Reimbursement for Satisfaction of Community Obligations with Separate Property: Getting What's Yours

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I. REIMBURSEMENT—AN OVERVIEW

A husband and wife divorce, ending years of arguing and emotional roller coasters. Unfortunately, the real fight has not even begun. After the judge enters the divorce judgment, each spouse uses portions of the community property and awaits partition. The wife retains a car and a house as she begins to make a new life for herself, no longer part of a duo. She has never worked outside the home and does not even have a college education. Now, she is forced to support herself and her children on minimum wage and monthly child support payments. Soon, the mortgage on the house and the car note fall due. In an effort to prevent foreclosure and repossession, she pays both community notes out of her salary—separate property—but does not have enough to make ends meet this month. She hopes for reimbursement from her husband for half her expenses, but none comes because of the type of property related to the obligation and timing of payments, the source of a circuit split among Louisiana courts. Unable to sustain the notes, she gives up both house and car to her husband in a settlement to alleviate her burden. She and the children then move to a small apartment and she continues to

1. Though the couple is divorced, this debt is still a community obligation because the property has not yet been judicially partitioned. LA. CIV. CODE ANN. arts. 2360, 2361 (2007). This obligation is presumed to be a community obligation because it was incurred during the existence of the community for the common interest of the spouses. The property, upon which that debt was incurred, has not yet been judicially partitioned; therefore, it is still co-owned, and each spouse is liable for the debt.

2. See LA. CIV. CODE ANN. art. 2341 (2007) (indicating what property is separate). Salary is generally considered community property because they are acquired through the effort, skill, or industry of either spouse; however, this is only applicable during the existence of the legal regime. LA. CIV. CODE ANN. art. 2338 (2007). Therefore, the salary obtained after the termination of the legal regime is separate property.
carve out a living—struggling but surviving. Such is the harsh reality of many divorces. What can be done to protect this woman and other spouses like her who use their separate funds to pay community obligations?

The prevalence of divorces in the United States is increasing dramatically. The marriage rate is currently 7.5 per 1,000 total population. However, the current rate of divorce in the United States is an astounding 3.6 per 1,000 total population. Based on these statistics, chances are great that many of us will face a grueling trip to family court. Unfortunately, the family court’s task is not an easy one. In the midst of a private emotional battle between a husband and wife, a public legal battle is waged in the courtroom. The job of the court is to sort through the broken pieces of this union, undo, and repair. To do this, the court must attempt to separate lives that have become intertwined—to untangle the untangleable.

Because Louisiana is a community property state, the court’s task is further complicated. The central notions of mutuality and sharing imposed by the community property regime create complications as spouses are tied together financially, almost inextricably. Such complications of the community property system could easily be avoided if the spouses contracted for a separate property regime. However, this is not a practical solution for many living in community property states. Often, spouses without the benefit of a legal education are not cognizant of state laws concerning marriage. They simply do not realize that contracting for a separate property regime is possible before marriage. Also, many couples do not possess the financial

5. Id. (including 46 reporting States and D.C.).
resources to seek legal advice or properly execute the required documentation to establish the separate property regime.\(^9\) Therefore, few people will pursue the separate property regime, and most spouses are left with the community property system already in place along with its inherent complications.

The Louisiana community property regime's scheme of reimbursement,\(^{10}\) in particular, is a complicated maze that Louisiana courts must navigate in separating spouses. The right of reimbursement upon the termination of the community is the major vehicle in Louisiana for adjusting claims between spouses, as it lessens the economic burden imposed on one spouse when he or she pays a debt for which he or she should not be held solely responsible.\(^{11}\) The notion of reimbursement may seem elementary; however, this ostensibly simple concept has wrought serious controversy in the courts and legislature since its adoption in 1978.

The Louisiana reimbursement scheme provides, in part, that "if community property has been used to satisfy a separate obligation of a spouse, the other spouse is entitled to reimbursement upon the termination of the community property regime for one-half the amount of the value that the property had at the time it was used."\(^{12}\) Thus, assume a Louisiana husband purchased a car or

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9. In Louisiana, a matrimonial agreement may be executed by the spouses before or during marriage. LA. CIV. CODE ANN. art. 2331 (2007). It shall be made by authentic act or by an act under private signature duly acknowledged by the spouses. Id. Spouses may enter into a matrimonial agreement that modifies or terminates a matrimonial regime during marriage only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing principles and rules. LA. CIV. CODE ANN. art. 2329 (2007).

10. Reimbursement is repayment and indemnification. BLACK'S LAW DICTIONARY 1312 (8th ed. 2004). A spouse may have a claim against the other spouse for reimbursement upon the termination of the community property regime. LA. CIV. CODE ANN. art. 2358 (2007).


home before marriage and took out a loan to finance the purchase price. Even if, after marrying and establishing a community property regime, the wife uses her earnings (community property) to pay the loan payments, the wife will have no ownership interest in the car or home. Louisiana’s classification scheme classifies property primarily at the time of acquisition. The contribution of funds of a different character later is irrelevant for classification purposes. In Louisiana, the remedy for the

13. Property acquired during the marriage through the effort, skill, or industry of a spouse is community property. LA. CIV. CODE ANN. art. 2338 (2007). This is generally true of earnings; therefore, earnings are community property. See generally Paxton v. Bramlette, 228 So. 2d 161 (La. App. 3d Cir. 1970) (holding that a wife’s salary was community income).

14. See infra note 16. Louisiana rejects the buy-into title theory whereby the wife using community funds as payment on the husband’s separate obligation would give herself an ownership interest in his property.

15. SPAHT & CARROLL, supra note 6, at 28.

16. In applying principles that refuse an ownership interest to a spouse who contributes by making payments, Louisiana is different from many of the other community property states because it advocates a reimbursement rather than buy-into-title theory. California is one state that uses buy-into-title to resolve claims and propounds that:

[W]here community funds are used to make payments on property purchased by one of the spouses before marriage “the rule developed through decisions in California gives to the community a pro tanto community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds.

In re Marriage of Moore, 618 P.2d 208, 210 (1980) (quoting Forbes v. Forbes, 257 P.2d 721, 722 (1953)). Nevada employs another version of the buy-into-title theory that is not based on the amount of principal reduction attributable to each monthly mortgage payment. WILLIAM A. REPPY & CYNTHIA SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 9 (2000). Credit for the unpaid balance on the obligation is assigned pro rata according to a time rule based upon the total number of monthly payments made from separate or community property. Id. at 9–10. Arizona uses a combination reimbursement and buy-into-title theory and holds that, for example, if community funds are used to make mortgage payments after an initial separate property acquisition, the amount of reimbursement owed to the community upon termination is the same value as the community’s actual interest in the property at the time of dissolution. Id.

Clearly, the buy-into-title theory has many different variations, some employing reimbursement concepts; however, Louisiana does not use this theory because of its potentially unfair results. For example, if the community makes a single payment on the husband’s property purchased before marriage, then the
wife’s contribution is reimbursement rather than an ownership interest in the husband’s car or house. Under article 2364 of the Louisiana Civil Code, the wife may get back one-half of the funds she paid.

However, the real problems concerning reimbursement have come not with reimbursement of community funds used to satisfy a separate obligation, but rather with the counterpart concept of reimbursement when one spouse uses his separate funds to satisfy a community obligation. Article 2365 states: “If separate property of a spouse has been used to satisfy a community obligation, that spouse, upon termination of the community property regime, is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used.” This very language implies that one spouse is theoretically and equitably responsible for only one-half of a community obligation. For instance, if wife uses her separate funds (saved before marriage or acquired by inheritance) to pay a community loan on a house or car, she should be able to see a return of one-half of the payments upon termination of the community property regime. This is because she has paid a community debt owed by both spouses. This core concept of equalizing the economic burden of payment seems rather straightforward, but in light of recent misinterpretations of article 2365, the wife, who paid the debt for which both parties were accountable, may get nothing, either because of the timing of the payment or because of the type of underlying property on which the debt was paid.

Controversy over article 2365 has raged since its adoption in 1980. Twenty-seven years later, the controversy remains

wife will have an ownership interest in that property. One inconsequential payment should not give the wife an ownership interest in property on which the husband has been making the majority of payments. One of the central premises underlying community property is to provide equitable results to spouses; the buy-into title theory does not accomplish that goal. Therefore, Louisiana seeks fairer remedies by opting for pure reimbursement principles.

17. See supra note 16.
20. See art. 2365.
powerful, and the Louisiana Supreme Court still has not addressed the circumstances under which reimbursement for satisfaction of a community obligation with separate funds is available. The time has come for the court to step in and resolve the competing views in the Louisiana circuits over the proper circumstances for reimbursement under article 2365. The purpose of this comment is to serve as a guide for this resolution by addressing the totality of the jurisprudential confusion regarding when a spouse may obtain reimbursement for separate property used to satisfy a community obligation.

The various Louisiana circuit courts have employed several strained interpretations of the right to reimbursement for the use of separate funds to satisfy a community obligation. Some courts have held that one must distinguish between the type of property related to the community obligation—movable or immovable—and allow reimbursement only for payments made on immovable property.21 Other courts have hinged the availability of reimbursement on the timing of the payment.22 As a derivative of this theory, some Louisiana courts have held that reimbursement is available only for payments made before termination of the legal regime, thus disallowing reimbursement for payments made after the termination of the marriage, but before the partition of the community property.23 Others, on the contrary, have allowed all

21. See, e.g., Mason v. Mason, 927 So. 2d 1235 (La. App. 2d Cir. 2006) (holding that a wife was entitled to reimbursement for the use of her separate funds to pay the mortgage on the family home, but that she was not entitled to reimbursement for payments on a car note); Sheridan v. Sheridan, 867 So. 2d 38 (La. App. 3d Cir. 2004) (holding that a wife could not get reimbursement for expenses spent on the purchase of a car); Davezac v. Davezac, 483 So. 2d 1197 (La. App. 4th Cir. 1986) (holding that a husband was entitled to reimbursement for payments made on the family home after termination of the community regime, but that he was not entitled for reimbursement for clothing and payments made on a car note.); Gachez v. Gachez, 451 So. 2d 608 (La. App. 5th Cir. 1984) (holding that a husband was entitled to reimbursement for payments made on a house mortgage, but not for payments of a car).

22. See, e.g., Sheridon, 867 So. 2d 38; Bergeron v. Bergeron, 693 So. 2d 199 (La. App. 3d Cir. 1997); Davezac, 483 So. 2d 1197; Moody v. Moody, 622 So. 2d 1381 (La. App. 1st Cir. 1993); Bordelon v. Bordelon, 942 So. 2d 708 (La. App. 3d Cir. 2006).

23. See, e.g., Sheridon, 867 So. 2d 38; Bergeron, 693 So. 2d 199; Bordelon, 942 So. 2d 708.
post-termination payments, as long as they were made pre-partition of community property.\textsuperscript{24}

Ultimately, the statutory and scholarly authority, along with equity and public policy, demand that the spouse who satisfies a community obligation with separate funds should be reimbursed even if payment was made after termination of the community property regime (as long as it was made pre-partition of property). Courts should not refuse reimbursement because the payment was not made during the existence of the community or draw a distinction between an obligation related to movables and one related to immovables. The wealth of Louisiana jurisprudence indicating otherwise is misguided and should be overruled.

Part II of this comment looks at the different treatments utilized by Louisiana courts in determining when to allow reimbursement and demonstrates the need for reform. Part III explains why allowing reimbursement regardless of when the payment was made presents a more workable solution, one that is fair to all concerned and in accord with the precepts of the Civil Code. Likewise, Part III shows that premising the right to reimbursement on the nature of the property related to the obligation is inappropriate, as it deviates from the plain language and intent of the code articles and unnecessarily and unjustly discriminates against the person discharging the community obligation.

II. THE HISTORY OF LOUISIANA REIMBURSEMENT

Before 1980, under the Louisiana Civil Code of 1870 article 2408, reimbursement was a source of confusion among Louisiana courts because the measure of reimbursement was difficult to discern.\textsuperscript{25} For example, Louisiana courts did not know whether to deduct reimbursement claims, by one spouse against the other, from the net community assets or from the obligor spouse's share of the net community.\textsuperscript{26} With the addition of the new articles and subsequent revisions, the confusion dissipated as to calculation of

\textsuperscript{24} See, e.g., Moody, 622 So. 2d 1381; Davezac, 483 So. 2d 1197.

\textsuperscript{25} SPAHT & MORENO, supra note 11, § 7.13, at 562 (noting that the fundamental difference between the old and new articles is the measure of reimbursement).

\textsuperscript{26} Katherine Shaw Spaht, Matrimonial Regimes, 50 LA. L. REV. 293 (1989).
reimbursement, but a new problem arose. Confusion resulted over when and under what circumstances reimbursement would be available for the use of separate funds to satisfy community property obligations. What sort of payments on what sort of community obligations should be considered reimbursable expenses?

A. The Evolution of the Right of Reimbursement in Louisiana

Before 1980, there was only one article in the Louisiana Civil Code of 1870 governing reimbursement, article 2408, which stated in full:

When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one-half of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the result of the common labor, expense or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

In looking at the text, the article did not specify from where the reimbursement funds should come or who was to pay them. Additionally, no distinction was made between the use of separate or community funds for purposes of reimbursement. Revisions were necessary.

As a part of a comprehensive revision of the Louisiana matrimonial regimes rules in 1979 and 1980, the redactors modified Louisiana’s reimbursement scheme. In 1980, they added eleven new articles (2358 through 2368) and in 1990, they added two new articles (2367.1 and 2367.2). The rationale behind the
addition of these articles was simple—to remedy confusion over determining the measure of reimbursement. The amount of reimbursement was clarified to be one-half the amount expended in satisfying the community obligation. Further, after 1990, one clearly calculates the value of the community assets minus community debts and then determines each spouse’s equal share. The claim for reimbursement must be deducted from each spouse’s share of the net community, rather than from the total net value of the community assets.

In addition to resolving the conflict presented by prior law about the measure of reimbursement, the new articles, for the first time, presented a statutory recognition of a right to reimbursement when separate property was used to satisfy a community obligation or to improve community property. This was accomplished through the repeal of old article 2408 and the addition of Civil Code articles 2365 and 2367.

Under repealed article 2408, there was no statutory right to reimbursement where separate property was used to satisfy a community obligation. A spouse was assumed to be willing to

Article 2365 has been amended solely for the purpose of clarification of the law. It has always been implicit in the first paragraph of this article that the reimbursement was to be made from the other spouse. Reimbursement from the undivided mass of the community property of only one-half of the amount due would lead to absurd results.


31. SPAHT & MORENO, supra note 11, § 7.13, at 562.
32. Id. at 562–63.
34. Comment (c) to article 2358.1 states:
   The principle of accounting is simple and clear. One-half of the community property that was used to satisfy the separate obligation of a spouse belonged to that spouse and, therefore, no reimbursement is due to him. The other half of the community property that was used belonged to the other spouse, and therefore reimbursement is due him.
35. SPAHT & MORENO, supra note 11, § 7.13, at 563.
36. Id. at 562.
37. Id.
give to the community without expecting reimbursement. However, as this unrealistic view of spousal expectations yielded to the reality of spouses' true, often harsh underlying intentions, the courts realized a new set of rules was in order. One must concede that most spouses do not keep a ledger of separate and community accounts during marriage. This is true because the issue of reimbursement is relatively insignificant during the marriage. In fact, this issue is restricted to divorce consideration because the courts will not allow reimbursement suits during the marriage. When divorce is imminent or pending, spouses are not likely to consider separate property payments on community obligations, made during the marriage or post-termination, to be gifts free from the expectation of repayment. At this time, they will want a strict accounting of what debts are paid with what funds and how much they can get back. The new reimbursement articles sought to bring statutory protection in such situations to spouses who anticipated reimbursement after expending separate funds in this manner.

B. The New Law on Reimbursement for Satisfaction of Community Obligations with Separate Funds

Since the 1980 revision, Civil Code article 2365 expressly regulates reimbursement for separate funds used to pay a community debt. This article reads, in full:

If separate property of a spouse has been used to satisfy a community obligation, that spouse, upon termination of the

40. Comment (c) to Louisiana Civil Code article 2366 (2007) states: "Although prior article 2408 did not provide [a statutory right of] reimbursement when separate property was used to benefit the community, the jurisprudence recognized such a right." (citing Emerson v. Emerson, 322 So. 2d 347 (La. App. 2d Cir. 1975)). Now, the spouses expecting reimbursement have greater protection, because legislation serves as stronger authority than jurisprudence in Louisiana. LA. CIV. CODE ANN. art. 1 (2007).
41. SPAHT & MORENO, supra note 11, § 7.14, at 569 (noting that article 2365 permits reimbursement if a community obligation is satisfied with separate property of a spouse).
community property regime, is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used. The liability of a spouse who owes reimbursement is limited to the value of his share in the community after deduction of all community obligations. Nevertheless, if the community obligation was incurred for the ordinary and customary expenses of the marriage, or for the support, maintenance, and education of children of either spouse in keeping with the economic condition of the community, the spouse is entitled to reimbursement from the other spouse regardless of the value of that spouse’s share of the community.42

The gist of article 2365 is to permit reimbursement when a community obligation is satisfied with a spouse’s separate property.43 If during an accounting of the community property upon divorce, one discovers that separate property of either spouse has been used for community purposes, reimbursement may be claimed.44 The measure of reimbursement is one-half the amount or value of the property at the time it was used.45 However, a spouse may only claim reimbursement if there are community assets from which reimbursement can be made.46

The purpose of this limitation is to protect the other spouse’s separate property from liability for such expenditure for the indefinite future if the community was insolvent when terminated.47 However, if the community obligations were incurred for the ordinary and customary expenses of the marriage,

42. L.A. CIV. CODE ANN. art. 2365 (2007). The sources for this article are Louisiana Civil Code article 2408 (1870) and Louisiana Revised Statutes section 9:2852(f) (repealed 1979).
43. Art. 2365 (“If separate property of a spouse has been used to satisfy a community obligation, that spouse, upon termination of the community property regime, is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used. The liability of a spouse who owes reimbursement is limited to the value of his share in the community after deduction of all community obligations.”).
45. SPAHT & MORENO, supra note 11, § 7.14, at 569.
46. Pugh, supra note 44.
47. SPAHT & MORENO, supra note 11, § 7.14, at 569–70.
or for the support, maintenance, and education of children, article 2365 allows the spouse making payments to seek reimbursement even if there are no community assets from which to draw. This is the only situation where the non-paying spouse's separate property can be reached for reimbursement because the other spouse used separate funds to satisfy a community obligation. The justification is that the familial nature of the debt validates more extensive liability.

Article 2365 has proven to be a substantial improvement to the Louisiana law of reimbursement. First, this article affords greater protection to spouses expending separate funds to satisfy a community obligation than did prior law, because it makes statutory reimbursement for such expenditures available for the first time. This security afforded to spouses is socially and commercially useful, as it promotes equity among parties who have joint ownership of property and gives greater assurance to creditors that debts will be paid because the payor is at lower risk; a spouse will be more likely to pay the community debt with the assurance that half of the funds expended will be returned. Second, article 2365 provides a formula for calculating the measure of reimbursement. Providing a clear measure of reimbursement reduces a great deal of confusion surrounding reimbursement cases and speeds up the judicial process because issues pertaining to reimbursement calculation can be swiftly and accurately litigated. Third, the articles make it clear that the burden of proof is on the party claiming reimbursement to show that separate funds were used for the benefit of the community.

Article 2340 states in full: "Things in the possession of a spouse

48. Art. 2365 ("Nevertheless, if the community obligation was incurred for the ordinary and customary expenses of the marriage, or for the support, maintenance, and education of children of either spouse in keeping with the economic condition of the community, the spouse is entitled to reimbursement from the other spouse regardless of the value of that spouse's share of the community.").
49. Spaht, supra note 26, at 296.
51. See id. § 7.13, at 563.
52. See id. § 7.14, at 569–74.
53. Fountain v. Fountain, 644 So. 2d 733, 744 (La. App. 1st Cir. 1994) (citing Patterson v. Patterson, 417 So. 2d 419, 421 (La. App. 1st Cir. 1982)).
during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property." 54 This article establishes that, in disputes, courts will presume that property in possession of spouses during marriage is community. The spouse claiming that something is separate property must prove this by a preponderance of the evidence and thereby rebut the strong presumption of community. 55 Article 2365 upholds this presumption of community in reimbursement cases and requires that the party claiming reimbursement rebut the presumption by proving that separate funds (rather than community funds) were used to satisfy the community obligation. 56

C. Continuing Problems with Louisiana's Reimbursement Scheme

As evidenced in the previous sections, both the legislature and courts have expended much effort to improve Louisiana's scheme of reimbursement. However, their work is not yet complete. Another significant problem has developed concerning the interpretation of article 2365. The focus of the debate has shifted to questions surrounding the availability of reimbursement on the whole. Under what circumstances should reimbursement under article 2365 be allowed?

Much controversy has raged in the Louisiana courts concerning this issue. Some courts assert a distinction theory whereby the availability of reimbursement is premised on the type of property on which the obligation was incurred (hereinafter "distinction theory"). 57 This theory originated in the fifth circuit in Gachez v. Gachez, where the court distinguished between allowing reimbursement for mortgage payments on the home and forbidding

54. LA. CIV. CODE ANN. art. 2340 (2007).
55. See generally Talbot v. Talbot, 864 So. 2d 590 (La. 2003) (holding that a spouse can rebut the presumption that property in possession of a spouse during the marriage is community property by a preponderance of evidence establishing the separate nature of the property).
56. Fountain, 644 So. 2d at 744.
57. See, e.g., sources cited supra note 21.
reimbursement for the payment of car notes. This case and those following its line of reasoning look at the use of the property and its valuation through rates of appreciation or depreciation.

Other courts assert that the availability of reimbursement must hinge upon when the community obligation was satisfied with separate property. This issue has also proved contentious and has resulted in two distinct points of view. The first urges that payment made after the termination of the community property regime should not be reimbursed. One of the first cases to distinctly employ this reasoning was Bergeron v. Bergeron. However, the alternative point of view asserts that, as long as the payment was made before the community property was partitioned, the expense must be reimbursed. One of the trailblazer cases to establish this interpretation was Davezac v. Davezac. Unfortunately, no consistent conclusion has been reached and no single theory uniformly expounded among the circuit courts. The debate will continue to rage until the Louisiana Supreme Court steps in and resolves this issue.

III. WHAT IS THE BEST SOLUTION?

There are two theories propounded to address when a spouse may obtain reimbursement for separate funds used to pay a community debt. The first theory states that the court must distinguish between types of property upon which the community debt is owed. Proponents of the distinction theory believe that reimbursement should be considered in light of whether the

59. See generally, e.g., Gachez, 451 So. 2d 608.
60. See, e.g., sources cited supra note 22.
61. See, e.g., sources cited supra note 23.
62. 693 So. 2d 199, 202 (La. App. 3d Cir. 1997).
63. See, e.g., sources cited supra note 24.
64. 483 So. 2d 1197, 1199 (La. App. 4th Cir. 1986). Although the court distinguished between movables and immovables, it still allowed reimbursement for a payment made post-termination of the marriage but pre-partition of property. Id.
65. See sources cited supra note 21 and accompanying text.
community debt involved a movable or an immovable.\textsuperscript{66} There should be no reimbursement for debts paid on movables, they argue, because use is directly related to depreciation; therefore, exclusive use on a movable presents a bar to reimbursement.\textsuperscript{67}

The second theory states that the court should premise the right to reimbursement on when the payment was made.\textsuperscript{68} This theory gets at the question of when a payment is made too late to be reimbursed. Some courts assert that if the payment was made after termination of the community property regime, then there can be no recovery.\textsuperscript{69} This view restricts the application of article 2365 to payments made on a community obligation during the existence of the marriage.\textsuperscript{70} However, other courts have rejected this construction of article 2365 and found that as long as the payment was made before the partition of community property, then reimbursement for a post-termination payment can still be obtained.\textsuperscript{71}

This section will (1) demonstrate the weaknesses of the first theory, which sorts reimbursement claims by property type and (2) display the strengths of the second theory, which seeks to allocate reimbursement regardless of the timing of payment, by showing that payments made post-termination of community but pre-partition of property are acceptable as reimbursement claims.

\textit{A. The Distinction Theory}

The second,\textsuperscript{72} third,\textsuperscript{73} fourth,\textsuperscript{74} and fifth\textsuperscript{75} circuits support the distinction theory.\textsuperscript{76} In contrast, the first circuit utilizes the alternative theory, based on the timing of the payment.\textsuperscript{77}

\begin{footnotesize}
\begin{enumerate}
\item[66.] See id.
\item[67.] Gachez v. Gachez, 451 So. 2d 608, 613 (La. App. 5th Cir. 1984).
\item[68.] See generally Sheridon v. Sheridon, 867 So. 2d 38 (La. App. 3d Cir. 2004); Moody v. Moody, 622 So. 2d 1381 (La. App. 1st Cir. 1993).
\item[69.] Sheridon, 867 So. 2d at 44.
\item[70.] Id.
\item[71.] Moody, 622 So. 2d at 1385.
\item[72.] Mason v. Mason, 927 So. 2d 1235, 1240 (La. App. 2d Cir. 2006).
\item[73.] Sheridon, 867 So. 2d at 45.
\item[74.] Davezac v. Davezac, 483 So. 2d 1197, 1199 (La. App. 4th Cir. 1986); Meyer v. Meyer, 553 So. 2d 943, 944 (La. App. 4th Cir. 1989).
\item[75.] Gachez v. Gachez, 451 So. 2d 608, 612–14 (La. App. 5th Cir. 1984).
\end{enumerate}
\end{footnotesize}
In the second circuit's decision in *Mason v. Mason*, for instance, Stanley and Rowena Mason obtained a judgment of divorce and then later sought to partition their property. When the trial court entered a judgment partitioning the property, it also assigned community liabilities. Rowena was allocated the mortgage on the house and the loan on the family car. Stanley appealed the judgment because the trial court awarded Rowena reimbursement for one-half of the amount she paid after termination of the marriage and before the community property partition on the home mortgage and the car loan.

Similarly, in *Sheridon v. Sheridon*, Mrs. Sheridon sought reimbursement for payments she made, post-termination of the marriage but pre-partition of the community property, on the home mortgage and payments on a vehicle of which she had use and possession. The trial court awarded her reimbursement. Mr. Sheridon appealed this judgment to the third circuit. In the fourth circuit's *Davezac v. Davezac*, Mr. Davezac sought reimbursement for payments he made out of his separate property on the note given for the purchase of the family vehicle. He had possession and use of the automobile at all times; however, he claimed the principles applied to reimbursement for home mortgages should be likewise applied to his situation with his vehicle. He appealed the trial court's denial for reimbursement for his separate property

76. The four definitive cases supporting this theory in these circuits are *Mason*, 927 So. 2d 1235, *Sheridon*, 867 So. 2d 38, *Davezac*, 483 So. 2d 1197, and *Gachez*, 451 So. 2d 608.
78. 927 So. 2d at 1237.
79. *Id.*
80. *Id.*
81. *Id.*
82. 867 So. 2d 38, 41–42 (La. App. 3d Cir. 2004).
83. *Id.*
84. *Id.*
85. 483 So. 2d 1197, 1199 (La. App. 4th Cir. 1986).
86. *Id.*
payments on the car note and sought reimbursement from the community for those payments.

Lastly, the facts in the fifth circuit’s Gachez v. Gachez case are similar but deal solely with immovable property. The trial court awarded the husband one-half of each of eleven mortgage payments he made on the community home after the date of the filing of the petition for divorce. The husband appealed this judgment, claiming he should have received full reimbursement rather than half.

The facts of each of these cases are similar and, in each, the court found that the availability of reimbursement hinged on the type of property upon which the debts were owed. However, close examination of these facts and the need for application of principles of equity to both spouses demonstrates that the reasoning behind the distinction theory is flawed and should not be used because of the inequitable results it perpetuates.

The distinction theory propounded by these four Louisiana circuits requires that courts draw a distinction between an obligation related to movables and one related to immovables. The theory is purportedly supported by the reality of appreciation and depreciation. The classic item of property illustrating movable depreciation is a vehicle. Under the distinction theory, a spouse who has exclusive use of an automobile following the termination of the community is not entitled to credit for notes paid on the vehicle. Automobiles and other movables tend to depreciate over time, and the use of the vehicle is directly related to its depreciation. Proponents of the theory believe equity dictates that a spouse should not have full use, benefit, and enjoyment of the movable at the expense of the other spouse.

87. Id.
88. Id. at 1198.
89. 451 So. 2d 608 (La. App. 5th Cir. 1984).
90. Id. at 610.
91. Id. at 611.
92. See sources cited supra note 21.
93. See generally Gachez, 451 So. 2d 608.
95. Gachez, 451 So. 2d at 613.
96. Id. at 614.
The car note payments by the spouse using the vehicle are considered a payment for the depreciation caused by his use of it. Thus, Mrs. Mason, Mrs. Sheridon, and Mr. Davezac were denied reimbursement for payments made out of separate property on a community car loan. This interpretation of article 2365, though attractive, suffers from a number of fatal flaws.

1. Plain Meaning Does Not Support the Distinction

As evidenced by the text of the Civil Code itself, one of the foundational tenets of civilian legislative interpretation is the plain meaning approach. When the language of an article is unambiguous and does not lead to an absurd result, the court should not use any additional interpretative methods. Certainly, different meanings can be given an article depending on who is interpreting it, but the intent of the drafters of the articles in the Civil Code was for the words and phrases to be given the meaning that best conforms to the purpose of the law as well as their generally prevailing meaning.

Therefore, in determining whether courts should distinguish between movables and immovables for the purposes of reimbursement, we should begin by looking at the plain language of article 2365. Article 2365 states: “If separate property of a spouse has been used to satisfy a community obligation, that spouse, upon termination of the community property regime, is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used.” There is nothing in the language of article 2365 suggesting a distinction between obligations owed on movables and those owed on immovables for the purpose of reimbursement. The article does not say “a

97. Mason, 927 So. 2d at 1240.
98. See generally Mason, 927 So. 2d 1235; Sheridon v. Sheridon, 867 So. 2d 38, 44 (La. App. 3d Cir. 2004); Davezac v. Davezac, 483 So. 2d 1197, 1199 (La. App. 4th Cir. 1986).
100. LA. CIV. CODE ANN. arts. 10, 11 (2007).
community obligation [owed on an immovable],” and it certainly does not exclude community obligations owed on movables.

Civil Code article 9 states: “When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.” In Louisiana, legislation is superior to any other source of law. The court must apply legislative provisions as written because the court cannot and should not ignore the plain expression of legislative will evidenced in the unambiguous words of the code articles. The courts cannot create, through a “judicial gloss,” a new test or policy to supersede clear code articles even when the plain meaning interpretation leads to an objectionable result. The plain, clear language of article 2365 draws no distinction between obligations on movables and immovables, and, according to Louisiana Revised Statutes section 24:177, “the text of the law is the best evidence of legislative intent.” Therefore, a theory that allocates reimbursement based on the type of property constituting the community obligation fails to comport with the well-accepted principles of legislative interpretation. Such a theory cannot stand.

The comments to article 2365 further reiterate that “when the separate property of a spouse is used to satisfy any community obligation, the spouse is entitled upon termination of the community property regime to reimbursement for one-half of the

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103. Art. 9.
104. Comment (c) to Louisiana Civil Code article 1 (2007) reads as follows: In Louisiana, as in other civil law jurisdictions, legislation is superior to any other source of law. Article 1 of the Louisiana Civil Code of 1870 (Article 2 of this projet), declaring that legislation is a formal expression of legislative will, has been interpreted to establish the supremacy of legislation and to exclude judicial legislation. It is only in cases not covered by legislation that a lawyer or judge may look for solutions elsewhere. See also A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM COURSEBOOK 45-47 (1977) (discussing legislation as a source of law in Louisiana).
106. Id. at 1085.
amount or the value that the property had at the time it was used." Though not a formal source of law, the doctrine contained in comments is still persuasive authority in Louisiana. Without completely binding the interpreter, the comments admonish him to use prudence before he disregards them. This doctrine indicates that no movable-immovable distinction should be drawn. The language provides that any community obligation can be reimbursed if satisfied with separate property—expressly rejecting a distinction between obligations related to movables and those related to immovables. Therefore, the implication of this relevant doctrine is that the conclusion of the Louisiana circuit courts supporting a distinction theory is erroneous.

2. Exclusive Use Based on Depreciation Does Not Withstand Scrutiny

The courts asserting the distinction theory, in the matrimonial regimes context, claim that the main reason for making the distinction is that use is directly related to depreciation in movables. Proponents of this theory suggest that by retaining exclusive use while making payments, one is thereby compensating for the decrease in value being caused by the constant use. For example, in Mason, the second circuit held that the payments on depreciable movables like vehicles were not reimbursable and, thus, reversed the judgment that gave Rowena reimbursement on half of her separate funds expended on the

109. Comment (b) to article 1 states, "According to civilian doctrine, legislation and custom are authoritative or primary sources of law. They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity, that may guide the court in reaching a decision in the absence of legislation and custom." See also YIANNOPOULOS, supra note 104, at 45–47 (discussing sources of law in Louisiana, focusing particularly on legislation).
111. See, e.g., Gachez v. Gachez, 451 So. 2d 608, 613 (La. App. 5th Cir. 1984).
112. Id.
Likewise, in Davezac, the court affirmed the judgment of the trial court and found that the husband was to be charged for the full cost of maintaining the vehicle of which he had exclusive use while it steadily declined in value.\(^{114}\)

Though the above reasoning seems solid, these courts and other proponents of the distinction theory fail to realize that there is sometimes depreciation in immovables as well, particularly when a piece of property is used and kept off the market. One example of depreciating immovables occurs in the housing market after a natural disaster. In the wake of the crisis, property values in areas away from the distressed region soar because of the massive influx of people desperately needing housing. After the need dies down, the property values will, in most cases, return to normal and property owners will own homes valued at substantially less than what they paid. In situations like these, when an immovable depreciates in value, exclusively using and keeping a piece of property off of the rapidly decreasing market will further the reduction in value.

Therefore, there is logic behind treating movables and immovables in the same manner and requiring a reduction in reimbursement for both. Though circumstances like these seem rare, they occur more frequently than one might think, especially in hurricane-prone states like Louisiana. The courts must not slight the people in community property jurisdictions like Louisiana who face these situations. To anticipate such scenarios, a uniform standard should be established as to movables and immovables with both given reductions in value based on use. Should the courts wish to avoid these complications altogether, they can easily do so by eradicating the distinction theory.

Applying these ideas to the cases supporting the distinction theory would have changed their results in important ways. Either reimbursement would have been reduced for the houses belonging to Mr. Gachez, Mr. Davezac, and Mr. Mason as well as the cases involving vehicles, or the court would have, instead, just allowed full reimbursement for the vehicles belonging to Mrs. Sheridon,

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\(^{113}\) Mason v. Mason, 927 So. 2d 1235, 1241 (La. App. 2d Cir. 2006).

\(^{114}\) Davezac v. Davezac, 483 So. 2d 1197, 1199 (La. App. 4th Cir. 1986).
Mrs. Mason, and Mr. Davezac. Whatever avenue is chosen, the distinction that is currently drawn cannot be perpetuated.

3. More Problems with Exclusive Use—No Use and Joint Use

Another problem exists with maintaining that the basis of the distinction theory is exclusive use offsetting depreciation. What about payments on a movable that no one used or that both spouses used?

A telling example of such a situation occurred in the previously-mentioned case of Sheridon v. Sheridon.115 Mr. and Mrs. Sheridon filed for divorce and partition of the community property on October 5, 1999 and were divorced by judicial decree on August 31, 2000.116 Because the date of termination of the community in Louisiana is typically retroactive to the date of filing of the divorce petition,117 the Sheridons' community ended effective October 5, 1999. The partition of the Sheridons' community property, however, was not effected until August 16, 2002.118 An automobile purchased during the existence of the community remained parked outside the family home from October 5, 1999, to September 9, 2000.119 During that time, Mr. Sheridon paid the insurance premiums on the vehicle and later claimed reimbursement for his separate funds expended on the community obligation.120 The trial court rejected his claim for reimbursement, stating that Mrs. Sheridon did not refuse to allow him to use the truck and did not use it herself.121 Therefore, Mr. Sheridon did not receive reimbursement for payments on a community obligation even though he did not have possession and exclusive use of the truck.122

This result is contrary to the typically avowed purpose of refusing to allow reimbursement for obligations related to

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115. 867 So. 2d 38 (La. App. 3d Cir. 2004).
116. Id. at 41.
117. LA. CIV. CODE ANN. art. 159 (2007).
118. Sheridon, 867 So. 2d at 41.
119. Id. at 49.
120. Id.
121. Id.
122. Id.
movables. Louisiana courts have refused reimbursement for obligations on movables based on the reasoning that the exclusive use and possession of one spouse directly contributes to the depreciation of the property.\textsuperscript{123} In Sheridon, there was no use or possession by the spouse who paid the note; therefore, there was no depreciation in value other than that caused by time as the vehicle aged. The third circuit should have allowed reimbursement in this case. However, because of the principal, albeit flawed, rationale supporting the distinction theory—namely, exclusive use causing depreciation—an erroneous judicial conclusion inevitably resulted. This is yet another reason the distinction theory must be abolished.

4. The Distinction Theory—An Inequity and Public Policy Nightmare

In examining whether courts should apply the distinction theory, one must look to equity and public policy. A debt is a legal obligation no matter the type of property upon which it is owed, and a party should be reimbursed if he pays a debt for which he is not solely accountable. For automobile and mortgage obligations incurred by either spouse during the existence of the community property regime, both spouses are obligated to pay the indebtedness in full.\textsuperscript{124} This is evidenced by the fact that creditors can seize the separate property of the incurring spouse and the entirety of the community property (or former community property) of the spouses to satisfy the debt.\textsuperscript{125} Herein lies the true

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\textsuperscript{123} See, \textit{e.g.}, Gachez v. Gachez, 451 So. 2d 608, 613 (La. App. 5th Cir. 1984).

\textsuperscript{124} \textit{Sheridon}, 867 So. 2d at 50 (Woodard, J., dissenting).

\textsuperscript{125} The Louisiana rules of seizure for creditors pertaining to spousal obligations are contained in Louisiana Civil Code articles 2345 and 2357 (2007). According to these rules, a separate or community obligation may be satisfied during the community property regime from community property and from the separate property of the spouse who incurred the obligation. Art. 2345. Additionally, an obligation incurred by a spouse before or during the community property regime may be satisfied after termination of the regime from the property of the former community and from the separate property of the spouse who incurred the obligation. Art. 2357. These rules of seizure are different from other community property jurisdictions. Idaho, Nevada, and Texas adhere to a
inequity of the distinction theory. Failure to pay the debt would result in severe credit and foreclosure problems for both spouses.\textsuperscript{126} If payments were disregarded, not only would the creditor be able to seize the separate property of the incurring spouse, but also the entirety of the community property that had not yet been partitioned.\textsuperscript{127} To avoid this result, Mr. Davezac, Mrs. Sheridon, and Mrs. Mason paid the car notes and benefited both their former spouses and themselves because the former community property could not be seized as long as the debt was paid.

Therefore, because of the necessity of timely payment on both movables and immovables, there should be no distinction drawn

managerial system category—only property that the incurring spouse had the right to manage can be seized by creditors (the purpose for which the debt was incurred is irrelevant). Andrea B. Carroll, \textit{The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?}, 47 SANTA CLARA L. REV. 14 (2007). Although Louisiana and California are often described as managerial systems, a strict managerial system would only allow a creditor to seize the property managed by the debtor spouse. \textit{Id.} at 13. Rather, Louisiana and California broaden creditors' access to seize all community property, the portion of the community property managed jointly, and the property managed exclusively by the non-incurring spouse. \textit{Id.} Therefore, management of community property has no bearing on creditor's rights, so the managerial label simply does not fit these states. \textit{Id.} Arizona, New Mexico, Washington, and Wisconsin, on the other hand, have rejected the managerial system and chosen the community debt system. \textit{Id.} at 17. Under this scheme, the community is characterized as a combination of property for the interest and benefit of the spouses; therefore, property in the community is only seizable for a debt incurred (by either spouse) for the benefit or in the interest of the community. \textit{Id.} The debt is then classified as a community debt and the entirety of the community property may be seized by creditors. \textit{Id.} Wisconsin, however, limits tort liability to the property of the debtor that is not marital property or that spouse's interest in marital property. WIS. \textsc{stat. ann.} § 766.55(2)(c)(2)(cm) (1985). In contractual liability, Wisconsin follows the other community debt states in allowing the seizure of the entirety of the community property. \textit{Id.} at § 766.55(2)(b). The Louisiana rule is inherently unfair because it allows creditors to have access to property managed by the spouse who had nothing to do with the incurring of the debt. The pure managerial system and community debt system provide more equitable results to spouses in that they better protect the property of the non-incurring spouse.

\textsuperscript{126} See generally Carroll, \textit{supra} note 125.

\textsuperscript{127} See \textit{id.} at 13.
for the purpose of reimbursement. The payor is acting in his or her own interest and the interest of the other spouse by satisfying the community debt. As such, he or she should be reimbursed for half the amount expended, regardless of the type of property on which the underlying obligation is owed. This scenario can be analogized to one in which a stranger pays an obligation for which he and another are both responsible. When this occurs, the payor may demand reimbursement for half of his payment from the other obligor. Why should the courts treat divorced spouses differently than strangers in the same circumstances?

In sum, the courts should not apply the distinction theory. It perpetuates interpretive error, as evidenced by the lack of distinction language in article 2365. Further, the theory is simply impracticable in that its only support rests on exclusive use (or lack thereof) as related to depreciation. Finally, public policy and the demands of equity dictate its abolition because of the unfair results it creates.

5. The Effect of Jurisprudence Constante

Regardless of how Louisiana courts should interpret article 2365, are they now required to apply the “distinction based on property type” theory as a result of the precedent set forth by the second, third, fourth, and fifth circuits? Louisiana, as a mixed jurisdiction, retains many civil law principles, including avoidance of the common law doctrine of stare decisis. Louisiana, instead, abides by the civilian principle of jurisprudence constante. The traditional civilian theory of jurisprudence is that it is not a source of law. Judgments have judicial force only between the persons who were parties to the proceedings and are

129. See sources cited supra note 21 and accompanying text.
not opposable to third parties as legislation would be; also, jurisprudence lacks the popular origin and duration required to make it customary law.\textsuperscript{134} Therefore, jurisprudence does not fall under the two true sources of Louisiana law—legislation and custom.\textsuperscript{135} Jurisprudence is thus an authority in civil law jurisdictions only in the sense that it influences decisions more or less forcefully while never imposing a decision as a matter of law. Nonetheless, jurisprudence is a “privileged” authority, as it has a greater chance of being accepted by the court before which litigation is pending than other merely persuasive sources.\textsuperscript{136} Still, “one of the fundamental rules of [the civil law tradition] is that a tribunal is never bound by the decisions which it formerly rendered: it can always change its mind.”\textsuperscript{137}

One may concede that, even under the Louisiana doctrine of jurisprudence constante, in the case of a long line of consistent judicial decisions, courts are not bound to, but often do adhere to, prior principles.\textsuperscript{138} However, there is no long line of consistent decisions in Louisiana courts relating to the proper interpretation of Louisiana Civil Code article 2365. For example, the second circuit initially refused to draw a distinction based on type of property when it considered the question in the 1997 case of \textit{Chance v. Chance}.\textsuperscript{139} Only recently, in 2006, did the second circuit overturn \textit{Chance} with the \textit{Mason v. Mason} decision supporting distinction.\textsuperscript{140} Thus, the second circuit has not had a long line of cases pointing toward the distinction theory. The development has only come about since 2006.

Likewise, the third circuit has not been firm in its stance on the distinction issue. In 2001, the court, in \textit{Nash v. Nash}, asserted that reimbursement should be allowed even though the paying spouse

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\textsuperscript{134} \textit{Id.} at 100-01.
\textsuperscript{135} LA. CIV. CODE ANN. art. 1 (2007).
\textsuperscript{136} MURCHISON & TRAHAN, \textit{supra} note 133, at 101.
\textsuperscript{138} MURCHISON & TRAHAN, \textit{supra} note 133, at 104 (citing BORIS STARCK, \textit{DROIT CIVIL: INTRODUCTION} 51–53 (J.-R. Trahan trans., 1997) (1972)).
\textsuperscript{139} 694 So. 2d 613, 616 (La. App. 2d Cir. 1997).
\textsuperscript{140} 927 So. 2d 1235, 1241 (La. App. 2d Cir. 2006).
had exclusive use of the movable. In *Nash*, the third circuit went against its own prior decisions in * Preis* and *Bergeron*, which had supported the distinction theory. However, the *Nash* decision was recently overturned by *Sheridon* in 2004. Clearly, then, the third circuit has taken no consistent position on the issue.

Ultimately, "no jurisprudential decision imposes itself on any court whatsoever" in a mixed jurisdiction like Louisiana. This position is bolstered by looking at the inconsistency regarding reimbursement’s connection to property type in the Louisiana circuits. There is no clear line of authority pointing toward a specific conclusion. Therefore, according to the principles of jurisprudence constante, no court is required, or even recommended, to follow the current, flawed majority view. Despite this standard, the Louisiana Supreme Court must still intervene to provide persuasive guidance from a higher authority and firmly correct the legal errors being perpetuated through the lower courts.

If the courts accept and apply reimbursement based on the type of property related to the obligation, much damage will be wrought in Louisiana’s law of matrimonial regimes. Errors resting on non-existent Code language will be perpetuated through the courts. Additionally, the spouse who pays an obligation on former community property to prevent serious and substantial effects of non-payment will suffer inequity. In view of these and other adverse effects, the distinction theory should be rejected.

**B. The Timing Theory**

In concluding that distinguishing between movables and immovables for purposes of reimbursement is erroneous, we must return to the original question: When is reimbursement available?

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141. 799 So. 2d 829, 830 (La. App. 3d Cir. 2001).
143. Sheridon v. Sheridon, 867 So. 2d 38, 45 (La. App. 3d Cir. 2004).
Some Louisiana courts (specifically the third circuit) have held that reimbursement can be made only when separate funds were expended during the existence of the community. In *Sheridon*, the court found that Ms. Sheridon would be entitled, under article 2365, to reimbursement for community debts she paid with separate funds before termination of the marriage. Therefore, the third circuit found that because the parties had terminated the marriage on October 5, 1999, the trial court erred in ordering Mr. Sheridon to reimburse Ms. Sheridon one-half of the amount she paid on the Pontiac Firebird between October 5, 1999 and November 15, 2001. Subsequently, the third circuit applied the *Sheridon* reasoning to the *Bordelon* case. Mr. Bordelon made mortgage payments in February 2002, after the community ended in 2001. The payments were made on a stipulated community debt with Mr. Bordelon's separate property. The court applied the same reasoning as used in *Sheridon* and found that the payments made on the mortgage, after termination of the marriage, were not reimbursable.

Other courts, instead, assert that any legitimate claim for reimbursement can be sustained, even post-termination of the community, as long as payment was made before the partition of the community property. The first circuit so held in *Moody v. Moody*: Mr. Moody paid the mortgage on the community home after the termination of the community but before the partition of property and sought reimbursement of these payments. The court found that under article 2365, Mr. Moody was entitled to be reimbursed for one-half the separate funds used to extinguish the community obligation.

146. *Sheridon*, 867 So. 2d at 44.
147. Id. at 41.
148. Id. at 44.
149. *Bordelon*, 942 So. 2d at 714.
150. Id.
151. Id. at 714–15.
152. See generally, e.g., *Moody v. Moody*, 622 So. 2d 1381 (La. App. 1st Cir. 1993).
153. Id. at 1385.
154. Id.
The remainder of the Louisiana circuit courts have not directly ruled on this issue. Which of these interpretations, if either, should the Louisiana courts consistently follow?

1. **Is There Any “Plain Meaning” on This Point?**

   The language of Civil Code article 2365 states that “[i]f separate property of a spouse has been used to satisfy a community obligation, that spouse, upon termination of the community property regime, is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used.” Supporters of the theory that article 2365 allows reimbursement only for separate funds expended before the termination of the community assert that the phrase “upon termination of the community property regime” in article 2365 means that one can only receive reimbursement for satisfaction of a community obligation with separate funds when the payment was made during the existence of the community property regime. They maintain that the article does not state “upon partition” but specifically states “upon termination,” so the codal reimbursement scheme pertains solely to those debts paid during the marriage and not those paid after the termination of the community. Under such an interpretation of article 2365, no post-termination payments may be reimbursed.

   Is such a timing restriction justified? An alternative interpretation of article 2365 is that the phrase “upon termination” merely means that spouses must wait until the marriage is terminated to sue for reimbursement. Therefore, payments made post-termination of the community but pre-partition of property are allowed because there is no requirement that payment be made during the marriage.

   Unfortunately, the two logical, yet fundamentally contradictory interpretations of the phrase “upon termination of the community property regime” demonstrate that the plain language of article 2365 is ambiguous on this particular point. The text of the article

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155. See, e.g., Sheridon, 867 So. 2d at 44.
156. Id.
157. See, e.g., id. at 51 (Woodard, J., dissenting).
gives no real indication of what the phrase is meant to describe. Does it mean that one can only be reimbursed for payments made during the existence of the community property regime? Or, does it merely mean that spouses cannot sue each other during the existence of the community for reimbursement? The inherent ambiguity in the language of article 2365 necessitates the use of other methods of interpretation to determine the actual meaning of the phrase "upon termination of the community property regime."

Moreover, even if one accepts the dubious proposition that the plain language of article 2365 is clear and only allows reimbursement for separate funds expended to satisfy a community obligation during the marriage, one might conclude that such a reading would lead to an absurd result and should, therefore, be rejected. After the termination of the community, property awaits judicial partition and is still owned by both spouses, though it may be in the possession of just one. Because the spouses are each accountable for community obligations, and creditors can seize the separate property of the incurring spouse and the entirety of the community property to pay these debts, the husband and wife must both be responsible for the debts incurred by the community up until the point that the property is partitioned and ownership is divided. Even after partition, courts allocate liability only as between the spouses. Third parties remain unaffected and can always seize former community property in the hands of either spouse. Not allowing co-owners of property (who are fully liable to third parties for debts) to seek reimbursement from one another when one satisfies that debt, only because the marriage no longer exists, is absurd. As long as the community property has not been partitioned, half of all payments made on community debts with the separate property of one spouse

158. LA. CIV. CODE ANN. art. 2358 (2007).
159. LA. CIV. CODE ANN. art. 2369.2 (2007).
160. Sheridon, 867 So. 2d at 51 (Woodard, J., dissenting).
162. This debt collection rule is not limited to community property obligations as it also applies to separate property obligations. Art. 2357.
164. Id.
should be reimbursed by the other spouse because the payments benefit both.

The effects of the interpretation rejecting reimbursement claims for post-termination payments are as detrimental as those associated with the distinction theory. Once again, equity demands that a spouse who pays a community obligation to prevent ill-effects of default, even after the termination of the community but before partition, be reimbursed for half the payment. A spouse must not be forced to bear the costs of the obligation just because he was generous or unwise enough to pay the debt at the incorrect time. By refusing to reimburse post-termination payments, a spouse pays off an obligation to a third party but then cannot acquire relief from his former spouse. The absurd, inequitable result produced by this interpretation necessitates that another theory be asserted that better protects the spouses' rights and places them on a more level playing field.

2. Reading Article 2365 in Pari Materia with Other Matrimonial Regime Articles

Reimbursement should be allowed for post-termination payments made on a community debt with separate funds as long as those payments were made before the community property was partitioned. An argument in pari materia demonstrates the reasonableness of such an approach. An argument in pari materia appeals to context and suggests that legislation should be interpreted in light of similar and surrounding articles.\(^{165}\) Civil Code article 2358, also in the section dealing with the spouses' rights of reimbursement, states: "Upon termination of a community property regime, a spouse may have a claim against the other spouse for reimbursement in accordance with the following provisions."\(^{166}\) The phrase "upon termination of the community property regime" in article 2358 is clearly meant to explain when suit for reimbursement can be brought. The phrase aims to prevent spouses from suing each other for reimbursement while married.\(^{167}\)

\(^{165}\) MURCHISON & TRAHAN, supra note 133, at 172–73.

\(^{166}\) LA. CIV. CODE ANN. art. 2358 (2007).

This assertion is furthered by Louisiana Revised Statutes section 9:291, which states:

Spouses may not sue each other except for causes of action pertaining to contracts or arising out of the provisions of Book III, Title VI of the Civil Code; for restitution of separate property; for divorce or declaration of nullity of the marriage; and for causes of action pertaining to spousal support or the support or custody of a child while the spouses are living separate and apart.

This interspousal immunity exists to maintain domestic tranquility and promote the stability of the family unit. Ultimately, the phrase is not meant to say that only payments made during the existence of the community property regime are valid for reimbursement consideration. Quite the contrary, the phrase merely states that suit can only be brought "upon termination of the community property regime."

Therefore, in reading article 2365 in light of article 2358, one must conclude that the phrase "upon termination of the community property regime" in article 2365 means that spouses cannot sue for reimbursement during the marriage. Payments made post-termination can be claimed for reimbursement as long as they were made before the partitioning of property, after which the former community property would become individually owned.

3. Public Policy and Principles of Equity Support Post-Termination/Pre-Partition Reimbursement

Public policy along with equity and fairness support this interpretation of the timing theory. In Louisiana, when no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity; to decide equitably, resort is made to justice, reason, and prevailing usages. Both law and equity dictate that if one pays a debt for which he is not solely accountable, he must be compensated. As previously mentioned, until community property is partitioned, both spouses

170. Sheridan, 867 So. 2d at 51 (Woodard, J., dissenting).
retain ownership and are responsible, to the extent of the former community property, for the community obligations incurred during marriage. Someone must pay this debt or a creditor may seize the separate property of the incurring spouse and the entirety of the spouses’ community property to satisfy it. If one party utilizes his separate property to pay a debt, the incurrence of which subjects the spouses’ community property to seizure, law and equity demand that he be reimbursed for half.

A person who has been enriched without cause at the expense of another person is bound to compensate that person. Such is the case here because one spouse is unjustly enriched when he or she is relieved from paying an obligation owed by both spouses. However, principles of unjust enrichment are not used when the law provides an alternative remedy for the impoverishment. Therefore, instead of using the doctrine of enrichment without cause between spouses, courts employ article 2365, which provides the alternative remedy of reimbursement for situations involving satisfaction of community obligations with separate property.

Clearly, a former spouse must not be denied reimbursement when he expends his separate property to satisfy a community obligation after the marriage was terminated but before ownership was partitioned. As long as the property has not been partitioned, ownership is still shared, and the obligation subjects the former community property of both spouses to seizure. Therefore, reimbursement must be accorded to the spouse who generously pays the community debt with separate funds in order to prevent creditors from seizing his former community property.

The inequities inherent in refusing reimbursement for post-termination, pre-partition payments are well illustrated in the context of home mortgages. For example, assume a husband and wife own a home acquired during the community. After they divorce, the wife retains the home and pays the monthly mortgage

172. *Sheridon*, 867 So. 2d at 51 (Woodard, J., dissenting).
174. *Id.*
176. Art. 2357.
payments with her separate funds. The husband is also accountable for the mortgage, and the former community in either the wife’s or the husband’s hands could be seized to satisfy the debt. However, the wife continues the payments on the debt, thereby bringing a benefit to her former husband. Under an interpretation that only allows reimbursement for payments made during the existence of the community, the wife would not receive reimbursement for any portion of the payments made after the divorce.

Under this flawed interpretation of article 2365, the husband will have an unfair advantage and may potentially prolong the settlement as the wife continues making payments that the husband is not required to reimburse. This theory could result in three problems.

First, the husband would have no financial incentive to bring the proceedings to a conclusion because he is not liable for reimbursement payments. The case would be prolonged in the courts, hindering judicial efficiency. Often, getting a partition of property after rendering a judgment of divorce takes years. If reimbursement is not available during this period, thousands of dollars will be lost by the spouse who is paying the community debt with his separate property. By declaring that the non-paying spouse will owe no reimbursement to the other, no financial incentive is created to speed up the judicial process. Therefore, reimbursement must be required so as not to create a bar to judicial efficiency.

Second, the wife may have an unfair disadvantage. If she is financially unable to continue making payments, she will be forced to settle to her disadvantage to get out from under the massive financial obligation. This unfair disadvantage is tied to the lack of financial incentive to reach a settlement. If the husband does not have a financial reason (such as reimbursement) to reach a compromise, he could drag the judicial proceedings out until the wife is no longer able to make payments. Thus, she might settle for a less than beneficial agreement just to get out from under the massive debt of which she has assumed sole payment, with no hope of reimbursement. A court should not subject the spouse paying the debt to this unfair disadvantage. By requiring reimbursement, the spouse paying the community debt will be
refunded half the payments made with separate property and will not be disadvantaged for purposes of settlement.

Third, if the wife were making payments in their entirety and thereby further increasing home equity, half of which would be dispersed to the husband upon the eventual partition of the home, the husband would have the unfair advantage of benefiting from these payments without making reimbursement contributions. Equity is the difference in amount between the fair market value of the home and the unpaid balance on its mortgage. When the wife pays off the outstanding balance on the mortgage, she is, thereby, increasing the equity in the home. By not having to contribute to the payments through reimbursement, the husband will derive the benefit of the equity in the home without supplementing the payments. Louisiana advocates equal division of property upon divorce. Under no circumstances could it be considered equal or even equitable for the wife to solely contribute to the equity of the home and the husband to reap the benefit without having to reimburse.

Allowing reimbursement for post-termination, pre-partition payments would not only conform to the Louisiana principles favoring equal distribution upon divorce. Requiring a husband to make reimbursement for half of the mortgage payments post-termination of the marriage would also discourage him from delaying judicial resolution of the spouses' property dispute. This interpretation of article 2365 will encourage swift judicial settlements.

Equity and fairness will be furthered because the party paying the debt on property that is still jointly owned would be reimbursed. Neither equity nor policy support the view that one should be forced to bear the entire debt for something partially owned by another just because the payments were made post-termination but pre-partition, because he has exclusive use, or because it is a depreciating asset. Finally, this interpretation most

178. Spaht, supra note 26, at 296.
strictly adheres to the language of Article 2365 and the spirit of the law governing reimbursement as a whole.

4. Correct Treatment in Prior Distinction Theory Cases

Although the timing of payment issue has only been expressly addressed by the first and third circuits, several courts have applied article 2365 correctly on this point in dicta. In cases that mistakenly apply the distinction theory, the courts still allowed reimbursement for payments made post-termination. Their mistake lies in the fact that they added additional requirements based on the type of property related to the obligation. This was the true error, not their findings on timing of payment. For example, in Davezac v. Davezac, the fourth circuit found that the former husband was entitled to reimbursement for mortgage payments made on the family home after the termination of the marriage. Though the court erroneously applied the distinction theory, it still allowed the post-termination, pre-partition payment to be reimbursed. The fifth circuit in Gachez v. Gachez came to a similar result. The court found that the husband was entitled to reimbursement for all payments made after the dissolution of the marriage. Once again, the court mistakenly incorporated the distinction theory as an additional requirement; however, it correctly allowed reimbursement even though the payment was not made during the marriage. These cases demonstrate that refusing reimbursement simply because payment was not made during the existence of the community is an absurd interpretation not even employed by cases using the flawed distinction theory. Therefore, even if Louisiana courts or the legislature act to correct the distinction theory, the theory allowing post-termination, pre-partition payments remains a part of the Louisiana jurisprudence.

IV. Problem Solved

The Louisiana courts should reevaluate their scattered opinions interpreting Civil Code article 2365. These courts should conclude

179. 483 So. 2d 1197, 1198 (La. App. 4th Cir. 1986).
180. 451 So. 2d 608 (La. App. 5th Cir. 1984).
181. Id. at 612.
that the party who pays a community debt with separate funds must be reimbursed regardless of the classification of the property underlying the community debt as long as payment was made before the partition of the community property. Serious error is perpetuated both in drawing a property distinction between an obligation related to movables and one related to immovables, and in maintaining that reimbursement is only available for payments made during the existence of the community. The distinction based on the nature of the property subject to the obligation is clearly not within the language of article 2365 nor is it supported by any logical interpretive methodology. Therefore, this theory must be discarded.

Further, refusing to allow reimbursement for post-termination, pre-partition payments on community obligations with separate funds conflicts with the language of the Civil Code and creates numerous practical problems for equal division upon divorce. Courts must allow reimbursement for post-termination payments of a community obligation as long as the property and, therefore, ownership, has not yet been divided. This approach provides equity and fairness between the parties and strictly adheres to the language and spirit of the Louisiana Civil Code. It is, therefore, the optimal and most reasonable solution.

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