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## CONTRACTS OF ADHESION UNDER THE LOUISIANA CIVIL CODE

Ronald L. Hersbergen\*

"Not always are contracts formed through a process of negotiation and bargaining. Necessities of modern life have gradually developed a kind of contract one of the parties to which is not free to bargain."<sup>1</sup> The unbargained-for terms of standard form contracts do govern virtually all of the consumer's contractual relationships today. On the one hand, the standard form contract conserves time and energy, and exerts a positive influence on the reduction of the costs of goods and services.<sup>2</sup> In short, given the volume of transactions involved, there is no other orderly method by which to distribute goods and services to the consuming public.<sup>3</sup> But for all its utility, the terms of the standard form contract are dictated by the distributors of goods and services and terms unfairly advantageous to the distributor are, therefore, the likely result. Though the "adhesion" contract has been recognized in Louisiana as presenting a conceptual problem of consent in fact,<sup>4</sup> it has been said that no "theory" has been adopted in Louisiana by which courts are to treat the issue of consent thus raised.<sup>5</sup> Despite the ostensible absence of a systematic approach, Loui-

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1. 1 S. LITVINOFF, OBLIGATIONS § 194 in 6 LOUISIANA CIVIL LAW TREATISE 346 (1969).

2. See Llewellyn, Book Review, 52 HARV. L. REV. 700, 701-02 (1939).

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

4. See *Golz v. Children's Bureau of New Orleans, Inc.*, 326 So. 2d 865 (La. 1976); *Louisiana Power & Light Co. v. Mecom*, 357 So. 2d 596 (La. App. 1st Cir. 1978); *Davis v. Humble Oil & Ref. Co.*, 283 So. 2d 783 (La. App. 1st Cir. 1973). The Louisiana Supreme Court in *Golz* offered the following definition of a contract of adhesion: "a standard contract . . . prepared by a party of superior bargaining power for adherence or rejection of the weaker party . . . [which will] sometimes raise a question as to whether or not the weaker party actually consented to the terms." 326 So. 2d at 869. The *Golz* court, citing Civil Code articles 1766 and 1811, found consent present. Lack of true consent to terms as to which there could be no bargaining was offered by the first circuit in *Louisiana Power & Light Co. v. Mecom*, 357 So. 2d at 598, and in *Davis v. Humble Oil & Refining Co.*, 283 So. 2d at 787, as a definition of adhesion contracts. The term, however, is French: *contrat d'adhesion*. M. AMOS & F. WALTON, INTRODUCTION TO FRENCH LAW 149 (1935).

5. *Louisiana Power & Light Co. v. Mecom*, 357 So. 2d 596, 598 (La. App. 1st Cir. 1978); Duncan, *Adhesion Contracts: A Twentieth Century Problem for a Nineteenth Century Code*, 34 LA. L. REV. 1081 (1974). But see *Gautreau v. Southern Farm Bureau Cas. Ins. Co.*, 410 So. 2d 815 (La. App. 3d Cir. 1982).

siana courts have in fact dealt with the contract of adhesion and, in consumer transactions or transactions having consumer-interest overtones, have done so with reasonable success.

As Professor Litvinoff has explained, the nature of the document in which the adhesive terms are contained can be important.<sup>6</sup> Thus, the small, receipt-like but term-laden piece of paper generated in everyday transactions may not constitute a contract document at all.<sup>7</sup> The rationale for cases so holding is clear: not one in a thousand consumers receiving such a piece of paper is aware of the content of the language printed thereon, and almost all consumers perceive it as a mere receipt. To permit such to constitute a contract would allow the superior party to limit most, if not all, of its duties and obligations to the inferior party without the knowledge or consent of the latter.<sup>8</sup> This is a result inconsistent with Civil Code articles 1766, 1798, 1811, and 1819.<sup>9</sup>

The Louisiana Civil Code is flexible enough to deal with the problem of adhesion contracts or terms on the level of consent.<sup>10</sup> Though

6. See S. LITVINOFF, *supra* note 1, at § 195, p. 350.

7. See *Vogel v. Saenger Theatres, Inc.*, 207 La. 835, 22 So. 2d 189 (1945) (admission ticket to movie theatre, reserving right of theatre management to refuse admission to theatre); *Roppolo v. Pick*, 4 So. 2d 839 (La. App. Orl. Cir. 1941) (rent receipt releasing lessor from liability); *Marine Ins. Co. v. Rehm*, 177 So. 79 (La. App. Orl. Cir. 1937). See also *St. Paul Fire & Marine Ins. Co. v. Zurich Ins. Co.*, 250 So. 2d 451 (La. App. 4th Cir. 1971). The most recent expressions of the idea that a receipt may not be a contract document are found in *Clofort v. Matmoor, Inc.*, 370 So. 2d 1305 (La. App. 4th Cir. 1979) and in *Bowes v. Fox-Stanley Photo Prods., Inc.*, 379 So. 2d 844 (La. App. 4th Cir. 1980). *But cf.* *Southern States Equip. v. Jack Legett Co.*, 379 So. 2d 881 (La. App. 4th Cir. 1980) (commercial transactions).

8. *Vogel v. Saenger Theatres, Inc.*, 207 La. 835, 22 So. 2d 189 (1945); *Clofort v. Matmoor, Inc.*, 370 So. 2d 1305 (La. App. 4th Cir. 1979).

9. See, S. LITVINOFF, *supra* note 1, at § 195, p. 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).

10. LA. CIV. CODE art. 1766: "No contract is complete without the consent of both parties. In reciprocal contracts it must be expressed. In some unilateral contracts the law provides that under certain circumstances it shall be presumed."

LA. CIV. CODE art. 1798: "As there must be two parties at least to every contract, so there must be something proposed by one and accepted and agreed to by another to form the matter of such contract; the will of both parties must unite on the same point."

LA. CIV. CODE art. 1811:

The proposition as well as the assent to a contract may be express or implied:

Express when evinced by words, either written or spoken;

Implied, when it is manifested by actions, even by silence or by inaction, in cases in which they can from circumstances be supposed to mean, or by legal presumption are directed to be considered as evidence of an assent.

LA. CIV. CODE art. 1819:

Consent being the concurrence of intention in two or more persons, with regard

no reported decisions squarely present such an analysis in an adhesion case in which undeniably a "contract form" has been signed by the relief-seeking party, two decisions do indicate that in such a case consent may be lacking.<sup>11</sup>

In *Davis v. Humble Oil & Refining Co.*<sup>12</sup> a former oil company employee sought entitlement to a certain level of benefits under a pension plan, an issue which by the terms of the plan was to be governed by the law of New York. Although the first circuit ultimately backed away from this feature of the case on rehearing,<sup>13</sup> the court did offer the most scholarly approach to adhesionary contracts or terms to be found to date in a reported Louisiana decision:

As to the adhesionary nature of the provision, while it is true that parties may choose the law to govern their agreements under some circumstances (See Restatement Second, Conflict of Laws § 187), we see no indication in the facts of the present case of a free choice of law on the part of the plaintiff, Davis. There is no evidence of him or any party representing him having any part in the confection of the printed instrument. The New York law clause is not something about which he bargained or which he was free to accept or refuse.

Therefore, we are of the opinion that the printed provision in the plan is not something about which the parties bargained but is in reality a portion of an adhesion contract. Professor Albert A. Ehrenzweig of the University of California . . . observes that:

"Slowly and against much resistance courts and writers are beginning to recognize and to admit that the law of contracts has ceased to be a unitary set of rules relating to a 'bargain' and a 'meeting of the minds.'"

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An examination of the relevant provisions of Louisiana law reflects that an adhesion contract would not be binding under the

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to a matter understood by all, reciprocally communicated and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent, not only where the intent has not been mutually communicated or implied, as is provided in the preceding paragraph, but also where it has been produced by—

Error;  
Fraud;  
Violence;  
Threats.

11. *Orkin Exterminating Co. v. Foti*, 302 So. 2d 593 (La. 1974); *Davis v. Humble Oil & Ref. Co.*, 283 So. 2d 783 (La. App. 1st Cir. 1973).

12. 283 So. 2d 783 (La. App. 1st Cir. 1973).

13. *Id.* at 794-95.

fundamental principles of our codal law. Referring to contracts, Louisiana Civil Code Article 1798 says, in pertinent part, that ". . . the will of both parties must unite on the same point." And describing consent, Civil Code Article 1819 provides it is the ". . . concurrence of intention in two or more persons, with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will. . ."

There is no evidence that plaintiff ever consented or agreed that his rights to a disability pension would be governed by New York law. After examining the Humble Benefit Plan and its provision concerning the law to be applied we believe that it is an adhesion contract and that the adherent, plaintiff here, had no real choice and struck no bargain which might be described as him joining in a choice of law to govern the contract. We approve, therefore, the rule suggested by Professor Ehrenzweig that ". . . a stipulation of applicable law in an adhesion contract is invalid as lacking freedom of choice." 53 Columbia L. Rev. 1072 at 1084. We decline to recognize a provision of an adhesion contract which would have as its effect the substitution of the law of another jurisdiction for the law of Louisiana.<sup>14</sup>

The absence of meaningful choice surfaced in *Orkin Exterminating Co. v. Foti*<sup>15</sup> as an alternative ground on which to deny enforcement of a noncompetition clause in Orkin's standard form employment contract:

As noted in [National Motor Club of La., Inc. v.] Conque, 173 So. 2d 241, the essential basis of these [non-enforcement] decisions "is the right of individual freedom and of individuals to better themselves in our free-enterprise society, where liberty of the individual is guaranteed. A strong public policy reason likewise for holding unenforceable an agreement exacted by an employer of an employee not to compete after the latter leaves his employment, is the disparity in bargaining power, under which an employee, fearful of losing his means of livelihood, cannot readily refuse to sign an agreement which, if enforceable, amounts to his contracting away his liberty to earn his livelihood in the field of his experience except by continuing in the employment of his present employer."<sup>16</sup>

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14. *Id.* at 787-88.

15. 302 So. 2d 593 (La. 1974).

16. *Id.* at 596.

The *Davis-Orkin* analysis seems a correct one. But, at the same time, important public policy notions of individual financial security intertwined in each case make it difficult to quantify what theoretically should have been purely an analysis of consent, the public policy issues aside.<sup>17</sup> Realistically, the employment contract cases are probably more susceptible to the adhesion analysis of *Davis* and *Orkin* than are cases involving the acquisition of material goods. Furthermore, evidence of actual bargaining over the terms in issue will render the *Davis-Orkin* approach inapplicable, even in an employment context.<sup>18</sup> Also, clear evidence that consent was otherwise truly "free and deliberate" can override the fact that an adhesion contract has been signed, even in circumstances indicative of the most elementary public policy considerations conceivable.<sup>19</sup>

Whether Louisiana consumers will ultimately benefit from the *Davis-Orkin* consent analysis is thus speculative.<sup>20</sup> Still, the *Davis-Orkin* analysis of consent in a civilian setting does demonstrate that in an appropriate consumer case involving adhesionary terms, the Louisiana judiciary has available significant flexibility with which to fashion a just result.<sup>21</sup> Thus, while Louisiana courts may or may not have to date adopted "the theory of adhesion contracts,"<sup>22</sup> the Civil Code's consent articles are in no manner insufficient for the task.

When a consumer has signed what undeniably is a "contract form," as opposed to merely being in possession of a "receipt form," it is still possible to achieve justice in an adhesion contract case not involving the strong public policy issues seen in *Davis* and *Orkin* by applying various code concepts and jurisprudential rules. For instance, fine print seems indigenous to the standard form contract of adhesion, and that fact alone has in the past permitted a court in Loui-

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17. The importance of the public policy toward employment is best seen in *Morse v. J. Ray McDermott & Co.*, 344 So. 2d 1353 (La. 1977).

18. See *Gold & Suckle, Inc. v. Suckle*, 335 So. 2d 713 (La. App. 2d Cir. 1976). See also *Louisiana Power & Light Co. v. Mecom*, 357 So. 2d 596 (La. App. 1st Cir. 1978).

19. See *Golz v. Children's Bureau of New Orleans, Inc.*, 326 So. 2d 865 (La. 1976).

20. The case of *Louisiana Power & Light Co. v. Mecom*, 357 So. 2d 596 (La. App. 1st Cir. 1978) upheld a utilities services contract against a claim of no free and deliberate choice or consent, in a non-consumer case.

21. In *Mecom*, the first circuit, without reference to either *Davis* or *Orkin*, observed that "the power . . . to disregard clauses in contracts when one party had no power to negotiate terms . . . should only be exercised in cases in which the clauses in question are unduly burdensome or extremely harsh." 357 So. 2d at 598. Of relevance also is the possibility that various terms in a consumer contract may be unenforceable as an abuse of rights. See *Morse v. J. Ray McDermott & Co.*, 344 So. 2d 1353 (La. 1977); Cueto-Rua, *Abuse of Rights*, 35 LA. L. REV. 965 (1975).

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

siana to conclude that consent was lacking. Particularly is it so in a case where a *seller* has utilized fine print in his attempt to comply with Civil Code article 2474<sup>23</sup>—fine print simply is incompatible with a “clear explanation” of the extent of the seller’s obligations, even if the fine print language is in itself not ambiguous.<sup>24</sup> In fact, article 2474 declares that any *obscure* clause respecting the extent of his obligations, as well as an ambiguous one, is to be construed against the seller. From this principle can be drawn the conclusions that unambiguous but inconspicuous clauses in a contract of sale are ineffective,<sup>25</sup> whether or not fine print is the reason for the lack of conspicuity;<sup>26</sup> and that conspicuous, unambiguous contract language can be extrinsically obscured<sup>27</sup> and attention therefrom diverted,<sup>28</sup> so as to be ineffective. Finally, in the case of a sale, article 2474 decrees that the seller must explain himself in terms that may be read and understood by the ordinary layman-consumer.<sup>29</sup>

The best example of the application of the principle of Civil Code article 2474 is found in *Thibodeaux v. Meaux’s Auto Sales, Inc.*,<sup>30</sup> in

23. LA. CIV. CODE art. 2474: “The seller is bound to explain himself clearly respecting to the extent of his obligations: any obscure or ambiguous clause is construed against him.”

24. The issue most often arises in cases involving renunciation or modification of the implied warranty against redhibitory defects. *See, e.g.,* Kodel Radio Corp. v. Shuler, 171 La. 469, 131 So. 462 (1930) (limitation of time within which to make claims, found in small print on back side of seller’s invoice); Lyons Milling Co. v. Cusimano, 161 La. 198, 108 So. 414 (1926) (renunciation of warranty in small type); Lee v. Blanchard, 264 So. 2d 364 (La. App. 1st Cir. 1972) (renunciation of warranty clause in “extra fine print” on the purchase order form). *See also* Guillory v. Morein Motor Co., 322 So. 2d 375 (La. App. 3d Cir. 1975).

25. *See, e.g.,* Guillory v. Morein Motor Co., 322 So. 2d 375 (La. App. 3d Cir. 1975); Edwards v. Port AMC/Jeep, Inc., 337 So. 2d 276 (La. App. 2d Cir. 1976); Harris v. Automatic Enters. of La., Inc., 145 So. 2d 335 (La. App. 4th Cir. 1962).

26. *See, e.g.,* Wolfe v. Henderson Ford, Inc., 277 So. 2d 215 (La. App. 3d Cir. 1973); Lee v. Blanchard, 264 So. 2d 364 (La. App. 1st Cir. 1972). *Cf.* Hoover v. Miller, 6 La. Ann. 204 (1851) (as to a necessary explanation not given the law presumes that it would have been disadvantageous to have given it).

27. *See* Kodel Radio Corp. v. Shuler, 171 La. 469, 131 So. 462 (1930); Lyons Milling Co. v. Cusimano, 161 La. 198, 108 So. 414 (1926) (clause in small print and “not likely to be read”).

28. *See* Harris v. Automatic Enters. of La., Inc., 145 So. 2d 335 (La. App. 4th Cir. 1962).

29. *Thibodeaux v. Meaux’s Auto Sales, Inc.*, 364 So. 2d 1370 (La. App. 3d Cir. 1978) (buyer did not understand meaning of “redhibition” or “redhibitory vices”); Hendricks v. Horseless Carriage, Inc., 332 So. 2d 892 (La. App. 2d Cir. 1976) (“as is” terminology). *See also* Edwards v. Port AMC/Jeep, Inc., 337 So. 2d 276 (La. App. 2d Cir. 1976); Hersbergen, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Consumer Protection*, 40 LA. L. REV. 619 (1980).

30. 364 So. 2d 1370 (La. App. 3d Cir. 1978).

which the third circuit said of the seller's attempt to produce, in an adhesion contract, a valid renunciation, or waiver,<sup>31</sup> of redhibition:

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

The instrument also fails to meet the requirement that it must be explained to the buyer or brought to her attention. The testimony of the salesman . . . reflects that he did not explain nor did he point out the waiver to the plaintiff. He stated that he did not know what the waiver provisions meant.<sup>32</sup>

31. 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, subject to the above described restricted warranty . . . .

364 So. 2d at 1371.

32. 364 So. 2d at 1371-72 (citations omitted). 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 language in *Foy* was:

[I]t is specifically understood between the buyer and seller that this sale is made without any warranty whatsoever, expressed 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.

220 So. 2d at 238. In *Hendricks v. Horseless Carriage, Inc.*, 332 So. 2d 892 (La. App. 2d Cir. 1976), the bill of sale stipulated that buyer "buy[s] this car with no warranty"; and, though 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." 332 So. 2d at 893. The language was, however, held to have been brought to 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 of *Foy* was ineffective because the seller had not "explained" it, no doubt because the salesman testified that he, like his counterpart in *Thibodeaux*, did not know what was meant by a "vice" in a car.



The Third Circuit Court of Appeal accordingly ruled that this language was neither written in "clear and unambiguous terms," nor was it (or its meaning) brought to the buyer's attention or explained to him, and hence failed as a valid renunciation of redhibition.

Though lenders, lessors of habitable space, and services contractors are not "sellers" in Louisiana, there is no apparent policy reason why the same rules as to fine print, conspicuity, and readily understandable contract language should not apply to them equally as to the seller.<sup>33</sup> Given the widespread use of standard form contracting, such a duty of services contractors, lessors, and lenders can be traced to articles 1957 and 1958.<sup>34</sup> In fact, article 1958 has emerged as a primary means of attack on the contract of adhesion in all types of consumer transactions.<sup>35</sup> The effect of article 1958 is similar to that of article 2474, but the latter article is concerned only with the seller's explanation of the extent of his own obligations.<sup>36</sup> Article 1958 applies to *any* "doubt or obscurity," which the superior party should have explained in view of the fact that the contract language is *his* language. For example, an obscure clause respecting some feature of the *consumer's* obligation to pay, or some other matter beyond the scope of the superior party's own obligations, would nevertheless be

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33. See, e.g., *Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc.*, 377 So. 2d 92 (La. 1979) (lease); *Governor Claiborne Apts. v. Attaldo*, 231 La. 85, 90 So. 2d 787 (1956) (lease); *Gautreau v. Southern Farm Bur. Cas. Ins. Co.*, 410 So. 2d 815 (La. App. 3d Cir. 1982) (insurance); *United Cas. Mortgage & Inv. of Hammond, Inc. v. Estate of McGee*, 372 So. 2d 622 (La. App. 1st Cir. 1979) (loan); *Blum v. Marrero*, 346 So. 2d 356 (La. App. 4th Cir. 1977) (pest control services); *Algiers Medical & Surgical Group, Inc. v. Adams*, 275 So. 2d 907 (La. App. 4th Cir.), *writ denied*, 279 So. 2d 686 (1973). Cf. *Hudson v. Tilly*, 154 La. 839, 98 So. 265 (1923) (ambiguous interest provision); *Rayford v. Louisiana Sav. Ass'n*, 380 So. 2d 1232 (La. App. 3d Cir. 1980) (ambiguous loan provision).

34. LA. CIV. CODE art. 1957: "In a doubtful case the agreement is interpreted against him who has contracted the obligation."

LA. CIV. CODE art. 1958: "But 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."

35. See, e.g., *Rayford v. Louisiana Sav. Ass'n*, 380 So. 2d 1232 (La. App. 3d Cir. 1980); *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).

36. The seller's "obligations" language of article 2474 would mean at least those obligations found in articles 2475, 2476, and 2531, together with any other obligations expressly undertaken by the seller.

construed against the superior party who drafted the language in question.<sup>37</sup>

From a somewhat broader perspective, it is clear that the Civil Code's provisions as to *error* have a role to play in relieving the consumer of the harsh consequences of adhesion contracts. Articles 1825 and 1826 require that an error of fact, to result in the invalidity of a contract, must be as to the motive—that reason or purpose without which the contract would not have been made, and which was actually or presumably known to be such by the other party.<sup>38</sup> The reported consumer transaction decisions in this subject area, though relatively few in number, do demonstrate remarkable flexibility. Four cases are

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37. 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); *Doucet v. Standard Supply & Hardware Co.*, 250 So. 2d 549 (La. App. 3d Cir. 1971); *Ferguson v. Smill*, 183 So. 600 (La. App. Or. Cir. 1938).

The doubt or obscurity must have arisen for want of a "necessary explanation" which the party preparing the contract ought to have given; but 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. 1973), *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 and unexplained by the more knowledgeable merchant to the layman. 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).

38. LA. CIV. CODE art. 1825: "The error in the cause of a contract to have the effect of invalidating it, must be on the principal cause, when there are several; this principal cause is called the motive, and means that consideration without which the contract would not have been made."

LA. CIV. CODE art. 1826: "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."

At common law, knowledge on the one party's part that the other's motive was in error would not necessarily result in a mutual mistake for which rescission of the contract could be had; such would not be a true "mutual" mistake. See, e.g., *Berry v. Atlas Metals, Inc.*, 263 S.E.2d 179 (Ga. App. 1980); *Monsees Tool & Die, Inc., v. United States Fid. & Guar. Co.*, 423 N.Y.S.2d 747 (App. Div. 1979); *Ashworth v. Charlesworth*, 119 Utah 650, 231 P.2d 724 (1951).

illustrative. The consumer in *Gour v. Daray Motor Co.*<sup>39</sup> contracted for the purchase of a new Oldsmobile automobile. The manufacturer and the seller had carefully concealed from the buying public in general and from the consumer in question the fact that certain Oldsmobiles were equipped with engines manufactured by the Chevrolet division of General Motors. The scheme of concealment before the fact gave rise to the presumption that the seller and the manufacturer knew "from the nature of the transaction"<sup>40</sup> that the consumer's principal motive was to obtain an Oldsmobile equipped with an Oldsmobile engine and other components. The consumer in *Pollard v. Ingram*<sup>41</sup> contracted for a three-week European tour, believing that the travel involved would be primarily by air—an important consideration for the consumer, who suffered from a chronic heart disorder. In fact, the travel included a 2,400 mile bus tour. The consumer could tolerate no more than seven days on the tour before returning home due to ill health. The tour contractor, who had not misrepresented the travel arrangements, and who had not known of the consumer's motive, sued for the contract price. The court ruled that the mode of transportation is as important a motive to a traveler as where he is going—a fair enough appraisal—but did not apply article 1826 to defeat the consumer's defense.<sup>42</sup>

In *Jones v. DeLoach*,<sup>43</sup> defendant offered her home for sale under terms which included payments of \$295 per month. Plaintiff made an offer which defendant accepted, but which included payments of \$225 per month—an amount which neither party realized was insufficient to cover interest and principal. Now, lest one believe that the respective motives of buyer and seller are the acquisition of the thing, and the price, consider the message of the second circuit:

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

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39. 373 So. 2d 571 (La. App. 3d Cir. 1979).

40. LA. CIV. CODE art. 1826.

41. 308 So. 2d 860 (La. App. 4th Cir. 1975).

42. The source of the consumer's error in *Pollard* apparently was another party booked on the tour, and it is difficult to understand just how the tour contractor could have been apprised of the consumer's error in motive, or presumed from the nature of the transaction to have known it.

43. 317 So. 2d 240 (La. App. 2d Cir. 1975).

amount of the price of the property or the total amount of the loan.<sup>44</sup>

*Deutschmann v. Standard Fur Co.*<sup>45</sup> also represents an impressive line of cases demonstrative of Civil Code flexibility in the area of consent. Suppose that the consumer's understanding is that a certain term or phrase means one thing, while the merchant's understanding (and perhaps that of the usages of his trade) is something entirely different. The answer of the Louisiana courts is clear: the merchant, as an expert (at least relative to the consumer) must be diligent to spot any potential misunderstandings and make such disclosures as to avoid any potential misunderstandings. In *Deutschmann*, the consumer's contracting motive was the fabrication of a fur coat made with "continuous" furs, "not pieced together." The furrier did not reveal to the consumer that in his trade, a "V-type" seam was an acceptable method of joining fur pieces and was not considered "piecing together." But, "[i]t was his responsibility," said the court, "to communicate to [the consumer] information which . . . would have avoided the confusion,"<sup>46</sup> and his failure to do so was held to have caused an error of fact as to the consumer's principal cause, invalidating consent. This

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44. *Id.* at 243. See also *Stack v. Irwin*, 246 La. 777, 167 So. 2d 363 (1964) (buyer's determining motive was to obtain a residence so free of substantial defects that no major repairs would be required); *Carpenter v. Skinner*, 224 La. 848, 71 So. 2d 133 (1954) (buyer's motive was to obtain a home in a "white" neighborhood; such information would not have been readily ascertainable by ordinary inspection, even, so it seems, by knocking on neighborhood doors); *Gour v. Daray Motor Co.*, 373 So. 2d 571 (La. App. 3d Cir. 1979) (buyer's motive was to obtain an Oldsmobile automobile equipped with an Oldsmobile engine); *West Esplanade Shell Serv., Inc. v. Breithoff*, 293 So. 2d 595 (La. App. 4th Cir. 1974) (car owner's motive was the elimination of excessive oil consumption and smoke; a "valve" job would be within the motive only if it in fact eliminated excessive oil consumption and smoke); *Ouachita Air Cond., Inc. v. Pierce*, 270 So. 2d 595 (La. App. 2d Cir. 1972) (dealer replaced homeowner's defective "York" brand air conditioning unit with an "Amana" brand unit; held an error of fact, no meeting of the minds); *Campo Appliance Co. v. Hurst*, 256 So. 2d 317 (La. App. 1st Cir. 1971) (rescission granted where 1967 television set sold as a 1969 model); *National Co. v. Krider*, 150 So. 2d 592 (La. App. 4th Cir. 1963) (homeowner's motive in siding contract was not mere elimination of painting and other maintenance, but rather was the installation of siding with no removal of any wooden material); *Gibert v. Cook*, 144 So. 2d 683 (La. App. 4th Cir. 1962) (homeowner's motive was "perfectly" fitted cabinets, not standard-manufactured cabinets fitted to space with necessary cutting of window trim).

45. 331 So. 2d 219 (La. App. 4th Cir. 1976).

46. *Id.* at 221. Cf. *Addis v. Bernardin, Inc.*, 597 P.2d 250 (Kan. 1979) (applying a similar principle under the U.C.C.).

principle, apparently based on a number of Civil Code articles,<sup>47</sup> can be seen in many Louisiana cases.<sup>48</sup>

Arbitrary exercise of rights that flow from adhesive terms can be prevented by resort to the good faith requirement of Civil Code article 1901.<sup>49</sup> The third circuit recently did so—without express reliance on article 1901—in *Gautreau v. Southern Farm Bureau Casualty Insurance Co.*,<sup>50</sup> by permitting an insured the opportunity to show that the reason for non-renewal of the policy was beyond the range of reasons for non-renewal fairly contemplated by the insured. Under standard form insurance policies, the right to cancel or to refuse to

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47. The principle seems influenced by at least the following Civil Code articles: 1797, 1798, 1819, 1821, 1823, 1825, 1826, 1958, & 2474.

48. In *Leithman v. Dolphin Swimming Pool Co.*, 252 So. 2d 557 (La. App. 4th Cir.), cert. denied, 259 La. 1055, 254 So. 2d 464 (1971), a contractor's failure to reveal to the homeowner that usages of trade might permit a "kidney-shaped" pool of 16' x 14' x 32' dimensions to have at the narrowest point a width of 11'6" resulted in a construction of the contract against him under articles 1957 and 1958, a breach of the contract, and the following judicial remark from the fourth circuit: "The layman would not ordinarily be aware of this [trade usage or] circumstance. A layman contracting for a pool of stated dimensions . . . may reasonably understand that no dimension will be smaller than the smallest stated dimension." 252 So. 2d at 558. A similar result obtained in *Larriviere v. Roy Young, Inc.*, 333 So. 2d 254 (La. App. 3d Cir. 1976), which involved an oral contract for a 20' by 10' exterior measurement boat slip—unknown to the consumer, measurements in the construction business refer to exterior measurements, which resulted in an unusable internal width of only seven feet. Because it was the consumer's instructions which were carried out, the court made the following observation: "Where a layman contracts with a knowledgeable and experienced businessman, the burden is on the latter to point out obscurity. To fulfill the burden on the experienced contractor in dealing with laymen, he should point out the inadequacy of the layman's instructions." 333 So. 2d at 255. Both *Leithman* and *Larriviere* could have been decided on the basis of the consumer's error in motive. See also *Blum v. Marrero*, 346 So. 2d 356 (La. App. 4th Cir. 1977) (pest control company could not reasonably suppose that prospective homeowner would understand that a "termite inspection" would not include an inspection for wood-destroying insects of all kinds found in the locale); *Spring v. Stevens Ready-Mix Concrete, Inc.*, 343 So. 2d 256 (La. App. 1st Cir.), writ denied, 345 So. 2d 1194 (La. 1977) (contractor failed to warn homeowner, who was totally unfamiliar with the proper handling of concrete, of the danger of unsatisfactory results of pouring concrete when there was at least a 50% chance of rain). See generally *Fraser v. Ameling*, 277 So. 2d 633 (La. 1973); *Maxwell v. Bernard*, 343 So. 2d 431 (La. App. 3d Cir. 1977); *Co-Operative Cold Storage Bldrs., Inc. v. Arcadia Foods Inc.*, 291 So. 2d 403 (La. App. 4th Cir. 1974); *Dieball v. Bill Hanna Ford Co.*, 287 So. 2d 595 (La. App. 2d Cir. 1973); *Draube v. Reith*, 114 So. 2d 879 (La. App. Orl. Cir. 1959); *Kunnes v. Bryant*, 49 So. 2d 872 (La. App. Orl. Cir. 1951).

49. LA. CIV. CODE art. 1901: "Agreements legally entered into have the effect of laws on those who have formed them.

They can not be revoked, unless by mutual consent of the parties, or for causes acknowledged by law.

They must be performed with good faith."

50. 410 So. 2d 815 (La. App. 3d Cir. 1982).

renew is typically exercisable "at will," for any reason whatsoever, but if the absence of good faith can be established by the aggrieved insured,<sup>51</sup> his protection under the policy is preserved. The third circuit holding that a covenant of good faith and fair dealing preclusive of arbitrary exercise of rights was implied<sup>52</sup> in the insurance policy is the very essence of the good faith performance principle of article 1901.

The *Gautreau* decision is of particular significance to adhesion contracts that are not susceptible to the Civil Code principles of error, fraud, and ambiguity, all of which bear on consent. But there exists in Louisiana Civil Code article 1945 another, and highly significant, principle that also bears on the enforceability of adhesion contracts: terms that unambiguously lead to a result that would be *absurd* will not be enforced in the absence of clear proof of consent.<sup>53</sup> Demonstrative of this principle is *Boisseau v. Vallon & Jordano, Inc.*,<sup>54</sup> in which the Louisiana Supreme Court refused to enforce a real estate broker's listing agreement that unambiguously required the landowner to pay a broker's commission upon the acceptance of an offer to buy, whether or not the sale was ever consummated. To the court, such a stipulation was "out of accord with those usually found in such instruments," and was one that "no sane man would obligate himself" to perform, so that a doubt did arise as to the owner's consent under article 1945.<sup>55</sup> Also demonstrative of the article 1945 principle are: an agreement by which a seventy-year old woman of limited financial ability and a severe cataracts condition rendering her incapable of driving, purportedly purchased *in her own name* a new automobile<sup>56</sup> and an agreement for the benefit of a prospective house buyer to

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51. Cf. LA. R.S. 10:1-208 (Supp. 1974) ("at will" acceleration clauses in negotiable instruments must be exercised in good faith).

52. 410 So. 2d at 918.

53. LA. CIV. CODE art. 1945:

Legal agreements having the effects of law upon the parties, none but the parties can abrogate or modify them. Upon this principle are established the following rules:

First—That no general or special legislative act can be so construed as to avoid or modify a legal contract previously made;

Second—That courts are bound to give legal effect to all such contracts according to the true intent of all the parties;

Third—That the intent is to be determined by the words of the contract, when these are clear and explicit and lead to no absurd consequences;

Fourth—That it is the common intent of the parties—that is, the intention of all—that is to be sought for; if there was a difference in this intent, there was no common consent and, consequently, no contract.

54. 174 La. 492, 141 So. 38 (1932).

55. 174 La. at 501, 141 So. at 41.

56. *Chrysler Credit Corp. v. Henry*, 221 So. 2d 529 (La. App. 4th Cir. 1969).

conduct a "termite" inspection that revealed no termite infestation, but failed to reveal active beetle infestation purportedly not within the scope of a "termite" examination.<sup>57</sup> Of such seemingly unambiguous contracts or clauses the Louisiana courts in effect are saying, "they are so out of accord" with the consumer's reasonable expectations as to be unenforceable in the absence of proof positive that they were understood and freely consented to,<sup>58</sup> or that "it taxes our credulity to believe that such a contract would have been freely consented to."<sup>59</sup>

Even in the absence of absurdity, or of an obscurity or ambiguity, consent to the adhesion clause may still be lacking when the consumer is disadvantaged as to education, sophistication, or otherwise.<sup>60</sup> Louisiana courts have likewise long recognized the need to apply general equitable principles to avoid an unjust result,<sup>61</sup> and are perhaps recognizing abuse of rights as a theory applicable to the adhesion contract.<sup>62</sup>

#### CONCLUSION

The first circuit's statement in *Louisiana Power & Light Co. v. Mecom* that "Louisiana courts have not to date adopted the theory of adhesion contracts"<sup>63</sup> is arguably correct, but it is also misleading. With greater accuracy the court could have said that while Louisiana courts have not to date applied the Civil Code in a systematic way to the adhesion contract, the Civil Code is equal to the challenge. But of the common law system the same cannot be said. In the common law jurisdictions "unconscionability" has emerged from Uniform Commercial Code § 2-302(1)<sup>64</sup> as the principal judicial device by which the

57. *Blum v. Marrero*, 346 So. 2d 356 (La. App. 4th Cir. 1977).

58. *Id.* at 357. Compare *Boisseau v. Vallon & Jordano, Inc.*, 174 La. 492, 141 So. 38 (1932) with *Golz v. Children's Bureau of New Orleans, Inc.*, 326 So. 2d 865 (La. 1976).

59. *Chrysler Credit Corp. v. Henry*, 221 So. 2d 529, 533 (La. App. 4th Cir. 1969).

60. See *Succession of Molaison*, 213 La. 378, 34 So. 2d 897 (1948); *Guillory v. Morein Motor Co.*, 322 So. 2d 375 (La. App. 3d Cir. 1975); *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); *Segretto v. Menefee Motor Co.*, 159 So. 345 (La. App. Orl. Cir. 1935). See also *Smith v. Everett*, 291 So. 2d 835 (La. App. 4th Cir.), writ denied, 294 So. 2d 827 (La. 1974); *Griffing v. Atkins*, 1 So. 2d 445 (La. App. 1st Cir. 1941); *Davis v. Whatley*, 175 So. 422 (La. App. 1st Cir. 1937).

61. See, e.g., *Succession of Gilmore*, 157 La. 130, 102 So. 94 (1924); *City of New Orleans v. Le Bourgeois*, 50 La. Ann. 591, 23 So. 542 (1898). See also *Succession of Molaison*, 213 La. 378, 34 So. 2d 897 (1948).

62. See *Morse v. J. Ray McDermott & Co.*, 344 So. 2d 1353 (La. 1977). But see *Louisiana Power & Light Co. v. Mecom*, 357 So. 2d 596 (La. App. 1st Cir. 1978).

63. 357 So. 2d at 598.

64. U.C.C. § 2-302(1) (1978) (official text):

(1) If the court as a matter of law finds the contract or any clause of the con-

fairness of standard form contracts of adhesion in a consumer transaction is adjusted. In 1975 Louisiana became the fiftieth state to enact the Uniform Commercial Code, but unlike its sister states, Louisiana omitted U.C.C. articles 2, 6, and 9.<sup>65</sup>

By not enacting article 2 of the U.C.C., Louisiana remains, with California,<sup>66</sup> a jurisdiction without U.C.C., section 2-302—not the most important section in the U.C.C., perhaps, but by far the most interesting one. The principle of unconscionability undoubtedly would be a convenient judicial tool with which Louisiana courts could handle adhesion contracts, but no inherent weakness in the Civil Code necessitates the adoption of that principle.<sup>67</sup>

The common law and the civil law of Louisiana share a common heritage: one set of rules for the formation of contracts, with the implicit premise that all obligations are contracted at arm's length through a process of actual term-by-term bargaining by parties having relatively equal bargaining power. The need for mass contracting, brought about by mass production and mass marketing, surely undercut whatever validity that implicit premise historically may have enjoyed. The "similarity" between the two systems is superficial, for at the foundation of the common law is the notion of caveat emptor—an idea foreign to the Louisiana Civil Code.<sup>68</sup> Because of the tradition

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tract 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.

Among the many excellent commentaries on the doctrine of unconscionability are: Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969); Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969).

65. LA. R.S., tit. 10. By 1982, U.C.C. 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 reason for inaction perhaps being that articles 2 and 9 are incompatible with Louisiana's underlying Civil Code principles. 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); The fact that much of the effort herein can probably be cited in support of inaction in Louisiana on article 2 (and, it must follow, article 9 as well) is unintended but unavoidable.

66. California omitted § 2-302 entirely.

67. The author is presently writing an article entitled "Unconscionability: The Approach of the Louisiana Civil Code," which is scheduled to appear in a future issue of the LOUISIANA LAW REVIEW.

68. See *Rushton v. LaCaze*, 106 So. 2d 729 (La. App. 2d Cir. 1958); *Dependable Refrig., Inc. v. Giambelluca*, 94 So. 2d 148 (La. App. Or. Cir. 1957).



of caveat emptor, the common law states did not always adjust easily to changes in the manner in which agreements were formed with standard form contracts. The Civil Code, on the other hand, has been applied in Louisiana under a dual standard, recognized as such by the Supreme Court of Louisiana,<sup>69</sup> whereby the formation and enforceability of a contract may depend, to a large degree, on the level of sophistication of the buyer, landowner, lessee, or borrower. The court has recently reaffirmed that position in *Louisiana National Leasing Corp. v. ADF Service, Inc.*,<sup>70</sup> stating that: "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 lease agreement which they signed."<sup>71</sup>

It was perhaps to be expected that a legal system not founded in nor bound by the caveat emptor tradition would be shown to have greater flexibility for dealing with the problems of standard form adhesion contracts, and that certainly seems to be the case in Louisiana. Yet, no reason appears why the process of Civil Code revision should not address the problem of standard form contracts in a head-on manner. Easy answers do not spring forward immediately for the adhesionary terms that are not obscure or ambiguous. Certainly a starting point would be to expressly impose a duty of good faith in the contract formation process to accompany that of article 1901, which pertains to the performance of contracts. An alternative approach would be to give legislative blessing to the *Davis-Orkin* consent analysis, leaving the matter within the discretion of the judiciary in the style of unconscionability under U.C.C. § 2-302.

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69. In *Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., Inc.*, 262 La. 80, 262 So. 2d 377 (1972), the court stated that "Louisiana has aligned itself with the consumer-protection rule, by allowing a consumer without privity to recover . . ." 262 La. at 90, 262 So.2d at 381. The idea was applied in *Anderson v. Bohn Ford, Inc.*, 291 So. 2d 786 (La. App. 4th Cir. 1973), *writ denied*, 294 So. 2d 829 (La. 1974), in which the fourth circuit conceded that, because there is a greater presumption that a commercially sophisticated buyer is more aware of the contents of a written agreement than is the typical consumer, *id.* at 791, the rules as to renunciation or waiver of redhibition do not apply equally to those two classes of buyers.

70. 377 So. 2d 92 (La. 1979).

71. *Id.* at 96 (citation omitted).