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CONSUMER PROTECTION

*Ronald L. Hersbergen**

THE CIVIL CODE AS A SOURCE OF CONSUMER PROTECTION

In Louisiana, the seller is bound by a warranty that the thing sold is reasonably fit for its intended use, that is, free of non-apparent defects which render the thing sold either "absolutely useless" or "so inconvenient and imperfect [in its use], that it must be supposed that the buyer would not have purchased it, had he known of" the vice.¹ Upon proof of such a defect, and that it existed at the time of the sale and cannot be remedied by the reasonable efforts of the seller, the buyer is entitled to annul the sale and to obtain a restoration of the purchase price.² This warranty against the existence of hidden defects or redhibitory vices arises in every Louisiana sale by virtue of Civil Code articles 2475 and 2476, as among those things said by article 1764(2) to be implied from the nature of the agreement of sale. Article 1764(2) also indicates that the seller's implied warranty may be modified or renounced. But if the general law of Louisiana can be said to roughly equate that of the common law on this point, the two systems part company on the issue of modifying or renouncing the seller's implied warranty of fitness, for an enforceable renunciation (or "waiver") of the redhibition warranty in a consumer transaction in Louisiana is, in fact, rare. That such is the case is not at all accidental. Article 1819 requires that consent to any contract in Louisiana must result from a "free and deliberate exercise of the will." With respect to the two principal obligations of the seller in Louisiana, that of delivering the thing which he sells and that of warranting the thing which he sells³ to be free of hidden defects or redhibitory vices,⁴ article 2474 has an important commandment: the seller "is bound to explain himself clearly respecting the extent of his obligations [and] any obscure or ambiguous clause is [to be] construed against him." Given the widespread use of standard form contracts in consumer sale, loan, lease, and services contracts, that same duty of "clear explanation" is present in most consumer transactions in any event, by virtue of articles 1957 and

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1. LA. CIV. CODE art. 2520.

2. LA. CIV. CODE art. 2531. Article 2544 makes article 2531 applicable to the action for a reduction in the purchase price.

3. LA. CIV. CODE art. 2475.

4. LA. CIV. CODE arts. 2476 & 2520.

1958.⁵ In addition, a failure of the seller, lender, lessor, or contractor to give an explanation or to provide a disclosure can invalidate the entire contract in a case to which article 1832 has application.⁶ Basically, then, the unexplained and/or ambiguous term or phrase is treated in the Civil Code as one not freely and deliberately consented to and, therefore not enforceable.

From these Civil Code principles—in particular that of article 2474—has emerged a most meaningful jurisprudential rule as to renunciation or waiver of the implied redhibition warranty: to be effective, the language of renunciation must appear in the key sale document;⁷ be “clear, unambiguous, explicit, unequivocal”;⁸ be

5. There are some distinctions between article 2474 and articles 1957-58 that should be observed. Article 2474 requires only that the seller clearly explain the extent of *his* obligations (i.e., to deliver the thing sold and to warrant the thing sold). On the other hand, if the seller (or any other party) has prepared the contract for acceptance by the buyer, then *any* doubt or obscurity which arises will be construed against the seller, no matter whose obligations are at issue, if the doubt or obscurity has arisen for want of a “necessary explanation” which seller ought to have given. Because the one who prepares the form is almost always the more knowledgeable and experienced party, an explanation is typically necessary.

Furthermore, there is a distinction to be drawn between an unexplained clause which is ambiguous, because it admits of conflicting interpretations, and a clause which is clear and unambiguous but to which the buyer's attention is not directed, particularly if the buyer is disadvantaged by lack of education or literacy. See *Anderson v. Bohn Ford, Inc.*, 291 So. 2d 786 (La. App. 4th Cir. 1974). Article 2474 applies to both cases, but articles 1957-58 apply only to the former case.

Finally, a distinction can be seen between articles 2474 and 1957-58 in cases in which a seemingly unambiguous word or term has an esoteric trade or legal meaning unknown and unexplained to the layman by the more knowledgeable merchant. See, e.g., *Larriviere v. Roy Young, Inc.*, 333 So. 2d 254 (La. App. 3d Cir. 1976); *Deutschmann v. Standard Fur Co.*, 331 So. 2d 219 (La. App. 4th Cir. 1976); *Leithman v. Dolphin Swimming Pool Co.*, 252 So. 2d 557 (La. App. 4th Cir.), *cert. denied*, 259 La. 1055, 254 So. 2d 464 (1971).

6. The information not disclosed would have to relate to an error as to principal motive. LA. CIV. CODE arts. 1819, 1825 & 1832.

7. *Prince v. Paretti Pontiac Co.*, 281 So. 2d 112 (La. 1973); *Media Prod. Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 262 So. 2d 377 (1972); *Radalec, Inc. v. Automatic Firing Corp.*, 228 La. 116, 81 So. 2d 830 (1955); *Anderson v. Bohn Ford, Inc.*, 291 So. 2d 786 (La. App. 4th Cir. 1973). Cf. *Kodel Radio Corp. v. Shuler*, 171 La. 469, 131 So. 462 (1931).

8. The quoted phraseology results from a composite of Louisiana judicial statements concerning the relationship among Civil Code articles 1764(2), 2474, and 2503. See, e.g., *Hob's Refrigeration & Air Conditioning, Inc. v. Poche*, 304 So. 2d 326 (La. 1974); *Rey v. Cuccia*, 298 So. 2d 840 (La. 1974); *Prince v. Paretti Pontiac, Inc.*, 281 So. 2d 112 (La. 1973); *Dunlap v. Chrysler Motors Corp.*, 299 So. 2d 495 (La. App. 4th Cir. 1974); *Anderson v. Bohn Ford, Inc.*, 291 So. 2d 786 (La. App. 4th Cir. 1973); *Harris v. Automatic Enterprises, Inc.*, 145 So. 2d 335 (La. App. 4th Cir. 1962). Cf. *Guillory v. Morein Motor Co.*, 322 So. 2d 375 (La. App. 3d Cir. 1975). The *Harris* and *Rey* cases cite article 2474 as the source of the rule.

brought to the attention of the buyer or explained to him;⁹ and, because it is in derogation of general law, be strictly construed.¹⁰ A most striking example of the application of the waiver standard is presented by *Thibodeaux v. Meaux's Auto Sales, Inc.*,¹¹ in which the bill of sale contained the following waiver language:

“. . . Purchaser . . . does hereby waive the warranty of fitness or guarantee against the redhibitory vices applied in Louisiana by operation of law, more specifically, that warranty imposed by Civil Code Article 2476, or other applicable law. . . . Additionally, I forfeit any right I may have in redhibition pursuant to Civil Code Article 2520 and following articles, subject to the above described restricted warranty”¹²

The Third Circuit Court of Appeal ruled that this language was neither written in “clear and unambiguous terms,” nor was it (or its meaning) brought to the buyer’s attention or explained to him. The court maintained that:

[T]he language of this purported waiver is couched in legal terms, and not in terms which may be read and understood by a layman. The requirement “clear and unambiguous” means that the language used must be comprehensible by the average buyer. The plaintiff, a woman with a sixth grade education, stated that she did not know the meaning of the words “redhibitory vices,” “redhibition,” nor was she acquainted with the provisions of the Civil Code cited in the instrument. The plaintiff cannot be expected to be acquainted with these legal terms or their implications. This instrument did not contain “clear and unambiguous” language.

The instrument also fails to meet the requirement that it must be explained to the buyer or brought to her attention. The testimony of the salesman . . . reflects that he did not explain nor did he point out the waiver to the plaintiff. He stated that he did not know what the waiver provisions meant.¹³

9. See, e.g., *Prince v. Paretti Pontiac, Inc.*, 281 So. 2d 112 (La. 1973); *Hendricks v. Horseless Carriage, Inc.*, 332 So. 2d 892 (La. App. 2d Cir. 1976); *Harris v. Automatic Enterprises, Inc.*, 145 So. 2d 335 (La. App. 4th Cir. 1962).

10. See, e.g., *Dufief v. Boykin*, 9 La. Ann. 295 (1854); *Wolfe v. Henderson Ford, Inc.*, 277 So. 2d 215 (La. App. 3d Cir. 1973); *Harris v. Automatic Enterprises, Inc.*, 145 So. 2d 335 (La. App. 4th Cir. 1962).

11. 364 So. 2d 1370 (La. App. 3d Cir. 1978).

12. *Id.* at 1371.

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

[I]t is specifically understood between the buyer and seller that this sale is made

From the standard for valid renunciation which *Thibodeaux* epitomizes, it should follow that: 1) language found in a buyer's order, a manufacturer's warranty pamphlet, an invoice, or in any document other than the key sale document simply cannot constitute a valid renunciation of the redhibition warranty, no matter how clear, unambiguous, or explained it was, and regardless of whether the consumer's attention was drawn to it;¹⁴ 2) language in the key sale document that is specific, unequivocal, clear, and unambiguous must still be explained or brought to the attention of the consumer¹⁵ in an unambiguous manner;¹⁶ 3) there can be no meaningful explanation of, or attention drawn to, ambiguous renunciation language;¹⁷ 4) language in fine print will be neither clear and unambiguous nor brought to the consumer's attention,¹⁸ nor will other inconspicuous language satisfy the requirement;¹⁹ 5) the language "as is" or "no

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

220 So. 2d at 238. In *Hendrick v. Horseless Carriage, Inc.*, 332 So. 2d 892 (La. App. 2d Cir. 1976), the bill of sale stipulated that buyer "buy[s] this car with no warranty"; and, though the transaction was consummated beneath a sign stating, in eight-inch letters, "All Cars Sold As Is! Please Test Before Buying," the renunciation language was held not to be "clear and unambiguous." 332 So. 2d at 893. The language was, however, held to have been brought to buyer's attention. On the other hand, in *Wolfe v. Henderson Ford, Inc.*, 277 So. 2d 215 (La. App. 3d Cir. 1973), language closely approximating that of the *Foy* case was ineffective because the seller had not "explained" it, no doubt because the salesman testified that he, like his counterpart in the *Thibodeaux* case, did not know what was meant by a "vice" in a car.

14. *Prince v. Paretti Pontiac Co.*, 281 So. 2d 112 (La. 1973); *Media Prod. Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 262 So. 2d 377 (1972); *Radalec, Inc. v. Automatic Firing Corp.*, 228 La. 116, 81 So. 2d 830 (1955); *Anderson v. Bohn Ford, Inc.*, 291 So. 2d 786 (La. App. 4th Cir. 1974). *Cf.* *Kodel Radio Corp. v. Shuler*, 171 La. 469, 131 So. 402 (1931).

15. *Harris v. Drexler Motor Co., Inc.*, 339 So. 2d 1304 (La. App. 1st Cir. 1976); *Anderson v. Bohn Ford, Inc.*, 291 So. 2d 786 (La. App. 4th Cir. 1974); *Lee v. Blanchard*, 264 So. 2d 364 (La. App. 1st Cir. 1972); *Juneau v. Bob McKinnon Chevrolet Co.*, 260 So. 2d 919 (La. App. 4th Cir. 1972).

16. *Edwards v. Port AMC/Jeep, Inc.*, 337 So. 2d 276 (La. App. 2d Cir. 1976); *Guillory v. Morein Motor Co.*, 322 So. 2d 375 (La. App. 3d Cir. 1975); *Wolfe v. Henderson Ford, Inc.*, 277 So. 2d 215 (La. App. 3d Cir. 1973).

17. *Hendricks v. Horseless Carriage, Inc.*, 332 So. 2d 892 (La. App. 2d Cir. 1976); *Wolfe v. Henderson Ford, Inc.*, 277 So. 2d 215 (La. App. 3d Cir. 1973). *Cf.* *Harris v. Automatic Enterprises, Inc.*, 145 So. 2d 335 (La. App. 4th Cir. 1962).

18. *Guillory v. Morein Motor Co.*, 322 So. 2d 375 (La. App. 3d Cir. 1975); *Lee v. Blanchard*, 264 So. 2d 364 (La. App. 1st Cir. 1972). *Cf.* *Kodel Radio Corp. v. Shuler*, 171 La. 469, 131 So. 402 (1930).

19. *See, e.g., Wolfe v. Henderson Ford, Inc.*, 277 So. 2d 215 (La. App. 3d Cir. 1973); *Harris v. Automatic Enterprises, Inc.*, 145 So. 2d 335 (La. App. 4th Cir. 1962). Both *Wolfe* and *Harris* involve waiver language on the backside of the document.

warranties of any kind" will not, of itself, renounce the warranty,²⁰ though it may modify it;²¹ 6) the presence of an express warranty does not of itself constitute a renunciation of the implied warranty,²² even if it is "in lieu of" other warranties or limits the seller's obligation to repair or to replace defective parts.²³

In 1977 the state of New York enacted a statute requiring the use of "plain English" in certain consumer contracts.²⁴ The New York law requires that such contracts be written in "a clear and coherent manner using words with common and every day meaning."²⁵ The New York law apparently prompted the introduction of plain English bills in about twenty states.²⁶ Three or more of these bills would require contract language "which can be understood at least by a person of average intelligence."²⁷ The *Thibodeaux* case stands as a testimonial to Civil Code articles 1958 and 2474, which alleviate the need for a plain English statute in Louisiana.

Apparent defects are not among those treated by the Civil Code as redhibitory in nature;²⁸ accordingly, decisions as to the apprenacy

20. See, e.g., *Hendricks v. Horseless Carriage, Inc.*, 332 So. 2d 892 (La. App. 2d Cir. 1976); *Juneau v. Bob McKinnon Chevrolet Co.*, 260 So. 2d 919 (La. App. 4th Cir. 1972); *McLain v. Cuccia*, 259 So. 2d 337 (La. App. 4th Cir. 1972); *Beneficial Finance Co. v. Bienemy*, 244 So. 2d 275 (La. App. 4th Cir. 1971); *Breeden v. General Motors Acceptance Corp.*, 140 So. 2d 680 (La. App. 4th Cir. 1962). Two of the earlier cases to adopt this view are *Roby Motors Co. v. Cade*, 158 So. 840 (La. App. 2d Cir. 1935), and *United Motor Car Co. v. Drumm*, 3 La. App. 741 (Orl. Cir. 1926).

21. *Beneficial Finance Co. v. Bienemy*, 244 So. 2d 275 (La. App. 4th Cir. 1971); *Maddox v. Katz*, 8 So. 2d 749 (La. App. Orl. Cir. 1942); *Roby Motors Co. v. Cade*, 158 So. 840 (La. App. 2d Cir. 1935).

22. *Hob's Refrigeration & Air Conditioning, Inc. v. Poche*, 304 So. 2d 326 (La. 1974); *Bendana v. Mossy Motors, Inc.*, 347 So. 2d 946 (La. App. 4th Cir. 1977); *Bernard v. Tiner*, 181 So. 2d 863 (La. App. 4th Cir. 1966); *Bartolotta v. Gambino*, 78 So. 2d 208 (La. App. Orl. Cir. 1955). Cf. *Hoffman v. All Star Ins. Corp.* 288 So. 2d 388 (La. App. 4th Cir. 1974); *Hebert v. Claude Y. Woolfolk Corp.*, 176 So. 2d 814 (La. App. 3d Cir. 1965).

23. See, e.g., *Media Prod. Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 262 So. 2d 377 (1972); *Hoffman v. All Star Ins. Corp.*, 288 So. 2d 388 (La. App. 4th Cir. 1974); *Bernard v. Tiner*, 181 So. 2d 863 (La. App. 4th Cir. 1966); *Harris v. Automatic Enterprises, Inc.*, 145 So. 2d 335 (La. App. 4th Cir. 1962). Cf. *Hob's Refrigeration & Air Conditioning, Inc. v. Poche*, 304 So. 2d 326 (La. 1974); *Hebert v. Claude Y. Woolfolk Corp.*, 176 So. 2d 814 (La. App. 3d Cir. 1965).

24. N.Y. GEN. OBLIG. LAW § 5-701 (McKinney 1977). Section 5-701 was amended in 1978 and re-designated as section 5-702. The Act applies to all written residential leases and all other written consumer agreements respecting money, property or services intended primarily for personal, family or household purposes. Agreements involving amounts in excess of \$50,000 are excluded.

25. N.Y. GEN. OBLIG. LAW § 5-702 (McKinney 1978). The section also requires that the written contract be "appropriately divided and captioned by its various sections."

26. O'Connor, *Plain English*, 34 BUS. LAW. 1453 (1979).

27. These states are Maryland, New Jersey, and Rhode Island. *Id.* at 1456 n.9.

28. LA. CIV. CODE art. 2521.

of defects are of great importance to the consumer-buyer in Louisiana. Particularly is this true in the case of the home purchase, typically the most important of all consumer purchases. The presence of a real estate broker in a consumer home purchase is virtually universal, as is the listing sheet prepared by the broker for the benefit of potential buyers. The listing sheet typically assumes a standard format and contains a significant amount of information about the specifications of the listed residence. The 1974 decision of the second circuit in *White v. Lamar Realty, Inc.*²⁹ cast substantial doubt on the degree to which a home buyer could rely on broker-prepared erroneous information about the listed residence whenever the true state of fact was discernable by inspection.

The buyer in *White* unsuccessfully sought rescission of a home purchase upon discovery that the dimensions of several rooms in the house were not as large as the specification sheet had represented. Because the buyer had in fact inspected the premises, it was held that he could not assert that he had been deceived by the broker.³⁰ The fourth circuit recently rendered an opinion in which the redhibition issue was squarely raised against a factual background quite similar to *White*. The case, *Bernofsky v. Schwartz*,³¹ permitted inspecting buyers to nevertheless rely on an information sheet prepared by the seller and the seller's broker that erroneously listed a 20 feet by 13 feet den as having dimensions of 24 feet by 13 feet. The court found that the size of the den was one of the principal motives that prompted the buyer to purchase the home and that, because the defect³² related to *exact* rather than approximate dimensions, there was no reason for the buyer to question the accuracy of the information. Additionally, the opinion stresses that the buyer could not be expected to have noticed by simple inspection an inaccuracy that several experienced realtors had failed to detect. With

29. 303 So. 2d 598 (La. App. 2d Cir. 1974).

30. *Id.* at 600-02. The *White* case discussed the buyer's duty to inspect against a background composed of articles 1847, 2315, and 3018, in light of the buyer's primary contention that he relied on statements made in the broker's multiple listing sheet. The court dismissed the action against the vendor due to the buyer's failure to timely cure vagueness in his petition, thus pretermittting discussion of articles 2521 and 2529. As against the broker's possible fraud under either article 1847(9) or 2315, buyer was held not entitled to damages because the defects he alleged would have been discoverable upon an inspection of the home, which he was afforded prior to the sale. Since buyer did in fact inspect the property, the inference drawn by the trial court, and affirmed by the second circuit, was that he did not rely on the representation. The court cited *La Croix v. Recknagel*, 230 La. 842, 89 So. 2d 363 (1956), and *Rocchi v. Schwabacher*, 33 La. Ann. 1364 (1881).

31. 370 So. 2d 590 (La. App. 4th Cir. 1979).

32. *Id.* at 593, citing LA. CIV. CODE art. 2529.

respect to residential home purchases, the fourth circuit's *Bernofsky* case seems soundly premised upon articles 2520 and 2529³³ and achieves a realistic interpretation of article 2521 in the home sale context.³⁴

UNFAIR OR DECEPTIVE ACTS OR PRACTICES

The Louisiana Unfair Trade Practices and Consumer Protection

33. Civil Code article 2531's "opportunity to repair" provisions do not apply to cases such as *White* and *Bernofsky*, because the defects arise from article 2529 and are not repairable.

34. The *White* ruling unquestionably makes more sense in the context of a sale of real estate by a metes and bounds description (with a statement made as to acreage) than to a sale of a home as to the square footage of which a supposedly qualified broker has made, not an estimate, but an apparently mathematically computed assessment. Cf. *American Guar. Co. v. Sunset Realty & Planting Co.*, 208 La. 772, 23 So. 2d 409 (1944); *Exchange Bank v. E.B. Williams & Co.*, 120 La. 901, 45 So. 935 (1908).

If a *fraud* case similar to *White* should arise because of a statement by the vendor or broker as to square footage, *Rocchi v. Schwabacher*, 33 La. Ann. 1364 (1881), should be re-examined. In the first place, the statement as to dimension or square footage would, as *Bernofsky* holds, come under article 2529. While the relationship between that article and article 2521 is not necessarily clear, it would seem that a statement as to the (purported) exact square footage of a residence in effect advises the buyer not to bother making his own computation. On its own merits, square footage is probably not redhibitory and only becomes so by virtue of the declaration thereof as a quality of the thing. At the very least, the *character* of the buyer's inspection would be affected. Cf. *Edward v. Glasson*, 12 La. Ann. 586 (1857); *Berret v. Adams*, 10 La. Ann. 77 (1855); *Millaudon v. Prince*, 3 La. Ann. 4 (1848); *Peoples Furniture and Gift v. Carson Hicks/Freidrichs Refrigeration, Inc.*, 326 So. 2d 919 (La. App. 3d Cir. 1976); *Atlantic-Gulf Supply Corp. v. McDonald*, 175 So. 2d 6 (La. App. 4th Cir. 1965). Contributory negligence ought not be a defense to fraud or an article 2529 declaration. Contrary to the trial court's ruling, affirmed in *White*, logic does not necessarily indicate that an action for *damages* under article 1847 would be subject to the same defenses as an action to *rescind* brought under the same article. 303 So. 2d at 601. Cf. *American Guar. Co. v. Sunset Realty & Planting Co.*, 208 La. 772, 23 So. 2d 409 (1944). In *American Guaranty Co.*, the one misrepresenting stood before the court and pleaded that the defrauded party unwisely or carelessly trusted him and placed too much confidence in his honesty and truthfulness. The court held that this did not constitute a valid defense, particularly where the one misrepresenting is an expert.

A second and more fundamental reason requires a re-examination of the *Rocchi* approach in residential home sales: the theoretical basis of the case (both parties had equal means of knowledge) was taken from *Slaughter's Administrator v. Gerson*, 80 U.S. (13 Wall.) 379 (1871), and undeniably smacks of common law *caveat emptor*. In short, a common law notion may have crept into the 1881 decision in *Rocchi* and, unfortunately, it may have germinated. At about this time in Louisiana jurisprudential history, the Louisiana Supreme Court was heard to say that "the rule of law is caveat emptor." *McGuire v. Kearny, Blois & Co.*, 17 La. Ann. 295 (1865).

In any event, a buyer can certainly rely on the seller's representations whenever an inspection is difficult or inconvenient, *Atlantic-Gulf Supply Corp. v. McDonald*, 175 So. 2d 6 (La. App. 4th Cir. 1965), or where seller conceals the facts from buyer, *Bermes v. Facell*, 328 So. 2d 722 (La. App. 1st Cir. 1976); *Aubry v. Todd*, 55 So. 2d 276 (La. App. 2d Cir. 1952).

Law³⁵ declares unlawful "unfair or deceptive" acts or practices in the conduct of any trade or commerce. The law offers no definitions of the terms "unfair" or "deceptive"; but it has been recognized that the legislature patterned the law upon section 45(a) of the Federal Trade Commission Act of 1914³⁶ intending, upon familiar rules of statutory construction,³⁷ that Louisiana courts should consider the interpretations of the federal law by federal courts and the FTC in determining the meaning of "unfair and deceptive" acts or practices under the Louisiana statute.³⁸ Accordingly, there exists a reservoir of federal caselaw bearing heavily on the scope and application of the Louisiana statute.

In over six years of statutory life, the Louisiana consumer protection law has engendered only a handful of decisions.³⁹ Recently, however, significant issues of substance and procedure under the Act have been before the Louisiana courts. In *Moore v. Goodyear Tire and Rubber Co.*,⁴⁰ it was alleged that the action of Goodyear's employees in wrongfully seizing⁴¹ items of personal property from plaintiff's trailer home constituted an unfair act or practice under the Louisiana statute. In holding that the defendant had violated the statute, the second circuit offered a working definition of an unfair practice:

In determining whether a practice is unfair under the federal act, a rule, based on Federal Trade Commission criteria, has been established that a practice is unfair when it offends established public policy and when the practice is immoral,

35. LA. R.S. 51:1401-18 (Supp. 1972).

36. 15 U.S.C. § 45(a) (1975).

37. See *State v. Baddock*, 170 So. 2d 5 (La. App. 1st Cir. 1964).

38. See *Guste v. Demars*, 330 So. 2d 123 (La. App. 1st Cir. 1976).

39. *State v. Council of City of New Orleans*, 309 So. 2d 290 (La. 1976) (utility late charge billing practice held not a deceptive trade practice); *State v. Crossroads Gallery*, 357 So. 2d 1381 (La. App. 4th Cir. 1978) (comparative pricing practice held to be "unfair and deceptive"); *Guste v. Demars*, 330 So. 2d 123 (La. App. 1st Cir. 1976) (contractor's guarantee of quality not shown to be in violation of the Act); *General Investment, Inc. v. Gaudet*, 303 So. 2d 624 (La. App. 4th Cir. 1974) (seizure of automobile not in compliance with legal requirements held an unfair or deceptive act); *Faris v. Model's Guild*, 297 So. 2d 536 (La. App. 4th Cir. 1974) (offering of course of instruction by one not licensed as required by law was inferably in violation of the Act). See also *Gerasta v. Hibernia Nat'l Bank*, 411 F. Supp. 176 (E.D. La. 1975).

40. 364 So. 2d 630 (La. App. 2d Cir. 1978).

41. Repossession or seizure of goods *sans* judicial process or consent constitutes a wrongful (i.e., tortious) act. See, e.g., *Grandeson v. International Harvester Credit Corp.*, 223 La. 504, 66 So. 2d 317 (1953); *Samaniego v. Horseless Carriage, Inc.*, 350 So. 2d 193 (La. App. 2d Cir. 1977); *Lee v. Lewis*, 339 So. 2d 513 (La. App. 2d Cir. 1976) (all cited in the *Moore* case). See also *Fassit v. United T.V. Rental, Inc.*, 297 So. 2d 283 (La. App. 4th Cir. 1974).

unethical, oppressive, unscrupulous, or substantially injurious to consumers. . . .

The collection actions of Goodyear in entering Moore's home and taking possession of his property . . . , without Moore's knowledge and consent, amounts to an unfair trade act or practice under the Louisiana statute, applying common meanings to the words of the statute. Applying the federal criteria, the defendant's actions offended established public policy, constituted actions which have long been recognized in Louisiana as unlawful and as entitling the injured party to damages, were oppressive and unscrupulous, and caused substantial and actual injury to a consumer.⁴²

The Louisiana Supreme Court has recently held in *State v. General Motors Corp.*⁴³ that the Attorney General is entitled to bring a class action for restitution or diminution of price as a part of his authority to enforce the consumer protection statute.⁴⁴ The case involved General Motors' failure to disclose to Louisiana buyers that certain motor vehicles were equipped with engines not manufactured by the General Motors division that manufactured the vehicle.⁴⁵

Whether undisclosed component-part substitution is an unfair or deceptive act or practice was an issue not reached in the *General Motors* case, but the third circuit has recently held in the affirmative on that issue in *Gour v. Daray Motor Co.*⁴⁶ The case involved the purchase of an Oldsmobile model automobile equipped with a Chevrolet engine (i.e., the same subject matter as in the Attorney General's *General Motors* class action); Daray Motors and General Motors were held to have violated the Unfair Trade Practices and Consumer Protection Law. General Motors' violation rested upon deliberate *misrepresentation* of the substitution;⁴⁷ Daray Motors was

42. 364 So. 2d at 533-34 (citations omitted). The court cited *F.T.C. v. Sperry and Hutchinson Co.*, 405 U.S. 233 (1972), and *Spiegle, Inc. v. F.T.C.*, 540 F.2d 287 (7th Cir. 1976). The *Spiegle* case had found that the mail order company's practice of filing lawsuits against mail order credit customers in Illinois under the Illinois long-arm statute to be an unfair practice under the federal law. Cf. *General Inv., Inc. v. Gaudet*, 303 So. 2d 624 (La. App. 4th Cir. 1974).

43. 370 So. 2d 477 (La. 1979) (on rehearing).

44. See Note, *The Class Action as a Consumer Protection Device: State v. General Motors Corp.*, 40 LA. L. REV. 497 (1980).

45. It was alleged that General Motors sold in Louisiana some 1,100 Oldsmobiles equipped not with an Oldsmobile engine, but with an engine from, for example, the Chevrolet division of General Motors. 370 So. 2d at 478.

46. 373 So. 2d 571 (La. App. 3d Cir. 1979).

47. The source of the engine was not only concealed from the buying public by coded engine numbers on the window sticker; it was deliberately misrepresented by

held to have become a party to that misrepresentation by failing to *disclose* adequately the true source of the engine. The two defendants were held to be solidarily liable as joint tortfeasors for a return of the purchase price,⁴⁸ less a credit for use.⁴⁹

AUTOMOBILE SALES

Federal law imposes liability of up to \$1,500 on a transferor who knowingly sells a motor vehicle bearing a false odometer reading.⁵⁰ The victimized motor vehicle buyer faces no requirement of privity with a violator of the law. Violation of the federal law was not, however, the main bone of contention in the Louisiana Supreme Court's decision in *Chapotel v. Bailey Lincoln-Mercury, Inc.*⁵¹ The buyer unsuccessfully sought reversal of the court of appeal decision⁵² finding solidary liability for the federal statutory penalty,⁵³ rather than separate and individual liability, as between the immediate seller's transferor corporation and the individual violators who were corporate agents thereof. The buyer did obtain a reversal of the court of appeal's ruling on attorney's fees. Under the federal law, reasonable attorney's fees may be awarded in "any successful action" to

the act of General Motors in placing on the engine's air cleaner what the court calls "an eye-catching, red and black on silver decal" which read "Oldsmobile 350." *Id.* at 573.

48. A substituted major component parts case, such as either *Daray* or *General Motors*, probably does not support a "return of the purchase price" redhibition action, although a "reduction of price" action probably is appropriate in some cases. *See* *Gates v. Dykes*, 338 So. 2d 1190 (La. App. 2d Cir. 1976); *Violette v. Capital City Auto Co.*, 4 La. App. 465 (1st Cir. 1926); *But see Dupuy v. Blotner Bros.*, 6 So. 2d 560 (La. App. 2d Cir. 1942) (of a 1935 Chrysler equipped with a Plymouth engine, the court remarked, "The motors of these two makes of cars of that year were interchangeable," inferentially ruling that the buyer would have experienced no great inconvenience or imperfection); *Beyer v. Estopinal*, 70 So. 2d 109 (La. 1954); *Ganuchau v. Griff*, 181 So. 2d 854 (La. App. 4th Cir. 1966); *Port Finance Co. v. Campbell*, 94 So. 2d 891 (La. App. 1st Cir. 1957); *Castille v. Champ Auto Sales*, 92 So. 2d 131 (La. App. 1st Cir. 1957). However, one can argue that rescission may be premised upon a vice of consent. *See* *Barnidge v. Cappel Motor Co.*, 12 La. App. 216, 125 So. 778 (2d Cir. 1930); *Cockrell v. Capital City Auto*, 3 La. App. 385 (Orl. Cir. 1925). *Cf.* *Tauzin v. Sam Broussard Plymouth*, 282 So. 2d 266 (La. App. 3d Cir. 1973).

49. Defendants would have simply multiplied the normal rental value of the car (\$179 per month) by the buyer's fourteen months of use. But as the court points out, rental figures include a profit for the lessor, and defendants were held not entitled under the circumstances to profit from buyer's use of the car. Citing its own prior decision in *Robertson v. Jimmy Walker Chrysler-Plymouth*, 368 So. 2d 747 (La. App. 3d Cir. 1979), the third circuit allowed a credit of eight cents per mile for 17,000 miles.

50. 15 U.S.C. §§ 1981-91 (1972).

51. 363 So. 2d 451 (La. 1978).

52. 355 So. 2d 615 (La. App. 4th Cir. 1978).

53. 15 U.S.C. § 1989 (1972).

enforce the liability imposed by the law.⁵⁴ Plaintiff-buyer had obtained a judgment for the minimum statutory recovery of \$1,500, which was the amount that defendants had originally offered in settlement. Had plaintiff-buyer, therefore, been "successful"? The Louisiana Supreme Court concluded that the plaintiff's legal action could not properly be characterized as unsuccessful in that he had raised important questions of law under the federal statute and in that, under the plain language of the statute, he had not been the loser.

The possibility that concealment of true mileage, or a misrepresentation regarding same, will be a vice of consent,⁵⁵ or a redhibitory vice,⁵⁶ creates the potentiality of consumer-buyer success under both federal and state law.⁵⁷ The supreme court, however, categorized the federal law as authorizing the recovery of actual damages only, not penalties.⁵⁸ To so interpret the federal odometer law would prevent dual recoveries under state and federal law. Unfortunately, section 1989 of the federal law appears to contain a penalty feature by stipulating for liability "in an amount equal to the sum of . . . three times the amount of actual damages sustained [and costs/attorney's fees] or \$1,500 [and costs/attorney's fees], whichever is the greater." Thus, the buyer of a motor vehicle sold in violation of the federal law is entitled to a minimum recovery of \$1,500 even if he shows no actual damages. The federal odometer law is thus similar to the federal truth-in-lending law, which unquestionably permits the recovery of a penalty.⁵⁹

RATES OF CHARGE IN CONSUMER TRANSACTIONS

In a precomputed consumer credit transaction,⁶⁰ the Louisiana Consumer Credit Law provides that if the maturity is accelerated for any reason and suit is filed, "thereafter the obligation sued upon shall be deemed to bear a loan finance charge⁶¹ or credit service

54. 15 U.S.C. § 1989 (1972).

55. LA. CIV. CODE arts. 1832 & 1847. See *Sunseri v. Westbank Motors*, 228 La. 370, 82 So. 2d 43 (1955).

56. LA. CIV. CODE arts. 2520 & 2559. Cf. *Hanna v. Stovall*, 171 So. 2d 678 (La. App. 2d Cir. 1965); *Aiken v. Moran Motor Co.*, 165 So. 2d 662 (La. App. 1st Cir. 1964); *Murphy v. Etridge-Atkins Corp.*, 185 So. 487 (La. App. 2d Cir. 1938); *Twin City Motor Co. v. Pettit*, 177 So. 814 (La. App. 2d Cir. 1937).

57. In *Chapotel*, plaintiff's immediate seller might have avoided the federal law on the knowledge issue and still have been liable for a restoration or reduction of the price under articles 2520 and 2541-43.

58. 363 So. 2d at 454. The court so spoke in the context of multiple recoveries sought by plaintiff.

59. See 15 U.S.C. § 1640 (1974).

60. LA. R.S. 9:3516(22) (Supp. 1972).

61. LA. R.S. 9:3516(20) (Supp. 1972).

charge⁶² on the amount due not to exceed the rate previously charged on the obligation."⁶³ But section 3522 of the law also provides that beginning one year after contractual maturity, the loan finance charge or the credit service charge on a precomputed consumer credit transaction "may not thereafter exceed eight percent per annum."⁶⁴ In *Evangeline Bank & Trust Co. v. Guillory*,⁶⁵ the third circuit interpreted the Consumer Credit Law as authorizing a creditor to charge as much interest after maturity as charged in the original transaction,⁶⁶ but only for a period of one year after contractual maturity.⁶⁷ Thereafter, the creditor's charges fall within the eight percent per annum limit of section 3522 of the law. Because the note signed by the consumer in *Guillory* provided for interest at the rate of ten percent per annum from date of maturity, with no limitation as to the one year post-maturity period, the interest charge was usurious; and the entire interest on the note was subject to forfeiture.⁶⁸

EQUAL CREDIT OPPORTUNITY

Because "[c]redit has ceased to be a luxury item," Congress passed the Equal Credit Opportunity Act⁶⁹ to establish "as clear national policy that no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness."⁷⁰ The Act provides in pertinent part that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transac-

62. LA. R.S. 9:3516(14) (Supp. 1972).

63. LA. R.S. 9:3529 (Supp. 1972).

64. LA. R.S. 9:3522 (Supp. 1972).

65. 364 So. 2d 220 (La. App. 3d Cir. 1978).

66. In *Guillory*, the original rate of charge was 17.97 percent. Under Revised Statutes 9:3519, the bank could have charged within a maximum of 36 percent per year on the unpaid principal amount of the loan, or up to 18 percent per year on the unpaid balances of the amount borrowed.

67. The presence in the contract of a right to accelerate the contractual maturity date makes the term "contractual maturity" quite flexible.

68. LA. R.S. 9:3501 (1950). The court relied on *Thrift Funds of Baton Rouge, Inc. v. Jones*, 274 So. 2d 150 (La.), cert. denied, 414 U.S. 820 (1973). See Professor Johnson's discussion of *Jones*, in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations*, 34 LA. L. REV. 231, 238-44 (1974).

The creditor in *Guillory* did recover the amount of *principal* owed by the borrower, as well as attorney's fees and insurance premiums. The loans in *Jones* had violated the Louisiana Small Loan Law, LA. R.S. 6:571-93 (1950, repealed 1974), which called for a forfeiture not only of all interest, but also of principal. 274 So. 2d at 157.

69. 15 U.S.C. §§ 1691-91f (1976). The Act is accompanied by a set of regulations known as "Regulation B," found at 12 C.F.R. § 202 (1979).

70. [1976] U.S. CODE CONG. & AD. NEWS 405.

tion . . . on the basis of . . . sex or marital status."⁷¹ In 1975 Louisiana enacted an equal credit opportunity law,⁷² making unlawful both the refusal of credit by an extender of credit⁷³ on the basis of race, color, religion, national origin, sex or marital status, and the requirement that an applicant meet credit qualification standards not required of other persons similarly situated.⁷⁴

The federal law requires that a creditor give to an applicant against whom "adverse action" is taken a statement of specific reasons for such action.⁷⁵ "Adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount requested or on substantially the terms requested.⁷⁶ A creditor cannot avoid liability for failure to give a statement of reasons for adverse action, by maintaining that no application⁷⁷ had in fact been made—and hence no denial thereof—if the creditor discouraged the would-be applicant from making the application.⁷⁸ Thus, where there has

71. 15 U.S.C. § 1691(a) (1976). The Act also sets out, as forbidden bases of discrimination, race, color, religion, national origin, age, and public assistance income derivation. Section 1691e makes any creditor who violates the Act liable to the aggrieved applicant for any actual damages sustained and for punitive damages of up to \$10,000. Actions may be maintained individually or as a member of a class. The term "creditor" is defined in section 1691a(e) as any person "who regularly extends, renews, or continues credit." The terms "credit" and "applicant" are defined in subsection 1691a(b) and (d) so as to include applicants for *commercial*, as well as consumer, credit.

72. LA. R.S. 9:3581-85 (Supp. 1959).

73. The Louisiana Act contains no definition of "extender of credit," but that term is defined in the Louisiana Consumer Credit Law. LA. R.S. 9:3510-71 (Supp. 1972). But the latter Act comprises chapter 2 of Code title XII—Of Loan—in the Civil Code Annullaries, while the Equal Credit Opportunity Act forms chapter 3 thereof. The definition of "extender of credit," in section 3516(16), however, applies only as that term is used in chapter 2. Still, the plain meaning of the words "extender" and "credit" would seem to lead to no insurmountable problems.

74. LA. R.S. 9:3583 (Supp. 1979). The Louisiana Act does not expressly set forth age or public assistance income derivation as forbidden bases of discrimination; but the "standards not required" language may prohibit discrimination on either basis. For example, a welfare recipient with public assistance income of \$600 per month is, with respect to gross income, "similarly situated" as to a person with income from the private sector of \$600 per month. On the other hand, an applicant nearing a mandatory retirement age may not be "similarly situated" as to a much younger applicant.

75. 15 U.S.C. § 1691(d) (1976). The Louisiana Act has no such requirements. Not all creditors are required to make a written statement of reasons. See 15 U.S.C. § 1691(d)(5) (1976).

76. 15 U.S.C. § 1691(d)(6) (1974).

77. Given the definition of "adverse action" in section 1691(d)(6), that term is keyed to an application for credit in the cases in which no credit relationship then exists between the parties. Regulation B defines "application" as an oral or written request for credit made "in accordance with procedures established" by the creditor for the type of credit requested. 12 C.F.R. § 202.2(f) (1979).

78. 12 C.F.R. § 202.5(a) (1979).

been no statement of reasons for adverse action,⁷⁹ a self-professed aggrieved party will predictably attempt to show either that the application was discriminatorily denied or that the making of an application was discouraged. *Thames v. City National Bank of Baton Rouge*⁸⁰ was such a case.

Mrs. Thames desired to obtain a loan for the purchase price of an automobile. For that purpose she presented herself to Mr. Quinn, manager of one of the defendant-bank's branches, and the two parties discussed Mrs. Thames' desire for a loan. Although the specifics of the conversation were disputed, the one fact that clearly emerged from the meeting was a denial of the loan for Mrs. Thames. She sued the bank claiming a violation of the federal Act, but the jury returned a defendant's verdict. The First Circuit Court of Appeal, functioning in the manner of a federal appellate court,⁸¹ affirmed.

At its most basic level, the *Thames* decision simply highlights the difficult fact issues inherently involved in an equal credit opportunity case, whether under the federal or state law. But *Thames* is one of those decisions that leaves the perusing lawyer intellectually dissatisfied; something is clearly amiss in the case. For the jury to have returned a verdict in favor of the bank, it would have to have made the following findings of fact: 1) Mrs. Thames was not discouraged from making an application, but rather did so; 2) The application was either not "denied" or, if it was denied, it was not denied on a discriminatory basis; and 3) If the application was denied, a sufficient statement of specific reasons for that adverse action was given to Mrs. Thames. It seems clear that Mrs. Thames did make an oral application for credit⁸² in her own name, that the bank manager denied that application on the basis of the inadequacy of her income and her lack of a sufficient down payment for the desired automobile,⁸³ and that the manager did indicate to her that the desired loan could be made if a third-party would act as a co-signer.⁸⁴ A directed verdict on the "discouragement" issue had been granted defendant at trial. Thus, "adverse action" had occurred, requiring a determination of the basis for the denial and the sufficiency of the statement of reasons.

The bank could lawfully have either denied credit to Mrs. Thames or offered to grant it solely upon a co-signed obligation, only

79. The adequacy of a statement of reasons for adverse action was before the court in *Carroll v. Exxon Co., U.S.A.*, 434 F. Supp. 557 (E.D. La. 1977).

80. 370 So. 2d 892 (La. App. 1st Cir. 1978).

81. *Id.* at 893-94.

82. *Id.* at 893.

83. *Id.*

84. *Id.*

if the bank would have denied or conditioned the same amount of credit to a male applicant similarly situated as to income and down payment ability. Assuming that such is factually plausible, there would be no violation of the anti-discrimination provisions of the law. However, it clearly appears that Mrs. Thames did not receive a statement of reasons for adverse action that would comply with the requirements of the Act.⁸⁵ Furthermore, the sufficiency of the statement of reasons for adverse action, as the sufficiency of disclosure of the cost of credit,⁸⁶ is an issue of law not appropriate for jury determination.⁸⁷

In defense of the first circuit, it may be that the jury was not required to reach the issue of the sufficiency of the statement of reasons. But that conclusion would have to be premised upon a finding of no adverse action or no application for credit. Because the bank was at best willing only to grant the requested credit if there be a co-signer of Mrs. Thames, there was adverse action in that such was a "refusal to grant credit . . . on substantially the terms requested."⁸⁸ Therefore, the statement of reasons issue was avoidable only upon the basis that no application for credit was actually made. Yet, both Mrs. Thames and the bank seemed to have assumed that an application⁸⁹ for credit had been made.⁹⁰ If, despite the characterizations of the parties, the jury could find that no applica-

85. Assuming that the bank does not qualify under section 1691(d)(5) (and almost certainly it would not), the only written communication from the bank to Mrs. Thames that could have satisfied the statement of reasons requirement was a letter sent to her in response to her written request for a statement of the reasons why her application had not been accepted. The bank's letter not only fails to state "the specific reasons for the adverse action taken" [15 U.S.C. § 1691(d)(3)], but it also fails to state any reason at all for the adverse action. 370 So. 2d at 893. In *Carroll v. Exxon Co., U.S.A.*, 434 F. Supp. 557 (E.D. La. 1977), the aggrieved applicant had no major credit cards and no savings account; and she had been employed for only one year. Yet, Exxon's sole stated reason for adverse action was that the credit bureau had been able to furnish little or no definitive credit information. The eastern district held that the statement was insufficient under section 1691(d)(3). 434 F. Supp. at 562.

86. 15 U.S.C. §§ 1631-39 (1974).

87. The *Thames* opinion states that the issue is one to be resolved by the trier of fact. 370 So. 2d at 894. The *Carroll* court states, "The *legal* issue before this Court, then, is whether Exxon's responses to the plaintiff satisfy the notification requirements of [section 202.9]." 434 F. Supp. at 562 (emphasis added).

88. 15 U.S.C. § 1691(d)(6) (1974).

89. See note 77, *supra*.

90. The court, in synoptically reporting the testimony of the branch manager, states, "[H]e evaluated her oral application . . ." 370 So. 2d at 893. The letter sent to Mrs. Thames by the bank stated in pertinent part that the "transaction" had been handled "in the routine manner in which your previous *credit* requests were handled." *Id.* (Emphasis added.) On the other hand, the bank's letter also stated that "we are anxious to receive an application from you for the particular request." *Id.*

tion had been made, the issue of possible application-discouragement should not have been taken from jury consideration by directed verdict, for that action left the plaintiff in a conundrum for purposes of appeal.

Though there is no implication that such was the practice of City National Bank, the Federal Reserve Board has become concerned with the problem of informal credit inquiries. For example, if the response to Mrs. Thames' inquiry of the branch manager was, in essence, "don't bother making a formal application unless you have a co-signor lined up," the bank could assert that it was only fielding a general credit inquiry or was responding to an application for credit not made in accordance with the bank's established procedures⁹¹ requiring a formal, written application. Such an approach by the bank would too easily discourage applications by the very class of persons which the act seeks to protect. The Federal Reserve Board has taken the position that if a creditor in fact passes judgment on an individual's eligibility for credit in response to an informal, oral inquiry, or in response to some other form of communication falling short of established formal procedures, then there has been an application for credit made in accordance with the creditor's *de facto* established procedures.⁹²

91. Regulation B, 12 C.F.R. § 202.2(f) (1979).

92. FRB ECOA Letter No. 8 (April 20, 1978), *construing* Regulation B, 12 C.F.R. § 202.2(f) (1979). See [1978] 5 CONS. CRED. GUIDE (CCH) ¶ 42,103.