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William Gaskins

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## ***PEÑA V. SIMEON, AND THE MEANING OF CONSENT***

William Gaskins\*

The Louisiana Civil Code states that contracts are formed by consent established through offer and acceptance. But what exactly is the consent that the offer and acceptance establish? This article discusses the question with reference to *Peña v. Simeon*,<sup>1</sup> a Louisiana case in which a woman with a poor understanding of English is nonetheless held to have given her consent to an English-language contract that she signed.

### I. BACKGROUND

The facts of *Peña v. Simeon* are as follows: plaintiff Rosa Peña went to USAgencies to buy an automobile insurance policy for Fausto Justo, with whom she lived, and who was also the father of her two children. Neither Peña nor Fausto spoke English very well. Although Peña stated at trial that the insurance policy was for Justo, who was in fact the principal “Insured” in the policy document, both Fausto and Peña were listed on the policy as “Covered Persons” and “Operators,” and Peña signed her name on both pages of the document. Peña also signed her initials (Fausto did not) next to the waiver paragraph that stated: “I do not want UMBI coverage,” where UMBI refers to Uninsured Motorist Bodily Injury coverage, which would provide compensation if an uninsured driver caused an accident with the insured party. After procuring the policy, Peña got into a car wreck, and then sought to invoke UMBI coverage on the policy; USAgencies replied that she had waived UMBI coverage, and that it therefore owed no UMBI payments to her. Peña sued for those payments based on several

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\* J.D., D.C.L., Louisiana State University Law Center (2013). He would like to thank Olivier Moréteau, Jennifer Lane, and Daniel On for their help.

1. *Peña v. Simeon*, 11-1083 (La. App. 5 Cir. 5/22/12), 96 So. 3d 547.

theories, and lost in a trial court pre-trial summary judgment in favor of the other party.

## II. DECISION OF THE COURT OF APPEAL

In the appeal of the trial court's summary judgment, Peña essentially made two arguments: first, that she did not have authority to reject the UMBI coverage; and second, that she could not understand the contract because she did not have a very good understanding of English. The court of appeal first treated the question of whether someone with Peña's relation to Fausto—someone living with the principal "Insured," and the mother of his children, but not legally his wife—could waive all UMBI coverage under an insurance policy. Louisiana has a strong public policy in favor of finding UMBI coverage to exist even in doubtful cases.<sup>2</sup> However, citing a Louisiana law that says "any named insured in the policy" can reject coverage,<sup>3</sup> and two cases that ruled a wife could waive UMBI coverage on behalf of her husband,<sup>4</sup> the court of appeal found that Peña had the right to waive UMBI coverage in the insurance contract. As for the second issue, the court decided that Peña's weakness in the English language did not invalidate her waiver of UMBI coverage for two reasons. First, the court determined that there was no vice of consent, and thus Peña's consent to the waiver was not altered. Second, the court decided that Peña sufficiently understood her rejection of the UMBI policy because she knew the purpose of the visit to the insurer, because she could read English well enough to recognize what the insurance contract was, and because she signed the document. Thus, the court found that she was bound by the waiver of UMBI coverage.

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2. *Id.* at 550.

3. LA. REV. STAT. ANN. § 22:1295(1)(a)(i) (2009).

4. *Bonnette v. Robles*, 740 So. 2d 261 (La. App. 2 Cir. 1999); *Tucker v. Valentin*, 807 So. 2d 292 (La. App. 5 Cir. 2001).

## III. COMMENTARY

The Court of Appeal's decision as to whether someone of Peña's relationship to the principal insured and to the insurance contract could validly waive UMBI coverage is straightforward and needs no comment here. As for the second issue of the trial, that concerning Peña's understanding of the contract, there is more reason for close inspection.

*A. Vices of Consent*

The court stated toward the end of its opinion that, “[Peña] makes no claim of fraud, duress, or misconduct on the part of the insurance agent.”<sup>5</sup> Here, the court seems to have had in mind the vices of consent, which according to Louisiana Civil Code article 1948 are error, fraud, and duress. The court wrote explicitly that there was no claim of the second two vices, fraud or duress, and in fact it appears that neither vice existed in case. Misconduct seems to fall under fraud or duress, but for whatever reason it is added to the list. Oddly, there is no explicit mention of error. If the court ignored the issue of error because Peña failed to plead it, this is unfortunate for her. The *Duong*<sup>6</sup> case cited by the court decided that, for purposes of an error analysis, “coverage for uninsured motorist risk as statutorily provided is a ‘cause’ within the meaning of La. C.C. art. 1949.”<sup>7</sup> Because error vitiates consent when the

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5. Peña v. Simeon, 96 So. 3d at 552.

6. Duong v. Salas, 877 So. 2d 269.

7. *Id.* at 273. *Duong* did not state the exact reason for which coverage for uninsured motorist risk is a cause, but the most likely reason is that it bears on the nature of the law. Some potential ways in which error may concern cause are listed in Louisiana Civil Code art. 1950:

Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation.

error concerns cause,<sup>8</sup> the *Duong* finding, that lack of UMBI coverage is a cause, shows that Peña might have succeeded if she had pled error. Perhaps if Peña had asserted the defense, the court would have found that she too made an error as to cause when she signed the UMBI waiver, although the fact that the court found her mastery of English better than Duong's makes it seem unlikely that an error pleading would have yielded a different result from that which she received. But even if the basis of a vice of consent did exist, there is a more principal question, one that the court did not directly discuss: did Peña consent to the contract in the first place? To answer that question, consent must first be defined.

### *B. The Meaning of Consent*

The Louisiana Civil Code says that, "A contract is formed by the consent of the parties established through offer and acceptance."<sup>9</sup> Despite the importance of consent in the civil law of contracts, the law refers to consent without ever defining it. Louisiana Civil Code article 11 states that, "The words of a law must be given their generally prevailing meaning." What is the generally prevailing meaning of consent? The obvious definition is that consent means something like a manifestation of agreement; and indeed, a reference to various dictionaries reveals that to be so.<sup>10</sup> Similar definitions are "acquiescence," "permission," "approval," or "agreement" from Merriam Webster's Dictionary,<sup>11</sup> with the latter three also given by Black's Law Dictionary.<sup>12</sup>

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8. LA. CIV. CODE art. 1949: "Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party."

9. LA. CIV. CODE art. 1927.

10. BLACK'S LAW DICTIONARY 346 (Bryan A. Garner et al. eds., 9th ed. 2009); LE PETIT ROBERT 371 (Paul Robert ed., 1983); OXFORD LATIN DICTIONARY 412 (P.G.W. Glare et al. eds., 1968); 3 THE OXFORD ENGLISH DICTIONARY 760-61 (Robert Burchfield ed., 2nd ed. 1991); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE ENCYCLOPEDIA EDITION 312 (Joseph Friend et al. ed., 1960).

11. WEBSTER'S, *supra* note 10, at 312.

12. BLACK'S LAW DICTIONARY, *supra* note 10, at 346.

Likewise, the Petit Robert's translation of French *consentement* as "acquiescence," "agreement," or "acceptance,"<sup>13</sup> tends to show that consent means something like an outward manifestation of agreement. And indeed, the fact that the method of showing consent—that is, offer and acceptance—is an external manifestation is made clearer by the following sentence: "Unless the law prescribes a certain formality for the intended contract, offer and acceptance may be made orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent."<sup>14</sup> But there is also support for an opposite definition: that consent is not an outward manifestation at all, but rather something internal. The Oxford English Dictionary suggests consent may mean "common feeling," "sympathy," or "accord."<sup>15</sup> The CNRTL French dictionary suggests for *consentement* something translating to a "free act of thought,"<sup>16</sup> and the Oxford Latin Dictionary suggests for *consensus* "concord" or "unanimity," though also an "agreement in action."<sup>17</sup> From this subtle difference, it appears that in its generally prevailing meaning, consent as outward manifestation can be lexically separated from consent as an event within the person who shows it, but that both meanings are present in the common notion of consent.

From inward consent, a further distinction can be made. In classical Latin, the verb *sentire* could mean both what we call "to feel" and "to think." Although it will seem odd to moderns, Romans probably found there was no distinction to be needed when they used the word, so that a translation of *sentire* sometimes yields "to feel," sometimes "to think", and sometimes it is unclear

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13. LE PETIT ROBERT, *supra* note 10, at 371.

14. *Id.*

15. 3 THE OXFORD ENGLISH DICTIONARY, *supra* note 10, at 412.

16. CENTRE NATIONAL DE RESSOURCES TEXTUELLES ET LEXICALES, <http://www.cnrtl.fr/definition/consentement>: «Acte libre de la pensée» (Jul. 8, 2013).

17. OXFORD LATIN DICTIONARY, *supra* note 10, 412.

which is intended, or whether both meanings are present.<sup>18</sup> This is vexing for the present purpose, as to feel oneself bound (which, through reference to the word *sententia* may be better translated here as a “will” or “desire” to be bound)<sup>19</sup> and to understand exactly how one is bound are two very different things. It is here that the word “unanimity” is a perfect translation of consent,<sup>20</sup> but also an unhelpful one; for *uni-* corresponds to the idea of togetherness like *cum-*, and *animus* and *anima* can mean either mind or soul, just as *sensus* means either thought or feeling. Altogether, if consent is to be taken with its full general meaning, then it must be defined to include both a feeling or will to be bound, and also an understanding of what one is bound to, for both are included in the meaning of consent, just as the idea of external manifestation is.

Can the different kinds of consent exist apart from one another? It would seem that whenever an external manifestation of consent is freely and intentionally (that is, not accidentally) given, the person who consents must perform the external manifestation as an effect of his internal feeling (here, “will” is a good substitute) of consent. In other words, if the manifestation does not arise from the will, nor is forced, nor is an accident, then how can it arise at all? There must be some cause. But whereas consent of will is necessary for a free and purposeful external manifestation of consent, understanding can easily be shown not to be necessary for it: one may sign a contract without reading it or otherwise learning

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18. CLIVE STAPLES LEWIS, *STUDIES IN WORDS* 136-38 (Cambridge Univ. Press, 1960).

19. See CHARLTON T. LEWIS, *AN ELEMENTARY LATIN DICTIONARY* 769 (Oxford Univ. Press, reprint 1999); see also ST. THOMAS AQUINAS, *17 SUMMA THEOLOGICAE* 158-63 (Thomas Gilby O.P. ed. and English trans., 1970): Although consent arises in the reason (and thus animals do not have consent), consent is an appetitive power because it is an impulse to join oneself with an object which can be felt when present. This appetitive power is the will (*voluntas*). Thus the feeling element, the desire to move toward the object, may be called will.

20. H.W. FOWLER, *A DICTIONARY OF MODERN ENGLISH USAGE* 105-6 (Sir Ernest Gowers ed., 2nd ed. 1965); 3 *THE OXFORD ENGLISH DICTIONARY*, *supra* note 10, at 760-61; *OXFORD LATIN DICTIONARY*, *supra* note 10, at 412.

of its terms. Thus, it appears to be a rule for the general meaning of consent that where there is a free and purposeful external manifestation of consent, the manifestation always arises from the will; but understanding may or may not be present.

*C. The Law of Consent and its Application to Peña*

The law only explicitly requires the external manifestation of consent, as seen in Civil Code article 1927, which speaks of “offer,” “acceptance,” and various acceptable forms therefor.<sup>21</sup> If the external manifestations of consent necessarily arise from the internal will, then the law must also implicitly require that there be consent of the will. As for consent in understanding, although the Civil Code does not require it explicitly or even implicitly, the Louisiana jurisprudence requires it. The Peña court states the doctrine thus: “[i]t is well settled that a party who signs a written instrument is presumed to know its contents.”<sup>22</sup> That is, if a party gives an external manifestation of consent, then courts presume that he also consents in understanding.

The reason for the presumption that consent in understanding accompanies consent in manifestation is easy to see: neither courts nor other people can see whether a party understands a contract except by what he shows through his manifestations. If one could not trust that another party’s manifestations of consent were valid for a contract, then the formation of reliable contracts would be impossible. But if there is only a presumption that understanding accompanies the external manifestation, rather than a strict rule that it does, then can the presumption in some circumstances be overturned? And if so, when? The strong language from some Louisiana jurisprudence makes it seem that the presumption can never be overturned. *Tweedel v. Basseaux* states that, “The law of Louisiana is that one who signs an

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21. LA. CIV. CODE art. 1927.

22. Peña v. Simeon, 96 So. 3d at 552.



instrument without reading it has no complaint.”<sup>23</sup> *Aguillard v. Auction Management Corp.* likewise states that, “It is well settled that a party who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending that he did not read it, that he did not understand it, or that the other party failed to explain it to him.”<sup>24</sup> Again in *Coleman v. Jim Walter Homes, Inc.*:

Having signed this agreement, Mr. Coleman cannot seek to avoid its obligations by contending that he did not read or understand it. . . [T]he law does not compel people to read or to inform themselves of the contents of instruments which they may choose to sign, but, save in certain exceptional cases, it holds them to the consequences.<sup>25</sup>

The rule is strict; but there apparently are, according to *Coleman*, unnamed exceptional situations. *Tweedel* also seems to contradict itself by making an exception for rebuttal of the presumption, saying that proof that a party was deceived can overturn the presumption of understanding.<sup>26</sup>

Probably a large majority of cases that involve misunderstanding or mistake about a signed contract are cases of error as a vice of consent. In the normal case, a party has consented to enter a contract, but his understanding of some aspect of it is deficient or wrong. If his lack of understanding is a designated cause,<sup>27</sup> then the law regards the consent that he gave as vitiated and made ineffective. But sometimes consent is more than merely vitiated. Sometimes the parties are so far from agreeing with one another that consent cannot be said to ever have existed at all, even if the parties signed a contractual document. The problem in such a situation is known in French doctrine as *error obstacle*, or error resulting from an obstacle. *Error obstacle* is a radical

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23. *Tweedel v. Brasseaux*, 433 So. 2d 133, 138 (La. 1983).

24. *Aguillard v. Auction Management Corp.*, 908 So. 2d 1 (La. 2005).

25. *Coleman v. Jim Walter Homes, Inc.*, 6 So. 3d 184 (La. 2009).

26. *Tweedel v. Brasseaux*, 433 So. 2d at 137.

27. LA. CIV. CODE art. 1950, *supra* note 7.

misunderstanding as to the nature or the cause of a contract. Even though the parties seemed in many ways to agree, there was in fact no actual meeting of the minds. There was no agreement whatsoever because the parties “did not actually want the same thing. An essential condition to the formation of the contract is missing: the common intent, the true mutual understanding.”<sup>28</sup> In such a case, it would not make sense to say that consent has been vitiated, for there never was any consent except in appearance. Or we may say that there was an external manifestation of consent, but neither understanding of the terms nor any will to be bound to the terms as they were. Under *error obstacle* theory, external consent by itself is not enough to overcome a complete lack of will to be bound, so that the parties are simply not bound.

If, as in *Peña*, a party signs his name to a contractual document, but does not—or for the most part does not—understand the language in which the contract is written, then is he bound to the contract by law? Such a party manifests his consent to the contract when he signs the document, and his free and purposeful manifestation shows that he consents in will, too. As for his understanding, there are three main possibilities: first, that he does not understand the contested terms as printed, but that he gains understanding of them through a translation from some source outside of the contract; second, that he does not understand the contested contractual terms at all; and third, that he has a partial understanding of the contractual terms at issue. The first situation occurred in *Rizzo v. Ward*,<sup>29</sup> a case in which a native speaker of Spanish with below average ability in English signed the UMBI waiver in an English-language insurance contract, but discussed the document with an insurance agent in Spanish. Rizzo pleaded in court that his waiver of UMBI coverage was void

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28. FRANÇOIS TERRÉ ET AL., *DROIT CIVIL: LES OBLIGATIONS* 216 (9th ed., Dalloz 2005); trans. in e-mail from Olivier Moréteau, Professor, Paul M. Hebert Law Center, to author (April 24, 2013) (on file with author).

29. *Rizzo v. Ward*, 32 So. 3d 986 (La. App. 4 Cir. 2010).

because he did not understand the contract. But the court cited the presumption that parties understand the contracts that they sign, and found that, while inability to understand the language might by itself overturn the presumption of understanding, the fact that the insurance agent explained the contract in Spanish counterweighed his difficulty with English, so that the presumption was upheld. The second situation occurred in the *Duong* case, in which a Vietnamese man who spoke almost no English rejected UMBI coverage in an insurance contract. Here, the party visited the insurance agent with a friend who spoke more English, but even the friend's English was very bad. The court ruled that Duong's inability to understand the language of the contract was sufficient reason to invalidate the contract.<sup>30</sup> However, unlike *Rizzo*, the court turned to vice of consent, and found that the party had consented, but that his consent was vitiated by an error concerning cause. Although the *Duong* analysis seems to have reached the right conclusion (for the party indeed had almost no understanding of the details of his insurance contract), it is unfortunate that the court does not discuss the issue of whether or not there was full consent in the first place. And the third situation, that in which the party had some understanding of the language of the contract, is the one at issue in *Peña v. Simeon*.

In the present case, Peña externally manifested her consent when she signed her initials by the waiver of UMBI coverage in the insurance contract. At the same time, she must have consented in will to be bound to the provision. As for the understanding aspect of consent, the court concluded that Peña understood the waiver because she knew she was at the insurance office to buy insurance with Fausto, because she could read English well enough to understand that the document was an insurance contract, and because Peña signed her initials to the waiver. The first two of these reasons make at best only a weak argument that Peña

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30. *Duong v. Salas*, 877 So. 2d at 273.

understood the waiver. The fact that Peña was at the office for the purpose of buying insurance seems likelier to make Peña think the waiver clause would provide insurance coverage rather than take it away, and Peña's ability to recognize the document as an insurance contract was probably helped by her knowledge of the purpose of her visit. But, importantly, Peña signed her initials next to the UMBI waiver, and this signature created the presumption that she understood the clause. After weighing the evidence regarding her comprehension of the English language, the court found that the facts were not sufficient to reverse the presumption of understanding, and held that Peña consented to the waiver of UMBI coverage. Peña signed the waiver, of her free accord, and, by the un rebutted legal presumption, she understood the waiver; thus her consent was whole and valid.

Given the facts as the court took them, the result in *Peña* is the right one: for the law must presume that parties understand their contracts, and Peña offered little evidence to prove that she did not understand hers. Perhaps Louisiana could do more to make sure that people with a poor comprehension of English understand their contracts, both for their own sakes, and for the sakes of those who contract with them. However, it is difficult to think of a solution that would prove helpful in more than a few cases. One example of such a rule helping non-English-speakers is California's policy that requires people who conduct business primarily in one of the five foreign languages most-used in California to offer the other party a translation of some types of contracts into the language in which the contract was negotiated.<sup>31</sup> Such a rule would help a party like the one in *Rizzo*, who pleaded in court that he did not understand his English UMBI waiver even though the insurance agent discussed the contract with him in his native language. But the law would not help the parties in *Peña* or in *Duong* because their insurance agents discussed their contracts

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31. CAL. CIV. CODE ANN. § 1632 (2011).

only in English, and easily may not have spoken the parties' native languages of Spanish and Vietnamese, respectively. Furthermore, requiring provision of full translations of contracts would likely make the cost of contracting prohibitive for many people, and would likely lead to many problems arising from inaccurate translations. It may be true that a law requiring foreign language translation of some contracts would help some parties, but the first step is for Louisiana courts to clarify their doctrine of the difference between the vices of consent and a total lack of consent due to *error obstacle*. Only in so doing can Louisiana courts set straight this basic aspect of the rights and duties of contracting parties, both in cases of linguistic inability and elsewhere.

#### IV. CONCLUSION

Consent is necessary for all contracts under Louisiana law; but the law does not define consent, and its subtler intentions must be taken from its generally prevailing meaning. Consent contains both an external and an internal element, with the internal comprising both an idea of feeling or will and of knowing or understanding. The Louisiana courts presume that parties understand their contracts when they have manifested consent through their signatures. The presumption of understanding has been overturned on grounds of error in a case in which a party knew no English whatsoever; but it would be better for courts to find in such cases that lack of understanding, supported by enough evidence to overturn the presumption, prevents full consent in the first place. In *Peña*, where the party understood some English, the presumption that she understood the provision was rightly upheld. But Louisiana courts have yet to make clear their doctrine on the distinction between vices of consent and the full lack thereof, and cases involving linguistic inability will remain on unsteady ground until they do.