Public Law: Consumer Protection

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CONSUMER PROTECTION

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QUALITY EXPECTATIONS

The FTC's Proposed Trade Regulation Rule Concerning the Sale of Used Motor Vehicles

In 1975 Congress empowered the Federal Trade Commission to prescribe "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce . . . . , and rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce . . . ."1 The FTC acted pursuant to this grant of power by adopting in late 1975 the Preservation of Consumers' Claims and Defenses Rule which abolished the holder in due course concept in many consumer contracts.2 The Commission has recently adopted a Used Motor Vehicle Rule3 which promises4 to be even more signifi-

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1. 15 U.S.C. § 57a(a)(1)(A), (B) (1976). The FTC had previously assumed the power to make substantive "trade regulation rules" to enhance its ability to protect consumers from unfair or deceptive trade practices, but the Commission had been challenged on this point. See National Petroleum Ref. Ass'n v. Federal Trade Comm'n, 340 F. Supp. 1343 (D.D.C. 1972), rev'd, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 915 (1974). When the district court in National Petroleum had refused to recognize the power asserted by the FTC, Congress initiated action to enlarge the statutory authority of the Commission; the United States Court of Appeals subsequently reversed the decision of the district court, agreeing with the Commission. The Congressional initiative culminated in the FTC Improvement Act, 15 U.S.C. § 57a(a) (1976), which gave to the Commission the power to make substantive trade regulation rules. The Act, however, expressly revokes the nonlegislative power asserted by the Commission in the National Petroleum litigation. 15 U.S.C. § 57a(a)(2) (1976).


4. Rules adopted by the Commission do not become effective until six months after the conclusion of a ninety-day Congressional review period 15 U.S.C. § 57a-1(a). According to a conversation with the Office of the Division of Product Safety, Bureau
The Used Vehicle Rule, intended to prevent certain well-documented deceptive acts or practices in the used car industry, would make it a deceptive act or practice for any used vehicle dealer to: 1) misrepresent the mechanical condition of the vehicle; 2) fail to disclose, prior to sale, any material defect in the vehicle's mechanical condition, known to the dealer; 3) misrepresent at the time of sale that the vehicle, or any component thereof, is free from such material defects, unless the dealer has a reasonable basis for such representation at that time; 4) fail to make available, prior to sale, the terms of any written warranty offered in connection with the sale of the vehicle; 5) misrepresent the terms of any warranty offered in connection with the sale; 6) represent that the vehicle is sold with a warranty when the vehicle is sold without any warranty; and 7) fail to disclose, prior to sale, that the vehicle is sold without any warranty.

Compliance with the proposed Rule would be determined principally by compliance with the requirement of the Rule that there be displayed on a side window of a used vehicle a "Used Car Buyers Guide," which is a "point of sale" disclosure document in a required form. The " Buyers Guide" window form, or a copy of the original thereof, must be given to the buyer, and the information contained therein is required to be incorporated expressly into the contract of sale, overriding any contrary provisions in the contract of sale.

of Consumer Affairs, Federal Trade Commission, the ninety-day period was scheduled to begin on or about January 27, 1981. Should the Used Motor Vehicle Rule, as proposed, be disapproved either by direct Congressional action or by expiration of the ninety-day period, it is expected that the Rule will be resubmitted in amended form.

5. 46 Fed. Reg. 41,329 to 78 (to be included in 16 C.F.R. § 455 (1981)).

6. The terms "vehicle," "used vehicle," and "dealer" are defined by the Rule to mean, in composite, any motorized vehicle (other than a motorcycle) with a gross vehicle weight rating of less than 8500 pounds, a curb-weight of less than 6000 pounds, and a frontal area of less than 46 square feet, driven more than the limited use necessary in moving or road testing a new vehicle prior to delivery to a consumer (not including any vehicle sold for scrap or parts), sold or offered for sale by any person selling or offering for sale five or more used vehicles in the previous twelve months. The Rule does not apply to banks or financial institutions, a business selling vehicles to an employee, or a lessor selling a leased vehicle by or to that vehicle's lessee or to an employee of the lessee. A "consumer" under the Rule is simply any person who is not a "used vehicle dealer." See 46 Fed. Reg. 41,328 to 59 (1981) (to be included in 16 C.F.R. §§ 455.1 (c)(1), (2), (3) & (4) (1981)).

7. The term "defects" includes a list of common mechanical ailments ranging from oil leakage and cracked frames to missing belts and inoperative gauges. 46 Fed. Reg. 41,328, 41,359, 41,366 to 67 (1981) (to be included in 16 C.F.R. §§ 455.2, .6 (1981)).

8. By "warranty" the Rule means any undertaking in writing to refund, repair, replace, maintain or take other action with respect to a used vehicle, provided at no extra charge beyond the price of the vehicle.

9. 46 Fed. Reg. 41,328, 41,362 (1981) (to be included in 16 C.F.R. § 455.3a), (b) (1981)). The dealer must include conspicuously in each consumer contract of sale the
not make any statements, oral or written, or take other actions which alter or contradict the "Buyers Guide" window form disclosures, or the incorporation clause. If the sale is conducted in the Spanish language the window form and incorporation clause must be in that language.11

A used vehicle has a defect if any of the criteria of paragraphs (a) through (i) of section 455.6 of the Rule are met,12 or if the vehicle fails to meet the standards established by specific testing procedures set forth in paragraphs (j) through (n) of section 455.6.13 However, the dealer is not required by the Rule to inspect the vehicle14 for the presence of any such defects; the requirements of disclosure apply only to known defects.

The FTC's Used Car Rule is designed to complement the 1975 Magnuson-Moss Act,15 which imposed "point of sale" disclosure requirements on sales of new vehicles and other products accompanied by written warranties.16 Written warranties perhaps are less fre-

The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale.

A copy of the "Buyer's Guide" is contained in the appendix to this article at p. 538.

10. 46 Fed. Reg. 41,328, 41,362 (1981) (to be included in 16 C.F.R. § 455.4 (1981)). Negotiations over warranty terms may result in final warranty terms that differ from the window form, but such final warranty terms must be identified in the contract of sale and given to the buyer.


12. "Abnormal exhaust discharge" or "oil leakage, excluding normal seepage," for example, if known to the dealer, must be disclosed on the "Buyer's Guide" window form as a "major known defect" in the engine. 46 Fed. Reg. 41,328, 41,366 (1981) (to be included in 16 C.F.R. § 455.6(b)(1), (5) (1981)).

13. Paragraphs (j) through (n) of 46 Fed. Reg. 41,328, 41,366 to 67 (1981) (to be included in 16 C.F.R. § 455.6 (1981)), establish specific tests to determine the presence of various defects. For example, if the brake pedal on a vehicle equipped with power brakes does not remain firm under pressure, that is a defect in the power brake system. That determination is made objectively by the following procedure:

With the engine running on vehicles equipped with power brake systems, and the ignition turned to "on" in other vehicles, apply a force of 125 pounds to the brake pedal and hold for 10 seconds. Make sure that there is no decrease in pedal height and that the failure lamp [if original equipment] does not light. 46 Fed. Reg. 41,328, 41,366 (1981) (to be included in 16 C.F.R. § 455.6(j)(2) (1981)). Similar testing procedures are established for other facets of the brake system and for the steering and suspension systems, tires and wheels.


quent in the used car industry, but a written warranty accompany-
ing the sale of a used vehicle would come under the Magnuson-Moss
Act as well as the Used Car Rule.\textsuperscript{17} The present forum is inap-
propriate for an exhaustive analysis of the effect the Used Car Rule
would have on Louisiana's underlying law of redhibition, and such an
analysis of the Magnuson-Moss Act has been ably presented else-
where;\textsuperscript{18} however, the following conclusionary comments are ap-
propriate.

The "Buyers Guide" incorporates the following six disclosures
which dealers would be required to display on all used vehicles of-
fered for sale:

1. \textit{Warranty benefits offered.} The disclosure summarizes what
systems the dealer is warranting (if any), the length of coverage for
each system, and the percentage of repair costs the dealer will pay.
The disclosure also requires the dealer to label his warranty as
"full" or "limited," to show whether a "service contract" is available,
and to advise the buyer that state law implied warranties may give
him even more rights.

2. "As is"/"implied warranties only." The \textit{Buyers Guide} is
premised upon the Uniform Commercial Code treatment of "as is"
sales as a valid disclaimer of implied warranties. In states where the
"as is" term is prohibited or (as in Louisiana) limited in effect, an
alternative "implied warranties only" disclosure is to be made.

3. \textit{Known major defects.} The disclosure of known major defects
would, of course, bring such defects within Louisiana Civil Code article
2522.

4. \textit{Spoken promises warning.} The buyer is warned by the
\textit{Buyers Guide} that oral promises not put in writing are difficult to
enforce.

5. \textit{Pre-purchase Inspection.} The \textit{Buyers Guide} encourages the
buyer to inquire about the possibility of a pre-sale inspection of the
vehicle by a third-party.

6. \textit{Mechanical Systems List.} The \textit{Buyers Guide} sets out four-
teen major mechanical and safety systems and invites the consumer
to inquire about the current condition of those systems and about
any warranty coverage offered with respect to them.

\textsuperscript{17} Trade Regulation Rule Concerning the Sale of Used Motor Vehicles—State-
ment of Basis and Purpose, 46 Fed. Reg. 41,328, 41,359 (1981) (to be included in 16 C.F.R. § 455.1(c)(5), (6), (7) (1981)).

\textsuperscript{18} See Banks, \textit{The Magnuson-Moss Warranty Act: An Untapped Adjunct to the
If a written warranty is offered, the Magnuson-Moss Act also applies and would require the dealer (of a used or a new vehicle which is a "consumer product") to:

1. fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty, in accordance with § 2302 of the Act, and of the Commission's rules;

2. Designate the warranty as a "limited warranty," unless it can be designated as a "full warranty" by meeting the specific minimum standards of § 2304 of the Act;

3. Make available, prior to sale, the text of the warranty;

4. Disclose the availability of any informal dispute settlement mechanism;

5. Forego disclaimer or modification or implied warranties.

Effect of the Used Car Rule on Louisiana Law

If permitted by Congress to become effective, the proposed FTC rule would be compatible with the commandment of Civil Code article 2474 that the seller "is bound to explain himself clearly respecting the extent of his obligations," and that of Civil Code articles 1847, 2547 and 2548, concerning fraud on the part of the seller. The Used Car Rule and the Magnuson-Moss Act effectively advance the time of disclosure from the point of closing to the "point of sale," and, of course, prescribe a format for the disclosures respecting warranties offered by the seller. Arguably, that part of the Rule requiring disclosures as to "warrantly benefits offered" would add very little to current Louisiana law. The same may be said of the requirement of disclosure of known defects. Practically speaking, the known defect disclosure requirement and the format of the Buyers Guide should reduce the incidence of seller concealment cases.

The "pre-purchase inspection" item, and the "mechanical systems list" each invite the buyer to make an inquiry that ultimately may avoid litigation. No duty is imposed upon the seller to inspect the vehicle himself or to allow the prospective buyer to have the vehicle inspected elsewhere—ostensibly consistent with current Louisiana law—but, practically speaking, a sale should be lost by

the dealer's refusal to permit a pre-purchase inspection by a third-

party.

In Louisiana the "as is" term does not constitute a renunciation of implied warranty; that being so, it would be deceptive for a Louisiana dealer to use the "no implied warranty—as is" disclosure as set forth in the model Buyers Guide. The substitute "implied warranties only" disclosure form would seem to apply.26

The "known defect" disclosure may be somewhat broader than the concept of redhibitory defect. For example, a missing or inoperative belt would not necessarily meet the standard for redhibitory defects, but it is a defect which if known to the dealer must be disclosed under the Used Car Rule. The same may be said as to "abnormal exhaust discharge," "battery leakage," "inoperative gauges," "improper alignment," "tire tread depth"; all are defects or possible defects under the Rule, without regard to the mileage of the vehicle. In Louisiana, however, such defects might be redhibitory if in a new automobile, but not necessarily so in an older or high-mileage automobile.

The requirement of the Magnuson-Moss Act of "simple and readily understood" warranty disclosure language only restates the requirement inherent in Civil Code articles 1957, 1958 and 2474, while the "full" or "limited" label requirement simply enhances the language of Civil Code article 2474. A disclosure of the availability of informal dispute settlement mechanisms perhaps would not be required otherwise, but such a disclosure appears to be in the dealer's own interests in any event. The inability of a dealer under the Act to combine a written warranty and a renunciation of implied warranties merely prohibits that which is currently an infrequent occurrence in Louisiana.27

Because a written warranty has FTC Used Car Rule implications, and brings the Magnuson-Moss Act and its non-waiver of redhibition feature to bear on the sale, buyers naturally will seek to portray various words and phrases in the contract or in the disclosures incorporated therein as a "written affirmation of fact or written promise . . . which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect-free or will meet a specified level of performance

over a specified period of time." New automobile dealers are required to state for each vehicle the estimated miles per gallon, or fuel economy rating, for purposes of buyer comparison. The figures stated are those of the United States government, not of the dealer or manufacturer, and accompanying disclaimers do indicate that the figures are only an estimate of the fuel economy of the vehicle. A recent New York case has held that such estimates do not constitute a written warranty as to fuel economy.

Louisiana courts probably would agree with the New York court's assessment of the estimated MPG, but the issue is not entirely free of doubt. Likewise uncertain is the related issue of poor fuel economy as a redhibitory defect. In Willis v. Ford Motor Co. the Third Circuit Court of Appeal awarded the buyer of a new, fuel-inefficient automobile a reduction in price, but poor fuel economy was only one of several alleged redhibitory defects which, in cumulation, were sufficient to support the reduction in price. The trial judge's remarks, incorporated into the court of appeal's opinion, suggest that none of the defects, including poor fuel economy, individually would support the action. Because the redhibition action is premised not on the defect or defects in the thing, as such, but rather on the requisite degree of inconvenience of the use of the thing, the trial court's view of cumulative (individually non-redhibitory) defects as supportive of the redhibition action seems sound. Yet, excessive oil consumption or leakage, especially in a new automobile, is clearly supportive of the action in redhibition, and is not easily distinguishable from excessive fuel consumption.


29. The "EPA Fuel Economy Rating" annexed to the bill of sale in Sherman v. Manhattan Ford Lincoln-Mercury, Inc., 104 Misc. 2d 1, 431 N.Y.S.2d 949 (Sup. Ct. Sp. Term, N.Y. Co. 1980) stated, "Estimated MPG for Comparisons 15," but also stated, "The estimated mileage for this model, 15, is to be used to compare cars of this model with other cars. Your own mileage may be poorer depending upon options, driving conditions, your driving habits and your car's operating condition." 104 Misc. 2d at 3, 431 N.Y.S.2d at 950.


32. 383 So. 2d 136 (La. App. 3d Cir. 1980).


34. Louisiana courts have not focused so much on the inconvenience of constantly
Remedies Under the FTC Used Car Rule and The Magnuson-Moss Act

Violation of an FTC Trade Regulation Rule can result in a cease-and-desist order and a $10,000 civil penalty for each violation. Additionally, the Commission is empowered to bring a civil action for such relief as is necessary to redress consumer injury, which may include, but is not limited to, rescission or reformation of contracts, refunds or return of property, the payment of damages, and public notification respecting the violation. The Commission, however, has very limited enforcement resources, and because there are only very limited circumstances in which a private litigant may personally sue an FTC rule violator, enforcement of the Used Car Rule would depend heavily on voluntary compliance by dealers. A violator of the Used Car Rule would, however, be simultaneously in violation of the Louisiana Unfair Trade Practices and Consumer Protection Law, and an intentional violation of the Rule would seem clearly to fall within Civil Code articles 1832, 1847, 2545, 2547 and 2548.

The Magnuson-Moss Act does provide for personal civil actions by consumers, and the action may be premised upon a violation of the "form and contents" provisions of the act, or upon breach of the written or implied warranties, or of a service contract. The private action may be brought in state or federal courts, but to invoke federal jurisdiction the private claimant must show that each individual claim is at least $25 in amount and the total amount in controversy is more than $50,000. In Gorman v. Saf-T-Mate,
Inc., the question was whether personal injury claims related to a breach of warranty could be raised under the Magnuson-Moss Act. The Gorman decision rules that the private cause of action under the Act does not permit the recovery of personal injury damages. By contrast to the Gorman decision and the Magnuson-Moss Act, the distinction between the traditional Civil Code article 2315 products liability personal injury action against a manufacturer, and the action in redhibition under Civil Code article 2545 for restoration of the price, attorneys fees and damages, grows more faint with the decision of the Louisiana Supreme Court in Philippe v. Browning Arms Co.

Manufacturer Recall of Defective Products

Both the National Traffic and Motor Vehicle Safety Act of 1966 and the Consumer Product Safety Act of 1972 establish procedures for the notification and correction of defects in manufactured things. Even in the absence of the federal legislation, the failure of the manufacturer to warn purchasers of dangers or defects discovered after the sale arguably would result in liability premised on Civil Code articles 1901, 2315, and 2545. The primary focus of litigation involving mandatory recall notifications has been the admissibility and use of the recall campaign in a products liability case. Recent decisions outside Louisiana tend to hold that the recall notice is relevant to the issue of probability that the thing was defective at the time it left the manufacturer’s hands. In Louisiana the recall notification is apparently inadmissible to establish defectiveness at
the time of manufacture. In *Thomasson v. A.K. Durnin Chrysler- 
Plymouth, Inc.*, however, a recall campaign by Chrysler resulted in 
negligence liability for the seller.

A seller ordinarily is not bound to inspect the thing for nonap-
parent defects, but the seller is bound to perform a reasonable in-
spection of the thing. Reasonableness, of course, is dictated by the 
peculiar circumstances in each case. In *Thomasson*, for example, 
Chrysler's recall campaign had been initiated to correct a defect in 
the steering system of certain Chrysler automobiles. The automobile 
purchased by the Thomassons was within the recall category, but in-
explicably was not specifically listed in the computer print-out 
sheets accompanying Chrysler's correspondence to the seller. The 
Thomassons had experienced steering problems on several occa-
sions, and the seller was made aware of those difficulties as a result 
of its own repair efforts. The steering defect which caused the acci-
dent and resulting injuries to the Thomassons had not been dis-
covered by the seller prior to accident, nor had the Thomassons 
been notified of the defect. Because the seller knew of the steering 
problems experienced by the Thomassons and had been put on 
notice by the recall campaign that the particular type of vehicle sold 
to the Thomassons was "suspect," and had in fact been given an op-
portunity to correct what it knew to be a potentially serious defect, 
the failure of the seller to go beyond a routine inspection was 
negligence, and rendered the seller solidarily liable with Chrysler 
for the damages caused by the defect.

In view of the possibility of attorney's fees awards, one might 
well wonder what is the effect of a product recall on the require-
ment of seller knowledge under Civil Code article 2545. It would

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Motor Co., 226 So. 2d 198 (La. App. 4th Cir. 1969) (the court permitted the evidence of 
recall to be used in corroboration of other evidence of the existence of a defect in an 
avtomobile brake system). Gauche was questioned in *Trahan v. Liberty Mutual In-
surance Co.*, 273 So. 2d 331 (La. App. 3d Cir. 1973).

49. 399 So. 2d 1205 (La. App. 1st Cir. 1981).


51. A routine inspection would not have revealed the defect in question; only 
disassembly of the defective parts would have done so. The duty to do so was not 
mitigated by reliance on Chrysler's list of vehicles to be recalled (which list omitted 
the automobile in question) because such lists were known to the seller to have been 
incomplete in the past, because the seller was advised of the time frame in which the 
"suspect" vehicles were manufactured, and because an inspection of the date plate on 
the door frame of the vehicle would have revealed that it was one of the vehicles 
within that time frame.

liability).
seem beyond argument that, to the extent the federal recall mechanism has led to a formal notification from manufacturer to seller, the seller is within either Civil Code articles 2545 or 1901 (good faith) with respect to subsequent sales, so long as the defect is of the redhibitory nature.

Whether sellers in the secondary markets—including private, non-commercial sellers—would be affected would just as obviously seem to be a question of proof of knowledge of the recall, whether a federal or a voluntary-manufacturer recall. In the event the seller actually has made a

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53. The literal sense of Civil Code article 2545 would require the seller to know of the vice of the thing, so unless the possibility that the thing may be one among the many similar things subject to the recall is itself to be considered redhibitory in nature, article 2545 would not seem to apply. Yet, the imputed knowledge of the manufacturer has been equated with bad faith and fraud. Gordon v. Bates-Crumley Chevrolet Co., 158 So. 223 (La. App. 2d Cir. 1939). It would, accordingly, be no great logical jump to say that, at the least, the seller in the recall situation is not in good faith, and in fact may be within article 1832. Though the recall issue has not been decided in an article 2545 case, the matter of imputed knowledge has been raised in a closely related situation. Palmer v. Anchor Marine, Inc., 331 So. 2d 114 (La. App. 1st Cir. 1976), held that the seller knew of a defect in axle bearings on an all-terrain pleasure vehicle, based on a prior history of similar defects in similar vehicles sold by him. Of interest is the fact that the defect in Palmer, as in Thomasson, was of the character not usually discoverable by a seller. But, said the court:

Once this knowledge [of prior similar defects] was acquired by the seller . . . it then became an apparent defect as to the seller . . . . Certainly, if [the seller] did not know, as a matter of fact, the various vices and defects of this vehicle, he did, at least have constructive knowledge.

331 So. 2d at 117. The opinion cited Wade v. McInnis-Peterson Chevrolet, Inc., 307 So. 2d 798 (La. App. 1st Cir. 1975), in which the court had stated that to recover attorney's fees under article 2545, "[i]t is sufficient for the buyer to prove actual or constructive knowledge [of the defect] by the seller. Thus, if the seller knew or should have known of the defect and failed to declare it to the buyer, the seller is liable additionally for reasonable attorney's fees." 307 So. 2d at 803.

The matter of the recall as probative evidence has been before the Louisiana courts in a few cases. See Landry v. Adams, 282 So. 2d 590 (La. App. 4th Cir. 1973) (evidence of recall was relevant and corroborative of the inference that a defect was built into the thing during the manufacturing process). See also Greer v. General Motors Corp., 293 So. 2d 228 (La. App. 4th Cir. 1974); Gauche v. Ford Motor Co., 226 So. 2d 198 (La. App. 4th Cir. 1969). In Forstall v. Stewart, 12 La. App. 628, 126 So. 705 (Orl. Cir. 1930), the court noted that the seller, in defending against the buyer's claim that the thing sold (a refrigerator) was defective, had himself sued the manufacturer alleging that other, similar refrigerators were so defective that he had been besieged with complaints from his customers. Such evidence may not be fatal to the seller's case, but the inference of bad faith does seem to arise.

54. Voluntary manufacturer recalls would not necessarily be of the redhibitory class of defects, but a federal recall almost certainly will be of that class. But cf. Compte v. Rateau, 242 So. 2d 82 (La. App. 4th Cir. 1970) (missing hood latch not a redhibitory defect).

55. See, e.g., Wheat v. Boutte Auto Sales, 355 So. 2d 611 (La. App. 4th Cir. 1978); Juneau v. Bob McKinnon Chevrolet Co., 260 So. 2d 919 (La. App. 4th Cir. 1972);
claim against the manufacturer for expenses relating to a federal or voluntary recall, articles 2545 or 1901 certainly would seem to apply to sales of the affected products thereafter.56

Repaired or Reconditioned Things

When a damaged or defective thing comes into the hands of a seller or is damaged while in the hands of the seller, subsequent repair or reconditioning can free the thing from redhibitory vices. However, not always will the seller thereby be free of liability resulting from a subsequent sale. For example, in a case handed down several years ago, a previously unsold automobile was sold as “new” by a dealer when in fact the automobile had been damaged significantly and subsequently repaired by the dealer prior to the sale. The failure of the dealer to disclose the material fact of prior damage, that is, to disclose that the automobile did not possess the normal characteristics attributable to an automobile represented to be “new,” was held to be fraud within Civil Code articles 1847 and


Gauche v. Ford Motor Co., 226 So. 2d 198 (La. App. 4th Cir. 1969), is perhaps the only reported Louisiana decision touching upon the relationship between article 2545 and a product recall. The buyer, having disposed of the vehicle, was granted relief against the seller in the form of quanti minoris, based on a finding of defective automobile brakes. But against the manufacturer, the fourth circuit cast the case in fault under article 2315, rather than in implied warranty under article 2545. Thus, on rehearing, the fact that the automobile in question had been recalled for correction of possible problems, received these judicial comments:

The circumstance of [the buyer] having driven the automobile for 4,000 miles without a brake failure and without repairs of adjustments would certainly tend to corroborate defendants' theory of overheating by brakeriding [i.e., buyer fault or misuse], but, on the other hand, we have the circumstance of recall of the automobile along with 40,000 others of that model for a corrective modification of the braking system. This circumstance, in our opinion, tips the scales in favor of a preponderance of evidence that the brakes . . . were in fact defective.

The defendant . . . has cited an impressive list of authorities . . . [which] clearly support Ford's contention that we were in error in considering the . . . recall . . . as evidence of its "negligence" or actionable fault in the manufacture of plaintiff's automobile. We concede our error in this respect, but we fail to find anything in any of the authorities cited holding that such circumstances cannot properly be considered in corroboration of other evidence of the existence of a defect in the braking system of a particular automobile.

226 So. 2d at 210, 211. While the redhibitory defect/negligence dichotomy detracts from the analytical usefulness of the Gauche case, product recalls seemingly will be relevant to the article 2545 issue in a case squarely presenting that issue.
2547. The automobile was not redhibitorily defective in the sense of Civil Code article 2520; it did, however, fail to have a declared quality in the sense of Civil Code articles 2529 and 2547. A similar result is seen in Betz v. Reynaud Construction Co., in which a builder-seller sold, under the implied representation that it was constructed of new and undamaged materials, a previously unsold house that had been damaged by fire, and subsequently repaired. The builder-seller had not replaced some smoke-stained or lightly charred rafters the structural integrity of which had not been affected by the fire. Thus, there was no "defect" in the house. Unlike any subsequent seller of the house, the builder-seller had the obligation to reveal the unrepaired damages in order to avoid a misrepresentation under Civil Code article 2547. By contrast, each sub-vendee of a redhibitorily defective thing is subrogated to the rights of his vendor.

For the real estate broker, a case such as Betz can be disturbing, for however confused the state of the law as to the broker's duties may be, clearly the broker has a duty to reveal to the prospective purchaser the existence of a known material defect in the contemplated premises. The DeSoto v. Ellis decision adopts that view, but because the broker believed that the defect had been remedied, the issue was not the concealment of a known defect, but whether a reasonable person would have concluded, differently than did the broker, that informing a prospective purchaser of a defect that had apparently been remedied was unnecessary. The trial court's judgment in favor of the broker was affirmed.

The Seller's Obligation to Repair

In 1973 the Louisiana Supreme Court held in Prince v. Paretti Pontiac Co. that no Louisiana Civil Code provision required a purchaser who seeks to prove a redhibitory defect to first give his vendor

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58. 396 So. 2d 412 (La. App. 4th Cir. 1981).
59. DeSoto v. Ellis, 393 So. 2d 847 (La. App. 2d Cir. 1981), and cases cited therein.
61. 393 So. 2d 847 (La. App. 2d Cir. 1981). See also Hersbergen, supra note 27, at 623-25.
62. At issue was the sale of a house constructed upon an unstable foundation. Certain work had been performed at the recommendation of a civil engineer to make the house structurally sound. 393 So. 2d at 848.
63. 281 So. 2d 112 (La. 1973).
the opportunity to repair the thing sold. The Prince opinion did concede that such an opportunity to repair perhaps previously had been inferable from numerous cases in which a buyer had sought a restoration of the price only after first affording the seller one or more opportunities to repair the alleged redhibitory defects. The court's pronouncement seemingly meant that even a diagnosed and easily repairable defect could form the basis of a redhibition action against a good faith seller who stood ready and willing to repair at no cost to the buyer. No doubt, the court had correctly assessed the letter of the law: no such opportunity to repair was expressly set forth in the Civil Code or elsewhere. Yet, the court seemingly let pass a fine opportunity to set a meaningful policy: the opportunity/obligation to repair is easily gleaned from Civil Code article 1901's principle of performance in good faith—a principle equally applicable to a buyer and a seller—and from article 1903's principle of incidental obligations derived from equity and custom.

Within a year of the Prince decision, Civil Code article 2531 was amended to provide expressly that the good faith seller is only bound to "repair, remedy or correct" redhibitory defects, or if he is unable or fails to do so, "then he must restore the purchase price,..." Under amended Civil Code article 2531 an action for restoration of the price is considered premature prior to a tender to the seller for repair. Civil Code article 2544 ostensibly subjects the action for a reduction in the price to "the same rules and to the same limitations as the redhibitory action"; that should mean, among other things, that the buyer who contents himself with a reduction in price first must tender the thing to the seller for repair just as must the buyer who seeks a full restoration of the price. In what must be seen as at least an ironic twist, recent decisions have not required the buyer to tender the thing for repair prior to seeking a reduction in price.

Prior to the 1974 amendment to Civil Code article 2531, Louisiana courts routinely applied article 2544 literally. If a seller in a successful restoration of the price action was entitled to also recover finance charges attributable to the purchase price, so too could the buyer recover finance charges attributable to repair costs in an action for reduction of the price; if the seller was not in good


The most scholarly dissertation on the theory of recovery by the buyer in reduction of price cases appears in Menville v. Stephens Chevrolet, Inc., 300 So. 2d 858 (La. App. 4th Cir. 1974).
faith, the buyer in a reduction in price case would be entitled to damages and attorney’s fees under Civil Code article 2545, even though that article speaks only of the restitution of price case. Of course, it was well established prior to 1974 that if the buyer could not or would not tender to the seller the return of the thing itself, his action would be limited to one for a reduction in the price, for which action no tender of return of the thing was required. That rule made sense under the former version of Civil Code article 2531, but under amended article 2531, a tender of return becomes meaningless; any tender of the thing will be deemed a tender for repair, the buyer’s denomination to the contrary notwithstanding.

Three recent decisions have ruled that a tender for repair is not necessary in an action for reduction of price, despite the literal sense of Civil Code article 2544. Whether the decisions are correct is debatable, but the reasoning offered in all three is, at best, sloppy. The decisions in Rausch v. Hanberry and Dunn v. Pauratore rely in their rulings that a tender for repair is not required in a reduction in price case on Sokol v. Bob McKinnon Chevrolet, Inc., a 1975 decision. Sokol, however, did not address the tender for repair issue, but instead correctly holds that a tender of return of the thing is not necessary in a reduction in price case. The Dunn decision also suggests that tender for repair is unnecessary in a reduction in price action where the defect poses an immediate threat to the buyer’s safety. That answer seems to beg the question, since such an immediacy of danger probably would dispense with any tender that otherwise might be required.

Coffin v. Laborde indirectly relies on Sokol by agreeing with

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69. See Burns v. Lamar-Lane Chevrolet, Inc., 354 So. 2d 620 (La. App. 1st Cir. 1977). Cf. Stumpf v. Metairie Motor Sales, Inc., 212 So. 2d 705 (La. App. 4th Cir. 1968) (suggesting that a tender may be found so long as the buyer does not prevent the seller’s access to the thing or otherwise hamper the seller’s opportunity to repair).
70. 377 So. 2d 901 (La. App. 4th Cir. 1979).
71. 387 So. 2d 1227 (La. App. 1st Cir. 1980).
72. 307 So. 2d 404 (La. App. 4th Cir. 1975).
73. The defects in Dunn, a home sale case, were a leaking gas pipe and an unsafe furnace.
74. Cf. Madere v. Sharp, 230 La. 723, 89 So. 2d 214 (1956) (unseaworthy vessel); Ilgenfritz v. Radalec, Inc., 226 La. 59, 74 So. 2d 903 (1954) (repair attempts probably would have been futile); Poor v. Hemenway, 221 La. 770, 60 So. 2d 310 (1952) (unseaworthy vessel); Mattes v. Heintz, 69 So. 2d 924 (La. App. Orl. Cir. 1954) (defective water line required immediate repair to prevent damage to the purchaser’s property).
75. 393 So. 2d 915 (La. App. 4th Cir. 1981).
and citing Rausch, but perhaps recognizes that Sokol is inapposite by pointing out that Johnson v. H.W. Parsons Motors, Inc. and Bendana v. Mossy Motors, Inc., the facts of both of which arose prior to the 1974 amendment, did not require a tender for repair in a reduction in price case, despite jurisprudence at the time which required such a tender in a restoration of price case. The Coffin opinion characterizes the 1974 amendment as merely a legislative restatement of that jurisprudence. In fact, however, the buyer in Sokol did return the thing to the seller for the correction of the defect, only to find that the reason the interior of her automobile was not being cooled properly was because it was not equipped with air conditioning as the seller had represented. Clearly the seller had the opportunity then and there to correct that defect. In Johnson the seller clearly acquiesced in the buyer's efforts to obtain repairs elsewhere, paying half of one repair bill and requesting the buyer to take the vehicle to another dealer for repairs. In Bendana the Fourth Circuit Court of Appeal heard only the appeal of the manufacturer, and although a tender for repair had been made through a dealer, the tender for repair issue was not before the court. In any event, the manufacturer is not considered a good faith seller to whom tender for repair is required. Thus, neither Sokol, Johnson nor Bendana support the position taken in Rausch, Dunn and Coffin. Furthermore, the "jurisprudential rule" stressed in Coffin was not a rule at all, but as suggested by the Supreme Court in Prince the opportunity to repair "requirement" was merely an erroneous judicial inference, at odds with the Civil Code's expressed requirements. In fact, the Louisiana Supreme Court had suggested in 1955 that no such right to repair existed.

76. 231 So. 2d 73 (La. App. 1st Cir. 1970).
77. 347 So. 2d 946 (La. App. 4th Cir. 1977).
78. 307 So. 2d at 405.
79. 531 So. 2d at 75.
80. See Laughlin v. Fiat Distribs., Inc., 368 So. 2d 742 (La. App. 3d Cir. 1979); Bernard v. Bradley Auto., 365 So. 2d 1382 (La. App. 2d Cir. 1978); Burns v. Lamar-Lane Chevrolet, Inc., 354 So. 2d 620 (La. App. 1st Cir. 1977).
81. 281 So. 2d at 116.
82. In Radalec, Inc. v. Automatic Firing Corp., 228 La. 116, 121, 81 So. 2d 830, 832 (1955), the seller defended the redhibition action on the ground that the buyer had not allowed it to replace the defective parts in the thing. The court did not find the argument persuasive:

The fact that the defects were confined to a specific part of the machine and that the units could have been made to function properly by installing new motors or by rehabilitating the defective ones, does not furnish a valid basis for denying plaintiff the remedy of redhibition as provided by Article 2520. See also Fisher v. City Sales & Serv., 128 So. 2d 790 (La. App. 3d Cir. 1961); Roby Motors Co. v. Harrison, 139 So. 686 (La. App. 2d Cir. 1932).
The Rausch, Dunn and Coffin view of the relationship (or lack thereof) between Civil Code articles 2544 and 2531 is not necessarily incorrect, and actually favors the consumer. Still, permitting the buyer who has contented himself with a reduction in price demand to refuse the seller an opportunity to correct the defects, and yet charge the seller for that same correction by a third-party seems unfair. Perhaps some concern exists for the plight of the buyer who obtains repairs elsewhere without first tendering the thing to the seller. Such concern is probably misplaced, in that the typical buyer is not likely to call on a third-party for repairs without some prior (and presumably successful) contact with the seller.

The decisions in Rausch, Dunn and Coffin could have correctly ruled that a tender for repair is required in the reduction in price case by virtue of the interrelationship between Civil Code article 2544, 2531 and 1901, but that, as in a restoration of the price case, the tender for repair requirement is not immutably indispensable. In Rausch, for example, the buyers alleged that the seller was in bad faith; if bad faith is provable, such a seller is not entitled to require a tender for repair under article 2531. Furthermore, the opportunity to correct was not likely to be seized by the seller in the Rausch case, even if the defect was correctible. The Dunn case involved a defective home heating unit part that posed a threat to the buyer's safety. Was it not reasonable to have the defective part replaced, as opposed to first demanding that the non-merchant seller of the home repair the defect, especially when, at best, the seller will simply hire a repair contractor anyway? It was well established before 1974, for example, that the buyer's employment of a third-party repair contractor did not limit him to a reduction in price action where diagnostic dismantling by the third-party was no more an undertaking that the seller himself would have been required to perform. Finally, the Coffin facts indicate a plumbing problem arguably within the emergency circumstances exception to the tender requirement, and an inability to communicate with the seller, who, in any event would at best have done what the buyer did—call a plumber.

83. See cases in note 74, supra.
84. The defect in Rausch was the susceptibility of the home to flooding, a defect that is not necessarily correctable. Compare Cox v. Moore, 367 So. 2d 424 (La. App. 2d Cir. 1979) with Davis v. Davis, 353 So. 2d 1060 (La. App. 2d Cir. 1977). The buyers sought a reduction in price of $60,000 and damages of $80,000, plus attorneys' fees.
86. See cases in note 74, supra.
For those occasional cases in which the buyer, for no sufficient reason, denies the seller an opportunity to fulfill its repair obligations, either by refusing access to the thing, having the repairs done elsewhere, or by selling the thing, perhaps Louisiana courts now should rule that such a buyer has waived his rights entirely. Such an approach would be consistent not only with the literal sense of Civil Code article 2544, but also with the principal obligation of the seller, as altered by article 2531: the seller who is not a manufacturer and who is in good faith is not bound absolutely to deliver a thing that is free of redhibitory defects: rather, he is bound to deliver a thing that is either free of defects, or can by repair be made free of defects.

CREDIT TRANSACTIONS

Debt Collection Practices

A violation of the Fair Debt Collection Practices Act gives rise to an individual action in which the court may award any actual damages sustained by the consumer-debtor, and "such additional damages as the court may allow, but not exceeding $1,000," plus costs and reasonable attorney's fees. The consumer-debtor in Harvey v. United Adjusters argued unsuccessfully that the Act should be interpreted to mean that an award of $1,000 be made for each communication or action that violates the Act. The argument has some appeal in those cases involving persistent violations of the Act, but the intent of Congress was seen in Harvey as providing a range of possible damages so that the award can be tailored to fit the particular facts. Repeated violations could result in the full $1,000 award, while a single violation of the act might result in a "no additional damages" award. For example, the consumer-debtor in Carrigan v. Central Adjustment Bureau was awarded $100 actual damages for the mental anguish caused by the debt collector's actions, and $250 as an additional damages award, based on violations of the Fair Debt Collection Practice Act that were not seen by the court as harsh or abusive.

87. Cf. LA. Civ. Code arts. 11, 1764(2) (consensual waiver).
90. Frequent and persistent violations by the debt collector could also enhance the award of actual damages under 15 U.S.C. § 1692k(a)(1) (1980), upon proper evidence thereof.
Credit Reporting

The Supreme Judicial Court of Maine has rendered an opinion of interest to the credit reporting industry and its legal counselors. The state of Maine has a fair credit reporting act, similar to the federal statute, which prohibits a consumer reporting agency from putting certain information in reports to its subscribers. For example, information relative to the consumer's race, religion, sexual preference, criminal charges or arrests, is not to be reported in Maine. The Maine high court decided in *Equifax Services, Inc. v. Cohen* that those restrictions are an unconstitutional infringement on the qualified right of free speech enjoyed by those who sell consumer reports. The *Equifax* decision does not directly affect the federal Fair Credit Reporting Act, but it does at least raise a doubt as to the constitutionality of section 1691c of the Federal Act, prohibiting the reporting of obsolete information.

Recent Supreme Court Decisions Concerning Credit Transactions

Creditors subject to the Federal Truth in Lending Act are required to disclose the existence of any security interest that has been or will be taken either in the property purchased or in other of the debtor's property. Four of the five Courts of Appeals that had ruled on the issue held that the assignment of insurance proceeds and unearned insurance premiums created a security interest that must be disclosed under the Truth in Lending Act. The Supreme Court's majority opinion in *Anderson Brothers Ford v. Valencia* relies on the expressed intent of the Federal Reserve Board in its revised Regulation Z and the legislative history of the Revised

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94. 420 A.2d 189 (Maine 1980).
95. The Maine Act could constitutionally have prohibited a user of consumer reports from basing credit-granting decisions on the "suspect" information categories in question. 420 A.2d at 206.
96. The United States Supreme Court denied certiorari in the case.
98. Murphy v. Ford Motor Credit Co., 629 F.2d 556 (8th Cir. 1980); Souise v. First Nat'l Bank of Commerce, 628 F.2d 480 (5th Cir. 1980); Valencia v. Anderson Bros. Ford, 617 F.2d 1278 (7th Cir. 1980); Gennuso v. Commercial Bank & Trust Co., 566 F.2d 437 (3d Cir. 1977). The Tenth Circuit had ruled to the contrary. James v. Ford Motor Credit Co., 638 F.2d 147 (10th Cir. 1980).
Truth in Lending Act,\textsuperscript{101} in holding that such assignments are not “security interests” under the Act. The dissent in \textit{Valencia} stresses the support for the contrary view provided by the plain language of the statute and by established principles of statutory construction. The \textit{Valencia} decision will not rank among the court’s great utterances, but it does serve the spirit of Revised Truth in Lending by eliminating a disclosure that arguably contributed to a problem of information overkill under the old Act.

Under the original Regulation Z, an “arranger” of credit was as much a “creditor”\textsuperscript{102} as the actual extender of credit, and each was responsible for the disclosures,\textsuperscript{103} although the seller-arranger typically would have primary responsibility therefor.\textsuperscript{104} In \textit{Ford Motor Credit Co. v. Cenance}\textsuperscript{105} the Court approved as a satisfactory disclosure of Ford Motor Credit Company’s creditor status the statement in the automobile installment contract that notified the buyer that the contract was assigned by the dealer to Ford Motor Credit. The Revised Truth in Lending Act negates any importance the \textit{Cenance} decision might have had, for the revised Act defines “creditor” as the person to whom the debt is initially payable on the face of the evidence of indebtedness.\textsuperscript{106} If that party is the dealer, there is no need to identify Ford Motor Credit Company as a creditor, for it is not; if Ford Motor Credit Company is the person to whom the debt is initially payable, the dealer is not a creditor even though it may have arranged that credit.

The message of \textit{Valencia} and \textit{Cenance} is a clear and familiar one: the court is cutting back on the litigation potential under federal consumer protection laws, as it has done in the federal securities law area.\textsuperscript{107} This development finds support in and certainly parallels the revision of Truth in Lending, but was likely inevitable in any event.\textsuperscript{108} Further evidence of the shrinkage in the litigation

\textsuperscript{101} \textit{See} Report of the Senate Committee on Banking, Housing and Urban Affairs, S. REP. No. 96-368, 96th Cong., 1st Sess. 30 (1979).
\textsuperscript{102} 12 C.F.R. § 226.2(h)(5)(s) (1979).
\textsuperscript{103} \textit{Id.} 6(d).
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} 101 S. Ct. 2239 (1981).
\textsuperscript{106} 15 U.S.C. § 1602(f) (1980). The “arranger” concept is narrowed to include one who arranges for an extension of consumer credit from one who is not a “creditor” under the Act. \textit{Id.}
\textsuperscript{108} \textit{See} Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980), discussed in Hersbergen, \textit{supra} note 88, at 446-49.
potential under federal consumer protection laws is found in *American Express Co. v. Koerner*. Koerner & Company had applied for and received American Express Credit cards in the company name, for use by its officers. Mr. Koerner had the use of one of the company cards, and had agreed to be jointly and severally liable with the Koerner Company for all charges incurred by use of the card. But Mr. Koerner occasionally used the company card issued to him for personal expenses, in which case he would, quite properly, pay the indebtedness himself.

A billing dispute arose between American Express and its cardholder, Koerner & Company, in 1975. With respect to billing disputes between a creditor and an obligor, the Fair Credit Billing Act of 1974 establishes procedures for resolution of such disputes. That Act was designated as part "D" of Subchapter I of the Consumer Credit Protection Act and therefore within section 1602’s definitions; "creditor," under section 1602’s expressed reference to part D, meant "card issuers," which arguably meant that American Express must follow the procedures of part D, the Fair Credit Billing Act. American Express did not follow those procedures, but argued successfully that it had not made an "extension of consumer credit" and was therefore not subject to the Fair Credit Billing Act. Neither the disputed charges nor the primary purpose for obtaining the card could be characterized as extensions of consumer credit. The court unanimously agreed with American Express.

**CONSUMER LEASES**

*Return of Lessee Deposits*

When the lessee in *Altazin v. Pirello* vacated her apartment on August 15, 1977, at the demand of the lessor, the lessor came under the commandment of Revised Statutes 9:3251 that her $50 deposit "shall be returned . . . within one month" of termination. A

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111. 15 U.S.C. §§ 1602(f), (k), & (n) (1974). Section 1602(f) defines "creditor" for other purposes as an extender of credit.
112. The Fifth Circuit, in reversing the trial court, had determined that the personal liability of Mr. Koerner for charges made by use of the card made the transaction one of an extension of consumer credit. Koerner v. American Express Co., 615 F.2d 191 (5th Cir. 1980), rev’g 444 F. Supp. 334 (E.D. La. 1977).
113. 391 So. 2d 1267 (La. App. 1st Cir. 1980).
114. The lessee's apartment had been damaged by a fire, following which she had moved into another apartment in the same building. The lessor's manager gave the lessee instructions to "vacate your apartment by 8/31/77, due to repairs needed to this section." Id. at 1268.
lessor retaining any portion of the deposit "shall forward to the lessee . . . an itemized statement accounting for the proceeds which are retained and giving reasons therefor," also within one month of termination. A failure of the lessor to remit either the deposit, or the remaining portion thereof with an accompanying itemization and statement of reasons, within one month of the termination date, may or may not be willful; if it is, the lessee has the right to recover, in addition to the deposit, any actual damages, or two hundred dollars, whichever is greater, together with attorney's fees awardable in the discretion of the court.'16 The lessor in Altazin had neither remitted nor accounted for the lessee's deposit by November 23, 1977, when the lessee made a written demand for same."16 A written demand for return of the deposit cannot be ignored by a lessor; failure to remit within thirty days after written demand for a refund "shall constitute willful failure" under La. R.S. 9:3252.17 The lessor in Altazin also let this period expire, negating any defensible position it might have had regarding the deposit. That should have meant an automatic imposition of the $200 award, and a discretionary award of attorney's fees. The trial court awarded only the $50 deposit.

The trial court premised its judgment on the fact that the deposit check had been drawn in the lessee's maiden name, while the rental agreement had been signed in an anticipated married name which the lessee never assumed. The lessor subsequently reflected the lessee's maiden name on the rental agreement. In short, the trial court did not believe that willfulness had been shown in the case. Under section 3252, however, willfulness is established by the failure to remit upon written demand. The first circuit court of appeals in Altazin corrected the error by awarding the $200 and $1000 in attorney's fees, but Altazin is one of those cases that never should have been. It should not have been necessary to file the action, nor should it have been defended by the lessor, and an appeal from the trial court's judgment should not have been necessary. Section 3252 of the statute is clear, and moreover, the issue of bona fide mistake or dispute was settled in the first circuit in 1974 contrary to

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116. The lessee enlisted the aid of the Consumer Protection Center, and in response to a letter from the Center, the lessor denied ever having received a deposit from the lessee and falsely accused the lessee of causing a fire in her apartment. 391 So. 2d at 1268.
117. Logically, an accounting and statement of reasons thereof, within the thirty days of the lessee's demand should avoid the impact of section 3252; the statute, however, mentions the "accounting and statement of reasons" option only in connection with the "one month after the date the tenancy terminates" feature of section 3251, with section 3252 referring solely to a "failure to remit" within thirty days after written demand.
the position taken by lessor. Had the lessor's frivolous defense caused the appeal in Altazin, such would have been a good candidate for frivolous appeal damages. Perhaps the appellate courts should so classify cases such as Altazin.

The return of lessee deposit law has been amended to require that in the event of a transfer of the lessor’s interest in the leased premises during the term of the lease, the lessor must also transfer the sums deposited as security to his successor in interest. When the transfer of deposits occurs the lessor-transferor is relieved of further liability with respect to the deposit; however, a willful violation of section 3251 gives the lessee the right to recover the two hundred dollar damages award from the lessor or from the lessor’s successor in interest. As amended, the law does not require a return of deposit to the lessee who abandons the premises, either without giving a required notice or prior to the termination of the lease.

The Lessor’s Implied Warranty Obligations

The lessor in Louisiana is bound “from the very nature of the contract, and without any clause to that effect” to deliver the leased premises in good condition, and free from any repairs, and to maintain the premises free of vices and defects and “in a condition such as to serve for the use for which it is hired.” The storage facilities leased in Tassin v. Slidell Mini-Storage, Inc. did not meet that Civil Code implied warranty standard, but the lessor argued that responsibility for the condition of the premises had been shifted to the lessee by a waiver of the implied warranty. The lessor's implied warranties of suitability, as those of the seller, may be renounced or modified. The law has been clear for some time that to be effective against the buyer, a seller-stipulated renunciation of implied warranty must appear in the key sale document, be clear, unambiguous, explicit and unequivocal, and be brought to the attention of the buyer


119. LA. CODE CIV. P. art. 2164.


121. LA. CODE CIV. P. art. 2692, 2693 & 2695. See Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92 (La. 1979).

122. 396 So. 2d 1261 (1981).


125. Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92 (La. 1979); LA. CIV. CODE arts. 11, 1764(2), & 1901.
or explained to him. Furthermore, because the renunciation of implied warranty is in derogation of general law it is to be construed strictly.126 A renunciation of implied warranty is not enforceable by the manufacturer or the seller not in good faith.127

The Louisiana Supreme Court indicates in Tassin that the issues relative to renunciation of the lessor’s implied warranties will be resolved by analogy to the already established law of sales. In Tassin, for example, the lessor knew or should have known that the storage units in question were defective128 since they would not protect lessee’s property against the entry of normally occurring rain water. Knowledge or reason to know of the defective condition of the thing leased made the lessee’s renunciation of implied warranty not obligatory, and the lessor was liable for the water damage to lessee’s property.

The Lessor’s Obligations With Respect to Lessee Safety

One of the most significant recent developments in the common law is the emergence of an implied warranty of habitability in leases of residential space, a warranty that the premises are safe, sanitary, and free of latent defects so as to be suitable for the intended use.129 Important to the development of common law as the implied warranty of habitability may be, the identical principle resides in articles 2692, 2693, 2695 and 2699 of the Louisiana Civil Code. The implied warranty of habitability has been expanded in some states to the point that one must now question seriously the viability of the traditional common law rule that the lessor owes no special duty to protect the lessee from criminal acts committed on the premises by third parties.130

Lessees injured on the premises by the criminal acts of third parties were occasionally successful during the late 1960’s and early

127. LA. CIV. CODE art. 2548.
128. The storage unit door did not close flush with the concrete flooring of the unit (which sloped toward the rear of the unit), and no shelving has been provided. 396 So. 2d at 1262.
129. See Line, Implied Warranties of Habitability and Fitness for Intended Use in Urban Residential Leases, 26 BAYLOR L. REV. 161 (1974). The implied warranty is recognized in a majority of the states, either by judicial decision or by statute. The decisions and statutes are listed at Recent Developments, Expanding the Scope of the Implied Warranty of Habitability: A Landlord’s Duty to Protect Tenants From Foreseeable Criminal Activity, 33 VAN. L. REV. 1493, 1493 n.1 (1980).
1970's in establishing the concept of lessor liability in tort, where the lessor knew or should have known of the likelihood of criminal acts on the premises. The principles of superseding cause and foreseeability, however, detract considerably from the effectiveness of a tort remedy. If the criminal act can be brought within the scope of the warranty of habitability, however, the protection for the lessee becomes less restrictive. Thus, if secure windows and doors are deemed a feature of the implied warranty, entry gained by the robber or rapist as a result of the breach of that contractual duty would perhaps present for the lessee-plaintiff more certainty of outcome. The Supreme Court of New Jersey has taken that step in its 1980 decision in Trentacost v. Brussel, holding that the implied warranty of habitability obliges the lessor to furnish reasonable safeguards to protect tenants from foreseeable criminal activity on the premises, independently of any knowledge or notice of particular risks or unsafe conditions.

The impact of Trentacost will be some time in the measuring. The Trentacost issue, however, is certain to arise in Louisiana; when it does arise, the plaintiff will be faced with the 1977 decision of the third circuit court of appeal in Robicheaux v. Roy, which found no lessor liability, premised either on the duties set out in Civil Code articles 2692, 2693, and 2695, or on those set out in Civil Code articles 2315, 2316, and 2317, with respect to the loss suffered by a lessee merchant as a result of a burglary. Although the duties of the lessor of habitable space could certainly be viewed by Louisiana courts in a different light, the Robicheaux decision not only found


135. 82 N.J. 214, 412 A.2d 436 (1980). The warranty was held to have been breached by the lessor's failure to secure the building's front door.


137. 352 So. 2d 786 (La. App. 3d Cir.), cert. denied, 354 So. 2d 207 (La. 1978).

138. The unknown burglar had entered the leased premises through a hole cut in the common wall between the subject premises and other premises rented by the lessor to an unknown lessee. 352 So. 2d at 787.
the absence of a lessor duty to investigate the backgrounds of prospective lessees, but also it relied heavily on Civil Code article 2703 in affirming the action of the trial court in sustaining the lessor's exception of no cause of action. Article 2703 states, in relevant part, that the lessor is not bound to guarantee the lessee against disturbances caused by persons not claiming any right to the premises. While article 2703 may properly be seen as a reference to the lessor's "peaceable possession" obligation under article 2692, the Louisiana Supreme Court might adopt the Philippe v. Browning Arms Co. rationale in deciding the issue: Civil Code articles 2315 and 2316 are the fountainhead of tort responsibility in a personal injury case, but the court must decide the applicable standard of conduct by consulting the many other Code articles, statutes and laws which provide for certain responsibilities according to the person, activities, or relationship involved; in a case such as Trentacost, Civil Code article 2703 certainly affects that standard.

140. 395 So. 2d 310, 318 (La. 1981).
IMPORTANT: Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing. Keep this form.

VEHICLE MAKE | MODEL | YEAR | ID NUMBER
NOTICE: For your protection and safety

Ask about the current condition of the following major mechanical and safety systems of this car. See below which of these systems, if any, are covered by a warranty and which systems are known by the dealer to contain major defects. Dealers must inform you in writing if they know of certain defects in this car’s major systems.

Frame & Body  Brake System
Engine  Steering System
Transmission and Drive Shaft  Suspension Shaft
Differential  Tires
Cooling System  Wheels
Electrical System  Exhaust System
Fuel System  Accessories

PRE PURCHASE INSPECTION. Ask the dealer if you may have this car inspected by your mechanic either on or off the lot.

WARRANTIES FOR THIS CAR:

NO IMPLIED WARRANTY—“AS IS”. This means you will pay all costs for any repairs needed when you buy the car or after the time of sale. If this box is checked, the dealer makes no written promises about this car’s condition.

FULL LIMITED WARRANTY. The dealer will pay % of the total repair bill for covered systems that fail during the warranty. Ask the dealer for a copy of the warranty document for a full explanation of warranty coverage, exclusions, and the dealer’s repair obligations. Under state law, “implied warranties” may give you even more rights.

SYSTEMS COVERED:  DURATION:

SERVICE CONTRACT. A service contract is available from
for $-extra. This service contract adds to the dealer’s responsibilities under any warranty. If you buy a service contract within 90 days of the time of sale, state law “implied warranties” may give you additional rights.

MAJOR KNOWN DEFECTS: Dealers must tell you in the space below if they know about certain defects in this car’s major systems. The defects that must be disclosed if known are listed on the back of this form. However, there may be defects that are unknown to the dealer. If nothing is listed, the car is not necessarily free of defects.

See the back of this form for important additional major defect information.
Below is a list of some major defects that may occur in used cars.

<table>
<thead>
<tr>
<th>Frame &amp; Body</th>
<th>Brake System</th>
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<tbody>
<tr>
<td>Frame-cracks, corrective welds, or rusted through</td>
<td>Failure warning light broken</td>
</tr>
<tr>
<td>Dogtracks—bent or twisted frame</td>
<td>Pedal not firm under pressure (DOT specs.)</td>
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<tr>
<td>Engine</td>
<td>Not enough pedal reserve (DOT specs.)</td>
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<tr>
<td>Oil leakage excluding normal seepage</td>
<td>Does not stop vehicle in straight line (DOT specs.)</td>
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<tr>
<td>Cracked block or head</td>
<td>Hoses damaged</td>
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<tr>
<td>Belts missing or inoperable</td>
<td>Drum or rotor too thin (Mfgr specs.)</td>
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<tr>
<td>Knocks or misses related to camshaft, lifters and push rods</td>
<td>Lining or pad thickness less than 1/32 inch</td>
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<tr>
<td>Abnormal exhaust discharge</td>
<td>Power unit not operating or leaking</td>
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<tr>
<td>Transmission &amp; Drive Shaft</td>
<td>Structural or mechanical parts damaged</td>
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<tr>
<td>Improper fluid level or leakage, excluding normal seepage</td>
<td>Steering System</td>
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<tr>
<td>Cracked or damaged case which is visible</td>
<td>Too much free play at steering wheel (DOT specs.)</td>
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<tr>
<td>Abnormal noise or vibration caused by faulty transmission or drive shaft</td>
<td>Free play in linkage more than 1/4 inch</td>
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<tr>
<td>Improper shifting or functioning in any gear</td>
<td>Steering gear binds or jams</td>
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<tr>
<td>Manual clutch slips or chatters</td>
<td>Front wheels aligned improperly (DOT specs.)</td>
</tr>
<tr>
<td>Differential</td>
<td>Power unit belts cracked or slipping</td>
</tr>
<tr>
<td>Improper fluid level or leakage excluding normal seepage</td>
<td>Power unit fluid level improper</td>
</tr>
<tr>
<td>Cracked or damaged housing which is visible</td>
<td>Suspension System</td>
</tr>
<tr>
<td>Abnormal noise or vibration caused by faulty differential</td>
<td>Ball joint seals damaged</td>
</tr>
<tr>
<td>Cooling System</td>
<td>Structural parts bent or damaged</td>
</tr>
<tr>
<td>Leakage, including radiator</td>
<td>Stabilizer bar disconnected</td>
</tr>
<tr>
<td>Improperly functioning water pump</td>
<td>Spring broken</td>
</tr>
<tr>
<td>Electrical System</td>
<td>Shock absorber mounting loose</td>
</tr>
<tr>
<td>Battery leakage</td>
<td>Rubber bushings damaged or missing</td>
</tr>
<tr>
<td>Improperly functioning alternator, generator battery or starter</td>
<td>Radius rod damaged or missing</td>
</tr>
<tr>
<td>Fuel System</td>
<td>Shock absorber leaking or functioning improperly</td>
</tr>
<tr>
<td>Visible leakage</td>
<td>Tires</td>
</tr>
<tr>
<td>Inoperable Accessories</td>
<td>Tread depth less than 2/32 inch</td>
</tr>
<tr>
<td>Gauges or warning devices</td>
<td>Sizes mismatched</td>
</tr>
<tr>
<td>Air conditioner</td>
<td>Visible damage</td>
</tr>
<tr>
<td>Heater &amp; Defroster</td>
<td>Wheels</td>
</tr>
<tr>
<td>DEALER</td>
<td>Visible cracks damage or repairs</td>
</tr>
<tr>
<td>ADDRESS</td>
<td>Mounting bolts loose or missing</td>
</tr>
</tbody>
</table>

SEE FOR COMPLAINTS

IMPORTANT: The information on this form is part of any contract to buy this vehicle. Removal of this label before consumer purchase (except for purpose of test-driving) is a violation of federal law (16 C F R 455). Defect disclosure specifications are printed in Volume 16 C F R (Code of Federal Regulations) Part 455.