idea voiced in *Newman v. Dixie Sales & Serv.*:

> It might well be argued that since there is no contractual relationship between the manufacturer and the [ultimate] buyer, any cause of action by the buyer against the manufacturer must come from the retailer's right against the manufacturer by either subrogation or transmission. If this is so, then the manufacturer's duty should be no greater than that of the retailer, which is repair under article 2531.

387 So. 2d 1333, 1336 (La. App. 1st Cir. 1980). "However," noted the first circuit, "the supreme court has not adopted this view . . . ." *Id.*

213. 32 N.J. 358, 161 A.2d 69 (1960) (a Uniform Consumer Credit Code § 5.108 "prior application" case).

214. 407 F. Supp. 20 (M.D. Ala. 1975).

215. 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969).

216. 64 N.J. 260, 315 A.2d 16 (1974).

217. [1934] 1 K.B. 17 (C.A. 1933) (a UCC § 2-302 "illustrative results" case).

218. 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

R.M.E. Enterprises, Inc.,[219] *Sarfati v. M.A. Hittner & Sons*,[220] *McCarty v. E.J. Korvette, Inc.*,[221] *Chrysler Corp. v. Wilson Plumbing Co.*,[222] *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*,[223] *Robert A. Munro & Co. v. Meyer*,[224] *Butcher v. Garrett-Enumclaw Co.*[225] and *F.C. Austin Co. v. J.H. Tillman Co.*[226] Of course, the fact that most manufacturers today do make written warranties brings to bear the implied warranty nondisclaimer provisions of the Magnuson-Moss Act, a fact which in a consumer case renders moot both the need in Louisiana to impute knowledge of defects to the manufacturer and the need of a UCC court to invalidate manufacturer disclaimers of implied warranties on the basis of unconscionability.[227] Still, it is significant to note that while the manufacturer-disclaimer issue simply does not arise in Louisiana so as to provide a meaningful comparison to the unconscionability cases involving that issue, had *Henningsen v. Bloomfield Motors* arisen in Louisiana rather than in New Jersey, it would not have represented a landmark decision or even a significant departure from prior law. It would have been only a logical extension of *George v. Shreveport Cotton Oil Co.* Despite comparative differences, the result, an invalid waiver or renunciation of implied warranty, is the same in Louisiana, even without a principle of unconscionability.

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219. 58 A.D.2d 482, 396 N.Y.S.2d 427 (1977).

220. 35 A.D.2d 1004, 318 N.Y.S.2d 352 (1970), *aff'd*, 30 N.Y.2d 613, 331 N.Y.S.2d 40, 282 N.E.2d 126 (1972).

221. 28 Md. App. 421, 347 A.2d 253 (1975).

222. 132 Ga. App. 435, 208 S.E.2d 321 (1974).

223. 93 Utah 414, 73 P.2d 1272 (1937) (a UCC § 2-302 "illustrative results" case). It is not entirely clear from the report whether Weber Packing was a manufacturer (or processor) of the catsup or merely an intermediary distributor. In any event, Weber Packing most likely could be called a "vendor," and as such, it would be *presumed* to know of the qualities of the things it sold. *See* McAvin v. Morrison Cafeteria Co., 85 So. 2d 63 (La. App. Orl. 1956); MacLehan v. Loft Candy Stores, 172 So. 367 (La. App. Orl. 1937). In general, a distinction can be drawn between a clause disclaiming implied warranties and a clause requiring that any required warranty claims regarding implied warranties be asserted within ten days. In Louisiana, an attempt to reduce the time within which a redhibition claim may be asserted could be viewed as an attempt to force the buyer to renounce his protection. Because of the manufacturer's presumed or imputed knowledge of these very defects, such a clause falls under Civil Code article 2548 and would not be obligatory on the buyer. Viewed in this light, the assertion of claims clause in *Kansas City Wholesale Grocery* is unenforceable. A similar analysis would seem to fit Trinkle v. Schumacher Co., 100 Wis. 2d 13, 301 N.W.2d 255 (Ct. App. 1980) and Pittsfield Weaving Co. v. Grove Textiles, Inc., 121 N.H. 344, 430 A.2d 638 (1981). In both *Trinkle* and *Pittsfield*, manufacturers supplied defective goods (fabric and yarn) to be fabricated into finished products and asserted a limitation on claims despite the fact that the defects in question could not be discovered until the fabrication process was completed.

224. [1930] 2 K.B. 312 (a UCC § 2-302 "illustrative results" case).

225. 20 Wash. App. 361, 581 P.2d 1352 (1978), discussed in text at note 50, *supra*.

226. 104 Or. 541, 209 P. 131 (1922) (a UCC § 2-302 "illustrative results" case).

227. 15 U.S.C. § 2308 (1976).

The Supplier's Duty to Clearly Explain the Extent of His Own Obligations and Utilize a Contract Form Free of Ambiguity or Obscure Language

With respect to the refusal to enforce contracts consented to in error or tainted by fraud, the consumer in Louisiana probably fares better than consumers elsewhere, and this has probably been true historically. Fraud and error, however, are more or less what the judiciary chooses from time to time to make them. Accordingly, one could simply conclude that a more liberal tradition surrounds the issue in Louisiana than elsewhere. Even the rule of imputed manufacturer knowledge of defects can be categorized as primarily judge-made law. But the absence of a caveat emptor philosophy as a systematic difference between the Louisiana Civil Code and the common law is evident in two key error-avoidance articles of the Civil Code. By article 2474, a seller "is bound to explain himself clearly respecting the extent of his obligations: any obscure or ambiguous clause is construed against him."[228] Article 1958 requires, in reference to cases in which the intent of the parties is unclear or not clearly expressed (as to which article 1957 lays down the general rule that the agreement is interpreted against him who has contracted the obligation) that if the "doubt or obscurity arise for the want of necessary explanation which one of the parties ought to have given, or from any other negligence or fault of his, the construction most favorable to the other party shall be adopted, whether he be obligor or obligee."

The reference point of Civil Code article 2474's requirement of a clear explanation of the extent of the seller's own obligations is found in articles 2475, 2476, 2520, and 2531. The seller, in fact, is bound to three principal obligations: (1) that of delivery of the thing he sells, (2) that of the implied warranty that the thing he sells is free of redhibitory vices, and (3) that of restoring the price to the buyer if he is unable to correct any such vices.[229] Any other obligations of the

228. An early example of the application of Civil Code article 2474 is seen in the case of Pittsburgh & S. Coal Co. v. Slack, 42 La. Ann. 107, 7 So. 230 (1890), in which the seller and buyer disagreed as to whether the sale of a boat and barge were both to be completed on August 20 or whether the boat sale was to be completed on August 18 (a matter of some importance, since the boat sank on August 19). The ambiguity was resolved against the seller:

> The boat and barges were included in the same contract; and, if the [seller] intended to make different terms, as to the time when the sale was to take effect, from those as to the sale of the barges, it was his duty to have stated the difference very clearly, so that there should have been no room for misunderstanding.

42 La. Ann. at 109, 7 So. at 230.

229. Restoration of the price is the remedy for a breach of the seller's obligation to deliver a thing free of redhibitory vices, and as such, it is not mentioned in Civil Code articles 2474-2476, which form a part of Chapter 6 of Title VII, Book III of the

seller imposed on him by law[230] or the express terms of the contract likewise must be clearly explained to the buyer. Although lenders, lessors, and contractors of work, labor, and services are not "sellers," the article 2474 requirement of a clear explanation has been extended to those suppliers by analogy in Louisiana jurisprudence.[231] The universal use of supplier-prepared standard-form contracts brings the general principle of Civil Code article 1958 to bear on them in any event.

The effect of article 1958 is similar to that of article 2474, but while article 2474 commands a clear explanation only of the extent of the seller's own obligations, article 1958 applies to any "doubt or obscurity" which the supplier should have explained, because the doubtful or obscure contract language is *his* language.[232] Thus, obscure clauses or language in the supplier's contract form respecting some aspect of the *consumer's* obligation to pay or some other matter beyond the scope of the supplier's own obligations nevertheless would be construed against the supplier pursuant to Civil Code article 1958.[233]

Code, referenced "Of The Obligations of The Seller." By the language of Civil Code article 2531, however, the good faith seller is required to restore the price only if he is unable to "repair, remedy or correct" the vices of the thing, and he is "bound" to repair under that article.

Under Civil Code articles 2541-2543, the buyer may choose to demand only a reduction in the price and the court may decide to award only a reduction in price. By article 2544, the reduction in price ("quanti minoris") actions are subject to the same rules and limitations as the actions for restoration of the price.

230. Imputation of payments, LA. CIV. CODE art. 2166, and rebates of unearned, precomputed interest in consumer credit transactions, LA. R.S. 9:3527-9:3529 (Supp. 1972), are examples.

231. *See* cases collected at note 139, *supra.*

232. Lyons Milling Co. v. Cusimano, 161 La. 198, 108 So. 414 (1926).

233. *See, e.g.*, Meraux & Nunez v. Houck, 202 La. 820, 13 So. 2d 233 (1942); Rayford v. Louisiana Sav. Ass'n, 380 So. 2d 1232 (La. App. 3d Cir. 1980); Ellis v. Dozier, 339 So. 2d 873 (La. App. 3d Cir. 1976). The doubt or obscurity must have arisen for want of a "necessary explanation" which the party preparing the contract ought to have given. Because the one who prepares the form is almost always the more knowledgeable and experienced supplier, an explanation is typically necessary. There is a distinction, however, between an unexplained clause which is ambiguous because it admits of conflicting interpretations and a clause which is clear and unambiguous but to which the buyer's attention is not directed, particularly if the buyer is disadvantaged by lack of education or literacy. *See* Anderson v. Bohn Ford, Inc., 291 So. 2d 786 (La. App. 4th Cir.), *writ denied*, 294 So. 2d 829 (La. 1974). Article 2474 applies to both cases, but articles 1957 and 1958 apply only to the former case.

Furthermore, a distinction can be seen between "ambiguity" and "obscurity" in cases in which a seemingly unambiguous word or term has an esoteric trade or legal meaning unknown to the layman and unexplained by the more knowledgeable merchant. *See, e.g.*, Schonberg v. New York Life Ins. Co., 235 La. 461, 104 So. 2d 171 (1958) (meaning of "accidental death"); Thibodeaux v. Meaux's Auto Sales, Inc., 364 So. 2d 1370 (La. App. 3d Cir. 1978) (esoteric legal meaning); Leithman v. Dolphin Swimming Pool Co., 252 So. 2d 557 (La. App. 4th Cir.), *cert. denied*, 259 La. 1055, 254 So. 2d 464 (1971) (esoteric trade custom).

A remarkable number of the unconscionable contracts cases would have yielded the same nonenforcement result in Louisiana under the principle of Civil Code articles 2474 and 1958 that the unexplained, obscure, or ambiguous term is not freely consented to.[234] Some two dozen of the unconscionability decisions represent common law or UCC section 2-302 judicial relief for consumers faced with contract language purportedly modifying or disclaiming the supplier's or manufacturer's implied warranty or other obligation or limiting the remedy for breach thereof. In other cases, suppliers attempted to enforce other provisions of the contract despite a failure to have properly explained the provision to the buyer.

Similar to the UCC implied warranties of merchantability and fitness for particular purposes,[235] the warranty that the thing sold is free of hidden ("redhibitory") vices or defects arises in every sale in Louisiana by virtue of Civil Code articles 2475 and 2476, as among those things said by article 1764(2) to be implied from the nature of the agreement. Likewise, it is implied in a lease of habitable space that the premises are in a habitable condition suitable for the intended purposes and will be maintained as such.[236] So, too, does the contractor impliedly warrant that his work, labor, or services will be performed in a workmanlike manner.[237] Civil Code article 1764(2) also indicates, as does article 11, that such implied warranties may be modified or renounced. But if the law of Louisiana can be said to roughly equate that of the UCC and the common law to this point, the two legal systems part company on the issue of the enforceable modification or renunciation of implied warranties and remedies therein, for an enforceable renunciation of implied warranty is infrequent in a commercial transaction in Louisiana and, in fact, rare in a noncommercial (or "consumer") transaction. In light of the supplier's obligation to give a clear explanation, that such is the case is not purely accidental, for as a general matter, the unexplained obscure or ambiguous term or phrase is treated in the Civil Code as not freely and deliberately consented to and, therefore, not enforceable by a supplier.[238]

The good faith seller in Louisiana theoretically can present to the buyer a contract form containing a valid waiver or renunciation of

234. Consent must be as to "a matter understood" under LA. CIV. CODE art. 1819.

235. UCC § 2-314 (1977).

236. LA. CIV. CODE arts. 2692-2695; *see* Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92 (La. 1979).

237. LA. CIV. CODE arts. 1930, 1963-1965 & 2769. *See* Tiger Well Serv. v. Kimball Prod. Co., 343 So. 2d 1153 (La. App. 3d Cir. 1977); Hunter v. Mayfield, 106 So. 2d 330 (La. App. 2d Cir. 1958).

238. *See* LA. CIV. CODE art. 1819.

implied warranty, but the good faith seller of a defective thing is in no event liable beyond restoration of the price and reimbursement of certain of the buyer's expenses.[239] Unconscionability cases such as *Trinkle v. Schumacher Co.*,[240] *Majors v. Kalo Laboratories, Inc.*,[241] *Walsh v. Ford Motor Co.*,[242] *McCarty v. E.J. Korvette, Inc.*,[243] *Collins v. Uniroyal, Inc.*,[244] and *Pittsfield Weaving Co. v. Grove Textiles, Inc.*,[245] involving the enforceability of clauses limiting a seller's liability for consequential damages, are meaningless in Louisiana. The good faith seller has no such potential liability under the Civil Code, and the manufacturer or the seller not in good faith cannot, by virtue of Civil Code article 2548, disclaim or modify the implied warranty or its remedy in any event.[246] Three of the unconscionability cases involved attempts to disclaim implied warranties by suppliers who were not manufacturers, but who also were not in good faith: *Industralease Equipment Corp. v. R.M.E. Enterprises, Inc.*,[247] *Meyer v. Packard Cleveland Motor Co.*,[248] and *Jefferson Credit Corp. v. Marcano*.[249] The other unconscionability cases involved suppliers who were not in good faith, so that had the implied warranty or other disclaimer issue arisen, Civil Code article 2548 would have applied.[250]

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239. LA. CIV. CODE art. 2531. Among the "expenses" recoverable against the good faith seller are transportation costs, sales taxes, finance charges. *See* Abdelbaki v. University Presb. Church, 380 So. 2d 35 (La. 1980); Greenburg v. Fourroux, 300 So. 2d 641 (La. App. 3d Cir. 1974); Ticheli v. Silmon, 304 So. 2d 792 (La. App. 2d Cir. 1974); Bernard v. Tiner, 181 So. 2d 863 (La. App. 4th Cir. 1966); Rapides Grocery Co. v. Clopton, 15 La. App. 27, 125 So. 325 (1st Cir. 1929).

240. 100 Wis. 2d 13, 301 N.W.2d 255 (Ct. App. 1980).

241. 407 F. Supp. 20 (M.D. Ala. 1975).

242. 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969).

243. 28 Md. App. 421, 347 A.2d 253 (1975).

244. 64 N.J. 260, 315 A.2d 16 (1974).

245. 121 N.H. 344. 430 A.2d 638 (1981).

246. See text at notes 194-212, *supra*.

247. 58 A.D.2d 482, 396 N.Y.S.2d 427 (1977). Industralease became the "lessor" when it and the manufacturer fraudulently substituted agreements with the lessor. The transaction was held to be a sale. The case is discussed in text at notes 93-97, *supra*.

Waiver of a lessor's implied warranty objections is subject to Civil Code article 2474 by analogy. *See* cases at note 139, *supra*.

248. 106 Ohio St. 328, 140 N.E. 118 (1922) (a UCC § 2-302 "illustrative results" case). Seller used a deceptive and unfair advertisement of the "bait and switch" variety to lure buyers to his place of business. The promises and representations contained in the advertisement intentionally were excluded in the contract signed by the buyer. The case is discussed in text at note 99, *supra*.

249. 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969). The seller imposed upon the buyer a waiver of implied warranties despite the buyer's obvious inability to understand the significance of his act. See text at notes 133 & 147, *supra*.

250. *See* Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term. 1967); State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

With respect to the waiver or modification of the good faith seller's implied warranty obligation, there has emerged over the years from Civil Code articles 2474 and 1958 a most meaningful set of jurisprudential rules, extendable by analogy to all nonsale implied warranties: To be effective, the language of modification or renunciation must appear in the key sale document,[251] be "clear, unambiguous, explicit, and unequivocal,"[252] be brought to the attention of the purchaser or explained to him,[253] and, because it is in derogation of general law, be strictly construed.[254] A most striking example of the application of these standards is presented by *Thibodeaux v. Meaux's Auto Sales, Inc.*,[255] in which the bill of sale contained the following waiver language:

> Purchaser . . . does hereby waive the warranty of fitness or guarantee against the redhibitory vices applied in Louisiana by operation of law, more specifically, that warranty imposed by Civil Code Article 2476 or other applicable law. . . . Additionally, I forfeit any right I may have in redhibition pursuant to Civil Code Article 2520 and following Articles. . . .

The Louisiana Third Circuit Court of Appeal ruled that this language was not written in "clear and unambiguous terms":

> The language of this purported waiver is couched in legal terms, and not in terms which may be read and understood by a layman. The requirement "clear and unambiguous" means that the language used must be comprehendible by the average buyer. The plaintiff, a woman with a sixth grade education, stated that she did not know the meaning of the words "redhibitory vices," "redhibition," nor was she acquainted with the provisions of the Civil Code cited in the instrument. The plaintiff cannot be expected

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251. Prince v. Paretti Pontiac Co., 281 So. 2d 112 (La. 1973); Media Prod. Consults., Inc. v. Mercedes-Benz of N. Am., Inc., 262 La. 80, 262 So. 2d 377 (1972). *See generally* Hersbergen, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Consumer Protection*, 40 LA. L. REV. 619, 619-23 (1980).

252. The quoted phraselogy results from a composite of Louisiana judicial statements concerning the relationship between Civil Code articles 1764(2), 2474, and 2503. *See* Hob's Refrig. & Air Cond., Inc. v. Poche, 304 So. 2d 326 (La. 1974); Rey v. Cuccia, 298 So. 2d 840 (La. 1974); Prince v. Paretti Pontiac Co., 281 So. 2d 112 (La. 1973); Thibodeaux v. Meaux's Auto Sales, Inc., 364 So. 2d 1370 (La. App. 3d Cir. 1978); Guillory v. Morein Motor Co., 322 So. 2d 375 (La. App. 3d Cir. 1975); Dunlap v. Chrysler Motors Corp., 299 So. 2d 495 (La. App. 4th Cir 1974); Harris v. Automatic Enter., Inc., 145 So. 2d 335 (La. App. 4th Cir. 1962).

253. *See, e.g.*, Prince v. Paretti Pontiac Co., 281 So. 2d 112 (La. 1973); Thibodeaux v. Meaux's Auto Sales, Inc., 364 So. 2d 1370 (La. App. 3d Cir. 1978); Guillory v. Morein Motor Co., 322 So. 2d 375 (La App. 3d Cir. 1975).

254. *See, e.g.*, Dufief v. Boykin, 9 La. Ann. 295 (1854); Wolfe v. Henderson Ford, Inc., 277 So. 2d 215 (La. App. 3d Cir. 1973); Stracener v. Nunally Bros. Motor Co., 123 So. 911 (La. App. 1st Cir. 1929).

255. 364 So. 2d 1370, 1371 (La. App. 3d Cir. 1978).

> to be acquainted with these legal terms or their implications. This instrument did not contain "clear and unambiguous" language.[256]

Moreover, the court held that the seller failed to meet the requirement that the waiver language be explained to the buyer or brought to his attention.[257]

With respect to the waiver or modification of the good faith seller's implied warranty obligations, the *Thibodeaux* case and the jurisprudence it reflects[258] casts doubt on the viability of any renunciation of implied warranty by a consumer. In transactions between merchants or other relatively sophisticated parties, the Louisiana Supreme Court recently has indicated that the *Thibodeaux* standard is not to be applied so vigorously: "Safeguards protecting consumers must be more stringent than those protecting businessmen competing in the marketplace. It must be presumed that persons engaged in business . . . were aware of the contents of the . . . agreement which they signed."[259] The commercially sophisticated consumer, therefore, can-

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256. *Id.* at 1371-72. The court distinguished the waiver language held valid by Foy v. Ed Taussig, Inc., 220 So. 2d 229 (La. App. 3d Cir. 1969), as being more explicit and understandable by an ordinary buyer. The *Foy* language was:

> [I]t is specifically understood between the buyer and seller that this sale is made without any warranty whatsoever, express or implied, except as to title, and the buyer herein specifically waives the implied warranty provided for by Louisiana law, including all warranties against vices or defects or fitness for any particular purpose. This express waiver shall be considered a material and integral part of any sale which may hereafter be entered into between the parties covering the automobile herein described.

Id. at 238. In Hendricks v. Horseless Carriage, Inc., 332 So. 2d 892 (La. App. 2d Cir. 1976), the bill of sale stipulated that the buyer buys "this car with no warranty," and although the transaction was consummated beneath a sign stating, in eight inch letters, "All Cars Sold As Is! Please Test Before Buying," the renunciation language was held not to be "clear and unambiguous." The language, however, was held to have been brought to the buyer's attention. On the other hand, in Wolfe v. Henderson Ford, Inc., 277 So. 2d 215 (La. App. 3d Cir. 1973), language closely approximating that found in *Foy* was held ineffective because the seller had not "explained" it, no doubt because the salesman testified that he, like his counterpart in *Thibodeaux*, 364 So. 2d at 1372, did not know what was meant by a "vice" in a car.

257. 364 So. 2d at 1372. The testimony of the salesman reflected that he had not pointed out the waiver language to the buyer and he had not explained it to her because he did not know what the waiver language meant. Given that the language of waiver was ambiguous, it would have been irrelevant to have merely pointed it out to the buyer without any explanation. *See* Hendricks v. Horseless Carriage, Inc., 332 So. 2d 892 (La. App. 2d Cir. 1976).

258. *See* Hersbergen, *supra* note 253, at 619-23.

259. Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92, 96 (La. 1979) (citations omitted). The Louisiana Supreme Court has historically has made a distinction between consumer transactions and purely mercantile transactions. *See* Davis v. Turnbull, 7 Mart. (o.s.) 228 (La. 1819); *see also* Louisiana Power & Light Co. v. Mecom, 357 So. 2d 596 (La. App. 1st Cir. 1978).

not as easily claim that the waiver of redhibition language in the contract had not been sufficiently explained to him or brought to his attention. The relatively unsophisticated "average layman," conversely, will not be bound by language that is ambiguous or which the seller should have pointed out to him or explained to him, the consumer's signature on the contract notwithstanding.[260]

It has been said that the application of the doctrine of caveat emptor presupposes parity of bargaining power between the parties.[261] Because the doctrine of caveat emptor is foreign to the Louisiana Civil Code,[262] the Code does not presume an equality between the bargaining parties; rather, it requires disclosures by the seller that are intended to assure that the buyer's consent is freely given as to a matter understood by him.[263]

From the standard for valid consent to renunciation which *Thibodeaux* epitomizes, it should follow that (1) language in an order form, a manufacturer's warranty pamphlet, an invoice, or in any document other than the key transaction document simply cannot constitute a valid renunciation of the implied warranties, no matter how clear, unambiguous, or explained it was or that attention is drawn to it;[264] (2) language in the key transaction document that is specific, unequivocal, clear, and unambiguous still must be brought to the at-

260. The time-honored rule in Louisiana and elsewhere is that competent parties who are not mislead and who do not read the contract or have it read to them are negligent and are estopped to deny that they are bound by the contract. *See, e.g.*, Snell v. Union Sawmill Co., 159 La. 604, 105 So. 728 (1925); Jackson v. Lemle, 35 La. Ann. 855 (1883); Watson v. Planters' Bank, 22 La. Ann. 14 (1870). Civil Code articles 1958 and 2474 cut across the rule, of course

261. *See* Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969).

262. *See* Rushton v. LaCaze, 106 So. 2d 729 (La. App. 2d Cir. 1958); Dependable Refrig. v. Giambelluca, 94 So. 2d 148 (La. App. Orl. 1957); Landry v. Poirier, 11 Orl. App. 194 (La. App. 1914).

263. LA. CIV. CODE art. 1819.

264. Prince v. Paretti Pontiac, Co., 281 So. 2d 112 (La. 1973); Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., Inc., 262 La. 80, 262 So. 2d 377 (1972); Bendana v. Mossy Motors, Inc., 347 So. 2d 946 (La. App. 4th Cir. 1977); Anderson v. Bohn Ford, Inc., 291 So. 2d 786 (La. App. 4th Cir.), *writ denied*, 294 So. 2d 829 (La. 1974); Stevens v. Daigle & Hinson Rambler, Inc., 153 So. 2d 511 (La. App. 1st Cir. 1963); *cf.* Kodel Radio Corp. v. Shuler, 171 La. 469, 131 So. 462 (1931) (limitation on time for asserting claims found on invoice in fine print). Harris v. Automatic Enter., Inc., 145 So. 2d 335 (La. App. 4th Cir. 1962), leaves open the possibility that language in a collateral document could be incorporated by reference into the contract so as to be effective. Such incorporating recitals would themselves have to be clear, unambiguous, and conspicuous. However, the pronouncement of the Louisiana Supreme Court in *Prince* seems to draw a line: "[W]arranty limitation provisions in 'Buyer's Order' documents and automobile service manuals have no effect on the implied warranty against hidden defects." 281 So. 2d at 116; *see also Media*, 262 La. at 87, 262 So. 2d at 380.

tention of the consumer[265] or explained to him in an unambiguous manner;[266] (3) there can be no meaningful attention drawn to ambiguous renunciation language;[267] (4) language in fine print will be neither clear and nonobscure nor, by itself, brought to the consumer's attention,[268] nor will obscure or inconspicuous language satisfy the requirement;[269] (5) the language "as is" or "no warranties of any kind" is not sufficiently clear and unambiguous and will not of itself renounce the implied warranty,[270] although it may modify the warranty;[271] (6) the

265. Prince v. Paretti Pontiac Co., 281 So. 2d 112 (La. 1973); Anderson v. Bohn Ford, Inc., 291 So. 2d 786 (La. App. 4th Cir.), *writ denied*, 294 So. 2d 829 (La. 1974); Lee v. Blanchard, 264 So. 2d 364 (La. App. 1st Cir. 1972); Juneau v. Bob McKinnon Chevrolet Co., 260 So. 2d 919 (La. App. 4th Cir. 1972).

266. Edwards v. Port AMC/Jeep, Inc., 337 So. 2d 276 (La. App. 2d Cir. 1976); Guillory v. Morein Motor Co., 322 So. 2d 375 (La. App. 3d Cir. 1975); Lee v. Blanchard, 264 So. 2d 364 (La. App. 1st Cir. 1972); Wolfe v. Henderson Ford, Inc., 277 So. 2d 215 (La. App. 3d Cir. 1973).

267. Hendricks v. Horseless Carriage, Inc., 332 So. 2d 892 (La. App. 2d Cir. 1976); R.O. Roy & Co. v. A & W Trailer Sales, 277 So. 2d 204 (La. App. 2d Cir. 1973); Wolfe v. Henderson Ford, Inc., 277 So. 2d 215 (La. App. 3d Cir. 1973); Harris v. Automatic Enter., Inc., 145 So. 2d 335 (La. App. 4th Cir. 1962).

268. Guillory v. Morein Motor Co., 322 So. 2d 375 (La. App. 3d Cir. 1975); Lee v. Blanchard, 264 So. 2d 364 (La. App. 1st Cir. 1972); *cf.* Kodel Radio Corp. v. Shuler, 171 La. 469, 131 So. 462 (1931) (limit on time for filing claims). *See also* Note *Contract Clauses in Fine Print*, 63 HARV. L. REV. 494 (1950).

269. *See* cases cited in note 268, *supra; see also* Wolfe v. Henderson Ford, Inc., 277 So. 2d 215 (La. App. 3d Cir. 1973); Harris v. Automatic Enter., Inc., 145 So. 2d 335 (La. App. 4th Cir. 1962) (both cases involve waiver language on the backside of the document).

270. *See* Hellman v. Commeaux, 353 So. 2d 407 (La. App. 4th Cir. 1977); Hendricks v. Horseless Carriage, Inc., 332 So. 2d 892 (La. App. 2d Cir. 1976); Sallinger v. Mayer, 304 So. 2d 730 (La. App. 4th Cir. 1974); Juneau v. Bob McKinnon Chrevrolet Co., 260 So. 2d 919 (La. App. 4th Cir. 1972); McClain v. Cuccia, 259 So. 2d 337 (La. App. 4th Cir. 1972); Beneficial Fin. Co. v. Bienemy, 244 So. 2d 275 (La. App. 4th Cir. 1971); Breeden v. General Motors Accept. Corp., 140 So. 2d 680 (La. App. 4th Cir. 1962).

In Roby Motors Co. v. Cade, 158 So. 840 (La. App. 2d Cir. 1935), a sale on "as is" terms was held to have excluded the implied warranties; also present in the contract was the stipulation that "any adjustments or repairs made from this day will be charged for." The *Breeden* decision characterized the latter stipulation as the true reason for exclusion of implied warranties in *Cade*. 140 So. 2d at 682. In Dunlap v. Chrysler Motors Corp., 299 So. 2d 495 (La. App. 4th Cir. 1974) and Stumpf v. Metairie Motor Sales, Inc., 212 So. 2d 705 (La. App. 4th Cir. 1968), language that the buyer "understood that no warranties of any kind or character, either express or implied, are made by" seller was held not sufficiently clear, explicit, and unambiguous. Similarly, language that "I . . . understand no warranty is given because car reduced from $1,995 to $1,795" was held not clear and unambiguous in Edwards v. Port AMC Jeep, Inc., 337 So. 2d 276 (La. App. 2d Cir. 1976). *See also* Stracener v. Nunally Bros. Motor Co., 123 So. 911 (La. App. 1st Cir. 1929) ("no warranties have been made by the vendor" held not a clear and explicit waiver of implied warranties).

271. Beneficial Fin. Co. v. Bienemy, 244 So 2d 275 (La. App. 4th Cir. 1971); Breeden v. General Motors Accept. Corp., 140 So. 2d 680 (La. App. 4th Cir. 1962); Kuhlmann

existence of an express warranty does not constitute a renunciation of the implied warranty,[272] even if it is "in lieu of" other warranties or limits the supplier's obligation to repairs or replacement of defective parts.[273]

Under the jurisprudence of Civil Code articles 2474 and 1958, virtually all of the unconscionability cases involving supplier disclaimer of implied warranties or other supplier obligations would be resolved favorably to the consumer in Louisiana, by virtue of the supplier's use of obscure or ambiguous language or by his failure to clearly explain the extent of his own obligations or draw the consumer's attention to language clearly making that explanation.

Ambiguous Contract Language

Henningsen v. Bloomfield Motors, Inc.[274] is cited by the comments to Uniform Consumer Credit Code section 5.108 as a decision exemplary of prior de facto application of the doctrine of unconscionability. An analysis of the decision reveals that it would have caused very little stirring among Louisiana civilians and points out the fundamental reason why the doctrine of unconscionability, in large measure, is cumulative in Louisiana. *Henningsen* is the classic example of a court grappling with the entrenched but harsh effects of a caveat emptor tradition in a case raising a simple issue: Did Chrysler's written "warranty" validly foreclose Mrs. Henningsen's suit for personal injuries[275]

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v. Purpera, 33 So. 2d 84 (La. App. 2d Cir. 1947); Maddox v. Katz, 8 So. 2d 749 (La. App. Orl. 1942); United Motor Car Co. v. Drumm, 3 La. App. 741 (Orl. 1926).

272. Hob's Refrig. & Air Cond. Inc. v. Poche, 304 So. 2d 326 (La. 1974); Media Prod. Consults., Inc. v. Mercedes-Benz of N. Am., Inc., 262 La. 80, 262 So. 2d 377 (1972); Bendana v. Mossy Motors, Inc., 347 So. 2d 946 (La. App. 4th Cir. 1977); Hoffman v. All Star Ins. Corp., 288 So. 2d 388 (La. App. 4th Cir. 1974); Bernard v. Tiner, 181 So. 2d 863 (La. App. 4th Cir. 1966).

273. The Louisiana Supreme Court suggested in Radalec, Inc. v. Automatic Firing Corp., 228 La. 116, 81 So. 2d 830 (1955), that had the written warranty stated that it "was given in lieu of all other warranties implied by law," the written warranty might have excluded the implied warranty. 228 La. at 124, 81 So. 2d at 833. Twenty years later, in Hob's Refrig. & Air Cond., Inc. v. Poche, 304 So. 2d 326 (La. 1974), the court seemingly expressed doubt that the "in lieu of" language is sufficiently clear and explicit to be regarded as a waiver of implied warranties. However, if the "sold as is" and "no warranties of any kind or character" language, see note 270 *supra*, will not clearly and unequivocably renounce the warranty, it is difficult to see how the "in lieu of" language would suffice, particularly in view of *Thibodeaux*.

274. 32 N.J. 358, 161 A.2d 69 (1960).

275. Mr. Henningsen purchased a new car under a standard form contract of adhesion. Small print on the front of the purchase order referred the reader to the reverse side thereof, where it was stipulated that neither the seller (dealer) nor Chrysler "made" any warranties, express or implied, and that Chrysler's sole obligation was to "make good any defective parts." This "warranty" was said to be "in lieu of all other warran-

caused by a breach of implied warranty?[276] The Supreme Court of New Jersey held that it had not foreclosed the suit.

If it is assumed that the seller, Bloomfield Motors, was in good faith (knew not of the defect), the *Henningsen* decision has no relevance in Louisiana, for under Civil Code article 2531, the good faith seller is only bound to restore the price (assuming, as would have been the case in *Henningsen*, that the defect cannot be repaired by the seller). He is not subject to damages that flow from the defect. As to the manufacturer, the disclaimer would be ineffective, as discussed previously.[277] As to the buyer's redhibition action against the good faith seller for restoration of the price, however, *Henningsen* can be examined against the standard embodied in Civil Code articles 2474 and 1958, and that examination reveals that the buyer would have prevailed against the seller had the case arisen in Louisiana. Although the contract stipulated that the dealer "made no warranties, express or implied," except the manufacturer's express warranty to replace defective parts "in lieu of" all other warranties, such was not a clear and unambiguous explanation of the dealer's position with respect to implied warranties.[278] The language "seller makes no implied warranties" is not considered clear and unambiguous in Louisiana, because warranties of fitness for general purposes are not "made" by the seller; they are implied or "legislated." Therefore, a disclaimer of warranties "made" by the seller is not an effective modification or renuncia-

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ties expressed or implied, and all other obligations or liabilities." Mrs. Henningsen subsequently was injured in a crash apparently caused by a defect in the automobile. The circumstances surrounding the crash (which occured twelve days after the sale) are discussed at 32 N.J. at 368-69, 161 A.2d at 75. Chrysler apparently could not successfully point out a plausible theory of the accident other than a steering defect or breakdown.

276. A case for negligence would have hinged on the Henningsens' ability to prove some negligence in design, manufacture, or inspection on Chrysler's part or would have been based on *res ipsa loquitur*.

277. See text at notes 184-227, *supra*. If the defendant is a bad faith seller or a manufacturer, a personal injury plaintiff can recover traditional personal injury damages such as loss of future earnings; because the standard of care is partially governed by Civil Code article 2545, attorney's fees can be awarded as well. This is so because the act of delivering a known defective thing gives rise to delictual, as well as contractual, liability. Phillipe v. Browning Arms Co., 395 So. 2d 310 (La. 1981). In addition, the plaintiff would face a lessened burden of proof as to the exact nature of the actual defect. *See, e.g.*, Moreno's, Inc. v. Lake Charles Catholic High Schools, Inc., 315 So. 2d 660 (La. 1975); Rey v. Cuccia, 298 So. 2d 840 (La. 1974); J.B. Beaird Co. v. Burns Bros., 216 La. 655, 44 So. 2d 693 (1950); Grayson v. General Motors Corp., 309 So. 2d 373 (La. App. 2d Cir. 1975). *See generally* Crawford, *Products Liability—The Cause of Action*, 22 LA. B.J. 239 (1975); Robertson, *Manufacturer's Liability For Defective Products in Louisiana Law*, 50 TUL. L. REV. 50 (1975).

278. 32 N.J. at 399-401, 161 A.2d at 92-93. See note 282, *infra*.

tion by the consumer of the legislatively implied warranty as to redhibitory defects.[279]

It seems obvious that the express warranty "in lieu" of all other warranties is not significantly more clear or less ambiguous than the "seller makes no warranty" language.[280] To the New Jersey court, such language *was* ambiguous:

> [Can] it be said that an ordinary layman would realize what he was relinquishing in return for what he was being granted? . . . Any ordinary layman of reasonable intelligence, looking at the phraseology, might well conclude that Chrysler was agreeing to replace defective parts. . . , but that he would not be entitled

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279. Edwards v. Port AMC/Jeep, Inc., 337 So. 2d 276 (La. App. 2d Cir. 1976); Dunlap v. Chrysler Motors Corp., 299 So. 2d 495 (La. App. 4th Cir. 1974); Stumpf v. Metairie Motor Sales, Inc., 212 So. 2d 705 (La. App. 4th Cir. 1968); Stracener v. Nunally Bros. Motor Co., 123 So. 911 (La. App. 1st Cir. 1929). *See also* Tuttle v. Lowrey Chevrolet, Inc., 424 So. 2d 1258 (La. App. 3d Cir. 1982). That such decisions are premised upon Civil Code articles 1958 and 2474 is not always expressly stated, but as the following excerpt from *Stracener v. Nunally Bros. Motor Co.* reveals, the premise cannot be doubted:

> That clause . . . shows [that vendor] was laboring under the mistaken idea that unless he agreed to the warranties and properly indorsed them on the contract, he was not bound by any warranties. It is . . . probable that no warranties had "been made by the vendor"; but even so. . . , they were nevertheless made or implied by law as they are in all contracts of sale . . . These warranties are expressly given by law, and should not be denied the purchaser "unless they have been waived expressly or by the clearest implication," [because] by such waivers the parties make a law unto themselves, in derogation of the general law, and they should therefore be construed strictly.

123 So. at 911.

It can be argued that the Louisiana Supreme Court's decision in Louisiana National Leasing Corp. v. ADF Service, Inc., 377 So. 2d 92 (La. 1979) (see notes 259 & 260, *supra*), has implicitly overruled the *Stracener* idea that "the seller makes no warranties" language is not a clear waiver, at least in a commercial context. The court in *ADF* upheld a waiver of a lessor's implied warranties between two commercially sophisticated parties. The key language of the waiver was: "Lessor itself makes no express or implied warranties as to any matter whatsoever, including, without limitation, the condition of equipment, its merchantability or its fitness for any particular purpose." 377 So. 2d at 94. This language was held to be clear and unambiguous. *Id.* at 96. The court also pointed out, however, that ADF "at all times expected [the supplier] to warrant and service the machine," making it clear that the lessor's waiver language came as no surprise to ADF. *Id.* The majority opinion does not offer a rebuttal to any of the consumer transaction cases cited hereinabove, and in fact, the majority opinion carefully segregates the consumer and nonconsumer transaction. Justice Dixon, however, dissented, taking the view that the key language was not "clear and unambiguous." *Id.* at 96.

280. Moreover, the language in *Henningsen* (which appeared in fine print on the reverse side of the document) was rendered even more ambiguous and confusing by a reference to the dealer's obligations under the "owner service policy." 32 N.J. at 407-08, 161 A. 2d at 96-97.

> to a new car. . . . [O]nly the abandonment of all sense of justice would permit us to hold that, as a matter of law, the phrase "its obligation under this warranty being limited to making good at its factory any part or parts thereof" signifies to an ordinary reasonable person that he is relinquishing any personal injury claim that might flow from the use of a defective automobile.[281]

Only those who wish not to do so conceivably could fail to see the similarity between the quoted language and the principle it represents and the language of *Thibodeaux* and article 2474: "The seller is bound to explain himself clearly respecting the extent of his obligations."[282]

The *Henningsen* waiver unquestionably would be ineffective against a consumer in Louisiana today. In fact, seller waiver attempts, in general, are less likely to succeed in Louisiana than in the UCC jurisdictions, for while the UCC and Louisiana law as to valid waiver of implied warranty are quite similar in terms of requirements as to conspicuity and clarity and as to the nonviability of waivers in collateral documents, there exist perhaps two grounds beyond that of Civil Code articles 1958 and 2474 upon which to defeat the Louisiana supplier's waiver attempt. The first is rooted in legal philosophy. Unlike the UCC seller, a Louisiana seller cannot "waive" the implied warranties by his unilateral act—the waiver must be the expressed

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281. 32 N.J. at 399-400, 161 A.2d at 92-93. Of this language, the New Jersey court also observed:

> The draftsmanship is reflective of the care and skill of the Automobile Manufacturers Association in undertaking to avoid warranty obligations without drawing too much attention to its effort in that regard. No one can doubt that if the will to do so were present, the ability to inform the buying public of the intention to disclaim liability for injury claims arising from breach of warranty would present no problem.

32 N.J. at 400, 161 A.2d at 93.

282. In the quoted excerpt from *Henningsen*, the reference to the expectations of "an ordinary layman" is quite meaningful in light of *Thibodeaux*, *supra* notes 254-273 and accompanying text. In Citizens Loan Corp. v. Robbins, 40 So. 2d 503 (La. App. 2d Cir. 1949), the Louisiana court made a similar statement where a used automobile was rendered unsteerable by a defective coupling rod:

> We assume that [purchaser] recognized, by reason of the age of the vehicle, that he would likely be subjected to annoyance, inconvenience and difficulty in maintaining the car in operation, but none of this . . . would justify the conclusion that he expected [it], suddenly and without warning, to leave the road . . . and destroy itself . . ., subjecting him, incidentally, to serious bodily injury. Such an assumption would be entirely contrary to any standard of human behavior.

40 So. 2d at 505. The ordinary layman's expectations are not the only underlying rationale of the Civil Code article 2474 standard; Louisiana jurisprudence has long distinguished between the knowledgeable contractant and the layman contractant. *See, e.g.*, Deutschmann v. Standard Fur Co., 331 So. 2d 219 (La. App. 4th Cir. 1976); Leithman v. Dolphin Swimming Pool Co., 252 So. 2d 557 (La. App. 4th Cir.), *cert. denied*, 59 La. 1055, 254 So. 2d 464 (1971).

agreement of both seller and buyer, and it must be knowingly and understandingly consented to. In short, while it is perhaps correct to speak of an exclusion of implied warranty *by* a UCC seller, it is incorrect to speak of an exclusion of implied warranty *by* a Louisiana seller. In Louisiana, both parties must agree that the warranty is waived.[283] The second additional Louisiana ground has more to do with logistics or, perhaps, simply privity of contract: It seems clear that the seller cannot point to the manufacturer's waiver language to avoid his own implied warranty responsibility.[284]

Language identical to that in *Henningsen*—"no warranties are made"—was denied effectiveness as a disclaimer of implied warranties in the unconscionability cases of *Eckstein v. Cummins*[285] and *Chrysler Corp. v. Wilson Plumbing Co.*[286] In neither case would the language suffice as a clear explanation of the seller's obligations respecting implied warranty in Louisiana.[287] As an additional matter, the buyer in *Wilson Plumbing* signed a purchase order stating "this car is sold as is," and he received at the time of delivery of the automobile (and after he was obligated to buy) Chrysler's "warranty" that "neither Chrysler. . . nor the dealer assumes any other obligation or responsibility with respect to the condition of the vehicle." Neither the phrase "as is"[288] nor any language in a collateral document can be an effective waiver of implied warranty in Louisiana.[289]

The UCC section 2-302 "illustrative results" cases of *Robert A.*

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283. *See* Stevens v. Daigle & Hinson Rambler, Inc., 153 So. 2d 511 (La. App. 1st. Cir. 1963); Stracener v. Nunally Bros. Motor Co., 123 So. 911 (La. App. 1st Cir. 1929).

284. Hebert v. Claude Y. Woolfolk Corp., 176 So. 2d 814 (La. App. 3d Cir. 1965); Fisher v. City Sales & Serv., 128 So. 2d 790 (La. App. 3d Cir. 1961).

285. 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

286. 132 Ga. App. 435, 208 S.E.2d 321 (1974).

287. See text at note 279, *supra*. The waiver clause, found on the backside of the "retail buyer's order" in both cases, stated in relevant part: "No warranties are made . . . by either the dealer or the manufacturer . . ., excepting only Chrysler Corporation's current printed warranty . . ., which . . . is incorporated herein . . . . Such warranty shall be expressly in lieu of any other warranty, express or implied, including . . . any implied warranty of merchantability or fitness . . . ." The *Wilson Plumbing* decision held the waiver language ineffective under UCC § 2-316 because it was written in the same size and color of type as all other paragraphs on the same side of the form—a failure of conspicuity. The same outcome and rationale is predictable under Civil Code articles 2474 and 1958. Inconspicuous language will not meet the requirements that the langauge of the renunciation be "clear, explicit, and unequivocal." Such language is, in fact, arguably "obscure" within the meaning of articles 1958 and 2474. *See* Guillory v. Morein Motor Co., 322 So. 2d 375 (La. App. 3d Cir. 1975); Lee v. Blanchard, 264 So. 2d 364 (La. App. 1st Cir. 1972); *see also* Kodel Radio Corp. v. Shuler, 171 La. 469, 131 So. 462 (1930); Lyons Milling Co. v. Cusimano, 161 La. 198, 108 So. 414 (1926).

288. See note 270, *supra*.

289. See note 264, *supra*.

Munro & Co. v. Meyer,[290] *Bekkevold v. Potts*,[291] and *Hardy v. General Motors Acceptance Corp.*,[292] along with *Industralease Automated & Scientific Equipment Corp. v. R.M.E. Enterprises, Inc.*,[293] *Butcher v. Garrett-Enumclaw Co.*,[294] and *Mieske v. Bartell Drug Co.*,[295] present variations of the "no warranties have been made"[296] disclaimer language of *Henningsen, Wilson Plumbing*, and *Eckstein*. But as previously mentioned, the warranties of fitness for general purposes in a sale or lease in Louisiana (as in the common law states) are not "made" by the seller or lessor; they are "implied" or "legislated." This fact of life presented an ambiguity in both *Bekkevold* and *Hardy* which was resolved by the court in each case against the seller. The same result clearly would be mandated under Civil Code articles 1958 and 2474.[297]

290. [1930] 2 K.B. 312.

291. 173 Minn. 87, 216 N.W. 790 (1927).

292. 38 Ga. App. 463, 144 S.E. 327 (1928).

293. 58 A.D.2d 482, 396 N.Y.S.2d 427 (1977).

294. 20 Wash. App. 361, 581 P.2d 1352 (1978) (discussed in text at note 50, *supra*).

295. 92 Wash. 2d 40, 573 P.2d 1308 (1979). The case concerns the liability of a contractor for consequential damages where the receipt stipulates that he "assumes" no responsibility beyond retail cost. The stipulation likely would be given no viability, as discussed in text at notes 14-28, *supra*, but in any event, the "we assume no responsibility" language seems indistinguishable from language such as "we make no warranties," "I understand no warranty is given," or "there are no warranties of any kind." *See* Edwards v. Port AMC/Jeep, Inc., 337 So. 2d 276 (La. App. 2d Cir. 1976); Hendricks v. Horseless Carriage, Inc., 332 So. 2d 892 (La. App. 2d Cir. 1976); Stracener v. Nunally Bros. Motor Co., 123 So. 911 (La. App. 1st Cir. 1929).

296. *Munro* involved the "with all faults" variation of the "as is" language of disclosure.

297. In a sense, the Louisiana jurisprudence and the *Bekkevold* and *Hardy* decisions themselves actually hold that there is no true ambiguity at all concerning the effect on the implied warranties of the language "no warranties are made by the seller"; rather, the seller's construction is simply an erroneous and unreasonable one which would produce an unfair result if adopted. The *Bekkevold* court's assessment of the issue was as follows:

> We are of the opinion that the parties intended to say that no contractual warranties had been made; that the seller had not spoken or written any warranty in reference to the outfit. There was no other way by which such warranties could have been "made." No action of the parties was necessary to "make" that implied warranty [of fitness] which the law writes into it. We must conclude that the parties did not intend to exclude the implied warranty which could easily have been done in unmistakable terms had they so chosen.

173 Minn. at 90, 216 N.W. at 791.

The *Hardy* decision presented a construction of the ambiguous waiver language that is quite similar to that of *Bekkevold*:

> The language of the [purported waiver] . . . should be construed as referring to express stipulations, and not as excluding the warranties implied by law. It should not be taken to nullify the implied convenant that the . . . property. . . was merchantable and reasonably suited to the uses intended, and that the seller knew of no latent defects undisclosed. The rational interpretation of the [waiver] provision must be taken to be that the company making the sale sought in this

Meyer v. Packard Cleveland Motor Co.[298] also involved only a variation of the "seller makes no warranty" language. The seller advertised "rebuilt" Packard trucks, advising the reading public that the rebuilt trucks would give the buyer "the very best of service," would be a better buy and of more substantial value than a cheap new truck, and would be "practically as good as a new one" as far as wearing qualities and operating efficiency was concerned. But in the actual contract form signed by the buyer, it was stipulated that "all promises, verbal understandings or agreements of any kind pertaining to this purchase, not specified herein are hereby expressly waived." The Ohio court refused to permit the clause to negate the representations made in the advertisements.[299] A Louisiana court undoubtedly would do the same, in that the seller's waiver clause in *Meyer* created an ambiguity as to the extent of the seller's obligations.[300]

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way to make it plain that it was not be be bound by any expressed verbal warranties which might have been made by its agents, but was limited to only such express obligations as were set forth in the sale agreement. The expression cannot reasonably be taken to refer to implied warranties, which do not have to be "made," and are not supposed to be expressed, but which if not excluded by the contract, are deemed to be a part thereof as a matter of law.

38 Ga. App. at 465, 144 S.E. at 328. The similarity between *Bekkevold, Hardy*, and Stracener v. Nunally Bros. Motor Co., 123 So. 911 (La. App. 1st Cir. 1929), quoted at note 279, *supra*, is apparent.

The *Bekkevold* court distinguished Bagley v. General Fire Extinguisher Co., 150 F. 284 (2d Cir. 1906), which upheld, as a valid waiver of implied warranties, the language "no obligations . . . shall be binding upon either party." In view of *Thibodeaux* and the Civil Code article 2474 jurisprudence discussed at notes 228-273, *supra*, even the *Bagley* waiver language may not meet the "clear and unequivocal" standard in Louisiana. *See* Gullet Gin Co. v. Varnado Gin Co., 120 So. 240 (La. App. 1st Cir. 1929) ("this order [as] accepted by you . . . shall be . . . the entire contract between us and no agreement, verbal or otherwise, other than is set forth herein, forms any part of this contract" held ineffective as a waiver); *cf.* Wolfe v. Henderson Ford, Inc., 277 So. 2d 215 (La. App. 3d Cir. 1973) ("no guarantee of any kind applies . . . and buyer expressly waives any right to rescind or reduce the sale for hidden defects or redhibitory vices" phraseology was not brought to buyer's attention or explained to the court; held it was not a valid waiver). *But see* Foy v. Ed Taussig, Inc., 220 So. 2d 229 (La. App. 3d Cir. 1969).

298. 106 Ohio St. 328, 140 N.E. 118 (1922) (a UCC § 2-302 "illustrative results" case).

299. The court said of the clause: "[This language] relates solely to any special contracts or arrangements expressly made by the parties outside of the general custom or usage in such sale of goods. It in no wise negatives or nullifies the things or matters set forth by the [seller] in its general newspaper ads." 106 Ohio St. at 337-38, 140 N.E. at 121.

300. *Cf.* Kodel Radio Corp. v. Shuler, 171 La. 469, 131 So. 462 (1930) (seller's limitation of liability as to claims made after twenty days from receipt of the goods—a limitation found on the backside of the shipping invoice—was ineffective to alter the expressed guaranty found in the seller's catalog); R.O. Roy & Co. v. A & W Trailer Sales, 277 So. 2d 204 (La. App. 2d Cir. 1972) (supplier's express warranty was ambiguous in that it both guaranteed against defects in material and workmanship for

Another theory of nonenforcement applicable to *Kansas City Wholesale Grocery Co. v. Weber*,[301] in which the seller of catsup attempted to exclude "all claims other than swells" not made within ten days of receipt by the buyer, is to view it as an attempted modification of the normal one-year period under Civil Code article 2534 for instituting the redhibition action; thus the exclusion must be clearly explained to the buyer.[302] While the language seems clear enough, the decision itself points out the ambiguity: Did the seller really mean to impose a time limit on claims that were premised on latent defects discoverable only by a microscopic examination?[303]

The cases of *Majors v. Kalo Laboratories, Inc.*,[304] *Walsh v. Ford Motor Co.*,[305] *Trinkle v. Schumacher Co.*,[306] *McCarty v. E.J. Korvette, Inc.*,[307] *Fischer v. General Electric Hotpoint*,[308] *Pittsfield Weaving Co. v. Grove Textiles, Inc.*,[309] *Frank's Maintenance & Engineering, Inc. v. C. A. Roberts Co.*,[310] and *Collins v. Uniroyal, Inc.*[311] each found an exclusion of consequential damages an unconscionable limitation of remedies for breach of warranty.[312] The eight cases have little significance for Louisiana because a similar limitation on consequential damages is found in Civil Code article 2531 with respect to good faith sellers; accordingly, there is no need for a good faith seller in

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the "life-time" of the thing and limited its warranty to ninety days from delivery); Harris v. Automatic Enter., Inc., 145 So. 2d 335 (La. App. 4th Cir. 1962) (express warranty that the product was suitable for intended purposes, but restricting remedy for breach thereof to replacement of defective parts, was ambiguous).

To the extent that the seller's advertisements in *Meyer* would come under Civil Code article 2529 as declarations as to qualities of the thing, *see, e.g.*, Coco v. Mack Motor Truck Corp., 235 La. 1095, 106 So. 2d 691 (1958); Gates v. Dykes, 338 So. 2d 1190 (La. App. 2d Cir. 1976); Reiners v. Stran-Steel Corp., 317 So. 2d 657 (La. App. 3d Cir.), *cert. denied*, 320 So. 2d 914 (La. 1975), it seems clear that the waiver language used by the seller would not be a valid waiver under the article 2474 jurisprudence. To the extent that the seller was not in good faith, Civil Code article 2548 would disallow a waiver of the implied (or article 2529) warranty anyway.

301. 93 Utah 414, 73 P.2d 1272 (1937). See text at notes 173-175 & 223, *supra*. *Weber* is one of the UCC § 2-302 "illustrative results" cases. It is not entirely clear whether the seller in *Weber* was also the manufacturer (*i.e.*, processor) and, thus, arguably unable to place any limits on the redhibition action in Louisiana.

302. LA. CIV. CODE art. 2474.

303. LA. CIV. CODE art. 1958.

304. 407 F. Supp. 20 (M.D. Ala. 1975).

305. 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup Ct. 1969).

306. 100 Wis. 2d 13, 301 N.W.2d 255 (Ct. App. 1980).

307. 28 Md. App. 421, 347 A.2d 253 (1975).

308. 108 Misc. 2d 683, 438 N.Y.S.2d 690 (Dist. Ct. 1981).

309. 430 A.2d 638 (1981).

310. 86 Ill. App. 3d 980, 408 N.E.2d 403 (1980). *Frank's* involved both a seller-defendant and a manufacturer-defendant.

311. 64 N.J. 260, 315 A.2d 16 (1974).

312. *See* UCC § 2-719(3) (1978 Official Text).

Louisiana to so stipulate. Manufacturers and sellers not in good faith also have no need to stipulate against consequential damages, because such a stipulation is without effect under Civil Code articles 2545 and 2548.[313]

In six of the eight cases, the buyer was assured by express warranties that the product would not fail to perform, but the contract also added that if it did so fail, the buyer's sole remedy would be replacement of defective parts or a refund of the price. This was the same limitation denied enforcement in *Henningsen*.[314] In Louisiana, the buyer would have little to gain by attacking the validity of such a limitation of remedies as against a good faith seller,[315] and, no doubt, he would prefer to sue the manufacturer whenever possible. Still, it is noteworthy that six of the eight cases arguably present an ambiguity as to the extent of the seller's obligations, because as in *Henningsen*, these cases present situations in which a buyer is not clearly made to understand that the seller (or manufacturer) is taking the position that personal injuries and other consequential damages caused by a failure of the product to meet the express guarantee are not its responsibility.[316] In Louisiana, it has been held that to both

313. See text at notes 184-227, *supra*. *Collins* involved only a manufacturer. *Walsh*, *McCarty*, and *Majors* involved both the manufacturer and the seller. *Trinkle* involved a nonmanufacturer-seller. Like *Henningsen*, *Majors*, *McCarty*, *Walsh*, and *Collins* involved a limit on remedies to repair, replacement, or refund. Such a remedy is essentially the sole remedy available against the good faith seller in Louisiana and manufacturers cannot so limit the remedy for breach of the implied warranty.

314. See text at note 280, *supra*.

315. LA. CIV. CODE art. 2531. It is unclear in *Pittsfield Weaving* whether the manufacturer expressly warranted the yarn or whether the contract stipulated that the buyer's sole remedy would be refund or replacement. Because the contract did stipulate that all disputes would be submitted to arbitration, perhaps no such limitation was stipulated. It is only inferable in *Fischer* that there was an express warranty of suitability, but the inference is a strong one because the product was a refrigerator for use in the buyer's home. In general, an express warranty comes within Civil Code article 2529's "a declaration made in good faith by the seller, that the thing sold has some quality . . ." language. If, under that article, the thing sold does not have the declared quality, the declaration gives rise to a claim in redhibition or avoidance of the sale if the declared quality was the principal motive for making the purchase. In *Collins* and *McCarty*, for example, the manufacturer (seller) declared, by express warranty, that its tires would not "blowout." The manufacturer, saddled with imputed knowledge of any defects, see text at notes 182-227 *supra*, cannot make that declaration in "good faith"; rather, the manufacturer comes within articles 2545, 2547, and 2548 and as such, is liable for damages that he cannot contractually avoid. *See* Aetna Ins. Co. v. General Elec. Co., 362 So. 2d 1186 (La. App. 4th Cir. 1978). In any event, the good faith seller is not liable for damages under article 2531.

316. In *Fischer*, the opinion itself states that the seller "should have been aware that the plaintiff did not understand the significance of the provision [excluding consequential damages for breach of warranty]." 108 Misc. 2d at 684, 438 N.Y.S.2d 690, 691. *Collins*, *McCarty*, and *Walsh* involved personal injury plaintiffs asserting rights to

guarantee the suitability of the thing for its intended purposes and to restrict the buyer's remedy for breach to replacement or refund

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damages in the face of *Henningsen*-like stipulations that refund or replacement of defective parts was the exclusive remedy for breach of warranty. In all three cases, the relationship between the seller's expressed warranties and the actual stipulated remedy created an ambiguity and would not constitute a "clear" explanation to the average layman-buyer of the extent of seller's obligation In that sense, these cases clearly resemble *Henningsen*. In *McCarty* and *Collins*, the seller in effect expressly warranted that its tires would not "blow-out," only to later say in the contract, "If they do blow-out, we'll replace them (or refund price) and do nothing more." For the courts in *Collins* and *McCarty*, this was simply too much to swallow; it was "unconscionable" to so limit damages, in light of a buyer's natural reliance on the expressed warranties (of advertising and otherwise).

In both *Collins* and *McCarty*, the issue of actual cause of the blow-out, as a proof problem, received an interesting injection of consumer justice. In *Collins*, the court held that the presumption of unconscionability (inherent in UCC § 2-719) overcomes the lack of proof as to specific defect. In *McCarty*, the court ruled that the failure of the tire to conform to the "nonblowout" express warranty *was* the defect but, had the tire been warranted only as against defects in material and workmanship, plaintiff would have had to show a specific defect in the tire. *Compare* Williams v. United States Royal Tires, 101 So. 2d 488 (La. App. 1st Cir. 1958) (reliance on *res ipsa loquitur*) *with* Phoenix Ins. Co. v. United States Rubber Co., 245 So. 2d 436 (La. App. 1st. Cir. 1970) (specific allegation as to defect).

In Frank's Maintenance & Eng'g, Inc. v. C.A. Roberts Co., 86 Ill. App. 3d 980, 408 N.E.2d 403 (1980), the disclaimer of consequential damages provision appeared on the backside of the seller's purchase acknowledgment, with nothing on the face of the acknowledgment to alert the buyer to the disclaimer, and in fact, the printed legend "conditions of sale on reverse side" had been stamped over and, in the court's words, "rendered practically illegible." The language appeared at first glance to read, "No conditions of sale on reverse side."

In *Majors*, the seller of a soybean inoculant stated on the product package, "[S]atisfaction guaranteed or the purchase price . . . will be refunded." Yet the seller also limited its liability solely to the refund. The *Majors* court ruled that the limitation of remedies was unconscionable. A contractual stipuation as to "satisfaction" or "satisfactory" performance or even an advertisement of "satisfaction guaranteed" if (as in *Majors*) the advertisement constitutes an express warranty creates rights in the buyer to determine, either arbitrarily or, depending on the intent of the parties, in a reasonable fashion, whether he personally is satisfied. *See generally* 17 AM. JUR. 2d *Contracts* §§ 79, 366-368 (1964); Annot., 86 A.L.R.2d 214 § 13 (1962); Annot., 44 A.L.R.2d 1124 (1955). *See* Passman v. Lindsay, 192 So. 767 (La. App. 2d Cir. 1939) (parties agreed that if a beverage cooler did not give "complete and satisfactory service," seller would make necessary adjustments if possible or, if not, seller would pick it up; held, buyer was dissatisfied for a good reason, since cooler did not perform as impliedly warranted or as expressly guaranteed). *Compare* Slemaker v. Tri-State Motors, 186 So. 871 (La. App. 2d Cir. 1939) *with* Reedy v. Davidson, 235 N.W. 710 (S.D. 1931). *And see* Young v. Amato, 200 So. 2d 316 (La. App. 4th Cir. 1967). *But see* California Chem. Co. v. Lovett, 204 So. 2d 633 (La. App. 3d Cir. 1967); McCauley v. Planters Seed Co., 85 So. 2d 334 (La. App. 2d Cir. 1956) (good faith waiver of warranty and limitation of liability upheld as between two merchants); Gilbert v. Reuter Seed Co., 80 So. 2d 567 (La. App. Orl. 1955) (same); Landreth Seed Co. v. Kerlec Seed Co., 126 So. 460 (La. App. Orl. 1939) (same).

Although there was no true ambiguity in the contract language itself in *Trinkle*

is to create an ambiguity as to the extent of the seller's obligations.[317] *Walsh* speaks well for *Majors, McCarty,* and *Collins* in agreeing with Louisiana jurisprudence that such limitations are ambiguous: "The contractual provisions pleaded here [i.e., replacement or repair of defective parts, 'expressly in lieu of any other . . . warranty'] disclaim all warranties, and at the same time would limit the remedies available for a breach of warranty, and attempts to do both create an ambiguity."[318] *Jutta's, Inc. v. Fireco Equipment Co.*[319] also involved an unconscionable limitation on consequential damages and, thus, has no meaning in Louisiana. The decision, however, expressly notes that the meaning of the clause was obscure and that there was no clear and unambiguous waiver of the implied warranties.[320]

Nosse v. Vulcan Basement Waterproofing, Inc.[321] involved an express warranty that was "explained" in language describable only as terminally ambiguous[322] and which could only be loved, much less

("positively no claims allowed after goods are cut"), the decision is identical to *Kansas City Wholesale Grocery Co. v. Weber* in that it is unclear whether the parties understood that certain claims were to be barred even if discoverable only after processing, fabrication, or microscopic examination.

317. Radalac, Inc. v. Automatic Firing Corp., 228 La. 116, 81 So. 2d 830 (1955); Harris v. Automatic Enters., Inc., 145 So. 2d 235 (La. App. 4th Cir. 1962); *see also* Lyons Milling Co. v. Cusimano, 161 La. 198, 108 So. 414 (1926).

In Kodel Radio Corp. v. Shuler, 171 La. 469, 131 So. 462 (1930), the seller's catalog guaranteed that its radios were the "most satisfactory line of radio merchandise in the industry," yet in small print on the shipping invoice, the seller limited the time within which to make claims to twenty days. No limit was placed on the catalog's representations; hence it could be argued that ambiguity aside, the buyer had not consented to the limitation insofar as it affected the guarantee of satisfaction.

318. 59 Misc. 2d at 242-43, 298 N.Y.S.2d at 540. *See* cases cited in note 317, *supra.* Again, it is to be observed that the breach of warranty remedies sought in *Collins, McCarty,* and *Walsh* would be unavailable against a good faith seller in Louisiana. Against a manufacturer or a seller not in good faith, however, waiver language would be ineffective as against the consumer or other "layman" in view of the previously discussed Civil Code article 2548 waiver jurisprudence. This being so, personal injury damages and attorney's fees are available under Civil Code articles 2315 and 2545. *See* Phillipe v. Browing Arms Co., 395 So. 2d 310 (La. 1981); Arndt v. D.H. Holmes Co., 119 So. 91 (La. App. Orl. 1928). Gordon v. Bates-Crumley Chevrolet Co., 158 So. 223 (La. App. 2d Cir. 1935), closely resembles *Walsh,* but *Gordon* was a tort case with an implied warranty "alternative pleading." *Phillipe* sets forth the definitional relationship between Civil Code articles 2315 and 2545.

319. 150 N.J. Super. 301, 375 A.2d 687 (1977).

320. The limitation clause was "concealed in a provision clearly suggesting that it was conferring upon the purchaser a benefit in the form of a guarantee; nothing in the heading [suggested] the presence of a sharp limitation on defendants overall liability hidden therein." 150 N.J. Super. at 307, 375 A.2d at 690.

321. 35 Ohio Misc. 1, 299 N.E.2d 708 (1973).

322. The basement leakproofing contract provided that the contractor would "guarantee . . . five years . . . at an additional cost to the customer . . . this guarantee shall become effective upon customer's full compliance with [the] stated payment terms."

understood, by lawyers. In *Ashland Oil, Inc. v. Donahue*,[323] a lease agreement and a dealer contract, prepared by the oil company, each provided for extension and termination rights which, when the two agreements were considered together, were "incapable of being reconciled in such a manner as to be clearly expressive of an intention which can be said to have been within the reasonable contemplation of the contracting parties."[324] The termination provisions of the dealer agreement, giving to Ashland alone the right to terminate at any time upon ten day's written notice (upon the happening of certain listed but vague circumstances[325]), was held unconscionable. The case could be resolved favorably to the lessee in Louisiana by applying Civil Code articles 1901,[326] 1945,[327] or 1958.[328]

But among the payment terms was the following: "If it is necessary to install a [floor draining system to draw away water that still leaks through the walls despite the waterproofing treatment] . . . the customer is to be charged an additional price . . . if customer refuses, [contractor] will no longer be responsible." After application of a waterproofing substance around the foundation, the basement leaked more that it had previously. Since the contract required the consumer to agree to additional work at added expense before the contractor would honor its "guarantee," that additional work was consented to and performed, but the basement continued to leak. The contractor, who had obviously not performed in a good and workmanlike manner, decided that the consumer was required by the contract to accept a leak-channeling system or have no remedy. It is difficult to determine just what the contractor's obligation really was, much less whether it was clearly explained as required by Civil Code article 1958.

The Louisiana case most closely resembling *Nosse* is Michel v. Efferson, 223 La. 136, 65 So. 2d 115 (1953), in which a contractor refused to deliver possession of the premises to the plaintiff unless the building was accepted with all defects. The court would not categorize the plaintiff's acquiescence as a voluntary waiver of her rights against the contractor for nonperformance. *See also* Troy v. Betz, 399 So. 2d 667 (La. App. 1st Cir. 1981); Melancon v. Juno, 337 So. 2d 652 (La. App. 4th Cir. 1976).

323. 223 S.E.2d 433 (W. Va. 1976).

324. *Id.* at 438.

325. The termination right could be exercised when, in Ashland's sole judgment, the lessee had "indulged in practices which tend to impair the quality, good name, good will or reputation of the products of Ashland." No standard was set out in the dealer agreement by which the oil company's judgment was to be determined or circumscribed. 223 S.E.2d at 438.

326. Good faith performance by Ashland would be inconsistent with an arbitrary termination of the lease. *See* Gautreau v. Southern Farm Bureau Cas. Ins. Co., 410 So. 2d 815 (La. App. 3d Cir. 1982).

327. See text at notes 387-437, *infra*.

328. It is well established in Louisiana that it is the duty of the lessor to explain himself clearly and that a failure to do so will result in a construction of ambiguous terms favorably to the lessee. Like the seller, the lessor typically has the power in the first instance to *clearly* stipulate in his own favor. Martin v. Martin, 181 So. 63 (La. App. 1st Cir. 1938). *See generally* Governor Claiborne Apts. v. Attaldo, 231 La. 85, 90 So. 2d 787 (1956); Werlein v. Janssen, 112 La. 31, 36 So. 216 (1904); Equilease Corp. v. Hill, 290 So. 2d 423 (La. App. 4th Cir. 1974); Bass v. Santoro, 194 So. 2d 780 (La. App. 2d Cir. 1967); Claude Neon Fed. Co. v. Meyer Bros., 150 So. 410 (La. App. Orl. 1933).

Williams v. Walker-Thomas Furniture Co.[329] was a case in which a very important obligation of the seller—the giving of title—was treated in "extremely fine print."[330] That clause in *Williams* provided for a prorating of payments (an obligation of the buyer),[331] but the *effect* of the clause retained title in the seller so long as any outstanding balance in the account remained. The matter of title is an obligation of the seller, and it is to be explained to the buyer clearly.[332] One can well argue that simply placing before a person of "limited education"[333] a contract form which in extremely fine print explains that payments will be prorated on all purchases is not a clear explanation of the seller's obligations as to title. If the jurisprudence respecting the seller's Civil Code article 2474 obligation of explanation as to implied warranties is to serve by analogy as a guide, then, undoubtedly, the pro rata clause could be construed favorably to the buyer in a *Williams* case in Louisiana as a clause that is ambiguous and obscure. Moreover, the same result is predictable as a matter of article 1958, which dictates that *any* obscure or ambiguous clause should be construed against the preparer of the contract form. Nonenforcement of the pro rata clause would trigger Civil Code articles 2163-2166,[334] which treat the subject of imputation of payments.

The issue in *Ellsworth Dobbs, Inc. v. Johnson*[335] was whether a real estate broker's commission was "earned" under the listing agreement when the broker produced a buyer with whom the seller entered into an agreement of sale, regardless of the subsequent financial inability of the buyer to consummate the sale. The New Jersey Supreme Court overturned the well-established rule in that state favoring the

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329. 350 F.2d 445 (D.C. Cir. 1965), *rev'g on other grounds* 198 A.2d 914 (D.C. 1964).

330. 198 A.2d at 915.

331. LA. CIV. CODE arts. 2439, 2456, 2549.

332. LA. CIV. CODE arts. 2474, 2476. The common law "conditional sale" is not recognized in Louisiana; hence *Williams* probably would be treated as a series of sales secured by a chattel mortgage. *See* cases cited at note 65, *supra*.

333. 198 A.2d at 915.

334. Where there are several debts, the debtor has the right to declare what debt he means to discharge by his payment. LA. CIV. CODE art. 2163. However, he cannot impute the payment to reduce the principal when interest is due. LA. CIV. CODE art. 2164. If the creditor's receipt, accepted by the debtor, itself states that a certain imputation of the payment has been or will be made, the debtor no longer may declare the imputation, unless there has been fraud or surprise by the creditor. LA. CIV. CODE art. 2165. When both the receipt and the debtor are silent, the payment must be imputed to the debt, which the debtor had at the time most interest in discharging, of those that are equally due; otherwise to the debt which has fallen due, though less burdensome than those which are yet payable.

If the debts be of a like nature, the imputation is made to the debt which has been longest due; if all things are equal, it is made proportionally.

LA. CIV. CODE art. 2166.

335. 50 N.J. 528, 236 A.2d 843 (1967).

broker in cases in which the buyer had failed to close and decreed that any attempt by the broker to vary the rule announced would be unconscionable. The court, however, did agree with the decision of the appellate division that the commission agreement was "at the very least ambiguous."[336] *Ellsworth Dobbs* most probably would have been decided in Louisiana on the basis that any ambiguity in the contract concerning the earning of the commission was the broker's ambiguity and was to be construed against it on the authority of Civil Code article 1958 or, alternatively, if there was no ambiguity, that the plain words of the contract led to an absurdity.[337] Less likely would the Louisiana Supreme Court announce a broad new policy prescribing what terms the parties could incorporate into their agreement. To the preparer of the contract language, its esoteric meaning was no doubt clear, but that meaning simply did not comport with the common understanding of the consumer or real estate seller, creating, in the absence of an explanation, an ambiguity.

The most important point of the decision in *Thibodeaux v. Meaux's Auto Sales, Inc.* was that the requirements of Civil Code articles 1958 and 2474 are not met by contract language that is incomprehensible to the average layman, i.e., *legalistic language.*[338] The court held—virtually as a matter of law—that legal terms and the implications thereof are not "clear and unambiguous" to the average consumer.[339] The ambiguous nature of legalistic language no doubt also discourages any attempts by the average consumer to even try to comprehend its meaning. Legalistic language probably could be found to be at least a contributing factor in most of the sixty-five unconscionability cases.[340] It was expressly pointed out in one New York case: *Seabrook v. Commuter Housing.*[341] This case involved the lease of habitable space, a transaction to which Civil Code article 1958, of course, applies and to which Civil Code article 2474 and *Thibodeaux* apply by analogy.[342]

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336. 50 N.J. at 556, 236 A.2d at 858.

337. *See* Boisseau v. Vallon & Jordano, 174 La. 492, 141 So. 38 (1932), discussed in text at notes 397-402, *infra.*

338. 364 So. 2d at 1371. See text at notes 255-258, *supra. Thibodeaux,* in essence, calls for the use of "plain English" in consumer sales contracts. *See* Hersbergen, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Consumer Protection,* 40 LA. L. REV. 619-623 (1980).

339. 364 So. 2d at 1371.

340. *See* Appendix Table 1 for listing of the cases.

341. 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972), *aff'd per curiam on other grounds,* 79 Misc. 2d 168, 363 N.Y.S.2d 566 (App. Term. 1973).

342. *Cf.* Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92 (La. 1979) (lessor's duty to explain clearly is relaxed in the case of the commercially sophisticated lessee).

The Need to Explain or Draw the Consumer's Attention to Unambiguous Contract Language

Had the language of waiver in *Henningsen* been clear, explicit, unequivocal, and unambiguous, the waiver still would have been ineffective in Louisiana because it was not specifically brought to the buyer's attention and no attempt was made to "make him understand that he was yielding his right."[343] The waiver language in *Wilson Plumbing* was held ineffective because it was written in the same size and color type as all other paragraphs on the same side of the form, a failure of conspicuity. Language disclaiming an implied warranty must be conspicious under UCC section 2-315, but no similar provision governs other self-serving clauses that are incorporated into the supplier's adhesion contracts. This being the case, common law courts frequently are constrained to rule that it is the duty of the consumer to read the contract before signing it and, if he cannot read, it is his duty to have someone read it to him. If he does neither, he is bound by the terms thereof, at least in the absence of fraud.

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343. 32 N.J. at 408, 161 A.2d at 97. *See* Prince v. Paretti Pontiac Co., 281 So. 2d 112 (La. 1973); Anderson v. Bohn Ford, Inc., 291 So. 2d 786 (La. App. 4th Cir.), *writ denied*, 294 So. 2d 829 (La. 1974); Wolfe v. Henderson Ford Inc., 277 So. 2d 215 (La. App. 3d Cir. 1973); Harris v. Automatic Enters., Inc., 145 So. 2d 335 (La. App. 4th Cir. 1962); *cf.* Guillory v. Morein Motor Co., 322 So. 2d 375 (La. App. 3d Cir. 1975) (no attention drawn to waiver language located in "a most inconspicuous position on the document"); Lee v. Blanchard, 264 So. 2d 364 (La. App. 1st Cir. 1972) (no attention drawn to exclusionary clause in fine print on the purchase order).

The attention of the buyer in *Henningsen* was not directed to the exclusionary language on the back of the purchaser order, drawing the following remark from the court:

> It is indisputed that the president of the dealer with whom Henningsen dealt did not specifically call attention to the warranty on the back of the purchase order. The form and the arrangement of its face . . . certainly would cause the minds of reasonable men to differ as to whether notice of a yielding of basic rights stemming from the relationship with the manufacturer was adequately given. The words "warranty" or "limited warranty" did not even appear in the fine print above the place for signature, and a jury might well find that the type of print itself was such as to promote lack of attention rather than sharp scrutiny . . . If either [the manufacturer or the seller] or both of them wished to make certain that Henningsen became aware of the agreement and its purported implications, neither the form of the document nor the method of expressing the precise nature of the obligation intended to be assumed would have presented any difficulty.

32 N.J. at 399, 161 A.2d at 92. The ancient case of Hoover v. Miller, 6 La. Ann. 204 (1881), contains an idea strikingly apropos of *Thibodeaux* and *Henningsen*: where one of the parties has had an opportunity to give the other a necessary explanation of a doubtful or obscure term and has not done so, the inference is that the explanation would have been disadvantageous to him if made.

The recent Louisiana Supreme Court decision in *Louisiana National Leasing Corp. v. ADF Services, Inc.*[344] casts doubt on the strict application of the rule that one is presumed to have read and understood the contract he has signed, a rule nominally accepted in Louisiana for years.[345] The court suggests that while the rule certainly applies to "persons engaged in business," the rule is not to be strictly applied to consumers because "[s]afeguards protecting consumers must be more stringent than those protecting businessmen competing in the marketplace."[346] Thus, unambiguous language still must be explained or brought to the attention of the consumer in Louisiana; its mere presence in unexplained and unemphasized fine print or other inconspicuous circumstances will be of no avail to the supplier.[347]

Placing a particular clause in the body of a contract in fine print and without emphasis virtually guarantees that, unless an explanation of it is made to the consumer or his attention specifically directed to the clause, it will not truly be consented to because it will not be what Civil Code article 1819 refers to as a "matter understood." To enforce such a clause often is seen in UCC states as "unfair surprise," an outcome that unconscionability is designed to prevent. In fact, unconscionability has been applied in several cases to deny en-

344. 377 So. 2d 92 (La. 1979).

345. *See* Plan Invs., Inc. v. Heflin, 286 So. 2d 511 (La. App. 2d Cir. 1973).

346. 377 So. 2d at 96.

347. Actually, a mere reading of Civil Code article 2474 seems authority enough for the proposition that waiver of implied warranty language in fine print will not of itself be effective. It will not be a clear explanation by the seller; rather, it will be an obscure one to be construed against him. Several Louisiana cases made meaningful mention of the fact of fine print waiver language. *See, e.g.*, Kodel Radio Corp. v. Shuler, 171 La. 469, 473, 131 So. 462, 463 (1930) ("It is too trite a proposition to need citation of authority that a stipulation printed in small type . . ., and not . . . brought to the attention of the other party, has no effect against him."); Lyons Milling Co. v. Cusimano, 161 La. 198, 205, 108 So. 414, 416 (1926) ("The paragraph, in the letter of confirmation, declaring that there were no conditions, representations, or warranties, . . . was printed in very small type and was not likely to be read."). *See also* Guillory v. Morein Motor Co., 322 So. 2d 375 (La. App. 3d Cir. 1975); Lee v. Blanchard, 264 So. 2d 364 (La. App. 1st Cir. 1972).

The principle that fine print not brought to the consumer's attention has no effect against him applies not only to a sale but also to any contract in writing. Civil Code article 1958 has been interpreted to require that "[w]here a layman contracts with a knowledgeable and experienced businessman, the burden is on the latter to point out obscurity." Larriviere v. Roy Young, Inc., 333 So. 2d 254, 255 (La. App. 3d Cir. 1976). *See also* Leithman v. Dolphin Swimming Pool Co., 252 So. 2d 557 (La. App. 4th Cir.), *writ denied*, 259 La. 1055, 254 So. 2d 464 (1971).

The *Henningsen* opinion itself casts doubt on the viability of fine print as sufficiently directing the buyer's attention to the warranty waiver language on the reverse side of the document: "[A] jury might well find that the type of print itself was such as to promote lack of attention rather than sharp scrutiny." 32 N.J. at 399, 161 A.2d at 92.

forcement of such obscure clauses. *Unico v. Owen*,[348] *Dean v. Universal C.I.T. Credit Corp.*,[349] *Architectural Cabinets, Inc. v. Gaster*,[350] *Bogatz v. Case Catering Corp.*,[351] and *Seabrook v. Commuter Housing Co.*[352] are examples. Fine print and "buried" clauses, in fact, are elements in many of the sixty-five unconscionability cases,[353] and in several cases, the consent of the consumer to the clause is expressly doubted by the court.[354] Unconscionability, however, is seemingly the remedy of choice in the UCC jurisdictions for the prevention of the unfair surprise that would result from enforcement of such "buried" clauses as forfeiture of downpayment, confession of judgment, and waiver of claims and defenses.

The "presumed to have read it" principle was applied reluctantly by the intermediate appeals court in *Williams v. Walker-Thomas Furniture Co.*,[355] permitting the operation of a payment prorating clause that was located in "extremely fine print." Had the clause been one of waiver of implied warranties, it clearly would have been ineffective in Louisiana, even if unambiguous.[356] The same conclusion also is warranted because the consumer's attention to the clause (which pertained to the seller's obligation as to title) was not directed by either the seller or the contract itself. Thus, the clause itself would be "obscure" under Civil Code articles 1958 and 2474 and unexplained in any event under article 2474.

Neither the contract itself nor any efforts of the supplier directed the consumer's attention to or emphasized the importance of the key fine print clause buried in the body of the contract in *Bogatz, Seabrook, Dean, Architectural,* and *Unico.* Civil Code article 2474 would apply

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348. 50 N.J. 101, 232 A.2d 405 (1967) (a UCC § 2-302 "prior application" case involving a "waiver of claims and defenses" clause; the clause was the fifth of eleven fine-print paragraphs).

349. 114 N.J. Super. 132, 275 A.2d 154 (App. Div. 1971) (waiver of claims and defenses clause).

350. 291 A.2d 298 (Del. Super. Ct. 1971).

351. 86 Misc. 2d 1052, 383 N.Y.S.2d 535 (Civ. Ct. 1976).

352. 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972), *aff'd per curiam on other grounds*, 79 Misc. 2d 168, 363 N.Y.S.2d 566 (App. Term. 1973).

353. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); New Prague Flouring Mill Co. v. Spears, 194 Iowa 417, 189 N.W. 815 (1922); Chrysler Corp. v. Wilson Plumbing Co., 132 Ga. App. 435, 208 S.E.2d 321 (1974); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

354. *See* Architectural Cabinets, Inc. v. Gaster, 291 A.2d 298, 301 (Del. Super. Ct. 1971); Unico v. Owen, 50 N.J. 101, 123, 232 A.2d 405, 417 (1967); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

355. 198 A.2d 914 (D.C. 1964), *rev'd on other grounds*, 350 F.2d 445 (D.C. Cir. 1965).

356. Anderson v. Bohn Ford, Inc., 291 So. 2d 786 (La. App. 4th Cir. 1973), *writ denied*, 294 So. 2d 829 (La. 1974). The clause in *Williams* was not, in fact, free of ambiguity, but was rather esoteric. See text at notes 58, 64, 132, 330-334, *supra*.

to *Dean, Architectural,* and *Unico,* as would article 1958, to deny enforceability of the obscured clause, while article 1958 would similarly apply to *Bogatz* and *Seabrook.*

An analysis under Civil Code articles 1958 and 2474 also resolves various other unconscionability cases. In *New Prague Flouring Mill Co. v. Spears,*[357] the Iowa court refused to enforce certain fine print provisions not discussed or called to the buyer's attention and not read to him or readable by him because of poor eyesight. One doubts that a single sheet of paper measuring but five inches in width by eight inches in length and containing four thousand words,[358] in any event could be considered "clear," "unambiguous," and "unobscure" to an uncounseled layman. The same can be said of the lease contract in *Seabrook,* which contained fifty-four clauses and ten thousand words. The very format creates obscurity.

Insurance policies are renown for fine print clauses and adhesionary terms. Hence it is mildly surprising that unconscionability has been applied (by analogy) in so few insurance policy cases. The insured in *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*[359] purchased a policy to protect its property from burglary and robbery. The policy listed various occurrences not covered, but the insured's attention was not drawn to, nor any explanation made of the importance of, the policy's fine print definition of "burglary." That definition turned out to be an exclusion: The policy only covered burglaries in which the exterior of the premises bore visible marks of force and violence. A divided Iowa Supreme Court held the definition unconscionable and permitted the insured to recover for a burglary that, while producing visible marks of force on an interior door, had not left the required visible marks on the exterior.[360] The Louisiana Supreme Court is not so likely to be divided on the issue, for the insurer, like the seller, is obligated by Civil Code article 1958 (and, by analogy, article 2474) to explain himself clearly concerning that which is covered by the policy and that which is not. Technically, there was no patent ambiguity in the *C & J* definition, but Louisiana courts have held that if there is a commonly accepted meaning of a term such as "burglary" and that meaning is not what the insurance company, in its policy definition, has in mind, an ambiguity has been created if the uncommon meaning is not explained.[361]

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357. 194 Iowa 417, 189 N.W. 815 (1922). *See* Annot., 86 A.L.R.3d 862 (1978).

358. 194 Iowa at 429, 189 N.W. at 820.

359. 227 N.W.2d 169 (Iowa 1975). *See generally* Annot., 86 A.L.R.3d 862 (1978).

360. The majority opinion relied on New Prague Flouring Mill Co. v. Spears, 194 Iowa 417, 189 N.W. 815 (1922) (the court's own prior decision and a UCC § 2-302 "illustrative results" case).

361. *See, e.g.,* Jennings v. Louisiana & S. Life Ins. Co., 290 So. 2d 811 (La. 1974);

Louisiana courts also have subscribed to the "dominant intent" idea, by which the insured is permitted to recover, even though the claim is clearly excluded by the policy, where the circumstances of the claim do not defeat the intent of the exclusion. Thus, in *C & J*, the intent of the definition of burglary was to protect the insurer against the "inside" job. The Iowa court obviously believed that an outside party had burglarized the premises despite the absence of external visible signs. The result would be the same in Louisiana.[362]

Two similar cases, *Johnson v. Mobile Oil Corp.*[363] and *Weaver v. American Oil Co.*,[364] held unconscionable clauses in dealer leases that were highly protective of the lessor oil company. In *Weaver*, the oil company's contract with the lessee stipulated in fine print that the lessee would indemnify and hold the company harmless against all claims, including those pertaining to the negligence of the *company*'s agents or employees. The clause was not explained to the lessee "in a manner from which he could grasp [its] legal significance,"[365] and the lessee's attention was not directed to it. The company asserted the clause when its own employee negligently sprayed gasoline on the *lessee*, causing injury to him. The contract in *Johnson* stipulated, presumably in fine print, that "in no event shall [the company] be liable for prospective profits or special, indirect or consequential damages." This clause, which had neither been pointed out to the plaintiff nor explained to him, was invoked by the company when the service station operated by the plaintiff was destroyed by a fire caused by the company's delivery of gasoline containing water. The clause was held unconscionable in both cases.

Although the offending clause in both *Johnson* and *Weaver* was free of ambiguity and part of a purely commercial transaction, there is reason to believe that the results of the two cases would be the same in Louisiana. When the Louisiana Supreme Court recognized in *Louisiana National Leasing Corp. v. ADF Service, Inc.* that, while "[s]afeguards protecting consumers must be more stringent than those protecting businessmen competing in the marketplace. . . ., [i]t must

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Schonberg v. New York Life Ins. Co., 235, La. 461, 104 So. 2d 171 (1958); Garrell v. Good Citizens Mut. Benefit Ass'n, 204 La. 871, 16 So. 2d 463 (1943); Succession of Cormier, 80 So. 2d 571 (La. App. 1st Cir. 1955); *cf.* Gautreau v. Southern Farm Bureau Cas. Ins. Co., 410 So. 2d 815 (La. App. 3d Cir. 1982) (option to renew an insurance policy).

362. *See, e.g.*, Powell v. Liberty Indus. Life Ins. Co., 197 La. 894, 2 So. 2d 638 (1941); Lewis v. Liberty Indus. Life Ins. Co., 185 La. 589, 170 So. 4 (1936); *cf.* Hemel. v. State Farm Mut. Auto. Ins. Co., 211 La. 95, 29 So. 2d 483 (1947) (definition of "mechanical breakdown"); Muse v. Metropolitan Life Ins. Co., 193 La. 605, 192 So. 72 (1939) (definition of "loss of hand").

363. 415 F. Supp. 264 (E.D. Mich. 1976).

364. 257 Ind. 458, 276 N.E.2d 144 (1971).

365. 257 Ind. at 461, 276 N.E.2d at 146.

be presumed that persons engaged in business . . . were aware of the contents of the . . . agreement which they signed,"[366] the court did not necessarily mean to draw a sharp distinction between personal, family, or household motives and commercial or profit motives. In the 1972 decision of *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*,[367] for example, the court stated that Louisiana had aligned itself with the "consumer-protection rule, by allowing a consumer without privity to recover,"[368] yet the case involved a purchase by a profit-motivated corporation. Of greater significance is the fact that in both *Johnson* and *Weaver* the service station operator was educationally disadvantaged[369] and was given no explanation of the clause in question. The courts in Louisiana historically have been inclined to protect such contractants, even in commercial settings.[370]

Under Civil Code article 2474, the oil company lessor-seller in *Johnson* would have been required to explain clearly the extent of its own obligations, and this duty to explain would apply to the company's obligations and responsibility for the consequences of its own fault.[371] Thus, *Johnson* would fall within Civil Code article 2474 and *Thibodeaux*; in fact, *Johnson* and *Thibodeaux* are quite similar philosophically.[372] The contract in *Weaver* was not nominally a sale,

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366. 377 So. 2d at 96.

367. 262 La. 80, 262 So. 2d 377 (1972).

368. 262 La. at 90, 262 So. 2d at 381.

369. The plaintiff in *Johnson* had dropped out of school in the eighth grade and was "practically illiterate." 415 F. Supp. at 268. The *Weaver* plaintiff was a high school dropout with no particular business experience. *Cf.* Price v. Amoco Oil Co., 524 F. Supp. 364 (S.D. Ind. 1981) (upholding, as against a sophisticated lessee, an indemnity clause quite similar to those in *Johnson* and *Weaver*).

370. Smith v. Everett, 291 So. 2d 835 (La. App. 4th Cir. 1974) and George A. Broas Co. v. Hibernia Homestead & Sav. Ass'n, 134 So. 2d 356 (La. App. 4th Cir. 1961), are part of the line of cases that follow the "inference of fraud" idea traceable to Succession of Molaison, 213 La. 378, 34 So. 2d 897 (1948), in which the Louisiana Supreme Court said, "[I]t is the duty of the courts to carefully and painstakingly investigate transactions between a person of limited mental capacity and one experienced in business affairs, in order that substantial justice might be meted out," 213 La. at 398, 34 So. 2d at 903. Yet *Smith* and *Broas* involved "consumers" in a profit-motivated transaction. See text at notes 106-137, *supra*.

371. The duties imposed on the seller by the Civil Code govern and give meaning to the broader issue of his responsibility for the consequences of his fault under Civil Code article 2315. Phillipe v. Browning Arms Co., 395 So. 2d 370 (La. 1980).

372. *Thibodeaux*, discussed in text at notes 255-273, *supra*, held a disclaimer of implied warranty ineffective because it was both ambiguous and unexplained. The language, said the Louisiana court of appeal, was "couched in legal terms, and not in terms which may be read and understood by the average layman." 364 So. 2d at 1371. By comparison, the federal district court in *Johnson* could have been applying Civil Code article 2474 when it observed the following:

but both Civil Code article 2474 and the *Molaison* requirement[373] would apply to the case by analogy,[374] so that the lessor's failure to explain its fine print clause would result in nonenforcement of the clause in Louisiana.

The strong message of *Johnson* and *Weaver* is that parties disadvantaged as to experience, education, or sophistication do not necessarily consent to the terms of a contract when the terms are decidedly favorable to the other party, but this imbalance can be cured by a good faith disclosure or the presence of competent bargaining assistance, as by a lawyer. This is also the implicit message of the *Molaison-Carter* line of Louisiana cases.[375] If legal or otherwise competent assistance had been available to the disadvantaged party in the *Molaison-Carter* cases, it is clear that the decision in each such case either could have been against this party,[376] or (and more likely) the factual pattern would not have been as it was in the first instance.

In the case of the illiterate or educationally disadvantaged consumer, pointing out a clause is meaningless. Only an explanation of

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> [B]efore a contracting party with the immense bargaining power of the Mobil Oil Corporation may limit its liability vis-a-vis an uncounseled layman, . . . it has an affirmative duty to obtain voluntary, knowing assent of the other party. This could easily have been done in this case by explaining to plaintiff in laymen's terms the meaning and possible consequences of the disputed clause.

415 F. Supp. at 269. The court then added that which is implicit in Civil Code article 1819's language that consent results from a free and deliberate exercise of the will with regard to a matter understood:

> Such a requirement [of explanation by the superior party] does not detract from the freedom to contract, unless that phrase denotes the freedom to impose the onerous terms of one's carefully-drawn printed document on an unsuspecting contractual partner. Rather, freedom to contract is enhanced by a requirement that both parties be aware of the burdens they are assuming. The notion of free will has little meaning as applied to one who is ignorant of the consequences of his acts.

415 F. Supp at 269.

373. See note 370, *supra.*

374. The principle of Civil Code article 2474 was applied by analogy to a lease in Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92 (La. 1979). *See also* Riverside Realty Co. v. National Food Stores, Inc., 174 So. 2d 229 (La. App. 4th Cir. 1965). The *Weaver* decision is also quite compatible with Civil Code articles 1819 and 2474: "The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and *came to his knowledge* and there was in fact *a real and voluntary meeting of the minds and not merely an objective meeting.*" 257 Ind. at 464, 276 N.E.2d at 148 (emphasis in original).

375. See text at notes 106-137, *supra.* The supreme court took note in *Molaison* that the legatee did not have the assistance of counsel in signing the renunciation, but this element is implicit in almost all consumer transactions.

376. *See* Louisiana Power & Light Co. v. Mecom, 357 So. 2d 596 (La. App. 1st Cir. 1978).

the clause will suffice, and then only the clearest explanation will do.[377] Where the consumer is not conversant in the English language, it arguably must be shown that an interpreter explained the import of the waiver or other language. No such explanation of the payment schedule was given in the unconscionability case of *Brooklyn Union Gas Co. v. Jimeniz*,[378] despite the request of the Spanish-speaking buyer for an explanation; thus, his misunderstanding of the payment schedule and his resulting default could not avail the seller in Louisiana.[379] The Spanish-speaking buyer in *Frostifresh Corp. v. Reynoso*[380] dealt with a Spanish-speaking salesman, but not only did he fail to get an explanation of the contract he signed, his consent was obtained through fraud.[381]

Not all "buried" clauses are in fine print. In *Baker v. City of Seattle*,[382] language disclaiming liability for personal injuries caused by the use of a leased golf cart comprised the seventh and eighth sentences of the eleven sentences in the one-paragraph contract form. All eleven sentences were the same size, and no paragraph heading indicated the significance of the disclaiming sentences contained in the paragraph. The lessee was injured when the golf cart overturned as a result of a brake failure. The disclaimer was ruled unconscionable.

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377. Anderson v. Bohn Ford, Inc., 291 So. 2d 786 (La. App. 4th Cir.), *writ denied*, 294 So. 2d 829 (La. 1974) (clear language of waiver not pointed out or explained); Thibodeaux v. Meaux's Auto. Sales, Inc., 364 So. 2d 1370 (La. App. 3d Cir. 1978) (ambiguous language not brought to buyer's attention or explained to him).

378. 82 Misc. 2d 948, 371 N.Y.S.2d 289 (Civ. Ct. 1975).

379. *Cf.* Succession of Molaison, 213 La. 378, 34 So. 2d (1948) (renunciation of legacy); Succession of Gilmore, 157 La. 130, 102 So. 94 (1924) (setting aside a probated will); Smith v. Everett, 291 So. 2d 835 (La. App. 4th Cir. 1974) (sale of land). In Murphy v. McNamara, 36 Conn. Supp. 183, 416 A.2d 170 (Super. Ct. 1979), the court twice notes, in the course of holding the price to be unconscionable, that the seller did not advise the buyer of the total amount required to be paid in order to "own" the thing sold. The agreement, however, did provide for weekly payments of $16 which, if paid for 78 successive weeks, would make the buyer the owner of the thing. The failure of the seller in *Murphy* was to point out just what 78 times $16 totalled, which arguably a seller should do in order to avoid, not an ambiguity, but an *obscurity* within the meaning of Civil Code article 1958. Certainly, such would be required where the buyer is educationally disadvantaged.

Another of the unconscionability cases, American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 291 A.2d 886 (1964) (discussed in text at note 116, *supra*), is quite similar to *McNamara*. The homeowner in *MacIver* was not given an explanation of the cost of credit, but that cost could have been determined by him by merely multiplying the disclosed monthly payments by the total number of payments and deducting the contract cash price.

380. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term. 1967).

381. See text at notes 119-120, *supra*.

382. 79 Wash. 2d 198, 484 P.2d 405 (1971).

In Louisiana a lessor is bound to deliver a thing that is safe,[383] but Civil Code articles 11 and 1764(2) presumably permit this implied obligation to be renounced by the lessee. The language of waiver, however, has to be unambiguous and brought to the lessee's attention or explained to him.[384] Since there was no suggestion in *Baker* that the lessor directed the lessee's attention to the seventh and eighth sentences, the waiver would be effective in Louisiana only if the contract itself directed attention to those sentences. It did not, and the waiver would fail in Louisiana. Although not involving personal injuries, the decision in *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*[385] is similar to *Baker* in that the clause limiting consequential damages was not conspicuous and the seller's form did not draw the buyer's attention to it and the seller did not explain it.[386]

Clauses or Contracts that Lead to an Absurdity

When, in 1967, the Supreme Court of New Jersey had before it, in *Ellsworth Dobbs, Inc. v. Johnson*,[387] a real estate broker's agreement containing language traditionally viewed as meaning that the broker's commission was to be deemed earned upon acceptance of a purchase offer, the case could have been decided expeditiously by affirming the decision of the appellate division that the commission clause was ambiguous and, therefore, was to be construed favorably to the real estate seller.[388] But as it did in *Unico v. Owen*[389] that same year and seven years earlier in *Henningsen v. Bloomfield Motors, Inc.*, the New Jersey court eschewed the ground of ambiguity[390] and took the opportunity to hand down a new and broad policy for the state. Important to the court was the reasonable expectation of the seller that the broker's commission would be paid only out of the proceeds of the sale. In effect, the court wrote that expectation into all such contracts in New Jersey,[391] thereby casting on the broker the risk,

383. LA. CIV. CODE arts. 2692-2695.

384. Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92 (La. 1979); Tassin v. Slidell Mini-Storage, Inc., 388 So. 2d 67 (La. App. 1st Cir. 1980), *rev'd on other grounds*, 396 So. 2d 1261 (La. 1981).

385. 86 Ill. App. 3d 980, 408 N.E.2d 403 (1980) (see note 312, *supra.*)

386. 86 Ill. App. 3d at 983, 991, 408 N.E.2d at 405, 411.

387. 50 N.J. 528, 236 A.2d 834 (1967).

388. 50 N.J. at 556, 236 A.2d at 858. See text at notes 335-336, *supra.*

389. 50 N.J. 101, 232 A.2d 405 (1967).

390. 32 N.J. 358, 161 A.2d 69 (1960). See text at notes 274-282, *supra.* The disclaimer language of *Henningsen* was not clear and free of ambiguity, 32 N.J. at 399-401, 407-08, 161 A.2d at 92-93, 96-97, and the waiver of defenses clause in *Unico* was the fifth of eleven fine print paragraphs and was not brought to the buyer's attention or explained to him despite the use therein of legalistic language, 50 N.J. at 123, 232 A.2d at 417.

391. 50 N.J. at 547, 555-56, 236 A.2d at 852, 857.

previously borne by the seller, of the financial inability of the buyer to perform. This risk was to be treated as a normal incident of the broker's business. The related issue, of course, was whether the broker could shift that risk back to the seller by appropriate contract language. The court left no doubt that such a contractual stipulation would be unconscionable.[392]

It might be assumed that UCC section 2-302 had a significant influence on the *Ellsworth Dobbs* case. This assumption is not necessarily incorrect, but, in fact, the decision cites, as a primary authority, the 1948 Louisiana case of *McKelvy v. Milford.*[393] In truth, the rule announced in 1967 in *Ellsworth Dobbs* is traceable through *McKelvy* to the 1842 decision of the Louisiana Supreme Court in *Didion v. Duralde*:[394] "[T]he record shows that the sale of the land was never effected, and . . . the judge below . . . correctly concluded, that no brokerage is due in the case of a sale until it is actually effected."

Left open by the *Didion* decision was the same issue as that presented in *Ellsworth Dobbs*: the effect of an express stipulation to the contrary in the broker's contract, i.e., a stipulation that the broker's commission *was* to be deemed earned upon acceptance of a purchase offer. Although the tenor of the *Didion* opinion reasonably could lead to the conclusion that such a stipulation would not have altered the outcome, the matter was laid to rest in *McKelvy* (which

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392. In the words of the court:

> Grossly unfair contractual obligations resulting from the use of . . . expertise or control by the one possessing it, which result in assumption by the other contracting party of a burden which is at odds with the common understanding of the ordinary and untrained member of the public, are considered unconscionable and therefore unenforceable.
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> . . . .
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> . . . Whenever there is substantial inequality of bargaining power, position or advantage between the broker and the other party involved, any form of agreement designed to create liability on the part of the owner for commission upon the signing of a contract to sell to a prospective buyer, brought forward by the broker, even though consummation of the sale is frustrated by the inability or the unwillingness of the buyer to pay the purchase money and close the title, we regard as so contrary to the common understanding of men, and also so contrary to common fairness, as to require a court to condemn it as unconscionable.
>
> . . .[W]henever the substantial inequality of bargaining power, position or advantage to which we have adverted appears, a provision to the contrary in an agreement prepared or presented or negotiated or procured by the broker shall be deemed inconsistent with public policy and unenforceable.

50 N.J. at 554-56, 236 A.2d at 856-58 (citations omitted).

393. 37 So. 2d 370 (La. App. 2d Cir. 1948).

394. 2 Rob. 163, 165 (La. 1842). *Cf.* Blanc v. New Orleans Improv. & Banking Co., 2 Rob. 63 (La. 1842) (loan brokerage commission).

involved a clear and unambiguous agreement that the "broker's commission . . . is earned upon the signing . . . by both parties" of an agreement to purchase) by this terse statement: "The quoted excerpt from the agreement is *unconscionable*."[395]

In fact, the Louisiana Supreme Court on at least two occasions between 1842 and 1948 has explained in Civil Code theory why such a clear and unambiguous clause is nevertheless invalid and unenforceable. In 1930, it was held in *Eastbank Land Co. v. Hoffstetter*, as to an allegation that the commission was earned and payable when the offer to purchase was signed by the plaintiff and accepted by the defendant:

> No such obligation was incurred by the defendant or contemplated by the parties at the time the offer was made and accepted.
>
> The commission could only be earned and [become] due when the offerer obtained a person ready, willing, and able to buy on the terms stated in the offer, and this . . . was never done.
>
> It would be strange indeed to say that the defendant owed the plaintiff a commission for making the offer to purchase.[396]

Two years later, the court had before it, in *Boisseau v. Vallon & Jordano, Inc.*,[397] a clear stipulation that the owner was to pay the commission upon the acceptance of an offer to buy.[398] The dissertation of the Louisiana Supreme Court, premised on civilian theory, said what the New Jersey Supreme Court in *Ellsworth Dobbs* was to say in the jargon of unconscionability thirty-five years later:

> Counsel for Vallon & Jordano . . . say that contracts not prohibited by law constitute the law between the parties and are enforceable against them, even though they were unwise in making the agreements, and that "courts do not sit to relieve persons of the results of their bad judgment."
>
> That is true enough, but courts do sit to interpret instruments evidencing obligations . . . .

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395. 37 So. 2d at 371 (emphasis added). In the absence of a contractual stipulation covering the issue, knowledge by the broker that the homeowner can only pay the commission from the proceeds of the sale probably would bring the case within Civil Code article 1897 as a contract "without cause." *See* First Progressive Bank v. Costanza, 427 So. 2d 594 (La. App. 5th Cir. 1983).

396. 170 La. 594, 597, 128 So. 527, 528 (1930).

397. 174 La. 492, 141 So. 38 (1932).

398. The contract, in fact, required the commission to be paid even in the event the contract of sale was declared null and void because of a title defect or for any other reason. 174 La. at 497, 141 So. at 40.

> When courts are called upon to interpret written instruments purporting to evidence obligations, if any doubt arises, they look beyond the mere wording of the instrument itself and endeavor to ascertain what was the true intent of the parties, for it is the intent of the parties which determines whether an obligation was assumed.[399]

The interpretation of agreements is treated in articles 1945 to 1962 of the Louisiana Civil Code, in which certain general principles are stated. Of significance in *Boisseau* were articles 1945, 1946, and 1950. Article 1950 requires that "[w]hen there is anything doubtful in agreements," the court is to "endeavor to ascertain what was the common intention of the parties, rather than to adhere to the literal sense of the terms," and by article 1946 the words of a contract "are to be understood . . . in the common and usual signification, without attending so much to grammatical rules, as to general and popular use." Under article 1945, the courts are bound to give legal effect to a contract according to "the true intent" of the parties, determined by the words of the contract, "when these are clear and explicit and lead to no absurd consequences." Applying these rules to the case, the Louisiana Supreme Court held that the seller was not bound to pay the commission:

> The words of this instrument are "clear and explicit" that he was to pay these commissions . . . . But we cannot give effect to these provisions when to do so would lead to an "absurd consequence."
>
> . . . .
>
> . . . No sane man would obligate himself to pay a real estate agent a commission for the bare privilege of listing his property for sale or exchange. . . . Yet that is what this contract, according to the agent's view, means. . . .
>
> The contract seems to have been written mainly in the interest of the real estate agent. Its provisions for the payment of the agent's commission are snares and traps to catch the unwary, and are so drastic, harsh, and out of accord with those usually found in such instruments that no court of justice will enforce them in the absence of proof positive that those who signed the instruments understood and intended to be bound by them.[400]

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399. 174. La. at 498-99, 141 So. at 40.

400. 174 La. at 500-02, 141 So. at 40-41. In general, the vendor will not be responsible for a commission in the event the transaction is not consummated, unless he is at fault, *e.g.*, by failing to convey title or by failing to present a marketable title. *See* Walker v. Moore, 68 So. 2d 222 (La. App. 2d Cir. 1953); *cf.* Deano, Inc. v. Michel,

To the Louisiana Supreme Court, there did arise a doubt as to the owner's intent and, therefore, as to the common intention of the parties within the meaning of article 1950, since the provision for commission was, in the literal sense of the terms, so out of accord with the ordinary homeowner's expectations as to be absurd. This being so, the court refused to enforce the literal sense of the terms in the absence of "proof positive" that the owner had understood them and truly intended to be bound by them.

The intriguing aspect of *Boisseau* lies not so much in its relationship to the landmark New Jersey decision thirty-five years later in *Ellsworth Dobbs*,[401] but in the similarity of approach of the two decisions. *Boisseau* reasoned that since "no sane man" would have signed such an absurd contract, the burden was heavy on the broker to prove a knowing and intentional consent, a task one may as well say is impossible. *Ellsworth Dobbs* warns that a clause contrary to its ruling would be unenforceable as an "unconscionable" clause, a term often defined as "one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other."[402]

In addition to the *Boisseau, Hoffstetter*, and *McKelvy* broker commission cases, *Blum v. Marrero*[403] and *Chrysler Credit Corp v. Henry*[404] are examples of the clear stipulation that leads to "an absurd consequence" under Civil Code article 1945. In *Blum*, a pest control company inspected a house for termite damage for the benefit of a prospective purchaser of the house, but it apparently failed to discover significant beetle damage. The pest control company defended on the basis that it had specifically contracted only to conduct a "termite inspection" and had performed that obligation. The Louisiana court was not impressed:

> The pest control company could not reasonably suppose that [a consumer] was unwilling to pay a contracted price for a house with damage from sub-terranean termites, but was willing to pay the same price for the same house with the same damage but from beetles (or another kind of termite). [I]t would make no sense (it would be an "absurd consequence" within C.C. art. 1945(3)) to

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191 La. 233, 185 So. 9 (1938) (lack of marketable title not the fault of vendor). Of course, where the prospective buyer defaults, *Boisseau* controls, but the broker may have an action against the buyer for his commission. *See* Probst v. Di Giovanni, 232 La. 811, 95 So. 2d 321 (1957) and cases cited therein.

401. The New Jersey Supreme Court's opinion does cite *Boisseau*. 50 N.J. at 550, 236 A.2d at 854.

402. Toker v. Westerman, 113 N.J. Super. 452, 454, 274 A.2d 78, 80 (1970).

403. 346 So. 2d 356 (La. App. 4th Cir.), *cert denied*, 349 So. 2d 872 (La. 1977).

404. 221 So. 2d 529 (La. App. 4th Cir. 1969).

> so construe a pest control company's contract for a "termite inspection" . . . .[405]

By the unambiguous contract language in *Chrysler Credit Corp. v. Henry*,[406] a seventy-year old woman with cataracts on both of her eyes purchased an automobile and was the proper party defendant in an action for the price. From this factual setting, the Louisiana court inferred fraud and, accordingly, denied enforcement of the contract, but the "absurd consequences" rationale was clearly an alternative available to the court.[407]

The following thirteen unconscionability cases are susceptible to the "absurd consequences" rational of Civil Code article 1945: *Ashland Oil, Inc. v. Donahue*,[408] *Dean v. Universal C.I.T. Credit Corp.*,[409] *Green v. Arcos, Ltd.*,[410] *New Prague Flouring Mill Co. v. Spears*,[411] *Seabrook v. Commuter Housing Co.*,[412] *Trinkle v. Schumacher Co.*,[413] *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*,[414] *United States Leasing Corp. v. Franklin Plaza Apts., Inc.*,[415] *Weaver v. American Oil Co.*,[416] *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*,[417] *Majors v. Kalo Laboratories, Inc.*,[418] *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*,[419] *Pittsfield Weaving Co. v. Grove Textiles, Inc.*,[420] and *Williams v. Walker-Thomas Furniture Co.*[421] Characterizing the contract language as leading to absurd consequences only would arise in *Majors, Weber, C & J*, and *Williams* in the unlikely event that the

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405. 346 So. 2d at 357. The alternative rationale for *Blum* is the application of Civil Code article 1958 to the ambiguous meaning of "termite inspection."

406. 221 So. 2d 529 (La. App. 4th Cir. 1969).

407. In the court's words, "It taxes our credulity to believe that a seventy year old woman in her physical and economic condition would . . . proceed on her own to buy a new automobile for slightly less than $3,600.00." 221 So. 2d at 533. *Cf.* Dennis Miller Pest Control, Inc. v. Denney Miller, Jr. Pest Controls, Inc., 379 So. 2d 801 (La. App. 4th Cir.), *cert. denied*, 383 So. 2d 25 (La. 1980) (contract required buyer to obtain financing, within 30 days, of $50,000 payable over a 30-year period—a virtual impossibility).

408. 223 S.E.2d 433 (W. Va. 1976), *aff'd*, 264 S.E.2d 466 (W. Va. 1980).

409. 114 N.J. Super. 132, 275 A.2d 154 (App. Div. 1971).

410. 47 T.L.R. 336 (C.A. 1931).

411. 194 Iowa 417, 189 N.W. 815 (1922).

412. 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972), *aff'd per curiam on other grounds*, 79 Misc. 2d 168, 363 N.Y.S.2d 566 (App. Term. 1973).

413. 100 Wisc. 2d 13, 301 N.W.2d 255 (Ct. App. 1980).

414. 86 Ill. App. 3d 980, 408 N.E.2d 403 (1980).

415. 65 Misc. 2d 1082, 319 N.Y.S.2d 531 (Civ. Ct. 1971).

416. 257 Ind. 458, 276 N.E.2d 144 (1971).

417. 227 N.W.2d 169 (Iowa 1975).

418. 407 F. Supp. 20 (M.D. Ala. 1975).

419. 93 Utah 414, 73 P.2d 1272 (1937).

420. 121 N.H. 344, 430 A.2d 638 (N.H. 1981).

421. 350 F.2d 445 (D.C. Cir. 1965).

previously discussed issues of ambiguity, obscurity, and the duty to explain were resolved favorably to the supplier in each case. Unambiguous language in fine print or "buried" within the contract is present in *New Prague, Seabrook, Dean,* and *Weaver* and could be an alternative ground of nonenforcement, as has been previously discussed.

It is absurd to believe that a farmer would purchase seed, costing him $90 to $100 per acre to harvest, pursuant to a clause by which he knowingly and voluntarily waived his right not only to recover lost profits but that $90 to $100 per acre expense as well in the event the seed was defective or not as represented (*Majors*). It is likewise absurd to contend that a head-of-household welfare mother would make payments for years in the knowledge that not one of the many items purchased over the years was or would be "hers" so long as there was an outstanding balance owed (*Williams*). Clauses which ostensibly require the buyer to promptly make claims for defects that are latent and not susceptible of prompt discovery (*Weber*) or to make, prior to processing, claims based on defects discoverable only during or after processing (*Trinkle* and *Pittsfield*) or that require the buyer to accept not only defective goods, but goods that do not meet the contract description (*Green*) lead to "absurd consequences" and will not be enforced according to the literal sense of the terms.[422]

A clause in *New Prague* was held "manifestly unreasonable"[423] in literally permitting the seller to deliver the wrong thing and thereafter treat the buyer's repudiation of the contract and his subsequent failure to give further shipping instructions as merely a request for an extension of time for performance. Likewise, can a court rationally be expected to believe that an under-educated service station lessee knowingly and freely consented to indemnify American Oil Company, an indemnification that could well reach into the millions of dollars and that could result from the sole fault of the oil company itself (*Weaver*)?[424] Is it not slightly more reasonable for a corporation to seek indemnity for the inevitable liability it faces from an insurance company? And if that lessee signed a contract with the oil company by which he could only terminate the lease on notice of nonrenewal sixty

422. *See* Losecco v. Gregory, 108 La. 648, 32 So. 985 (1901) ("purchaser assumes all risks" language did not contemplate the risk that seller's orchard would be totally destroyed by frost); *cf.* Elephant, Inc. v. Hartford Acc. & Indem. Co., 239 So. 2d 692 (La. App. 1st Cir. 1970) (to interpret the language "[we] shall hold Dr. Robert Cane harmless from any liability" as not including liability from negligence would be absurd since such, in effect, would mean "hold harmless from nothing at all"; this would not have been the intention of either party).

423. 194 Iowa at 433, 189 N.W. at 821.

424. *Cf.* Elephant, Inc. v. Hartford Acc. & Indemn. Co., 239 So. 2d 692 (La. App. 1st Cir. 1970) (interpretation argued for by plaintiff would have rendered the hold harmless clause meaningless).

days prior to the termination date, but the oil company could terminate the lease at will, wiping out his investment of time and money, is it not absurd to believe his consent was truly knowledgeable and freely given (*Ashland Oil*)?[425]

Dean, C & J, Seabrook, and *U.S. Leasing* likewise reveal absurdities. The offending clause in *Dean*, if taken literally, would have permitted the repossessing creditor to convert any property of the buyer left in the vehicle,[426] including, one assumes, the bank passbook needed by the buyer to withdraw his life's savings or the receipt that proves conclusively that his car loan payments, in fact, are not in default. The definition in *C & J* of "burglary" made coverage under the policy depend on the relative skill or ineptitude of the burglar. The contract in *U.S. Leasing* purportedly obligated the lessee to pay all three years of the lease payments despite the total uselessness of the thing leased, which was caused by the failure of the third-party supplier to deliver an indispensible component part.[427]

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425. *Cf.* Gautreau v. Southern Farm Bureau Cas. Ins. Co., 410 So. 2d 815 (La. App. 3d Cir.), *cert. granted*, 414 So. 2d 392 (La. 1982) (insurance renewal clause). *But cf.* Louisiana Power & Light Co. v. Mecom, 357 So. 2d 596 (La. App. 1st Cir. 1978) (commercial utilities customer bound by contract requirement that unless notice of termination be given prior to September 15, 1972, the contract would be extended through December 15, 1977).

426. Such a clause might be construed in Louisiana as an invalid security device. *See* Hibernia Nat'l Bank v. Lee, 344 So. 2d 16 (La. App. 4th Cir. 1977) (Redmann, J., dissenting).

427. The thing leased was an "addresser-printer," which was delivered, but the embossed plates bearing the names of the lessee's tenants was not delivered. Without the plates, the thing was of no use to the lessee. Under the lease, all "claims" were required to be asserted against the third party supplier, and the lessee was obligated to make the lease payments even in the event such a claim was asserted.

An issue similar to that in *U.S. Leasing* arose in Bancshares Leasing Corp. v. Cabral, 399 So. 2d 220 (La. App. 4th Cir. 1981), but there the contract did provide expressly that the purchaser-lessor and/or the lessee could enforce all warranties in "its own name." The opinion suggests, however, that the lessee could avoid payment in any event by showing that the lease was in reality a disguised sale. *See also* Capitol City Leasing Corp. v. Hill, 404 So. 2d 935 (La. 1981).

The lessor's implied warranty can be waived in a commercial transaction, as Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92 (La. 1979) demonstrates. The lessee which does not enjoy the benefit of an assignment of the lessor-buyer's implied warranty rights against the seller, and which cannot show a disguised sale, as in *Bancshares*, could argue that it is *subrogated* to the lessor's rights. *See* Moreno's, Inc. v. Lake Charles Catholic High Schools, Inc., 315 So. 2d 660 (La. 1975). The Civil Code, however, may have anticipated the kind of absurdity found in *U.S. Leasing*, for article 2699 provides:

> If, without any fault of the lessor, the thing cease to be fit for the purpose for which it was leased, or if the use be much impeded, as if a neighbor, by raising his walls shall intercept the light of a house leased, the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity.

Thus, even in the case of a valid waiver of the lessor's obligations to deliver and

The lease signed in *Seabrook* permitted the lessor to delay the occupancy date in the event that the apartment building was not completed on schedule, but it placed no time limit on such a delay, while holding the lessee and her $464 security deposit in limbo in the interim. In its literal sense, any open-ended clause such as in *Seabrook* and *New Prague* would yield an absurd consequence if carried to its logical extension. A court certainly would interpret an open-ended clause as meaning a reasonable delay or extension, but as in *Seabrook*, the absurdity is in believing that the lessee consented to bear the risk that his current lease (which he would not want to renew) would not expire long before occupancy began on the new lease or that he consented to bear the risk of second-guessing whether a four-month delay in the occupancy date would be viewed as "reasonable" by a court in subsequent litigation to recover the security deposit.[428]

UCC section 2-302 comment 1 lists *Kansas Flour Mills Co. v. Dirks*[429] as an "illustrative results" case, saying of an extension clause similar to the one in *New Prague*, "[I]n a rising market the court permitted the buyer to measure his damages for non-delivery at the end of *only one 30 day* postponement."[430] Of course, a clause ostensibly permitting either party to extend the time of performance without limit, in a nonstatic market, would be an unfair one to which it is absurd to think any party consciously would agree. *Kansas Flour* perhaps is seen by the UCC as a companion to *New Prague*, in that,

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maintain the thing leased in a condition such as to serve for the purpose for which it is hired (Civil Code article 2692), the lessee still could argue that article 2699 permits him to annul the lease whenever the thing's lack of fitness is unrelated to the lessor's normal implied warranty obligations. Civil Code article 2699 has been so applied as to suggest that the lessee in *U.S. Leasing* would find refuge thereunder, despite a waiver of the lessor's obligations. *See* Add Chemical Co. v. Gulf-Marine Fabricators, Inc., 345 So. 2d 216 (La. App. 3d Cir.), *cert. denied*, 347 So. 2d 263 (La. 1977); Truck Equip. Co. v. O'Reilly, 142 So. 2d 184 (La. App. 4th Cir. 1962). *But see* Scudder v. Paulding, 4 Rob. 428 (La. 1843).

428. *See* Chemical Cleaning, Inc. v. Brindell-Bruno, Inc., 214 So. 2d 215 (La. App. 4th Cir. 1968). The occupancy in *Seabrook* was expected to begin on March 1, 1972, but it was delayed until July of 1972. Plaintiff was forced to vacate her former lease in early May of 1972. The *Seabrook* decision was affirmed on the basis that the lessor had failed to perform its implied promise to make the premises available on the commencement date or within a reasonable time thereafter. 79 Misc. 2d 168, 363 N.Y.S.2d 566 (App. Term. 1973). *Cf.* Johnson v. Colonial Buick, Inc., 334 So. 2d 453 (La. App. 4th Cir. 1976) (applying LA. CIV. CODE art. 2485 to a contract for the sale of a new car, with no agreed time for delivery; after 14 weeks, it was held that a reasonable time had passed, permitting buyer to cancel and obtain a refund); Holmes Brick & Salvage Co. v. Reo Constr., Inc., 253 So. 2d 562 (La. App. 1st Cir.), *cert. denied*, 255 So. 2d 353 (La. 1971) (defendant breached a contract by failing to designate a time for the demolition of a building).

429. 100 Kan. 376, 164 P. 273 (1917).

430. UCC § 2-302, comment 1 (emphasis added).

presumably, the buyer would not have been permitted to extend performance for an unreasonable time in a rising market.[431]

The Civil Code points out that the contract is not to be "confounded with the instrument in writing by which it is witnessed."[432] When the writing expresses the true intent of the parties, the contract is to be given legal effect.[433] To be valid, however, all contracts must be based on consent,[434] and there can be no consent unless freely and deliberately given as to a matter understood.[435] Whether or not by design, the Civil Code appears to recognize that a signed writing does not necessarily tell the entire story of the contract between the parties, that is, what the parties truly intended. Given the presence of standard forms, that which the supplier intended may be clear; if not, article 1958 resolves any ambiguity against him. If the writing speaks clearly as to the supplier's intentions, the issue becomes not the clarity with which the parties have expressed *their* true intent but, rather, did the consumer really give his consent to the expressed intent of the supplier? As the *Boisseau* opinion observed, courts do not sit to relieve persons of the results of their bad judgments as to obligations undertaken, but courts do sit to interpret the instruments that evidence those obligations.[436] A knowing and voluntary assent to harsh contractual provisions permits no judicial scrutiny in Louisiana, but whenever the meaning or intent of the language of the instrument is the issue, the courts give weight to the obvious fact that "informed and experienced persons, do not usually and customarily bind themselves to unjust and unreasonable obligations."[437] Thus, even clear language may not prevent some doubt as to the parties' true intent.

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431. The delivery date in *Kansas Flour* was December 30, 1914, and this date was extended to January 15, 1915, at buyer's election. The court permitted the buyer to measure his damages by the difference between the contract price of $1.00 per bushel and the January 15th market price of $1.29 per bushel. Unfortunately, it does not appear from the opinion in *Kansas Flour* that the buyer ever attempted to extend performance so as to measure his damages beyond one postponement of the delivery date, and in fact, the one postponement made by the buyer was fifteen days, not thirty, as suggested by the comment. The court held this fifteen-day extension reasonable. In brief, inclusion of *Kansas Flour* in UCC § 2-302, comment 1 was perhaps improvident.

432. LA. CIV. CODE art. 1762.

433. LA. CIV. CODE art. 1945.

434. LA. CIV. CODE art. 1797.

435. LA. CIV. CODE art. 1819.

436. See text at note 400, *supra*.

437. Oil Field Supply & Scrap Material Co. v. Gifford Hill & Co., 204 La. 929, 934, 16 So. 2d 483, 484 (1943).

Price-Value Disparity and Problems Involving Substantive Unconscionability

Judges and legal commentators frequently speak of "procedural" unconscionability as distinguished from "substantive" unconscionability.[438] Presumably because there is no legislated definition of the term "unconscionable,"[439] some such delineation for purposes of analysis was inevitable. However, it is useful only for analytical purposes since a given case can involve elements of both procedural and substantive unconscionability.

When the term "procedural unconscionability" is used, the reference is to the contract formation process and freedom of consent and choice.[440] Among the factors to be considered in applying the label are the manner in which the contract was entered into, whether each of the parties had a reasonable opportunity to understand the terms of the contract, whether fine print hid significant terms, and whether the particular provision was conspicuous or otherwise brought to the attention of the party to whom the contract is presented.

Substantive unconscionability has reference to the terms themselves and whether they are commercially reasonable. In applying UCC section 2-302, judges tend to examine first the *terms* of the contract alleged to be unconscionable, and if they are not unreasonably favorable to one party, the inquiry into unconscionability typically ends.[441] If the terms appear unreasonably favorable to one party, however, the possibility of a lack of a real and voluntary meeting of the minds, or consent, is injected into the case. An inquiry then must be made of such factors as the age, education, intelligence, and business experience of, or presence of capable advisors for, the apparently disadvantaged party, the relative bargaining power of the parties, which party drafted the contract, whether the terms should have been explained, whether the advantaged party was willing to negotiate on the terms, and whether the disadvantaged party had a meaningful alternative choice.[442] With such an approach in mind, one can explain the significance of the fact that the clause in *Weaver v.*

438. *See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, §§ 4-3, 4-4, at 150-155 (2d ed. 1980).

439. See, however, LA. R.S. 9:3516(30).

440. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

441. *See* Younger, *A Judge's View of Unconscionability*, 5 UCC L.J. 348, 349 (1973). *Compare* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) *with* Allen v. Michigan Bell Tel. Co., 18 Mich. App. 632, 171 N.W.2d 689 (1969).

442. *See* Johnson v. Mobil Oil Corp., 415 F. Supp. 264 (E.D. Mich. 1976); Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1972).

American Oil Co.[443] was in fine print, while this fact had no particular significance in three commercial transaction cases finding no unconscionability.[444] As the United States District Court for the Southern District of New York wryly observed, there is no unfair surprise where competent parties are involved, for "to suggest that [the utility company's] representatives failed to read the documents . . . charges them with dereliction of duty or incompetence."[445]

An analysis of unconscionability in consumer transactions involves an initial inquiry into the terms of the contract: Do the terms seem out of proportion to the risks of the creditor? If the terms are unreasonably favorable to the creditor, it suggests an impairment of the deliberate and informed consent to which the legal system aspires as a standard. The suggestion of impaired consent can be confirmed if, in addition to the unreasonably favorable terms, there is found the lack of a meaningful alternative choice. But whether there is an absence of meaningful choice depends entirely on the circumstances of each case. The buyer who is "locked in" to a particular supplier may have no alternative but to accede to terms actually understood. Where fine print, unintelligible legal jargon, referral sales schemes, or similar deception also is present, the finding of unconscionability is simply facilitated. For the buyer who is not forced to deal with a given supplier, the apparent ability to "walk away" from the proposed transaction may not in fact be present if the buyer is lacking in ability to protect himself, as when there is a gross disparity of bargaining position or sophistication between the parties. The supplier in such a case is likened to a fiduciary, and because of the terms (in the contract) and the attendant circumstances, he is saddled with the burden of proving the *conscionability* of the transaction. This is quite a distance for common law courts to have travelled from the starting point of caveat emptor.

Whether confronted with purely mercantile agreements or with consumer transactions, those decisions finding unconscionability rely on a sort of sliding scale balancing of the "procedural" and "substantive" factors which underlie the particular case. Once the decision is made that the terms appear to be unreasonably favorable to the creditor (the substantive factor), an examination of the nature of the

443. 257 Ind. 458, 276 N.E.2d 144 (1972), discussed in text at notes 364-375 & 416-424, *supra*.

444. First New Jersey Bank v. F.L.M. Business Machines Inc., 130 N.J. Super. 151, 325 A.2d 843 (1974); Royal Indem. Co. v. Westinghouse Elec. Corp., 385 F. Supp. 520 (S.D.N.Y. 1974); Boone Valley Coop. Processing Ass'n v. French Oil Mill Mach. Co., 383 F. Supp. 606 (N.D. Iowa 1974).

445. Royal Indem. Co. v. Westinghouse Elec. Corp., 385 F. Supp. 520 (S.D.N.Y. 1974).

debtor's consent, i.e., the meaningfulness of his choice and his apparent ability to protect himself (the procedural factors), may reveal an unconscionable or unconsented-to bargain. An extremely harsh or unreasonably favorable term may be held unenforceable with mere lip service to the requirement of procedural unconscionability.[446] By contrast, the clear absence of a meaningful choice or other factors which contribute thereto may compel a court to withhold enforcement of terms expressly permitted by law.[447]

The principal thrust of Louisiana contract formation law is informed consent. It is incumbent on the superior party to explain, advise, declare, and disclose so that consent can be doubted only in those cases in which clear language leads to an absurdity. These are primarily the same factors one might outline for "procedural unconscionability." Most of the unconscionability cases do involve both procedural and substantive elements. Finding Louisiana Civil Code equivalents is not so difficult where, for example, there is a failure of the superior party (seller, lessor, builder) to explain (the procedural element), because that element itself tends in Louisiana to overshadow a substantive element such as whether the stipulation in question is simply too harsh, unfair, or unreasonable to enforce. Even the "absurd consequences" idea is primarily procedural, because the court is not technically judging the commercial reasonableness of the harsh terms of the contract in the absence of certainty that consent actually was given.

In a few unconscionability cases, however, one finds no significant presence of procedural factors, so that the terms themselves must be judged apart from the manner in which they came into being. For example, suppose a buyer, suffering no particular incapacities, sees a thing he wants and agrees in an ambiguity free contract to pay for it a price very much in excess of the thing's objective "market" value. Can it be said that such a contract is unconscionable? If so, would Louisiana law be in accord?

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446. *See* Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433 (W. Va. 1976) (involving a ten-day termination clause, unilaterally exercisable by the franchisor).

447. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), cited by the comments to UCC § 2-302, provides an example. A disclaimer of warranties clause, expressly permitted by UCC § 2-316, was found to be in fine print, "hidden" on the backside of the contract, and written in all but incomprehensible language in a contract which not only was not subject to bargaining between the parties but also was used in substantially similar form by all automobile retailers. A like evaluation can be made of *Williams v. Walker-Thomas* in that the price of the stereo may have been within normal "markup," and the pro rata clause is not necessarily unreasonably favorable to seller, since UCC § 9-204(5) arguably permits the "cross collateralization of future advances." *Cf.* Singer Co. v. Gardner, 65 N.J. 403, 323 A.2d 457 (1974).

Price Unconscionability

Within the UCC section 2-302 jurisprudence, there has developed the idea that unconscionability can be premised purely on a disparity between price and value. The "price unconscionability" idea was raised in, or that label applied by commentators to, the following cases: *Frostifresh Corp. v. Reynoso*,[448] *Vom Lehn v. Astor Art Galleries, Ltd.*,[449] *American Home Improvement, Inc. v. MacIver*,[450] *State v. ITM, Inc.*,[451] *Kugler v. Romain*,[452] *Murphy v. McNamara*,[453] *Jones v. Star Credit Corp.*,[454] *Toker v. Perl*,[455] *Jefferson Credit Corp. v. Marcano*,[456] and *Toker v. Westerman*.[457] As urged herein, the application of familiar Civil Code principles readily could account for the outcome in each of these cases, with the possible exception of *Star Credit* and *Westerman*.[458] In *Marcano* and *Reynoso*, for example, the buyers spoke only Spanish, yet they were given no interpretation or explanation of the contract terms. This fact alone would cast doubt on the enforceability in Louisiana of the contract or clause in question, in light of Civil Code articles 2474, 1901, and 1819.[459] Moreover, it is at least plausible that the sellers

448. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term. 1967).

449. 86 Misc. 2d 1, 380 N.Y.S.2d 532 (Sup. Ct. 1976).

450. 105 N.H. 435, 201 A.2d 886 (1964).

451. 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

452. 58 N.J. 522, 279 A.2d 640 (1971).

453. 36 Conn. Supp. 183, 416 A.2d 170 (Super. Ct. 1979).

454. 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct., 1969).

455. 103 N.J. Super. 500, 247 A.2d 701 (1968), *aff'd on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (1970).

456. 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969).

457. 113 N.J. Super. 452, 274 A.2d 78 (1970).

458. Both cases, however, are amenable to the "absurd consequences" and "inference of fraud" approaches. See text at notes 104-114 & 399-437, *supra*. *Cf.* Smith v. Everett, 291 So. 2d 835 (La. App. 4th Cir. 1974) (price-value disparity was an important ingredient in the affirmance of a finding of fraud).

459. Thibodeaux v. Meaux's Auto Sales, Inc., 364 So. 2d 1370 (La. App. 3d Cir. 1978) (buyer had only a sixth grade education, did not understand the meaning of "redhibition" and, therefore, could not be said to have knowingly waived it in the absence of a clear explanation); Guillory v. Morein Motor Co., 322 So. 2d 375 (La. App. 3d Cir. 1975) ("doubtful that an individual such as [buyer], a semi-illiterate, would have noticed or understood the implications of [a small hand-written *o* after the word 'warranty']"); Anderson v. Bohn Ford, Inc., 291 So. 2d 786 (La. App. 4th Cir. 1974) (buyer had only a seventh grade education and was unsophisticated; a clear and unambiguous waiver of warranty clause was neither explained nor brought to his attention; held, waiver invalid); Smith v. Everett, 291 So. 2d 835 (La. App. 4th Cir. 1974) (seller had not completed grade school, did not realize value of property he sold); Chrysler Credit Corp. v. Henry, 221 So. 2d 529 (La. App. 4th Cir. 1969) (elderly buyer whose reading ability was greatly impaired by severe cataracts, only a fourth-grade education; held, contract fraudulently induced); Carter v. Foreman, 219 So. 2d 21 (La. App. 4th Cir. 1969) (elderly buyer, illiterate, uneducated); Port Fin. Co. v. Campbell, 94 So. 2d 891 (La. App. 1st Cir. 1967) (buyer, an uneducated laborer, could not be charged with

in *Marcano* and *Reynoso* knew of the defective condition of the thing sold, so as to bring to bear Civil Code articles 1832, 1847, and 2548.[460] *Marcano* and *Reynoso* also seem clearly within the *Molaison-Carter* "inference of fraud" jurisprudence in that the buyer's disadvantage was obvious to the seller. Similarly, the seller in *Reynoso* knew of the buyer's lack of financial resources.[461] *Toker v. Perl* involved fraud in the execution[462] and would be within the purview of articles 1819, 1825, 1832, and 1847.

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knowledge of excessive oil consumption from fact that smoke came from the car); Broussard v. Fidelity Standard Life Ins. Co., 146 So. 2d 292 (La. App. 3d Cir. 1962) (buyer had little formal eduation, could not readily understand contracts); Davis v. Whatley, 175 So. 422 (La. App. 1st Cir. 1937) (illiterate person signed a release; held, error); Griffing v. Atkins, 1 So. 2d 445 (La. App. 1st Cir. 1941) (seller "ignorant," buyer a merchant; held, fraud); Segretto v. Menefee Motor Co., 159 So. 345 (La. App. Orl. 1935) (buyer illiterate; erroneously believed his down payment was the total price).

460. Fraud was not alleged in *Reynoso* or in *Marcano*, but this fact does not convince the reader of those cases that articles 1832 and 1847 would not apply in Louisiana to vitiate buyer's consent in a similar case. *See, e.g.*, Sunseri v. Westbank Motors, 228 La. 370, 82 So. 2d 43 (1955); Smith v. Everett, 291 So. 2d 835 (La. App. 4th Cir. 1974); Plan Invs. Inc. v. Heflin, 286 So. 2d 511 (La. App. 2d Cir. 1973); Tauzin v. Sam Broussard Plymouth, Inc., 283 So. 2d 266 (La. App. 3d Cir. 1973); Chrysler Credit Corp. v. Henry, 221 So. 2d 529 (La. App. 4th Cir. 1969); Fidelity Credit Co. v. Bradford, 177 So. 2d 635 (La. App. 3d Cir. 1965); Jones v. Greyhound Corp., 174 So. 2d 826 (La. App. 1st Cir. 1965); Housecraft Div. of S. Siding Co. v. Jones, 120 So. 2d 662 (La. App. Orl. 1960); Griffing v. Atkins, 1 So. 2d 445 (La. App. 1st Cir. 1941).

461. The seller in *Reynoso* knew that buyer had but one week left on his job. The issue is of importance under Uniform Consumer Credit Code §§ 5.108 and 6.111, for § 6.111(3) empowers the administrator to bring a restraining action against a creditor who, *inter alia*, had a belief at the time of sale that there was no resonable probability of payment in full by the debtor. *See generally* Hersbergen, *The Improvident Extension of Credit As An Unconscionable Contract*, 23 DRAKE L. REV. 225 (1974). The lack of buyer's financial ability likewise was known to the seller in *Williams v. Walker-Thomas* and in Carter v. Foreman, 219 So. 2d 21 (La. App. 4th Cir. 1969), but no Louisiana cases bearing on the effect of such knowledge have been found. However, the case of Coburn Fin. Corp. v. Bennett, 241 So. 2d 802 (La. App. 3d Cir. 1970), presents some interesting food for thought. The ultimate ruling in the case was that the loan to defendant was voidable for lack of capacity to freely consent. Yet, the third circuit's narrative permits speculation that the loan company's knowledge of the borrower's limited mental ability was as important a factor as the limitation itself:

> Coburn had been informed by [the borrower's] employer that in his opinion [borrower] had the mentality of a five or six-year-old child, did not know what he was doing, and should not be loaned the money or allowed to enter into the contractual [loan] arrangement. Despite all of this, Coburn without further checking or investigation, chose to proceed.

241 So. 2d at 804. Can it be said that the contract would have been enforceable had the borrower been of sufficient mental capacity, but that his financial capacity was known to lender to be inadequate to afford a reasonable probability of repayment of the loan in full? *Cf.* First Progressive Bank v. Costanza, 427 So. 2d 594 (La. App. 5th Cir. 1983) (applying Civil Code article 1897 to seller's knowledge of buyer's financial problems).

462. See text at notes 90-92, *supra*.

Both *State v. ITM* and *Kugler v. Romain* present numerous Civil Code grounds for nonenforcement, including error, fraud, and general bad faith.[463] Although categorized for discussion purposes as a case of unconscionability, *Kugler* is in fact a case brought under a state consumer fraud statute.[464] Within this context, *Kugler* says that a sale at an exhorbitant price, especially in a low-income market, "raises a strong inference of imposition."[465] Louisiana courts, as previously discussed, tend to scrutinize cases involving a merchant and a layman for facts upon which to raise an inference of fraud, the essence of which is said to be unjust advantage.[466] Further support for the pro-

463. See text at notes 107-116, *supra*. Aside from the obvious inability of the seller in *Kugler* to renounce the implied (Civil Code articles 2520, 2529, 2547, 2548) redhibition warranty, the contracts were not such that a Louisiana court, in good conscience, could enforce them in any event. *See, e.g.*, Ekman v. Vallery, 185 La. 488, 169 So. 529 (1936); Heeb v. Codifer & Bonnabel, 162 La. 139, 110 So. 178 (1926); Succession of Gilmore, 285 La. 488, 102 So. 94 (1924); Lazarus v. McGuirk, 42 La. Ann. 194, 8 So. 253 (1890); Roberson v. Maris, 266 So. 2d 488 (La. App. 4th Cir. 1972); Standard Acc. Ins. Co. v. Fell, 2 So. 2d 519 (La. App. 2d Cir. 1941). *Kugler v. Romain* compares nicely to Alexander Hamilton Inst. v. Hollis, 133 So. 458 (La. App. 2d Cir. 1931), in which the court declined to relieve the defendant from a "modern business course" contract. The court found the contract to be plain and unambiguous, and no fraud was proven. Defendant was not, however, within the *Molaison-Carter* category of disadvantaged buyers:

> Defendant apparently thought he would be able to find in the course certain matters of detail that would enable him to advance and to increase his knowledge of the retail furniture business, the line engaged in by him, but this is not practicable. Those details can be acquired and mastered only by actual experience in the business, and the only benefit that [one such as defendant can reasonably assume] can be acquired from the study course is the broadening effects obtained from studying general principles, as described in the course furnished by the plaintiff. Without a doubt, if the defendant had studied carefully and mastered all the books and pamphlets sent to him by the plaintiff, he would have been better fitted for any position in any retail mercantile business. There is no short cut to knowledge or success in any line of business. In his zeal to make a sale it may be that the plaintiff's salesman overdrew the picture somewhat as to the simplicity of the course of study and its direct application to defendant's business, but we cannot say that in so doing he acted fraudulently.

133 So. at 459-60. *Cf.* Delta School of Business, Baton Rouge, Inc. v. Shropshire, 399 So. 2d 1212 (La. App. 1st Cir. 1981) (school's representations as to placement was student's principal motive).

State v. ITM lacks the educationally disadvantaged buyer, but in addition to the rather obvious taint on consent of error and fraud, the contract, being of the "pyramid" sale variety, is against good conscience and public policy, and it would be among the article 1895 *contra bonos mores* obligations. *See* State *ex rel.* Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624 (Iowa 1971); Twentieth Century Co. v. Quilling, 130 Wis. 318, 110 N.W. 174 (1907).

464. *See* N.J. STAT. ANN. 56:8-1 to 56:802 (West 1964).

465. 58 N.J. at 545, 279 A.2d at 653.

466. Cotton States Chem. Co. v. Larrison Enters., Inc., 342 So. 2d 1212 (La. App. 2d Cir. 1977); Altex Ready-Mixed Concrete Corp. v. Employees Commercial Union Ins. Co., 308 So. 2d 889 (La. App. 1st Cir. 1975).

position that a great disparity between price and value necessitates an inference of fraud in Louisiana can be found in the idea that a merchant-purchaser cannot suppress the truth about the value of a thing he purchases from a nonmerchant layman[467] and in the idea that false bidding at an auction sale to enhance the price is fraud.[468] Similarly, buyers who agree to refrain from bidding against each other at an auction defraud the seller.[469] In fact, a buyer in Louisiana impliedly represents his solvency.[470] In such situations, conversely, does not the seller impliedly represent that his price is reasonably related to value? No Louisiana decision has been found so holding, but in 1955, the Louisiana Supreme Court found "startling" the knowledge that a truck sold by defendant in July of 1948 as new for a price of $1,903 had been resold by defendant to plaintiff in January of 1949 for $2,320 "with no evidence disclosing the reason for such disparity in price."[471]

The Civil Code has relatively little to say about price. Civil Code article 2464 treats the subject of price, but it does not ostensibly offer for the buyer a mirror image of the lesion idea of articles 1864, 1867, and 2222.[472] Still, it is worth observing that the fourth clause of article 2464 unambiguously states that the price "ought not to be out of all proportion with the value of the thing," and although the example offered therein of the one dollar price is directed toward distinguishing a sale from a donation, one certainly could argue that examples, like exceptions, ought not be permitted to swallow the rule.

In both *Star Credit* and *Westerman*, the buyer signed a contract to purchase a home appliance valued at about $300 for a price of $900. Although Louisiana courts apparently have not directly faced the "price-value disparity" issue as yet,[473] when that issue does arise, any

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467. Smith v. Everett, 291 So. 2d 835 (La. App. 4th Cir. 1974); Griffing v. Atkins, 1 So. 2d 445 (La. App. 1st Cir. 1941).

468. Baham v. Bach, 13 La. 287 (1839).

469. First Nat'l Bank v. Hebert, 162 La. 703, 111 So. 66 (1927); Chafee v. Meyer, 34 La. Ann. 1031 (1882).

470. Yeager Milling Co. v. Lawler, 39 La. Ann. 572, 2 So. 398 (1887).

471. Sunseri v. Westbank Motors, 228 La. 370, 378, 82 So. 2d 43, 46 (1955).

472. Louisiana Civil Code articles 1864, 1867, and 2222 permit rescission by a minor for lesion; lesion is the "injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract." LA. CIV. CODE art. 1860. The lesion idea has only narrow application to persons of full age. *See* LA. CIV. CODE arts. 1861-1863.

Article 2464 states that the price "ought not be out of all proportion with the value of the thing" sold, but the context of article 2464 is that of *serious* prices, as opposed to disguised donations. See note 485, *infra*.

473. Smith v. Everett, 291 So. 2d 835 (La. App. 4th Cir. 1974), comes very close on the facts to a price unconscionability case. In *Smith v. Everett*, real estate was sold for about one-seventh of its value, with the seller, rather than the buyer, being the victim. The decision nullified the act of sale on the ground of fraud, noting that

past unwillingness of Louisiana's courts to focus on the price issue should not foreclose attention to various plausible Civil Code grounds on which to premise nonenforceability of unconscionable price terms. For example, because the seller in both *Star Credit* and *Westerman* knew or should have known that the buyer had only limited financial resources,[474] the *Molaison-Carter* jurisprudence may apply. The courts in *Star Credit* and *Westerman* declined to take that fork in the road, and the decision in each case is properly placed in the "price unconscionability" category. As such, there may be no Louisiana equivalent. That is, if it be assumed that the consent of the buyer has not been tainted with fraud or error, that the terms of the contract are not ambiguous, that there has been no failure of the seller to explain clearly the extent of his obligations, and that the disadvantage, if any, as to education and experience is not so severe as to bring to bear on the case the *Molaison-Carter* "inference of fraud" jurisprudence, the Civil Code may not permit relief in the "pure" price unconscionability case.[475]

While Louisiana courts frequently have said that "[c]ourts are not created to relieve men of their bad bargains made,"[476] such a statement does not exist in a vacuum. Article 1901, the probable source of the rule, has reference to "agreements *legally* entered into,"[477] thus raising, among other things, the public policy issues inherent in article 1895. At least two situations are found in the jurisprudence which

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"[h]ad plaintiff known defendant was buying his property for a pittance of its real value, he would not have consented to the contract." 291 So. 2d at 840. *Cf.* Community Acceptance Corp. v. Kinchen, 417 So. 2d 22 (La. App. 1st Cir. 1982) (price unconscionability analogy applied to the financing of an automobile under the Louisiana Consumers Credit Law, LA. R.S. 9:3551).

474. The buyers in *Westerman* qualified for welfare assistance subsequent to the sale; the buyers in *Star Credit* were welfare recipients at the time of sale. Implicit within eligibility for public assistance is low income level, which a reasonable, good faith seller would have known. *Cf.* First Progressive Bank v. Castanza, 427 So. 2d 594 (La. App. 5th Cir. 1983) (seller knew of buyer's financial problems and could not enforce the sale); Carter v. Foreman, 219 So. 2d 21 (La. App. 4th Cir. 1969) (homeowner's financial status known to contractor).

475. *See* Fleming v. Sierra, 14 Orl. App. 168 (La. App. 1917); *cf.* E. Levy & Co. v. Pierce, 40 So. 2d 818 (La. App. 2d Cir. 1949) (allegation that price was contrary to good morals). The Louisiana courts, of course, could resort to the gut reaction of *Heeb v. Codifier & Bonnabel*: "The inequity, unreasonableness, and illegality of such a . . . clause . . . is so obvious as to scarcely need citation of authority." 162 La. 139, 143, 110 So. 178, 179-180 (1926). The statement in *Heeb* was addressed to a penal clause, but the underlying principle of lack of choice may be seen as justifying such a disposition. *See* Lazarus v. McGuirk, 42 La. Ann. 194, 8 So. 253 (1890).

476. Lama v. Manale, 218 La. 511, 515, 50 So. 2d 15, 16 (1950).

477. In Fleming v. Sierra, 14 Orl. App. 168, 177 (La. App. 1917), for instance, the court remarked, "[N]or is there any law authorizing an action on the bare allegation of a purchaser that he paid an 'unconscionable' price for a thing." (emphasis added).

suggest that consent in *Star Credit* and *Westerman* may not have resulted from a free and deliberate exercise of the will; in short, error, fraud, violence, or threats are not the only defects in consent deducible from article 1819. The first situation is represented by *Boisseau v. Vallon & Jordano, Inc.*,[478] in which a homeowner's agreement to pay a broker's fee upon accepting a buyer's offer, regardless of whether or not the sale was subsequently consummated, was unenforceable because it led to an absurd consequence. In two recent cases, the notion that consent unfettered by error or fraud may be less than free and deliberate has been discussed against a background of standard-form contracts of adhesion. In both cases, the contract was enforced, but an examination of the rationale in each illuminates the viability of the *Boisseau* approach as a Louisiana equivalent of the pure price unconscionability cases. In *Louisiana Power & Light Co. v. Mecom*,[479] a commercial utilities customer signed a contract with the utility company which, among other things, called for a minimum monthly bill of $1,850 for five years, "and thereafter for similar periods unless terminated by written notice given . . . not . . . less than three (3) months prior to the expiration of the original term or any extension thereof." Although the customer was in no manner disadvantaged and undoubtedly had legal assistance readily available,[480] he failed to give the notice of termination in 1972, and the contract automatically was extended to December 15, 1977. The customer quite clearly had signed a contract of adhesion: if he did not accept all of the utility company's terms, he could not receive electrical power for his business. He accordingly argued lack of a free and deliberate consent. The argument did not carry the day: "Even were our courts to recognize the power in themselves to disregard clauses in contracts when one party had no power to negotiate terms, we believe that such power should only be exercised in cases in which the clauses in question are unduly burdensome or extremely harsh."[481] It is perhaps improper to suggest that a Louisiana court would classify a sale of a refrigerator with a maximum retail value of $350, but a price of $900,[482] as "unduly burdensome or extremely harsh" merely because the buyer had not the most remote resemblance to the successful entrepeneur in *Mecom*. Yet, such a buyer clearly has a stronger factual base on which to present the *Boisseau* argument, and it also must

478. 174 La. 492, 141 So. 38 (1932). The case is discussed in text at notes 397-401, *supra*.

479. 357 So. 2d 596 (La. App. 1st Cir. 1978).

480. *Compare* Louisiana Power & Light Co. v. Mecom, 357 So. 2d 596 (La. App. 1st Cir. 1978) *with* Carter v. Foreman, 219 So. 2d 21 (La. App. 4th Cir. 1969).

481. 357 So. 2d at 598. See text at notes 107-116, *supra*.

482. Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); Toker v. Westernman, 113 N.J. Super. 452, 274 A.2d 78 (1970).

be admitted that if price terms two and one-half or three times the reasonable retail value are not "unduly burdensome or extremely harsh," one may well be at a loss to bring to mind the better example.

The lack of a free and deliberate consent also was raised unsuccessfully in *Golz v. Children's Bureau, Inc.*,[483] in which the plaintiffs, to their subsequent regret, had surrendered their child for adoption. The plaintiffs categorized their act of surrender as a contract of adhesion to which, because of disparate bargaining ability and the absence of negotiation between attorneys for the respective parties, their consent was not freely given. The facts of the case, however, indicate that the plaintiffs were mature and literate persons who had been subjected to no "pressure, undue influence or the like" by the defendant; their act was not a rash, impulsive one, but came after a cooling-off period of many months of "careful and apparent continued thought and deliberation" and after a "trial" period during which the child was actually surrendered; and the document they thereafter signed was unambiguous in its expression of the finality of their act and was carefully read and explained to them prior to signing. Two conclusions spring immediately from *Golz*: (1) no court possibly could have invalidated the act of surrender on the basis of lack of consent; and (2) any resemblance between the case and *Star Credit* and *Westerman* exists solely in the most fertile imagination. Thus, neither *Golz* nor *Mecom* stand as unyielding sentinels for the application of *Boisseau* to the pure price unconscionability case.

Johnson v. Mansfield Hardwood Lumber Co.[484] presents the second situation suggestive of the lack of free and deliberate consent approach to price unconscionability. Certain minority shareholders of the Mansfield Hardwood Lumber Company had sold to the corporation shares of stock worth about $2,000 per share for prices ranging from $350 to $400 per share. Although the case ultimately was decided on the ground of fraud, the trial court offered both Civil Code articles 2464 and 1965 as alternative grounds for rescission. To the extent that a gross inadequacy or disproportion of price versus value might shift the burden of proof to the seller to show that the price was the result of deliberate and intentional action by the parties, *Mansfield* is probably correct in its interpretation. It may be doubted, however, that article 2464 was intended to apply to the disproportionately higher price.[485]

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483. 326 So. 2d 865 (La. 1976).

484. 143 F. Supp. 826 (W.D. La. 1956), *later op. at* 159 F.Supp. 104 (W.D. La. 1958).

485. See note 472, *supra*. In the earlier opinion, which granted a preliminary injunction, the court held that the price was "so . . . trifling, so out of proportion to [the stock's] true value, that no fair-minded person could say it was 'serious.' Its inadequacy 'shocks the conscience'." 143 F. Supp. at 843.

The *Mansfield* opinion, on the other hand, may have struck a Civil Code chord resoundingly in holding that the buyer of stock had been unjustly enriched within the meaning of article 1965 and ought to make restitution.[486] Article 1965 has not received a great deal of judicial attention in Louisiana, and it has not been a significant source of judicial relief against harsh bargains. It is probable, also, that article 1965 by its terms and when read in its context does not have application to either *Mansfield* or the true price unconscionability cases.[487] Yet, the Louisiana Supreme Court, in what could be termed a public policy[488] decision, held that a given contract clause led to a result which was wholly inequitable and violated the rule which is embodied in article 1965 that one should not do unto others that which he would

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Article 2464 usually is discussed against the background of the common law "peppercorn" consideration idea, *i.e.*, the peppercorn would suffice as "consideration," but it might fail the test of "serious consideration" under article 2464. *See* Murray v. Barnhart, 117 La. 1023, 42 So. 489 (1906). Where no "price" is involved, article 2464 generally is discussed within a context of "mutuality" of obligations. *See* Blanchard v. Haber, 163 La. 627, 112 So. 509 (1927). In short, while article 2464 appears in context to be concerned with disguised donations and related matters, the language of the article does admit of the price unconscionability construction of *Mansfield*. No other cases tending to this construction have been found. However, in Haas v. Cerami, 201 La. 612, 10 So. 2d 61 (1942), the vendor's argument that the agreed price of $600 was "out of all proportion with the value" of the interest in question was turned back not because the theory was per se unsound, but because of the speculative nature of the interest. And the Louisiana First Circuit Court of Appeal has suggested that article 2464 is relevant to a case involving the sale of a thing (seed) having no value: "[N]o real consent takes place because the seed, in such a case, are not an equivalent for the price." Rapides Grocery Co. v. Clopton, 125 So. 325 (La. App. 1st Cir. 1929).

486. 143 F. Supp. at 843.

487. *See, e.g.*, Miller v. Housing Auth., 149 La. 623, 190 So. 2d 75 (1966), *on remand*, 200 La. 704, 200 So. 2d 704 (La. App. 4th Cir. 1967); Texas Co. v. State Mineral Bd., 216 La. 742, 44 So. 2d 841 (1959); Miami Truck & Motor Leasing Co. v. Dairyman, Inc., 263 So. 2d 110 (La. App. 1st Cir. 1972); Chemical Cleaning, Inc. v. Brindell-Bruno, Inc., 214 So. 2d 215 (La. App. 4th Cir. 1968); *cf.* Martinez v. Moll, 46 F. 724 (C.C.E.D. La. 1891) (buyer purchased a plantation worth only two-thirds of the price he paid); Lama v. Manale, 218 La. 511, 50 So. 2d 15 (1950); J.H. Jenkins Contractor, Inc. v. City of Denham Springs, 216 So. 2d 549 (La. App. 1st Cir. 1968). *See generally* Smith, *A Refresher Course in Cause*, 12 LA. L.REV. 2 (1951).

488. Public policy decisions in Louisiana often are premised on article 1895. A pertinent example is Fassitt v. United T.V. Rental, Inc., 297 So. 2d 283 (La. App. 4th Cir. 1974):

> Public policy cannot condone the use in a sale or lease contract of a provision *irrevocably* authorizing entry into a debtor's or lessee's home without judicial authority or without the owner's consent at the time of entry. We decline to construe [such a] provision, incorporated into a printed form contract as a necessary condition of the agreement, as irrevocable permission to enter a private home at any time, day or night, occupied or unoccupied, under any circumstances. Law and order cannot allow such a construction, which would tend to encourage breaches of the peace.

Id. at 287.

not wish others to do unto him and one should not enrich himself at the expense of another.[489]

Whether or not exorbitant price terms are "unduly harsh," "absurd" in result, or violative of the "spirit" of article 1965, Louisiana courts have relieved parties in circumstances similar to those of the buyers in *Star Credit* and *Westerman* and have done so with the mere pronouncement that "it is against good conscience" to enforce the bargain actually reached by the parties.[490] The concurrence of two equitable ideas which, if not traceable to articles 1945, 1965, and the good faith portion of article 1901, are certainly of the spirit of those articles, are thought to account for the several decisions which employ the "in good conscience" standard. The first such decision is found in *Succession of Gilmore*,[491] in which an attorney's advice had the effect of divesting a plaintiff of a one-half interest in the property bequeathed to him under a will and vesting that interest in another under a prior will. Plaintiff sought to set aside the judgment probating the prior will. The Louisiana Supreme Court did not cite articles 1901, 1945, or 1965, and, indeed, the applicability of those articles may be doubted. However, the court did grant relief:

> The courts of this state will not hesitate to afford relief against judgments . . ., when the circumstances . . . show the deprivation of legal rights . . ., and when the enforcement of the judgment would be unconscientious and inequitable. Our courts will follow the general principles of equity jurisprudence applied by the equity courts of other states . . . in actions of this character. Courts of equity will not permit one party to take advantage of and enjoy the gains of ignorance . . . by the other, which he knew of and did not correct, especially when a confidential or fiduciary relationship existed between them.[492]

If this writer has correctly perceived the message of *Gilmore*, relief can be granted in Louisiana in the absence of fraud[493] or of error as to principal cause[494] when the buyer is laboring under a mistaken

489. Boisseau v. Vallon & Jordano, Inc., 174 La. 492, 141 So. 38 (1932). Article 1965 was offered by the court as an alternative ground for the invalidity of a broker's commission clause. The court's remarks as to article 1965 are most likely to be seen as dicta. *Boisseau* is discussed in text at notes 397-402, *supra*.

490. *See* Lazarus v. McGuirk, 42 La. Ann. 194, 8 So. 253 (1890); Standard Acc. Ins. Co. v. Fell, 2 So. 2d 519 (La. App. 2d Cir. 1941); Roberson v. Maris, 266 So. 2d 488 (La. App. 4th Cir. 1972).

491. 157 La. 130, 102 So. 94 (1924).

492. 157 La. at 133, 102 So. at 95 (citing 2 POMEROY, EQUITY JURISPRUDENCE §§ 847-849, 956 (1918)).

493. Fraud was not alleged in *Gilmore*.

494. *Succession of Molaison*, discussed in text at notes 106-138, *supra*, may be an

assumption as to value and the other party *knows* it. In such circumstances, a fiduciary type relationship can be said to exist,[495] bringing forth the duty to disclose the known facts.

When the fiduciary duty idea is combined with the rule of construction, found in *J. H. Jenkins Contractor v. City of Denham Springs*, that "the fact that an *informed* and *experienced* person does not usually and customarily bind himself to unjust and unreasonable obligations, is a serious factor that must be considered"[496] in construing an ambiguous stipulation, the *Boisseau-Mansfield* idea clearly begins to resemble that which forms the very backbone of the doctrine of unconscionable contracts: "one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other."[497] This very idea can be found in Civil Code article 1934(4): "If the creditor . . ., at the time of making [the contract] . . . knew of any facts that must prevent or delay its performance, and concealed them from the debtor, he is not entitled to damages." A possible de facto application of this article is seen in *Chrysler Credit Corp. v. Henry*,[498] in which the seller knew that the buyer was a widow living on a pension. In short, the seller knew that the woman could not afford an automobile priced at $3,593, plus finance charges. The Louisiana Fourth Circuit Court of Appeal found a lack of consent: "It taxes our credulity to believe that a seventy year old woman in her physical and economic condition would, without some misrepresentation or fraud, proceed on her own to buy a new automobile for slightly less than $3,600.00."[499] *Henry* did involve allegations of misrepresentation and fraud not necessarily present in a pure price unconscionability case. Still, *Henry*, along with the *Molaison-Carter* cases, may have an important bearing on a very plausible interpretation of article 1934(4), particularly since all three cases are within the "failure to disclose" category. A creditor surely must be held to know when, given the prospective debtor's circumstances, there

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example. The court declined to apply the *fraud* label, and one might question whether the plaintiff there was in error as to the principal cause. She obtained precisely what she bargained for, although not realizing the value of what she gave up.

495. *Cf.* Smith v. Everett, 291 So. 2d 835 (La. App. 4th Cir. 1974) (in concealing the property's true value, buyer obtained seller's consent through fraud); Griffing v. Atkins, 1 So. 2d 445 (La. App. 1st Cir. 1941) (seller of ring did not know the true value of the thing).

496. 216 So. 2d 549, 554-55. (La. App. 1st Cir. 1979) (emphasis added).

497. Toker v. Westerman, 113 N.J. Super. 452, 454, 274 A.2d 78, 80 (1970). See text at note 402, *supra*. *Cf.* United Cos. Mortgage & Inv., Inc. v. Estate of McGee, 372 So. 2d 622 (La. App. 1st Cir. 1979) (case remanded for proof under LA. R.S. 9:3551).

498. 221 So. 2d 529 (La. App. 4th Cir. 1969).

499. *Id.* at 533.

is no reasonable prospect of payment of the contemplated obligation.[500] Such knowledge is expressly an unconscionable situation under the Uniform Consumer Credit Code,[501] and it is implicitly so under the UCC cases of *Toker v. Westerman* and *Jones v. Star Credit.* It may be that article 1934(4) has always admitted such a possibility.

Price or value is perhaps only in rare cases the buyer's principal motive, and a mistake as to value is usually not a ground for invalidity of the contract.[502] Yet, it would be ironic that a legal system which permits rescission where the buyer purchases for $1,900 a 1971 Volkswagen automobile in the mistaken belief that it is a 1975 model[503] would give no relief for the buyer who, knowing that he was purchasing a 1971 model, mistakenly paid the $1900 price of a 1975 model. The primary feature which distinguishes the Civil Code from the common law is the duty of disclosure. This duty is found in articles 2474, 1832, and 2547 and elsewhere in the Code. The seller in Louisiana is a fiduciary of sorts as to the qualities of the products he sells because of his superiority of knowledge. If price unconscionability is not soundly based on a particular Civil Code provision, it is soundly premised in both the principles and spirit of the Civil Code.

Unconscionable Consequences of Default

The matter of substantive unconscionability also is raised in ten cases which denied enforcement of stipulations regarding the consequences of default by the buyer, lessee, or services consumer. In five of the cases, *Oldis v. Grosse-Rhode,*[504] *Perkins v. Spencer,*[505] *King v. American Academy of Dramatic Arts,*[506] *Educational Beneficial, Inc.*

500. The duty of the more knowledgeable creditor to structure the obligation to fit the known financial capabilities of the debtor—including a refusal to contract—was explored by this writer in *The Improvident Extension of Credit as Unconscionable Contract,* 23 DRAKE L. REV. 225 (1974). Professor Countryman further explored the idea in a 1975 publication, *Improvident Credit Extension: A New Legal Concept Aborning?,* 27 ME. L. REV. 1 (1975).

By its terms, article 1934(4) would not apply to an obligation to pay merely money, and its scope probably would not even encompass the related idea that a seller's knowledge that a buyer will be incapable of obtaining substantial benefit from the thing sold is also unconscionable. UNIF. CONSUMER CREDIT CODE § 6.111(3)(b) (1969). *Cf.* LA. CIV. CODE arts 1832, 2545. *Compare* Fite v. Miller, 196 La. 876, 200 So. 285 (1940) *with* Henderson v. Leona Rice Milling Co., 160 La. 597, 107 So. 459 (1926).

501. *See* UNIFORM CONSUMER CREDIT CODE § 6.111(3)(a).

502. *See* Citizens' Bank v. James, 26 La. Ann. 264 (La. 1874).

503. *See* Sunseri v. Westbank Motors, 228 La. 370, 82 So. 2d 43 (1955); Johnson v. Heller, 33 So. 2d 776 (La. App. 2d Cir. 1948).

504. 35 Colo. App. 46, 528 P.2d 944 (1974).

505. 121 Utah 468, 243 P.2d 446 (1952).

506. 102 Misc. 2d 1111, 425 N.Y.S.2d 505 (Civ. Ct. 1980).

v. Reynolds,[507] and *Lazan v. Huntington Town House, Inc.*,[508] a stipulated damages or "penal clause" was refused enforcement. In none of these cases were procedural unconscionability elements found; thus the ruling of unconscionability in each case addresses the default terms themselves.

Louisiana Civil Code articles 2117-2129 treat the subject of "obligations with penal clauses." In these articles, the penal clause, which has been held to be the equivalent of the common law "liquidated damages" clause,[509] is said to be a secondary obligation the purpose of which is to enforce the performance of the primary obligation that supports it.[510] By such a penal clause, the parties fix the damages for nonexecution or nonperformance[511] by one or both of them. But if the principal obligation itself suffers from an infirmity, any such infirmity will infect the penal clause as well.[512] As with any other stipulation, the penal clause must be consented to.[513] When the creditor claims the penalty, he cannot enforce the performance also, unless the penalty was stipulated for the mere delay in performance.[514] However, the creditor may opt to sue for the execution of the principal obligation in lieu of enforcing the penal clause.[515]

In *Oldis* and *Perkins*, the penal clause, if enforced, would have

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507. 67 Misc. 2d 739, 324 N.Y.S.2d 813 (Civ. Ct. 1971).

508. 69 Misc. 2d 1017, 332 N.Y.S.2d 270 (Dist. Ct. 1969), *aff'd*, 69 Misc. 2d 1019, 330 N.Y.S.2d 751 (App. Term. 1972).

509. Pennington v. Drews, 218 La. 258, 49 So. 2d 5 (1949).

510. LA. CIV. CODE arts. 2117, 2118, 2119. Article 1934(5) is also relevant to the penal clause.

511. McGloin v. Henderson, 6 La. 715, 720 (1834).

512. LA. CIV. CODE art. 2120. *See* Richmond v. Krushevski, 243 La. 777, 147 So. 2d 212 (1962) (when, by its terms, the principal obligation became null and void because of the inability of the buyer to obtain financing, the penal clause likewise was rendered null and void); J.G. Wagner Co. v. City of Monroe, 52 La. Ann. 2132, 28 So. 229 (1899) (the city was not permitted to retain a construction project bidder's $2,500 deposit pursuant to a penal clause where, at the time, the city itself lacked the power to contract, thus giving the bidder a lawful excuse for its inexecution or nonperformance of the principal obligation); *cf.* Hughes v. Breazeale, 240 La. 126, 121 So. 2d 510 (1960) (raising the issue of nonperformance of the principal obligation because of an "irresistible force").

513. *See* Roberson v. Maris, 266 So. 2d 488 (La. App. 4th Cir. 1972). Not all stipulations that have the appearance of a penal clause necessarily will be so characterized in the courts. *See* Reimann v. New Orleans Pub. Serv., Inc., 191 La. 1079, 187 So. 30 (1939); Mossy Enters., Inc. v. Piggy-Bak Cartage Corp., 177 So. 2d 406 (La. App. 4th Cir. 1965); *cf.* McCray v. Cole, 236 So. 2d 863 (La. App. 3d Cir. 1970), *rev'd*, 259 La. 646, 251 So. 2d 161 (1971) (treating a clause similar to that in *Reimann* as a penal clause).

514. LA. CIV. CODE art. 2125; Barrow v. Bloom, 18 La. Ann. 276 (1866). An example of a penal clause stipulated for mere delay is found in Pennington v. Drews, 218 La. 258, 49 So. 2d 5 (1949). *See also* McGloin v. Henderson, 6 La. 715, 720 (1834).

515. LA. CIV. CODE art. 2124.

permitted the seller to retain as liquidated damages all payments made by the defaulting purchaser toward the price, whether the payments constituted 1 percent or 99 percent of the total price.[516] In *Oldis*, the clause would have meant a penalty of about one-third of the purchase price of $75,000; in *Perkins*, the penalty amount was about one-fourth of the purchase price of $10,500.

In cases such as *Oldis* and *Perkins*, the parties have not seized upon a predetermined amount of money that will constitute the liquidated damages. Such penal clauses have encountered rough sailing in Louisiana almost from the beginning. In the first place, there is a difference between damages stipulated for the breach of an obligation to simply pay money and damages stipulated for the breach of an obligation to give a thing or perform an act: damages stipulated for the failure to pay money cannot exceed the lawful interest rate.[517] Thus, the nonexecution of the purchaser's principal obligation to pay the price is viewed differently from the nonexecution of the seller's obligation to deliver and warrant. More to the point, however, is the nature of the Civil Code penal clause: it is designed to both fix the damages caused by nonperformance of the principal obligation and act as a constraint to encourage performance of that obligation.[518] In no way may the penal clause serve as a vehicle to recover punitive, as opposed to compensatory, damages. In a long line of cases virtually identical to *Oldis* and *Perkins*, the courts of Louisiana have refused to enforce clauses by which the seller was permitted to retain, as a penalty for nonexecution, all payments made by the purchaser.[519]

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516. The principal obligation in *Oldis* arose out of the sale of a corporation, the sole asset of which was a restaurant. The transaction in *Perkins* was the sale of a dwelling. In neither case was unconscionability the sole ground for nonenforcement. The common law jurisprudence would be hostile to any such method of "setting" the amount of liquidated damages. *See generally* Note, *Damages—Penal Clause—Liquidated Damages*, 25 TUL. L. REV. 407 (1951).

517. *See* Griffin v. His Creditors, 6 Rob. 216 (La. 1843); Mossy Enters. v. Piggy-Bak Cartage Corp., 177 So. 2d 406 (La. App. 4th Cir. 1965); Chauvin v. Theriot, 180 So. 847 (La. App. 1st Cir. 1938). *But cf.* Executive Car Leasing Co. v. Alodex Corp., 265 So. 2d 288 (La. App. 4th Cir. 1972), *aff'd*, 279 So. 2d 169 (La. 1973) (enforcing a clause similar to that invalidated in *Mossy*).

518. Heeb v. Codifer & Bonnabel, Inc., 162 La. 139, 110 So. 178 (1926); Morris Buick Co. v. Ray, 43 So. 2d 83 (La. App. 2d Cir. 1949).

519. Heeb v. Codifer & Bonnabel, Inc., 162 La. 139, 143, 110 So. 178, 179-80 (1926) ("in its very nature the penalty is by way of compensation of the creditor for the damages he sustains by the nonexecution of the principal obligation . . . . The inequity, unreasonableness, and illegality of such a penal clause as here sought to be enforced is so obvious as to scarcely need citation of authority"); Thompson v. Bullock, 236 So. 2d 892, 898 (La. App. 3d Cir. 1976) ("such a penal clause is regarded as null and void, since inequitable and unreasonable and an illegal attempt to recover punitive rather than merely compensatory damages"); Rainey v. McCrocklin, 185 So. 705 (La. App. Orl. 1939) (such stipulations "are void and unenforceable"); Chauvin v. Theriot,

The invalidity of the penal clause does not prevent the aggrieved party from proving his actual damages, but in general, the principal obligation of the defaulting party is the payment of money, and the damage in such a case in Louisiana is interest.[520] However, when the defaulting party has taken possession of the thing, the seller's damages may be measured by the fair rental value of the thing for the period of possession. The seller, therefore, is entitled to retain so much of the payments made as reflects the fair rental value, apparently without an express stipulation therefor.[521]

The agreement in *Educational Beneficial* bound the defendant to pay a total of $2,400 for her daughter to take a course in computer programming at a trade school. Under the agreement, a student who enrolled in the course could attend any hours of the school session, but in the event of withdrawal or discontinuance from the school, the student was entitled to a refund equal to the difference between the amount of net cash paid to the school and the "earned tuition." The agreement defined "earned tuition" as consisting of a $600 nonrefundable enrollment fee, plus $7 per hour for all scheduled instructional hours. The defendant's daughter dropped out of the course for personal reasons after some 129 hours of instruction (of the total 500 total hours in the course), with the result that the refund, as calculated by the school, showed a balance owed to the school of $740.

Although the *Educational Beneficial* agreement was not altogether free of procedural unconscionability elements,[522] the court's holding

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180 So. 847, 849 (La. App. 1st Cir. 1938) (a provision by which all payments made are to be forfeited upon default of the purchaser and the land is to be retained by the seller was "in the nature of a penalty for the nonpayment of money, in excess of the rate of interest allowed by law, and is therefore unwarranted, arbitrary, unreasonable, and without consideration"); Victor v. Lewis, 157 So. 293 (La. App. Orl. 1934) (provision is against public policy and invalid). *See also* Subdivision Realty Co. v. Woulfe, 135 So. 71 (La. App. Orl. 1931); Schluter v. Gentilly Terrace Co., 8 La. App. 422 (Orl. 1928).

520. LA. CIV. CODE art. 1935.

521. Scott v. Apgar, 238 La. 29, 113 So. 2d 457 (1959); Louisiana Delta Farms Co. v. Davis, 202 La. 445, 12 So. 2d 213 (1942); Ekman v. Vallery, 185 La. 488, 169 So. 521 (1936). In Pruyn v. Gay, 159 La. 981, 106 So. 536 (1925), the parties had agreed that all sums paid to the vendor would "be considered as rental" for the use of the property. The court approved the stipulation, but the amount retainable pursuant to the stipulation was limited to *fair* rental value. *See* Thompson v. Bullock, 236 So. 2d 892 (La. App. 3d Cir.), *writ refused*, 256 La. 894, 240 So. 2d 231 (La. 1970); Brown v. Weldon, 199 So. 620 (La. App. 1st Cir. 1941). For any amounts paid beyond a fair rental value, the vendor owed the defaulting purchaser an accounting. Pruyn v. Gay, 159 La. 981, 106 So. 536 (1925); Dambly v. Burrell, 147 So. 711 (La. App. 1st Cir. 1933). Not all things sold have a rental value, however. *See* Heeb v. Codifer & Bonnabel, 162 La. 139, 110 So. 178 (1926).

522. The plaintiff's apparent reason for existence was to hold the school's tuition notes as a holder in due course. Plaintiff actually made no loans and, apparently, did

is premised on the one-sided nature of the stipulation. Viewed as a stipulated damage clause, the earned tuition formula (which included the $600 "nonrefundable enrollment fee") seemed less a stipulation related to any damages the school might incur than a punitive damages stipulation, especially given that the student who attended no classes was charged the same $600 fee as the student who attended 99 per cent of the classes. There being no ostensible relationship between the figure of $600 and the expected damages, one might suggest that such a penal clause in Louisiana would be viewed as akin to the "retention of all payments" clause which is an impermissible attempt to stipulate punitive damages.[523] Such stipulations are not routinely enforced in Louisiana, but where the parties agree to a figure as a penal amount, the Louisiana courts typically do not second-guess them, because a stipulation for $600 or for "five times the rent per day"[524] is quite different from the stipulation for retention of all payments, however many. In fact, there is no requirement that the party seeking enforcement of the penal stipulation show any actual damages, much less that there is a close relationship between the penal amount and the actual damages.[525] Thus, in general, the agreed sum or agreed percentage of the total price as stipulated damages is readily enforceable in Louisiana.[526]

It is also clear from the jurisprudence that the parties must have made a good faith effort to reasonably estimate the probable loss that a breach would cause. Unrealistic and unreasonable amounts often are considered not to be good faith estimates of probable damages[527] or, alternatively, are considered to be attempts to produce punitive damages.[528] In some instances, such stipulations are likened to pro-

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not otherwise acquire commercial paper. Moreover, the defendant's daughter was marked "enrolled" as of a date two weeks in advance of the execution of the promissory note for the tuition. The "earned tuition" thus reflected 24 hours of instruction that preceded her actual enrollment. The school apparently was also in the habit of billing up to 100 hours of "allowable absences"; that fact was not apparent from a reading of the contract and was not disclosed to the defendant or her daughter. Based on the *Molaison* jurisprudence, discussed in text at notes 106-120, *supra*, a Louisiana court would no doubt look long and hard at the "agreement."

523. Heeb v. Codifer & Bonnabel, Inc., 162 La. 139, 110 So. 178 (1926); Thompson v. Bullock, 236 So. 2d 892 (La. App. 3d Cir. 1970); Chauvin v. Theriot, 180 So. 847 (La. App. 1st Cir. 1938).

524. *See* Western Union Tel. Co. v. Club De Peana, 242 F. 2d 730 (5th Cir. 1957); Lama v. Manale, 218 La. 511, 50 So. 2d 15 (1950).

525. Morris Buick Co. v. Ray, 43 So. 2d 83 (La. App. 2d Cir. 1949).

526. *See, e.g.*, Ducuy v. Falgoust, 228 La. 533, 83 So. 2d 118 (1955); Sherer-Gulett Co. v. Bennett, 153 La. 304, 95 So. 777 (1923); Warriner v. Marine, 68 So. 2d 786 (La. App. 2d Cir. 1953).

527. John Jay Esthetic Salon, Inc. v. Woods, 377 So. 2d 1363 (La. App. 4th Cir. 1979).

528. Louisiana Delta Farms Co. v. Davis, 202 La. 445, 12 So. 2d 213 (1942); Heeb v. Codifer & Bonnabel, Inc., 162 La. 139, 110 So. 178 (1926); John Jay Esthetic Salon,

mises not supported by serious consideration.[529]

Had there not been a "nonrefundable" amount in *Educational Beneficial*, the stipulation certainly would have had a greater likelihood of success in Louisiana.[530] Had the school sought to retain a cash down payment rather than to enforce the contract, there is a possibility that the defaulting student would have been without a remedy in Louisiana, so long as the school stood ready to perform.[531] A similar refund procedure crops up in *King v. American Academy of Dramatic Arts*, as to which the court remarked that to the extent the enrollment agreement would permit the academy to both *dismiss* a student without legal justification and also retain his payments, such would be unconscionable.[532] In fact, the refund procedure in the *King* contract covered only a voluntary departure by the student (as in *Educational Beneficial*) and not a dismissal. The outcome of a dismissal case generally depends on the firmness of the school's foundation for dismissal. The *King* decision reasoned that the dismissal was without just cause. Such a dismissal could be likened to a failure of performance by a school; as such it would constitute a basis for refund.[533]

Lazan v. Huntington Town House, Inc., a case in which the lessee of a party room defaulted, is quite similar to *King* in that there was a stipulation for damages, but in neither case did the facts come within that stipulation.[534] In both cases, the court labeled the clause as "unconscionable" when, in fact, such was an unnecessary ruling. In both *King* and *Lazan*, then, the true question is, in what circumstances may one retain a deposit or payments in the absence of an applicable penal clause? In the further absence of an agreement as to earnest money or an option, the answer in Louisiana may be that such a

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Inc. v. Woods, 377 So. 2d 1363 (La. App. 4th Cir. 1979); *see also* Monroe Sand & Gravel Co. v. Sanders, 79 F. 2d 292 (5th Cir. 1935); Claude Neon Fed. Co. v. Angell, 153 So. 581 (La. App. 2d Cir. 1934). *Compare* Gauthier v. Magee, 141 So. 2d 837 (La. App. 4th Cir. 1962) *with* McCray v. Cole, 236 So. 2d 863 (La. App. 3d Cir. 1970).

529. John Jay Esthetic Salon, Inc. v. Woods, 377 So. 2d 1363 (La. App. 4th Cir. 1979).

530. *See* Federal Sign Sys. v. Leopold, 120 So. 898 (La. App. Orl. 1929).

531. *Compare* Penny v. Spencer Business College, Inc., 85 So. 2d 365 (La. App. 2d Cir. 1956) *and* Alexander Hamilton Inst. v. Hollis, 133 So. 458 (La. App. 2d Cir. 1931) *with* Richardson v. Cole, 173 So. 2d 336 (La. App. 2d Cir. 1965) *and* Delta School of Business, Baton Rouge, Inc. v. Shropshire, 399 So. 2d 1212 (La. App. 1st Cir. 1981).

532. 102 Misc. 2d at 1113, 425 N.Y.S.2d at 507.

533. *See* LA. CIV. CODE art. 2046; Sciortino v. Leach, 242 So. 2d 269 (La. App. 4th Cir. 1970); *cf.* Guillot v. Spencer Business College, Inc., 267 So. 2d 738 (La. App. 4th Cir.), *writ refused*, 263 La. 986, 270 So. 2d 122 (1972).

534. In *King*, the penal clause or liquidated damages clause did not expressly cover a dismissal situation. In *Lazan*, the stipulation appeared in a "cancellation agreement" offered to the lessee of a reception hall *subsequently* to the lessee's notice of his default to the lessor, and it was not consented to by the lessee.

deposit must be refunded as a payment of a thing not due.[535] The creditor, however, would be entitled to prove his actual damages. Here, a potentially important distinction between *King* and *Lazan* arises: the specific party room leased in *Lazan* might be relet at no damage and perhaps at a better rate for the lessor because of the breach; the same reasoning does not apply to *King* in the absence of additional facts regarding maximum enrollment capacity, applicant waiting lists, and the like.

With respect to the *Lazan* liquidated damages clause,[536] nonenforcement in Louisiana can be predicted, since, as the New York court worried, the clause could be construed to mean that the defaulting lessee would be liable for the stipulated amount if he simply held his reception at another and perhaps vastly less elegant hall with but a few close friends, even though the lessor had relet the original room.[537] In any event, such a stipulation could bring to the case the "absurd consequences" idea of Civil Code article 1945.[538]

The remaining unconscionability cases concerning the consequences of default involve, in essence, specific performance actions for the contract price instituted by the creditor against the defaulting debtor. Only one of these cases, *Denkin v. Sterner*,[539] involved a sale. The buyer in *Denkin* agreed to purchase from the vendor certain equipment for a total price of $35,500. The agreement of sale contained a stipulation that in the event of default by the buyer, the seller would be entitled to the full amount of the unpaid purchase price, together with interest, costs, and attorney's fees. The buyer did breach the contract by a letter "cancelling" the order prior to delivery of any of the equipment. In one of the earliest reported UCC decisions, the Pennsylvania court held the clause unenforceable as violative of UCC section 2-718.[540]

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535. LA. CIV. CODE arts. 2133, 2302, 2303.

536. In the event the lessor did relet the room, the offer was to return the lessee's downpayment, but in the event that the lessee made "other arrangements elsewhere for their reception, the parties [agreed] that as liquidated damages the [lessor] [would] be entitled to 50% of the total bill." 69 Misc. 2d at 1018, 332 N.Y.S.2d at 271.

537. *See* Pennington v. Drews, 218 La. 250, 49 So. 2d 5 (1949); *see* cases collected at note 519, *supra*.

538. See text at notes 387-437, *supra*.

539. 10 Pa. D. & C. 2d 203 (1956).

540. By UCC § 2-718, damages for breach of a contract of sale may be liquidated in the agreement, "but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy." UCC § 2-718(1) (1978). However, subsection (1) concludes by stating that "[a] term fixing unreasonably large liquidated damages is void as a penalty." Thus, *Denkin* is not an unconscionability case, despite the courts use of that term. The opinion perhaps does indicate that nonenforcement of the clause would have been the result even in the absence of UCC § 2-718.

Because a UCC seller's normal damages for a breach by the buyer prior to delivery is the difference between the market price and the unpaid contract price at the time and place for tender[541] and because the seller has an "action for the price" in only limited circumstances,[542] a stipulation of the *Denkin* variety seems, by definition, to run afoul of the "unreasonably large liquidated damages" prohibition of UCC section 2-718.[543]

There is reason to believe that the answer to *Denkin* stipulations would be the same in Louisiana. For one thing, a stipulation which would obviously yield a greater sum of money than would performance by the purchaser will most likely be seen in Louisiana as an impermissible stipulation of punitive or noncompensatory damages.[544] In Louisiana, the measure of the seller's damage in a buyer repudiation case is virtually the same as that under the UCC: the difference between the contract price and the market price of the goods at the time of the breach.[545] Since that measure of damages presumably would place a seller in the position that he would have enjoyed had the buyer performed, it is analytically difficult to understand how a penal clause calling for the seller to retain the thing *and* be entitled to its price could ever be classified as a good faith and reasonable attempt to set damages.

Further stimulus for the argument that the *Denkin* clause would be unenforceable in Louisiana comes by way of the 1942 decision in *Mossy Motors v. McRedmond,*[546] a case quite similar to *Denkin* in that the buyer repudiated because he had subsequently found a better deal elsewhere.[547] The buyer, having found an automobile dealer who of-

541. UCC § 2-708(1) (1978). Subsection (2) of § 2-708 adds, however, that if the measure of damages under subsection (1) is inadequate to put the seller in as good a position as performance would have done, the measure of damages is the *profit* which the seller would have made.

542. UCC § 2-709, comment 2 (1978) reveals that "[t]he action for the price is now generally limited to those cases where resale of the goods is impracticable except where the buyer has accepted the goods or where they have been destroyed after risk of loss has passed to the buyer." Comment 3 adds: "[A]n action for the price . . . can be sustained only after a 'reasonable effort to resell' the goods 'at a reasonable price' has actually been made or where the circumstances 'reasonably indicate' that such an effort will be unavailing."

543. See note 540, *supra.*

544. *See* cases cited in note 519, *supra.*

545. *See* Friedman Iron & Supply Co. v. J.B. Beaird Co., 222 La. 627, 63 So. 2d 144 (1953); A.M. Cameron Co. v. Shaw's Dep't Store, 44 So. 2d 192 (La. App. 2d Cir. 1950); Cyrus W. Scott Mfg. Co. v. Stoma, 10 La. App. 469, 121 So. 335 (2d Cir. 1929).

546. 12 So. 2d 719 (La. App. Orl. 1943) (on rehearing), *aff'g on other grounds,* 11 So. 2d 279 (La. App. Orl. 1942) (original opinion).

547. The decision in A.M. Cameron Co. v. Shaw's Dep't Store, 44 So. 2d 192 (La. App. 2d Cir. 1950), is likewise similar to *Denkin v. Sterner.*

fered a better bargain, repudiated the contract with Mossy Motors. Mossy's suit for its lost profit on the contract was unsuccessful.[548] Because the major premise of the award of damages under Civil Code article 1934 is that "damages" are the amount of the loss the creditor has sustained by virtue of the breach or the amount of the gain of which he has been deprived,[549] the price typically would not be the equivalent of "damages," although arguably "profit" would. This being the case, the *Denkin* stipulation would appear to be punitive in nature.[550]

In two cases, *Fairfield Lease Corp. v. Umberto*[551] and *Fairfield Lease Corp. v. Pratt*,[552] stipulations in a contract for the lease of a coffee vending machine were refused enforcement as unconscionable because the lessor would have been given the right to repossess and accelerate and recover all unaccrued and unearned rent. In Louisiana, the lessor is entitled to take only one of two alternative courses of action upon breach of the lease by the lessee: he may elect to terminate the lease or he may elect to enforce it—he cannot do both.[553] If he elects to terminate or dissolve the lease,[554] the lessor is entitled to regain possession of the thing or of the premises[555] and he is entitled to any accrued and unpaid rent. If the lessor elects to enforce the lease, he may demand payment of all future rentals,[556] but he is not entitled to retake or disturb the lessee's right of possession or use

548. The *Mossy Motors* case on original hearing is discussed and criticized in Note, *Damages—Breach of Contract—Lost Profits—Article 1934 of the Louisiana Civil Code of 1870*, 17 TUL. L. REV. 658 (1943). The opinion of *Mossy Motors* on rehearing is commended in Note, *Sales—Breach of Contract by Vendee—Right of Vendor to Resell—Effect of Resale on Damages*, 17 TUL. L. REV. 673 (1943). "Profit," of course, must be distinguished from the difference between the contract price and the market price.

549. LA. CIV. CODE art. 1934(3).

550. *Cf.* Pennington v. Drews, 218 La. 258, 49 So. 2d 5 (1950) (a penal clause calling for $25 for each day that defendant refused or delayed a work call did not apply in the absence of a showing that plaintiff had specific work for defendant at the time of the refusal by defendant).

551. 7 UCC Rep. Serv. (Callaghan) 1181 (N.Y. Civ. Ct. 1970).

552. 6 Conn. Cir. Ct. 537, 278 A.2d 154 (1971).

553. *See, e.g.*, Weil v. Segura, 178 La. 421, 151 So. 639 (1933); United States Leasing Corp. v. Keiler, 290 So. 2d 427 (La. App. 4th Cir. 1974); Mid-Continent Refrig. Co. v. Williams, 285 So. 2d 247 (La. App. 3d Cir. 1973); Clay-Dutton, Inc. v. Coleman, 219 So. 2d 307 (La. App. 1st Cir. 1969).

554. LA. CIV. CODE art. 2729.

555. The Louisiana Civil Code makes no distinction between leases of movable property and leases of immovable property. *But see* LA. R.S. 9:3261-9:3271 (Supp. 1974).

556. Where the lessee abandons the leased premises, the entire amount of rent is matured. *See* Sliman v. Fish, 177 La. 38, 147 So. 493 (1933). The lessor is under no duty to mitigate damages. *See* Meyers v. Drewes, 196 So. 2d 607 (La. App. 4th Cir. 1967).

during the unexpired term of the lease.[557] In short, the defaulting and dispossessed lessee is liable only for the rent accrued and unpaid as of the time of repossession; the lessor may not stipulate to the contrary.[558]

Although the Louisiana Civil Code does not distinguish between leases of movable property and leases of immovable property, the Louisiana Revised Statutes do contain provisions pertinent to the lease of movables.[559] However, while the ancillary law merely codifies the jurisprudence as to the lessor's basic option to enforce or cancel the lease on default by the lessee, the lessor can cancel the lease and seek damages, including liquidated damages, under the statute.[560] Even so, the court may not award unreasonable liquidated damages.[561] In *Ouachita Equipment Rental Co. v. Baker Brush Co.*,[562] a clause for liquidated damages similar to that in the *Fairfield Lease* cases[563] was found to be unenforceable as written in that it provided for an unreasonable amount of liquidated damages.[564] It is clear that the *Fairfield Lease* cases would not be enforceable in Louisiana.

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557. The lessor may relet without impairing his recourse against the lessee, but the lessee is entitled to a credit for the rent received thereby. Weil v. Segura, 178 La. 421, 151 So. 639 (1933); Bernstein v. Bauman, 170 La. 378, 127 So. 874 (1930). In fact, the lessee's right to possession is a right that may be seized and sold by his judgment creditors. Hollier v. Boustany, 180 So. 2d 591 (La. App. 3d Cir. 1965).

558. United States Leasing Corp. v. Keiler, 290 So. 2d 427 (La. App. 4th Cir. 1974) (lease of a photocopier); Mid-Continent Refrig. Co. v. Williams, 285 So. 2d 247 (La. App. 3d Cir. 1973) (lease of refrigeration units); Clay-Dutton, Inc. v. Coleman, 219 So. 2d 307 (La. App. 1st Cir. 1969) (lease of an automobile); Bill Garrett Leasing, Inc. v. General Lumber & Supply Co., 164 So. 2d 364 (La. App. 1st Cir.), *writ denied*, 246 La. 595, 165 So. 2d 485 (1964) (lease of a truck).

559. LA. R.S. 9:3261-9:3271 (Supp. 1974).

560. LA. R.S. 9:3261, 9:3267; Ouachita Equip. Rental Co. v. Baker Brush Co., 388 So. 2d 477 (La. App. 2d Cir. 1980).

561. LA. R.S. 9:3267.

562. 388 So. 2d 477 (La. App. 2d Cir. 1980).

563. In both the *Fairfield Lease* cases and *Ouachita Equipment Rental*, the lessor, by the stipulation, could repossess and accelerate and recover, as liquidated damages, the entire unpaid future rent.

564. Penal clauses have been enforced against defaulting lessees in Louisiana. In Sherer-Gillett Co. v. Bennett, 153 La. 304, 95 So. 777 (1923), the lease of a store counter contained a stipulation for damages of 40 percent of the total rent, plus attorney's fees and court costs, in the event of breach by the lessee in refusing to accept delivery. Important to the court was the fact that "[o]nce the counter had been delivered and accepted and the price had become collectable, the contingency which made the present claim for damages possible would have passed out and been extinguished." 153 La. at 310, 95 So. at 779. In short, the 40 percent figure apparently covered the expenses incurred in obtaining the contract and the profit margin it represented.

In Leon v. Dupre, 144 So. 2d 667 (La. App. 4th Cir. 1962), a tavern owner had agreed that if he should require the lessor of a music box to remove it from the tavern at any time, the sum of $190 would be paid to the lessor. After having the thing only

It is likewise clear that *Bogatz v. Case Catering Corp.*,[565] involving the lease of a party room breached by the lessee four months prior to the rental date, simply would raise the same basic issues as the *Fairfield Lease* cases, so that the "full amount due" clause could only be imposed in the event that the lessor elected to enforce the lease, rather than cancel it.[566] In *Nu Dimensions Figure Salons v. Becerra*,[567] however, is found a case for which there may be no Louisiana Civil Code equivalent. The defendant had signed a contract form for a program of 190 one-half hour weight-reducing sessions over a twelve

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ten days, the tavern owner ordered the lessor to remove it. The trial judge gave the lessor a judgment for only $50. This judgment, so obviously compatible with LA. R.S. 9:3267 (Supp. 1974), was affirmed by the court of appeal. But, in Tac Amusement Co. v. Henry, 238 So. 2d 398 (La. App. 4th Cir. 1970), the lessee of a music box who breached the lease seven weeks into the ten-year term was relieved of liability for liquidated damages that would have equaled $20,430, based on the lessor's weekly share of the proceeds of the music box multiplied by the remaining weeks in the term. The court of appeal characterized such liquidated damages as being so far in excess of anticipated actual damages and profit and so far out of proportion to the lessor's rather indefinite obligations as to be a punitive damages stipulation and, thus, invoked Civil Code article 2464's serious and proportionate consideration requirement.

565. 86 Misc. 2d 1052, 383 N.Y.S.2d 535 (Civ. Ct. 1976). See text at notes 351-357, *supra*.

566. A number of alternative approaches to nonenforcement appear to apply to *Bogatz*. The liquidated damages provision was in small print, without any legend or attention-drawing device; for this reason, the case previously was treated as one of procedural unconscionability. See text at notes 351-357, *supra*. The subject matter of the contract was a wedding party, a party that became a moot issue when the wedding was cancelled four months in advance of the rental date. The contract was seemingly premised, therefore, on the assumption of fact by both lessor and lessee that the wedding would take place—an error in fact. See text at notes 29-66, *supra*. Equally plausible is the argument that in *Bogatz* there is a *contract without a cause*. LA. CIV. CODE art. 1893 provides that "[a]n obligation without a cause . . . can have no effect." Article 1897 explains that the obligation is without a cause "when the consideration for making it was something which, in the contemplation of the parties, was thereafter expected to exist or take place, and which did not take place or exist." As an example of the principle, article 1897 offers the gift in consideration of a future marriage if the marriage does not take place. *Cf.* LA. CIV. CODE art. 1827 ("A promise to give a certain sum to bear the expenses of a marriage, which the party supposes to have taken place, is not obligatory, if there be no marriage."). *See also* Roy v. Florane, 239 La. 749, 119 So. 2d 849 (1960) (gifts in contemplation of marriage); Ricketts v. Duble, 177 So. 838 (La. App. Orl. 1938) (same); Wardlaw v. Conrad, 18 La. App. 387, 137 So. 603 (2d Cir. 1931) (engagement ring); Decuers v. Bourdet, 10 La. App. 361, 120 So. 388 (Orl. 1929) (engagement presents). Perhaps the Louisiana case most reminiscent of *Bogatz* in this regard is McCormick v. Monette, 1 La. App. 186 (1st Cir. 1924). McCormick loaned (or donated) to Monette $500 to aid him in purchasing an automobile. At the time of the transaction, Monette was engaged to McCormick's daughter, but the daughter ultimately married another. Even accepting Monette's characterization of the transaction as a donation, said the court, it was a donation made on contemplation of a future marriage which did not take place and was void as without a cause under Civil Code article 1897.

567. 73 Misc. 2d 140, 340 N.Y.S.2d 268 (Civ. Ct. 1973).

month period, at a cost of $300 payable in ten successive monthly payments of $30. The contract stipulated that the $300 "shall be paid whether or not buyer avails herself of the sessions purchased" and that the sessions were not "transferable, refundable, or cancellable." Defendant did "cancel" the contract shortly after signing it. The New York court treated the $300 sought by the salon as presenting the "liquidated damages versus penalty clause" issue. To enforce such an unconscionable[568] clause, per the New York court, would have placed the salon in a better position after the breach than it would have been in had the defendant performed fully. This made the clause an unreasonable one, calling for liquidated damages disportionate to the probable damages that the salon might actually incur. In short, the clause provided for punitive rather than compensatory damages.

In Louisiana, a contract of the *Nu Dimensions* variety, stripped of all elements of procedural unconscionability, may be enforceable whether or not the action for the total payments is deemed a penal clause.[569] Viewing the contract as the equivalent of a lease of the salon's space and equipment, the lessor clearly can elect to hold the membership rights open for the defaulting lessee and collect the $300.[570] However, viewed in the light of penal clauses in the sales of movable property, the seller perhaps would be less likely to prevail.[571] But contracts for personal services are neither leases nor sales. Perhaps for this reason, the courts of Louisiana have not devised a sound approach for the problem.

In *Tac Amusement Co. v. Henry*,[572] a case involving, in essence, the same stipulation as in *Nu Dimensions*, the Louisiana Fourth Cir-

568. The court expressly did not decide the case on the ground of unconscionability. 73 Misc. 2d at 143, 340 N.Y.S.2d at 273.

569. There was testimony in the case of high pressure sales tactics and misrepresentations regarding the right to cancel. Moreover, the salon manager allegedly told the defendant that she could discontinue the sessions at any time; this directly conflicted with the "not cancellable" language in the contract. 73 Misc. 2d at 141 & 144, 340 N.Y.S.2d at 270 & 273. *Compare* Delta School of Business, Baton Rouge, Inc. v. Shropshire, 399 So. 2d 1212 (La. App. 1st Cir. 1981) (error as to principal motive), Sciortino v. Leach, 242 So. 2d 269 (La. App. 4th Cir. 1970) (school's nonperformance was a "failure of consideration"), *and* Richardson v. Cole, 173 So. 2d 336 (La. App. 2d Cir. 1965) (rescission of a contract for dancing instruction, based on plaintiff's subsequent physical disability) *with* Guillot v. Spencer Business College, Inc., 267 So. 2d 738 (La. App. 4th Cir.), *writ denied*, 263 La. 986, 270 So. 2d 122 (La. 1972); Penny v. Spencer Business College, Inc., 85 So. 2d 365 (La. App. 2d Cir. 1956), *and* Alexander Hamilton Inst. v. Hollis, 16 La. App. 448, 133 So. 458 (2d Cir. 1931) (all denying recovery of tuition or allowing avoidance of payment thereof).

570. As a lease of movable property, the salon contract would come under LA. R.S. 9:3261.

571. See text at notes 544-550, *supra*.

572. 238 So. 2d 398 (La. App. 4th Cir. 1970).

cuit Court of Appeal denied enforcement on a basis similar to that of *Nu Dimensions*: the stipulation called for an amount[573] "far in excess of conceivable actual damages."[574] In other words, the Louisiana court seemed to believe, as did the New York court, that a "full price" stipulation for breach in such a case inevitably benefits the lessor or services contractor more than would performance, thereby rendering it a punitive damages clause. But five years after *Tac*, in *Dennis Miller Pest Controls, Inc. v. Wells*,[575] the fourth circuit addressed the same issue in a case almost identical to *Nu Dimensions* and enforced the contract against a defaulting contractant—ruling that enforcement of the contract would not be "unconscionable."[576] Two of the five judges dissented, being of the view that there was "no authority for the proposition that [the pest control company] is entitled to collect the full amount of his contract while at the same time he will perform no obligations for a full nine out of the twelve months"[577] and that *Tac* permitted a recovery based on anticipated profits, not on the gross amount. The majority pointedly disagreed: "It cannot validly be maintained that plaintiff is only entitled to the loss of the profit it would have derived from the contract had it not been breached in view of the mutually agreed upon provisions stipulating the amount to be awarded in the event of such an occurrence."[578]

Recent decisions tend to indicate that the enforceability of clauses of the *Nu Dimensions* variety may depend on the commercial-consumer distinction drawn by the Louisiana Supreme Court in *Louisiana National Leasing Corp. v. ADF Service, Inc.*[579] In *Louisiana Power & Light Co. v. Mecom*,[580] for example, a commercial utilities subscriber was forced to pay $45,362 for utility services he did not need or consume, under a contract not dissimilar to that found in *Dennis Miller*. In the most recent penal clause case in Louisiana, *Ball Marketing Inc. v. Sooner Refining Co.*,[581] the court enforced a penal clause providing for a total amount of $3.9 million in damages, yet the court also conceded that Louisiana courts more closely scrutinize the harshness of penal clauses imposed by a party with "vastly superior bargaining power."[582]

573. The *Tac* contract concerned the leasing of coin operated music and amusement devices for the breach of which by the lessee, the lessor was entitled to liquidated damages in a sum equal to the lessor's average weekly share of the coin boxes prior to breach multiplied by the number of weeks remaining in the *ten-year* term.

574. 238 So. 2d at 399.

575. 320 So. 2d 590 (La. App. 4th Cir. 1975), *writ denied*, 323 So. 2d 806 (La. 1976).

576. 320 So. 2d at 595.

577. *Id.* at 596.

578. *Id.* at 594.

579. 377 So. 2d 92 (La. 1979). See text at notes 344-347, *supra*.

580. 357 So. 2d 596 (La. App. 1st Cir. 1978).

581. 422 So. 2d 582 (La. App. 3d Cir. 1982).

582. *Id.* at 586.

In *Ball Marketing*, the relative bargaining power of the parties was not found to be "vastly" disparate and they had negotiated their agreement. In *Mecom*, the utility company no doubt held a vast upper hand and a "take-it-or-leave-it" contract of adhesion was perhaps thrust upon the utility customer, but only the consequences of the contract were harsh—the actual terms were not.[583] By contrast, penal clauses have been considerably less successful when imposed upon a layman-consumer, as in *Nu Dimensions*, by a party having vastly superior bargaining power.[584]

In *Allen v. Michigan Bell Telephone Co.*,[585] a clear exclusion of damages in a "yellow pages" listing contract was held unconscionable, permitting the disappointed advertiser to sue the telephone company for damages resulting from the omission of his advertisement in the telephone company's 1963 yellow pages. *Allen*, however, is the minority view on the issue,[586] although prior decisions to the contrary did not apply the principle of unconsionability. In *Wille v. Southwestern Bell Telephone Co.*,[587] the Kansas Supreme Court did apply unconscionability to the same telephone company exclusion language, and it held that the exclusion was valid.[588] Unlike the good faith seller, the services

583. Mecom could have avoided the problem by simply giving a timely notice of termination. *See* 357 So. 2d at 597.

584. *See* John Jay Esthetic Salon, Inc. v. Woods, 377 So. 2d 1363 (La. App. 4th Cir. 1979); Community Constr. Co. v. Governale, 211 So. 2d 677 (La. App. 4th Cir. 1968) (construing a stipulated damages clause adversely to pest control company); Gauthier v. Magee, 141 So. 2d 837 (La. App. 4th Cir. 1962); *cf.* Short v. Mossy Motors, Inc., 354 So. 2d 734 (La. App. 4th Cir. 1978) (ruling that the purchaser's "cash deposit may be retained as liquidated damages" clause did not apply to a $900 payment by a purchaser who subsequently failed to complete the sale); Richardson v. Cole, 173 So. 2d 336 (La. App. 2d Cir. 1965) (consumer permitted to rescind the unearned portion of a contract for dancing lessons on the basis of "equitable considerations," *i.e.*, her subsequent physical disability). *But cf.* Tubbs v. Louisiana Power & Light Co., 349 So. 2d 994 (La. App. 2d Cir. 1977) (enforcing the contract against a customer who failed to notify the utility company that he no longer resided at the subject premises); Young v. Carr, 140 So. 2d 796 (La. App. 4th Cir. 1962) (enforcing a "20% of the contract price" liquidated damages clause).

585. 18 Mich. App. 632, 171 N.W.2d 689 (1969), *later op. at* 61 Mich. App. 62, 232 N.W.2d 302 (1975).

586. The *Allen* opinion lists several cases upholding the exclusion clause. 18 Mich. App. at 635 n.1, 171 N.W.2d at 691 n.1. *See also* Annot., A.L.R.2d 917 (1963).

587. 219 Kan. 755, 549 P.2d 903 (1976).

588. The primary expressed difference between *Allen* and *Wille* is the matter of the availability of reasonable advertising alternatives for the advertiser; the *Allen* court found that yellow pages advertising is unique and that no such reasonable alternatives exist, while the *Wille* opinion holds that numerous alternative forms of advertising exist. Important to the *Allen* opinion was the "common knowledge" that yellow pages listings are the "only directory of classified telephone listings freely distributed to all the telephone subscribers in the Flint [Michigan] area." 18 Mich. App. at 639-40, 171 N.W.2d at 693. In view of the legally sanctioned status of the clause in question

contractor in Louisiana is liable for damages upon breach of his contract,[589] but as in other contractual settings, a clear and unambiguous limitation of damages will be upheld.[590] Louisiana courts probably would follow their own precedents[591] on the *Allen* issue and side with *Wille*, even if unconscionability was an available tool for Louisiana courts. A disinclination to follow *Allen* is particularly likely by virtue of the recent decision of the Louisiana Supreme Court in *Louisiana National Leasing Corp. v. ADF Service, Inc.*[592]

CONCLUSION

Appendix Table 1 summarizes a principal conclusion of the project which culminates in this article: The outcome of virtually all of

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and the lack of "procedural" factors such as deception, the case can only stand for the proposition that purchasers who sign contracts of adhesion in order to secure goods or services not available elsewhere on better terms will not be presumed to have given their consent freely and deliberately to one-sided terms unreasonably favorable to the other and more powerful party. As such, the case exemplifies the reference in UCC § 2-302, comment 1 to "oppression."

589. *See* LA. CIV. CODE art. 1934(3). In several cases, damages have been awarded for the failure to include the plaintiff's listing in the "white" pages, the "yellow" pages, or both. Falcon v. South Cent. Bell Tel. Co., 327 So. 2d 631 (La. App. 4th Cir.), *writ denied*, 332 So. 2d 281 (La. 1976); Levy v. Southern Bell Tel. & Tel. Co., 172 So. 2d 371 (La. App. 4th Cir. 1965); Loridans v. Southern Bell Tel. & Tel. Co., 172 So. 2d 323 (La. App. 4th Cir. 1965); Mayeux, Bennett, Hingle Ins. Agency, Inc. v. Southern Bell Tel. & Tel. Co., 148 So. 2d 771 (La. App. 4th Cir.), *cert. denied*, 244 La. 131, 150 So. 2d 589 (1963); Scheinuk The Florist, Inc. v. Southern Bell Tel. & Tel. Co., 128 So. 2d 683 (La. App. 4th Cir. 1961).

590. In Wilson v. Southern Bell Tel. & Tel. Co., 194 So. 2d 739 (La. App. 1st Cir. 1967), a clause in the listing agreement limited the telephone company's liability for error or omissions to a refund of the charges for the advertisement. The clause was upheld where the plaintiff's advertisement was erroneously listed, but the court did not clearly extend its holding to the case of an advertisement that was omitted. However, in Marino v. South Cent. Bell Tel. Co., 376 So. 2d 1311 (La. App. 1st Cir. 1979), a similar clause was held valid in an omission case. *Cf.* South Cent. Bell Tel. Co. v. McKay, 285 So. 2d 563 (La. App. 1st Cir. 1973) (upholding a clause by which telephone company could refuse certain listings).

Any limitation clause, of course, would have to be free of ambiguity, for any ambiguity would be construed under Civil Code article 1958 favorably to the advertiser. *See* Meyer v. Southwestern Gas & Elec. Co., 16 La. App. 472, 133 So. 504 (2d Cir. 1931). To the extent negligence can be shown, the exclusion clause can be avoided. This occurred in Bunch v. South Cent. Bell Tel. Co., 356 So. 2d 104 (La. App. 1st Cir. 1978), in which the telephone company did list the plaintiff's business name correctly in fulfillment of the listing agreement, but it *also* inadvertently listed the phone number of plaintiff's competitor's business as that of plaintiff's business immediately above that of the plaintiff's correct listing. The exclusion clause was held inapplicable. However, where the allegations of negligence are merely "restatements of the breach of the contract," the exclusion clause will apply, as in *Marino*. 376 So. 2d at 1312. *See also* Hennessy v. South Cent. Bell Tel. Co., 382 So. 2d 1044 (La. App. 2d Cir. 1980).

591. *See* cases cited in note 590, *supra*.

592. 377 So. 2d 92 (La. 1979). See text at notes 259-260, *supra*.

the unconscionable contracts cases nation-wide could have been duplicated in Louisiana without either UCC section 2-302 or its underlying common law inherent judicial power idea. When all is said and done, however, one realizes that to ask whether Louisiana Civil Code equivalents can be found so that the UCC section 2-302 cases could be decided the same in Louisiana is to show a bias in one's assumptions. The question, just as legitimately, could be posed inversely: Would the adoption of UCC section 2-302 permit Louisiana courts to continue to handle unfair contract cases as successfully as does the Civil Code? The fact that this work suggests that the absence in Louisiana of section 2-302 is not particularly significant is not to be taken as a strong reason to omit section 2-302 or the entirety of UCC article 2. Certainly, one now cannot argue that section 2-302 would mean an end of the general norm that contracts are enforceable, because the section would bring to Louisiana nothing not already indigenous. Furthermore, while a few states account for several of the unconscionability cases, some states have contributed none of the decisons, despite having had section 2-302 for at least fifteen years. Unconscionability has not turned the world of contracts upside down, nor is it likely to do so in the future.

The Louisiana Civil Code and the Louisiana judiciary must be given extremely high marks in the area of unfair contracts. The flexibility demonstrated herein regarding the Louisiana legal system is the result of a partnership of sorts. The Civil Code itself has great concern for the contract formation process and for those situations in which there is a wide disparity in bargaining position or power between contractants. For its part, the Louisiana judiciary, sometimes following the lead of the Louisiana Supreme Court (and sometimes not), has been willing to give the evolution of the law a "nudge" from time to time so that a body of law of nineteenth century origin (and in a real sense, of much earlier origin) can continue to serve the citizens well, even though the system of production, marketing, and contracting has changed greatly over the years.

APPENDIX TABLE 1
UNCONSCIONABILITY CASES

		Lack of consent: error of fact as to determining motive	Lack of consent: fraud	Failure of seller to clearly explain extent of his obligations	Term ambiguous or obscure	Non-ambiguous term nevertheless leads to an absurd result	Term favors a party who has himself not performed	Impermissible waiver of warranty	Limitation of a remedy not available	Impermissible consequences of default
	Text at notes	1819 1825 1842	1832 1847 2547	2474 1901	1957 1958	1945 1950	2046	2545	2531	
1. Albert Merrill School v. Godoy* 78 Misc. 2d 647, 357 N.Y.S.2d 378 (Civ. Ct. 1974)	118-121 145		*							
2. Allen v. Michigan Bell Tel. Co. 18 Mich. App. 632, 171 N.W.2d 689 (1969) *later op at* 61 Mich. App. 62, 232 N.W.2d 302 (1975)	585-592									
3. American Buyers Club, Inc. v. Grayling* 53 Ill. App. 3d 611, 368 N.E.2d 1057 (1977)	75-77	*	*		*					
4. American Home Improvement, Inc. v. MacIver* 105 N.H. 435, 201 A.2d 886 (1964)	116-120 450		*	*						

5. Andrews Bros. v. Singer & Co. [1934] 1 K.B. 17 (C.A. 1933)	46-49 73-74 159-162 217	*	*	*	*		*	*	
6. Architectural Cabinets, Inc. v. Gaster 291 A.2d 298 (Del. Super. Ct. 1971)	350	*		*	*				
7. Ashland Oil, Inc. v. Donahue 223 S.E.2d 433 (W. Va. 1976)	323-327 408				*	*			
8. Baker v. City of Seattle* 79 Wash. 2d 198, 484 P.2d 405 (1971)	382-386			*	*				
9. Bekkevold v. Potts 173 Minn. 87, 216, N.W. 790 (1927)	291 296			*	*				
10. Bogatz v. Case Catering Corp.* 86 Misc. 2d 1052, 383 N.Y.S.2d 535 (Civ. Ct. 1976)	351 565-566	*		*	*				*
11. Brooklyn Union Gas Co. v. Jimeniz 82 Misc. 2d 948, 371 N.Y.S.2d 289 (Civ. Ct. 1975)	132 146 378	*	*	*	*				
12. Butcher v. Garrett-Enumclaw Co. 20 Wash. App. 361, 581 P.2d 1352 (1978)	50 168 225 294	*		*			*		
13. C & J Fertilizer, Inc. v. Allied Mut. Ins. Co. 227 N.W.2d 169 (Iowa 1975)	359-362 417	*			*	*			

	Text at notes	Lack of consent: error of fact as to determining motive 1819 1825 1842	Lack of consent: fraud 1832 1847 2547	Failure of seller to clearly explain extent of his obligations 2474 1901	Term ambiguous or obscure 1957 1958	Non-ambiguous term nevertheless leads to an absurd result 1945 1950	Term favors a party who has himself not performed 2046	Impermissible waiver of warranty 2545	Limitation of a remedy not available 2531	Impermissible consequences of default
14. Chrysler Corp. v. Wilson Plumbing Co. 132 Ga. App. 435, 208 S.E.2d 321 (1974)	222 286-289 343			*	*			*		
15. Collins v. Uniroyal, Inc.* 64 N.J. 260, 315 A.2d 16 (1974)	216 244 311				*			*	*	
16. Davis v. Kolb 263 Ark. 158, 563 S.W.2d 438 (1978)	121-124		*							
17. Dean v. Universal C.I.T. Credit Corp.* 114 N.J. Super. 132, 275 A.2d 154 (App. Div. 1971)	349 409			*	*	*				

18. Denkin v. Sterner 10 Pa. D. & C.2d 203 (1956)	539-550										
19. Eckstein v. Cummins* 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974)	218 285				*	*					
20. Educational Beneficial, Inc. v. Reynolds* 67 Misc. 2d 739, 324 N.Y.S.2d 813 (Civ. Ct. 1971)	507 522-531										*
21. Ellsworth Dobbs, Inc. v. Johnson 50 N.J. 528, 236 A.2d 843 (1967)	335-337 387-402	*				*	*	*			
22. F.C. Austin Co. v. J.H. Tillman Co. 104 Or. 541, 209 P. 131 (1922)	166-171 226					*		*	*		
23. Fairfield Lease Corp. v. Pratt 6 Conn. Cir. Ct. 537, 278 A.2d 154 (1971)	552-564										*
24. Fairfield Lease Corp. v. Umberto 7 U.C.C. Rep. Serv. (Callaghan) 1181 (N.Y. Civ. Ct. 1970)	551-564										*
25. Fischer v. General Elec. Hotpoint* 108 Misc. 2d 683, 438 N.Y.S.2d 690 (Dist. Ct. 1981)	308									*	
26. Frank's Maintenance & Eng'g, Inc. v. C.A. Roberts Co. 86 Ill. App. 3d 980, 408 N.E.2d 403 (1980)	310 385 414					*	*			*	
27. Frostifresh Corp. v. Reynoso* 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term. 1967)	88-89 134,148 380 448-461		*	*	*						

		Lack of consent: error of fact as to determining motive	Lack of consent: fraud	Failure of seller to clearly explain extent of his obligations	Term ambiguous or obscure	Non-ambiguous term nevertheless leads to an absurd result	Term favors a party who has himself not performed	Impermissible waiver of warranty	Limitation of a remedy not available	Impermissible consequences of default
	Text at notes	1819 1825 1842	1832 1847 2547	2474 1901	1957 1958	1945 1950	2046	2545	2531	
28. Green v. Arcos, Ltd. 47 T.L.R. 336 (C.A. 1931)	165-171 410					*	*			
29. Greene v. Gibraltar Mortgage Inv. Corp.* 488 F. Supp. 177 (D.D.C. 1980)	115 119		*							
30. Hardy v. General Motors Acceptance Corp.* 38 Ga. App. 463, 144 S.E. 327 (1928)	292 296			*	*					
31. Henningsen v. Bloomfield Motors, Inc.* 32 N.J. 358, 161 A.2d 69 (1960)	194-213 274-284 390	*		*	*			*		
32. Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enters. 58 A.D.2d 482, 396 N.Y.S.2d 427 (1977)	93-97 180, 219 247, 293		*	*	*	*	*			

33. Jefferson Credit Corp. v. Marcano* 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969)	133, 147 249 456-461		*	*	*	*		*		
34. Johnson v. Mobil Oil Corp. 415 F. Supp. 264 (E.D. Mich. 1976)	363-376	*		*		*				
35. Jones v. Star Credit Corp.* 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969)	135, 150 454,474 478-501		*		*					
36. Jutta's, Inc. v. Fireco Equip. Co. 150 N.J. Super. 301, 375 A.2d 687 (1977)	319-320			*	*		*			
37. Kansas City Wholesale Grocery Co. v. Weber Packing Corp. 93 Utah 414, 73 P.2d 1272 (1937)	173-175 223 301-303 419			*	*	*	*	*		
38. Kansas Flour Mills Co. v. Dirks 100 Kan. 376, 164 P. 273 (1917)	429-431			*	*	*				
39. King v. American Academy of Dramatic Arts* 102 Misc. 2d 1111, 425 N.Y.S.2d 505 (Civ. Ct. 1980)	506 531-533		*			*				*
40. Kugler v. Romain* 58 N.J. 522, 279 A.2d 640 (1971)	78-87 452, 463	*	*	*	*	*				
41. Lazan v. Huntington Town House, Inc.* 69 Misc. 2d 1017, 332 N.Y.S.2d 270 (Dist. Ct. 1969), *aff'd*, 69 Misc. 2d 1019, 330 N.Y.S.2d 751 (App. Term. 1972)	508			*		*				*

		Text at notes	Lack of consent: error of fact as to determining motive 1819 1825 1842	Lack of consent: fraud 1832 1847 2547	Failure of seller to clearly explain extent of his obligations 2474 1901	Term ambiguous or obscure 1957 1958	Non-ambiguous term nevertheless leads to an absurd result 1945 1950	Term favors a party who has himself not performed 2046	Impermissible waiver of warranty 2545	Limitation of a remedy not available 2531	Impermissible consequences of default
42.	Majors v. Kalo Laboratories, Inc. 407 F. Supp. 20 (M.D. Ala. 1975)	98, 214 241, 304 418	*	*	*	*	*		*	*	
43.	McCarty v. E.J. Korvette, Inc. 28 Md. App. 421, 347 A.2d 253 (1975)	221, 243 307			*				*	*	
44.	Meyer v. Packard Cleveland Motor Co. 106 Ohio St. 328, 140 N.E. 118 (1922)	96-100 99, 248 298-300	*	*	*	*		*	*		
45.	Mieske v. Bartell Drug Co.* 92 Wash. 2d 40, 593 P.2d 1308 (1979)	22-28 295	*		*	*					

46.	Murphy v. McNamara* 36 Conn. Supp. 183, 416 A.2d 170 (Super. Ct. 1979)	117-120 137-138 453		*	*						
47.	New Prague Flouring Mill Co. v. Spears 194 Iowa 417, 189 N.W. 815 (1922)	164-171 357, 411	*		*	*	*	*			
48.	Nosse v. Vulcan Basement Waterproofing, Inc.* 35 Ohio Misc. 1, 299 N.E.2d 708 (1973)	181-182 321-322			*	*		*			
49.	Nu Dimensions Figure Salons v. Becerra* 73 Misc. 2d 140, 340 N.Y.S.2d 268 (Civ. Ct 1973)	567-584									*
50.	Oldis v. Grosse-Rhode 35 Colo. App. 48, 528 P.2d 944 (1974)	504, 516									*
51.	Perkins v. Spencer* 121 Utah 468, 243 P.2d 446 (1952)	505, 516									*
52.	Pittsfield Weaving Co. v. Grove Textiles, Inc. 121 N.H. 344, 430 A.2d 638 (1981)	245, 309					*			*	
53.	Robert A. Munro & Co. v. Meyer [1930] 2 K.B. 312	163-171 224, 290	*		*	*	*	*			
54.	Sarfati v. M.A. Hittner & Sons* 35 A.D.2d 1004, 318 N.Y.S.2d 352 (1970), *aff'd*, 30 N.Y.2d 613, 331 N.Y.S.2d 40, 282 N.E.2d 126 (1972)	220							*		
55.	Seabrook v. Commuter Housing Co.* 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972), *aff'd per curiam on other grounds*, 79 Misc. 2d 168, 363 N.Y.S.2d 566 (App. Term. 1973)	341 352 412	*		*	*	*		*		

		Lack of consent: error of fact as to determining motive	Lack of consent: fraud	Failure of seller to clearly explain extent of his obligations	Term ambiguous or obscure	Non-ambiguous term nevertheless leads to an absurd result	Term favors a party who has himself not performed	Impermissible waiver of warranty	Limitation of a remedy not available	Impermissible consequences of default
	Text at notes	1819 1825 1842	1832 1847 2547	2474 1901	1957 1958	1945 1950	2046	2545	2531	
56. State v. ITM, Inc.* 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966)	79-87 451, 463	*	*	*	*	*				
57. Toker v. Perl* 103 N.J. Super. 500, 247 A.2d 701 (1968), *aff'd per curiam on other grounds,* 108 N.J. Super. 129, 260 A.2d 244 (1970)	90-92	*	*			*	*			
58. Toker v. Westerman* 113 N.J. Super. 452, 274 A.2d 78 (1970)	136, 152 457, 462 474 478-501		*			*				
59. Trinkle v. Schumacher 100 Wis. 2d 13, 301 N.W.2d 255 (Ct. App. 1980)	240, 306 413					*		*	*	

60.	Unico v. Owen* 50 N.J. 101, 232 A.2d 405 (1967)	176-179 348-389			*	*		*			
61.	United States Leasing Corp. v. Franklin Plaza Apts., Inc. 65 Misc. 2d 1082, 319 N.Y.S.2d 531 (Civ. Ct. 1971)	183, 415						*	*		
62.	Vom Lehn v. Astor Art Galleries, Ltd.* 86 Misc. 2d 1, 380 N.Y.S.2d 532 (Sup. Ct. 1976)	51-57 125-127 449	*	*							
63.	Walsh v. Ford Motor Co.* 59 Misc. 2d 241, 298 N.Y.S.2d 532 (Sup. Ct. 1976)	215, 242 305-318				*			*	*	
64.	Weaver v. American Oil Co. 257 Ind. 458, 276 N.E.2d 144 (1971)	364-376 416	*		*		*				
65.	Williams v. Walker-Thomas Furniture Co.* 350 F.2d 445 (D.C. Cir. 1965)	58-66 125-131 151 328-334 421	*	*	*	*	*	*			

* Consumer transaction

APPENDIX TABLE 2

AN ANALYSIS OF THE DECISIONS REFUSING ENFORCEMENT ON THE GROUND OF UNCONSCIONABILITY

CASES	Incomprehensible contract language?	Fine print, no attention drawn to clause?	Inordinate length?	Language barrier?	Education barrier?	Failure to give needed explanation?	Deception for misrepresentation involved?	Door-to-door sales setting	Form contract used?	Lack of serious bargaining as to term(s)?	High pressure sales tactics utilized?	Was public policy or other equitable approach an alternative analysis?	A knowing sale of things from which buyer could not receive substantial benefits?	A knowing sale of things which could not, with reasonable probability, be repaid in full?
1. Albert Merrill School v. Godoy*	ni**	ni	ni	y	y	ni	y	no	inf	y	ni	ni	y	
2. Allen v. Michigan Bell Tel. Co.	ni	ni	ni	ni	ni	ni	ni	no	y	y	ni	pr	no	no
3. American Buyers Club, Inc. v. Grayling*	ni	ni	ni	no	no	no	y	no	inf	pr	ni	y	y	no

* consumer transaction

** *Key*: ni (not included); po (possibly); pr (probably); an (analogous situation); inf (inferably)

4.	American Home Improvement, Inc. v. MacIver*	ni	ni	ni	ni	ni	y	y[593]	ni	pr	pr	ni	y	no	no
5.	Andrews Bros., Ltd., v. Singer & Co.	no[b]	no	no	no	no	no	y	no	y	ni	no	ni	no	no
6.	Architectural Cabinets, Inc. v. Gaster	ni	y	ni	ni	ni	y	ni	no	pr	pr	ni	y[594]	no	no
7.	Ashland Oil, Inc. v. Donahue	ni	ni	ni	ni	ni	ni	ni	ni	y	ni	ni	pr[595]	no	no
8.	Baker v. City of Seattle*	no	y	no	no	no	no	no	no	y	y	no	y	no	no
9.	Bekkevold v. Potts	no	ni	ni	ni	ni	po[596]	ni	no	pr	pr	ni	y	no	no
10.	Bogatz v. Case Catering Corp.*	ni	y	ni	ni	ni	y	ni	no	ni	ni	ni	y[597]	an	no
11.	Brooklyn Union Gas Co. v. Jimeniz	ni	ni	ni	y[598]	ni	y[599]	ni	no	ni	ni	y[600]	ni	no	no

593. After the buyer signed in blank, the seller added $809 over the agreed price of $1,759; the monthly payment amounts had been filled in as $42.81.

594. The case is decided on the basis of unfair suprise. Confession of judgment is permissible in Delaware, but the opinion indicates that the provision must be so placed as to draw special attention and small print will not do it.

595. The court did not "find it necessary to base [the] holding [that the contract was unconscionable on its face] upon a disparity of bargaining power." 223 S.E.2d at 440. Accordingly, "public policy" would seem to have been an alternative holding. *See also* Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).

596. The seller's attempt to disclaim implied warranties was of the "no warranties are made" variety.

597. The defendant had agreed to cater a wedding which was called off four months prior to the scheduled date. The defendant not only wanted to keep the plaintiff's $750 deposit but also wanted the remainder of the $1550 agreed price pursuant to a fine print clause in the contract. The court labelled the clause a "penalty" clause, not a liquidated damages provision, which would have provided an alternative holding.

598. The buyer was not conversant in the English language.

599. *Jimeniz* is one of the few cases in which a buyer with a language handicap actually requested an explanation and/or translation of the contract. The request was not honored.

600. The seller apparently was able to enlist the aid of the buyer's tenants in inducing the sale.

CASES	Incomprehensible contract language?	Fine print, no attention drawn to clause?	Inordinate length?	Language barrier?	Education barrier?	Failure to give needed explanation?	Deception for misrepresentation involved?	Door-to-door sales setting	Form contract used?	Lack of serious bargaining as to term(s)?	High pressure sales tactics utilized?	Was public policy or other equitable approach an alternative analysis?	A knowing sale of things from which buyer could not receive substantial benefits?	A knowing sale of things which could not, with reasonable probability, be repaid in full?
12. Butcher v. Garrett-Enumclaw Co.	no	y	ni	no	no	po	po	no	inf	ni	no	ni	no	no
13. C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.	ni	ni	po[601]	ni	ni	ni	ni	no	y	y	ni	pr[602]	no	no
14. Chrysler Corp. v. Wilson Plumbing Co.	ni	y	ni	ni	ni	y	ni	no	y	pr	ni	y[603]	no	no

601. Being a commercial insurance policy, it probably was not a short document; yet, length did not seemingly enter into the decision.

602. The primary ground upon which the court rests its decision is the insured's lack of choice in an adhesion contract. The obvious purpose of the key language in the clause in question was to exclude "inside" burglaries—which clearly had not occurred with the insured's claim.

603. The case could have been decided on the basis of an ineffective disclaimer of warranty, which was delivered to the buyer at the moment the car was delivered. *See* Prince v. Paretti Pontiac, Inc., 281 So. 2d 112 (La. 1973). The case, however, does fit the mold of § 2-302 in that, prior to the delivery of the disclaimer, the buyer clearly did have the implied warranties; hence it would be very unfairly surprising to him to find out that no such warranty existed after all.

15.	Collins v. Uniroyal, Inc.*	ni	ni	ni	ni	ni	ni	ni	no	pr	ni	ni	pr[604]	no	no
16.	Davis v. Kolb	no	no	no	no	no	no	y	no	ni	no	no	ni	no	no
17.	Dean v. Universal C.I.T. Credit Corp.*	ni	y	ni	ni	ni	y	ni	no	pr	pr	ni	y[605]	no	no
18.	Denkin v. Sterner	ni	ni	ni	ni	ni	ni	ni	ni	ni	ni	ni	pr[606]	no	no
19.	Eckstein v. Cummins*	ni	po	po	no	no	po	no	no	y	y	ni	po	ni	no
20.	Educational Beneficial, Inc. v. Reynolds*	ni	ni	ni	no	no	po	y	no	inf	y	ni	po	no	no
21.	Ellsworth Dobbs, Inc. v. Johnson	ni	ni	ni	ni	ni	y	ni	no	y	y	ni	pr	an	no
22.	F.C. Austin Co. v. J.H. Tillman Co.	ni	ni	no	no	no	no	po	no	ni	no	ni	y	no	no
23.	Fairfield Lease Corp. v. Pratt	ni	ni	ni	ni	ni	ni	ni	no	y	inf[607]	ni	pr	no	no
24.	Fairfield Lease Corp. v. Umberto	ni	ni	ni	ni	ni	ni	ni	no	y	y	ni	pr	no	no
25.	Fischer v. General Elec. Hotpoint*	ni	ni	ni	no	no	y	no	no	inf	y	ni	po	no	no

604. The seller unsuccessfully relied on the apparent inability of the buyer's survivors to prove that a defect (as opposed, for example, to a road hazard) caused the blow-out in the tire. Because the seller's contract was prima facie unconscionable (*see* UCC § 2-719), the absence of a defect was held not to overcome the presumption of unconscionability.

605. The agreement not to assert defenses was in very small print, and the clause was unenforceable in New Jersey under Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967). Additionally, the clause placing the risk of loss on the buyer amounted to an invalid security interest in personal property.

606. On default, the contract gave the seller the right to enter a judgment for the full amount of the unpaid price. As an alternative holding, the clause was a liquidated damages clause providing unreasonably large liquidated damages and, for that reason, unenforceable.

607. In *Umberto*, nothing in the form lease was changed by "negotiation"; one assumes that the same approach obtained in *Pratt*.

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26. Frank's Maintenance & Eng'g, Inc. v. C.A. Roberts Co.	ni	y	ni	no	no	y	ni	no	inf	y	no	ni	no	no
27. Frostifresh Corp. v. Reynoso*	ni	ni	ni	y	ni	y	y[608]	no	pr	y	y	ni	no	y[609]
28. Green v. Arcos, Ltd.	no	no	ni	no	no	ni	no	no	ni	ni	ni	pr	no	no

608. A referral scheme was employed to induce the buyer to enter into the "agreement"; the buyer was told that the freezer would not really cost him anything because of $25 commissions to be earned on all sales made to friends and neighbors. Such ploys are forbidden in Louisiana. *See* LA. R.S. 9:3536 (Supp. 1972).

609. The buyer, who spoke only Spanish, told the salesman that he had but one week left on his job and he "didn't think he could afford" the freezer. As it developed, he was right.

29. Greene v. Gibraltar Mortgage Inv. Corp.*	ni	ni	ni	no	ni	y	y	no	inf	y	po	y	no	no
30. Hardy v. General Motors Acceptance Corp.*	no	ni	ni	ni	ni	po[610]	ni	no	pr	pr	ni	y	no	no
31. Henningsen v. Bloomfield Motors, Inc.*	y[611]	y	ni	ni	ni	y	no	no	y	y	ni	pr[612]	no	no
32. Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enters.	no	no	ni	no	no	ni	y	no	inf	ni	ni	ni	po	no

610. The seller's disclaimer clause stated that "no warranties have been made by the seller unless indorsed hereon in writing." The court pointed out that sellers do not "make" those warranties implied by law and the attempted disclaimer could not reasonably be taken to refer to implied warranties.

611. The court states at 161 A.2d at 92-93:

> Assuming that . . . the [buyer] should be charged with awareness of [the warranty] language, can it be said that an ordinary layman would realize what he was relinquishing in return for what he was being granted? . . . Any ordinary layman of reasonable intelligence, looking at the phraseology, might well conclude that Chrysler was agreeing to replace defective parts . . . during the first 90 days or 4,000 miles of operation, but that he would not be entitled to a new car . . . *In the context* of this warranty, only the abandonment of all sense of justice would permit us to hold that . . . [the language] signifies to an ordinary reasonable person that he is relinguishing any personal injury claim that might flow from the use of a defective automobile.

612. The New Jersey Supreme Court incorporated a dissertation on "public policy," and the holding itself is nothing short of a civil indictment, not of the seller or the manufacturer, but of the entire automobile industry and its marketing approach.

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33. Jefferson Credit Corp. v. Marcano*	ni	ni	ni	y	pr[613]	ni	po	no	inf	y	ni	y[614]	po[615]	po
34. Johnson v. Mobil Oil Corp.	pr	ni	ni	ni	y	y	ni	no	y	y	ni	po	no	no

613. The buyer agreed to pay $14.87 per week, indicating income instability, low-paying employment, and, hence, an educational barrier. The buyer, who also spoke only Spanish, did consult a lawyer; thus he at least had common sense, whatever his educational achievements.

614. Plaintiff, the assignee of the seller, repossessed Marcano's car after he had defaulted (presumably, because the car was in need of repairs which the seller refused to undertake) on his contract for $1,542. The price was $1,395; taxes, fees, and credit charges amounted to $372, and buyer had made a down payment of $219. Plaintiff, having advanced $650 to seller (holding $764 in reserve—a total of $1,414) resold the car to seller for $348 within six months of the sale to Marcano—a fair indication of the wholesale worth of the car. The "repossession plus resale-at-wholesale = deficiency claim" syndrome is permitted by the UCC. *See* Hersbergen, *The Improvement Extension of Credit as an Unconscionable Contract*, 23 DRAKE L. REV. 225, 249-263 (1974). Thus, plaintiff had received $750 ($402 paid by the buyer and $348 on resale) on its outlay of $650 and the seller had received $1,169 ($650 from plaintiff, $219 from Marcano, and a $300 second profit from the second retail sale at $1,050, less the wholesale repossession sale price of $348), all on the sale of a defective car. This clearly stuck in the judicial craw.

615. To the extent the car was known to be defective, the buyer could not receive substantial benefits from it.

35.	Jones v. Star Credit Corp.	ni	ni	ni	ni	inf[616]	y	ni	y	pr	pr	ni	ni	ni	po[617]
36.	Jutta's Inc. v. Fireco Equip. Co.	ni	ni	ni	no	no	y	ni	no	inf	inf	ni	ni	no	no
37.	Kansas City Wholesale Grocery Co. v. Weber Packing Corp.	no	no	ni	no	no	no	no	no	pr	ni	no	po[618]	no	no
38.	Kansas Flour Mills Co. v. Dirks	no	no	ni	no	no	ni	no	no	ni	no	no	no	no	no
39.	King v. American Academy of Dramatic Arts	no	ni	ni	no	no	y	no	no	inf	pr	ni	ni	no	no
40.	Kugler v. Romain*	ni	ni	ni	ni	y[619]	y	y[620]	y	y	y	y	ni	y[621]	y[622]
41.	Lazan v. Huntington Town House, Inc.*	no	no	ni	no	no	no	no	no	ni	pr	no	ni	po	no

616. The buyers were welfare recipients, of whom the court said the seller took "knowing" advantage.

617. The buyers agreed to pay $1,235, yet the seller knew the buyers were welfare recipients. On the other hand, the buyers did in fact pay slightly more than one-half the agreed amount, although not without incurring substantial late payment charges.

618. The opinion refused to permit a catsup seller's clause providing that all claims must be made within ten days of receipt to apply to a claim pertaining to mold discoverable only by microscopic examination; such a result, said the court, would be manifestly unfair. 93 Utah at 421-422, 73 P.2d at 1275.

619. The seller consciously directed its "pitch" to minority groups in urban areas, favoring persons with incomes of less than $5,000 per year (circa 1965). The court found that the buyers typically were incapable of understanding what they were doing.

620. The court found no "fraud per se" under the New Jersey Consumer Fraud Law, but the seller's representatives did make several misrepresentations, including misrepresentations as to price, achievability of high school equivalency diploma, and cancellation of the contract.

621. The court found that the "educational" book package had little or no educational value for the children in the age group and socioeconomic position seller represented would be benefited.

622. As observed in note 619, *supra*, the seller consciously aimed at low income, urban minority families; in addition, 779 collection actions were found to have been filed between 1964 and 1968, of which 628 resulted in judgment against the buyer.

CASES	Incomprehensible contract language?	Fine print, no attention drawn to clause?	Inordinate length?	Language barrier?	Education barrier?	Failure to give needed explanation?	Deception for misrepresentation involved?	Door-to-door sales setting	Form contract used?	Lack of serious bargaining as to term(s)?	High pressure sales tactics utilized?	Was public policy or other equitable approach an alternative analysis?	A knowing sale of things from which buyer could not receive substantial benefits?	A knowing sale of things which could not, with reasonable probability, be repaid in full?
42. Majors v. Kalo Laboratories, Inc.	ni	ni	ni	ni	ni	ni	po[623]	no	pr	ni	ni	pr [624]	po[625]	no

623. The seller sold its soybean inoculant as "100% guaranteed," yet it limited the guarantee to a return of the purchase price, knowing that there was some uncertainty as to the effectiveness of its new (and perhaps experimental) product. This apparently was not disclosed to buyer.

624. The *Majors* decision distinguished between a limitation on consequential damages which operated merely to prevent a seller of agricultural products, such as soybean inoculant, from becoming an insurer of crop yields—an outcome affected by innumerable variables beyond seller's control—and an exclusion or limitation thrown up as a defense to a claim of crop loss based on alleged latent defects in the product itself. To allow such a limitation to operate in the case of a defect would have permitted the buyer in *Majors* to recover only about 30 cents per acre (the price of the product), yet he would have expenditures in planting, harvesting, and cultivating of about $90 per acre—as the seller well knew. The case is alternatively viewable as a UCC § 2-719(2) case, in that it involved a limited remedy which had been caused by the circumstances to "fail of its essential purpose" and one in which the remedy was grossly disproportionate to the anticipated expenses a buyer would incur in order to use the product. *See also* Corneli Seed Co. v. Ferguson, 64 So. 2d 162 (Fla. 1953).

625. Because of the circumstances outlined in note 624, *supra*, the seller knowingly sold a thing from which the buyer might receive no benefits at all; in fact, losses were foreseeable to the buyer.

43.	McCarty v. E.J. Korvette, Inc.*	ni	ni	ni	ni	ni	ni	po[626]	no	pr	ni	ni	pr	no	no
44.	Meyer v. Packard Cleveland Motor Co.	no	ni	ni	ni	ni	po[627]	y[628]	no	pr	y	ni	y[629]	no	no
45.	Mieske v. Bartell Durg Co.*	no	y	no	no	no	y	no	no	y	y	no	y	no	no
46.	Murphy v. McNamara*	ni	pr	ni	ni	inf	y	po	no	inf	y	po	y	no	pr
47.	New Prague Flouring Mill Co. v. Spears	y[630]	y	y	no	no	y[631]	po[632]	no	y	y	no	y	no	no
48.	Nosse v. Vulcan Basement Waterproofing, Inc.	y	ni	ni	no	no	y	po	ni	y	inf	ni	y	po	no

626. The opinion in *McCarty* characterized it as "unfair" for a seller to advertise and expressly warrant against "blow-outs" in a tire, only then to say, "[W]e, of course, will replace any tires that do blow-out." *Cf.* Walsh v. Ford Motor Co., 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969).

627. The seller advertised certain "high-grade used trucks," categorizing such as being "practically a new truck as far as wearing qualities and operating efficiency is concerned." Yet, the buyer signed a contract form which expressly waived "all promises, verbal understandings or agreements of any kind . . . not specified herein."

628. See note 627, *supra.*

629. The opinion expressly recognizes that the result obtained is a substantial modification of the caveat emptor philosophy, as to which the court in no manner seeks to hide its disdain. 106 Ohio St. at 338-339, 140 N.E. at 121.

630. Into a space of about five by eight inches was crowded some 4000 words in small type. 194 Iowa at 429, 189 N.W. at 820.

631. The buyer's vision problems prevented him from reading, and the seller's agent admitted that he had not read the contract to the buyer and that the buyer had not read it in the presence of the agent before signing it. 194 Iowa at 431, 189 N.W. at 821.

632. The buyer alleged that the seller's agent had represented that the flour purchased would be "old wheat flour" and that, if the buyer was dissatisfied, he could refuse further shipments. Additionally, the buyer alleged that provisions of the printed form were at no point even mentioned to him. 194 Iowa at 430, 189 N.W. at 820.

CASES	Incomprehensible contract language?	Fine print, no attention drawn to clause?	Inordinate length?	Language barrier?	Education barrier?	Failure to give needed explanation?	Deception for misrepresentation involved?	Door-to-door sales setting	Form contract used?	Lack of serious bargaining as to term(s)?	High pressure sales tactics utilized?	Was public policy or other equitable approach an alternative analysis?	A knowing sale of things from which buyer could not receive substantial benefits?	A knowing sale of things which could not, with reasonable probability, be repaid in full?
49. Nu Dimensions Figure Salsons v. Becerra*	ni	ni	ni	ni	ni	y	y[633]	no	pr	pr	y	y[634]	an	no
50. Oldis v. Grosse-Rhode	ni	ni	ni	ni	ni	ni	ni	no	ni	ni	ni	pr[635]	no	no

633. The case was not decided on the basis of § 2-302. Defendant contracted for 190 half-hour reducing sessions at a price of $300, payable in 10 monthly installments of $30 each. Although the contract clearly said that the sessions were not refundable or cancellable, plaintiff allegedly told defendant that she could discontinue at any time—neglecting to mention, of course, that if she did so, she'd still be liable for the $300. Defendant sought to cancel on the same day. The case was decided by labelling the clause in question as a "penalty" clause rather than a liquidated damages clause. The court added, however, the public policy notion that it is unconscionable to place a contractant in a better position upon breach by the other party than he would have been in had that party fully performed.

634. *Id.*

635. The contract in *Oldis* purported to allow the seller of a restaurant to retain, as "liquidated damages," all payments made by the buyer upon buyer's default." Thus, the seller theoretically could have retained 1 percent or 99 percent of the contract price, depending upon when the buyer defaulted. As a policy matter, the clause readily could be seen as an unenforceable common law "forfeiture," rather than as a liquidated damages clause.

51.	Perkins v. Spencer*	ni	y	ni	no	no	po	no	no	y	y	no	y	no	no
52.	Pittsfield Weaving Co. v. Grove Textiles, Inc.	no	no	ni	no	no	no	no	no	y	y	no	ni	po	no
53.	Robert A. Munro & Co. v. Meyer	no	no	no	no	no	no	no	no	pr	ni	no	ni	no	no
54.	Sarfati v. M.A. Hittner & Sons*	ni	ni	ni	no	no	ni	no	no	inf	ni	no	ni	no	no
55.	Seabrook v. Commuter Housing Co.	y[636]	y	y	ni	ni	y	ni	no	y	pr	ni	y	no	no
56.	State v. ITM, Inc.*	ni	ni	ni	ni	ni	y	y[637]	y	y	y	y[638]	ni	y[639]	y[640]
57.	Toker v. Perl*	ni	ni	ni	ni	ni	y	y[641]	y	pr[642]	pr[643]	ni	no	no	no

636. The lease contained 54 clauses and 10,000 words, many of which were incomprehensible. It was 4 pages long.

637. The sellers used a referral sales scheme of the "pyramid," or "endless chain," variety, did not disclose to each prospective buyer his respective standing in the geometric progression of the "pyramid" sales scheme, and engaged in various other deceptive acts and practices, including the use of "sewer service." *Cf.* State *ex rel.* Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624 (Iowa 1971).

638. When asked to leave or return at a later time, sales representatives told the buyers, "[I]t's now or never."

639. The sellers using an endless chain sales scheme must be held to know that the buyers near the bottom of the "pyramid" cannot possibly benefit therefrom; on the other hand, the goods which are incidental to the scheme may be simply misrepresented as to quality, but nevertheless usable in fact. In only two instances did the buyers earn enough in commissions to pay for the products purchased, and the seller did not pay commissions actually earned in most cases.

640. The seller obtained numerous default judgments, indicating either low quality goods for which the buyers refused to pay or an inability to pay on the part of the buyers.

641. The buyers signed three forms: (1) a "food plan" contract, (2) an installment contract for a freezer (they were led to believe was included in the price of the food plan contract), and (3) an application for financing. The food plan contract was so placed that only the signature lines of the bottom two documents were visible.

642. In view of the circumstances, as outlined in note 641 *supra*, bargaining over terms is not likely to have occurred.

643. In view of the circumstances, as obtained in note 641 *supra*, high pressure sales tactics was a virtual certainty.

CASES	Incomprehensible contract language?	Fine print, no attention drawn to clause?	Inordinate length?	Language barrier?	Education barrier?	Failure to give needed explanation?	Deception for misrepresentation involved?	Door-to-door sales setting	Form contract used?	Lack of serious bargaining as to term(s)?	High pressure sales tactics utilized?	Was public policy or other equitable approach an alternative analysis?	A knowing sale of things from which buyer could not receive substantial benefits?	A knowing sale of things which could not, with reasonable probability, be repaid in full?
58. Toker v. Westerman*	ni	ni	ni	ni	inf[644]	ni	ni	y	pr	pr	ni	ni	no	po[645]
59. Trinkle v. Schmacher	no	no	no	no	no	no	no	no	y	ni	no	ni	po	no
60. Unico v. Owen*	ni	ni	ni	ni	ni	ni	ni	no	pr	y	ni	y[646]	no	no
61. United States Leasing Corp. v. Franklin	ni	ni	ni	no	no	ni	ni	no	pr[647]	ni	ni	pr	no	no

644. The buyers subsequently sought (and qualified for) welfare assistance, from which the inference as to educational attainment derives.

645. The comments made in note 644 *supra*, also provide a basis for inferences as to the ability to repay, although it is not indicated whether the seller was aware of such ability.

646. The case is simply one of the classic "holder in due course versus the consumer" variety, with the defense of nonperformance by the seller allegedly "cut off" by the status of the holder in due course. The court's ruling would not have been necessary had the seller been the plaintiff.

647. In several cases, the writer has indicated that form contracts were "probably" used. This presumption is borrowed from those pro-

62.	Vom Lehn v. Astor Art Galleries, Ltd.*	ni	ni	ni	no	no	po	po	no	ni	ni	po	ni	no	no
63.	Walsh v. Ford Motor Co.*	po[648]	ni	ni	ni	ni	ni	po[649]	no	y	ni	ni	pr[650]	no	no
64.	Weaver v. American Oil Co.	pr[651]	y	ni	ni	y[652]	y	ni[653]	no	y	y	ni	po[654]	no	no
65.	Williams v. Walker-Thomas Furniture Co.*	ni	y	ni	ni	y[655]	y	no	y	pr	pr	y	ni	no	y[656]

nouncements of courts in "judicial notice" cases: courts surely are deemed to know what the average person knows, to wit, a transaction which does not involve a form contract is rare.

648. The contract both disclaimed all warranties and limited remedies available for a breach of warranty—creating something of an ambiguous undertaking.

649. *Id.* Within the context of this category, "deception" does not necessarily refer to a misrepresentation or an act of concealment of information; rather, the connotation is that of the FTC—having the ability to mislead. In this sense, the ambiguous nature of the contract may have deceived the buyer in *Walsh*.

650. The buyer in *Walsh* sued for personal injuries caused by the breach. UCC § 2-719(3) states the public policy as to limitation of liability in such cases: it is prima facie unconscionable in a consumer sale.

651. The "probable" entry is based on an educated guess as to the contract form employed by American. In view of his limited education, there is little doubt that Weaver did not understand the full import of what he was executing.

652. Johnson was described as "practically illiterate."

653. No true deception appears in the case, although the mere ceremonious approach of American's representative effectively glosses over a rather significant bit of contractual language.

654. The impression cannot be avoided that the *Weaver* court made an important public policy decision in Indiana: If the contract is so complicated or onesided that the layman needs a lawyer to protect his interests, the party in the superior bargaining position must either advise him to obtain legal assistance or make a meaningful, clear, and unbiased explanation of the terms of the contract prior to execution thereof.

655. The opinion describes the buyer as a person of limited education.

656. The seller knew that the buyer was separated from her husband and was supporting her seven children on public assistance of $218 per month. The seller knew she had an unpaid balance in her account of $164 and still sold her a $515 stereo.