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Consumer Protection

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CONSUMER PROTECTION

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QUALITY EXPECTATIONS

Renunciation of Redhibition by "As Is" Language

Only in article 2548[1] does the Civil Code expressly deal with renunciation of the redhibition warranty,[2] and that article limits renunciation only if there has been "fraud on the part of the seller." Moreover, comment (c) to new article 7 of the Code describes the ability of a purchaser to renounce a right—such as the redhibition warranty—as a "self-evident proposition."[3] In spite of this apparently liberal approach to renunciation by the drafters of legislation, a jurisprudential rule has evolved, based on several Code articles,[4] that tends to strike down attempted renunciation of the implied redhibition warranty. To be effective, under this rule, the renunciation language must be "clear, un-

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1. This article provides in full: "The renunciation of warranty, made by the buyer, is not obligatory where there has been fraud on the part of the seller."

2. La. Civ. Code arts. 2475, 2476.

3. The comment refers to the language of former Civil Code article 11 (1870) permitting individuals to "renounce what the law has established in their favor" when the rights of others are not affected, there is no express or implied prohibition thereof, and the renunciation is not contrary to the public good.

4. This rule grounds itself on Civil Code articles 2548, 2474, 2056, and 2057. Civil Code article 2474 compels the seller to "explain himself clearly respecting the extent of his obligations," one of which is warranting the thing he sells against redhibitory vices under Civil Code articles 2475 and 2476.

La. Civ. Code art. 2056 provides:

> In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text.
>
> A contract executed in a standard form must be interpreted, in case of doubt, in favor of the other party.

La. Civ. Code art. 2057 provides:

> In case of doubt that cannot otherwise be resolved, a contract must be interpreted against the obligee and in favor of the obligor of a particular obligation.
>
> Yet, if the doubt arises from lack of a necessary explanation that one party should have given, or from negligence or fault of one party, the contract must be interpreted in a manner favorable to the other party whether obligee or obligor.

ambiguous, explicit, and unequivocal";[5] the phraseology must be in the key sale document;[6] it must be brought to the attention of the purchaser or explained to him;[7] and, as a stipulation in derogation of general law, the renunciation provision must be strictly construed.[8]

The courts have applied deferentially this jurisprudential rule to consumer-purchasers,[9] conforming to the Louisiana Supreme Court's recognition of the principle that "[s]afeguards protecting consumers must be more stringent than those protecting businessmen competing in the marketplace."[10] As a result, a court-approved renunciation clause in consumer-purchaser cases is rare; within the last twenty years such a clause has been relatively nonexistent. Moreover, neither the Louisiana Supreme Court nor the courts of appeal have been pedagogically inclined when passing on renunciation questions. Hence, while the bar can discern from the jurisprudence that language which does not renounce redhibition effectively,[11] it is not clear what language would be effective.

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5. The quoted phraseology results from a composite of Louisiana judicial statements concerning the relationship among Civil Code articles 2474, 2503, and former article 1764(2). 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) (cites La. Civ. Code art. 2474 as the source of the rule); Prince v. Paretti Pontiac Co., 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), writ denied, 294 So. 2d 829 (1974); Harris v. Automatic Enter., Inc., 145 So. 2d 335 (La. App. 4th Cir. 1962) (cites La. Civ. Code art. 2474 as the source of the rule); cf. Guillory v. Morein Motor Co., 322 So. 2d 375 (La. App. 3d Cir. 1975).

6. Prince v. Paretti Pontiac Co., 281 So. 2d 112 (La. 1973); Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., 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 (1930).

7. See, e.g., Prince v. Paretti Pontiac, Co., 281 So. 2d 112 (La. 1973); 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); Harris v. Automatic Enter., Inc., 145 So. 2d 355 (La. App. 4th Cir. 1962).

8. See, e.g., Dufief v. Boykin, 9 La. Ann. 295 (1854); Harris v. Automatic Enter., Inc., 145 So. 2d 335 (La. App. 4th Cir. 1962).

9. See Thibodeaux v. Meaux's Auto Sales, Inc., 364 So. 2d 1370 (La. App. 3d Cir. 1978); cf. Tassin v. Slidell Mini-Storage, Inc., 396 So. 2d 1261 (La. 1981) (consumer lease).

10. Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92, 96 (La. 1979).

11. The language "as is" or "no warranties of any kind" will not of itself renounce redhibition. See Hellman v. Comeaux, 353 So. 2d 407 (La. App. 4th Cir. 1977); 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); Breeden v. General Motors Acceptance Corp., 140 So. 2d 680 (La. App. 4th Cir. 1962). Nor is an express warranty "in lieu of" implied warranties an effective renunciation. Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., Inc., 262 So. 2d 377 (La. 1972). A renunciation clause couched in "legalese" is ineffective as well. Thibodeaux v. Meaux's Auto Sales,

In the former category is the phrase "as is." Louisiana courts have consistently held that a sale "as is" does not effectively renounce implied warranties of redhibition.[12] By contrast, the Uniform Commercial Code takes an approach opposite to that of our judiciary. Section 2-316(3)(a) expressly sanctions the "as is" phrase as an effective exclusion by the seller of all implied sales warranties. The premise underlying section 2-316(3)(a) is that expressions such as "as is" or "with all faults" are matters of common understanding that call the buyer's attention to the exclusion of warranties and that make it "plain that there is no implied warranty."[13] In short, the approach of UCC presupposes that most buyers normally would understand that such expressions exclude, or at least limit, implied warranties; the parties will have taken into account the absence of implied warranties and will make the appropriate adjustments when setting the price.[14]

Perhaps the reluctance of Louisiana courts to recognize "as is" as a clear and unambiguous renunciation of redhibition stems from the disclosure requirement of Civil Code article 2474, which requires the seller to explain the extent of his obligations "clearly." Courts may consider "as is" to be an "obscure and ambiguous clause" and hence construe the clause in favor of the buyer.[15] The greatest effect given

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Inc., 364 So. 2d 1370 (La. App. 3d Cir. 1978). "Seller makes no implied warranties" is not a clear and unambiguous renunciation of redhibition because implied warranties are not "made" by sellers; they are legislated. See Edwards v. Port AMC/Jeep, Inc., 337 So. 2d 276 (La. App. 2d Cir. 1976); Dunlap v. Chrysler Motors Corp., 299 So. 2d 495 (La. App. 4th Cir. 1974); Stumpf v. Metairie Motor Sales, Inc., 212 So. 2d 705 (La. App. 4th Cir. 1968); cf. Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92 (La. 1979) ("lessor makes no express or implied warranties" held a clear and unambiguous renunciation by the commercial lessee).

12. See Hellman v. Comeaux, 353 So. 2d 407 (La. App. 4th Cir. 1977); Hendricks v. Horseless Carriage, Inc. 332 So. 2d 892 (La. App. 2d Cir. 1976); Sallinger v. Mayer, 304 So. 2d 730 (La. App. 4th Cir. 1974); Juneau v. Bob McKinnon Chevrolet Co., 260 So. 2d 919 (La. App. 4th Cir. 1972); Beneficial Fin. 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).

In Roby Motors Co. v. Cade, 158 So. 840 (La. App. 2d Cir. 1935), a sale on "as is" terms was held to have excluded the implied warranties; also present in the contract was the stipulation that "any adjustments or repairs made from this day will be charged for." The *Breeden* decision characterized the latter stipulation as the true reason for exclusion of implied warranties in *Cade*. 140 So. 2d at 682.

13. Under UCC § 2-316(3)(a), "unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is,' 'with all faults' or other language that in common understanding calls the buyer's attention to the exclusion of warranties and makes it plain that there is no implied warranty."

14. R. Nordstrom, Handbook of the Law of Sales 272 (1970).

15. Among the earliest decisions rejecting the "as is" expression as an effective renunciation of redhibition is United Motor Car Co. v. Drumm, 3 La. App. 741 (Orl.

the "as is" language has been that it may modify the buyer's reasonable expectations of the usefulness and convenience of the thing sold.[16]

Despite a traditional reticence of our courts to uphold "as is" renunciations, Louisiana sellers continue to use this language and to litigate its effectiveness. Two recent decisions suggest that Louisiana is reevaluating the validity of the "as is" renunciation, at least when the purchaser is a "businessman competing in the marketplace."[17] These cases do seem to indicate that consumer purchasers will remain protected by redhibition warranties despite an "as is" clause.

The reaffirmation of the courts' protectiveness of consumers in the "as is" scenario came in *Harvell v. Michelli*.[18] In that case, the bill of sale of a used motor vehicle stipulated that "this car 78 Mustang sold 'AS IS' without warranty . . . [and] [d]ue to the reduced price of this car, customer understands and agrees to 'NO Warranty.' "[19] The court held that the attempt to renounce the implied warranties was ineffective against the consumer purchaser, since it was not a clear and unambiguous renunciation.[20]

1926). In *Drumm*, the court provided this dissertation:

> Warranty is an implied condition in all sales. But the automobile in this case was, under express stipulation of the parties, purchased by the defendant "As is."
>
> The use of these words in a contract of sale means, we take it, "as it is," and as applied to the automobile sold by plaintiff it was purchased "as it was." We would not wish to be understood as holding that the presence of these words in a contract of sale would amount to a waiver of all warranty by the purchaser. But, certainly, the phrase modifies the warranty implied. If, however, the thing sold, the automobile in this case is not fit for the use for which it was intended; for example, if it would not run, the fact that it was sold "as is" would not prevent a rescission of the sale for one of the characteristics of an automobile, as its name suggests, is the ability to run on its own power. In this case the automobile sold was five years old and second-hand. It has been proven that it required considerable mechanical attention to keep it going, but a five-year-old, second-hand automobile usually does. As was well said by the learned judge a quo: "The fact that it is second-hand and has been used for several years carries with it the implication, like an old man 75 or 80 years of age, that the machinery is worn out and that the party buying it agrees to take a practically defective machine in order to get it for a very small price."

3 La. App. at 743.

16. Id.

17. Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92, 96 (La. 1979).

18. 500 So. 2d 871 (La. App. 1st Cir. 1986).

19. Id. at 872.

20. One may infer from the opinion that the language in question would have renounced any express warranties, but the opinion further states that because the seller personally assured the buyer that the vehicle was in "good condition" at the time of purchase, such an assurance would have "qualified" any otherwise effective renunciation language. 500 So. 2d at 873. In fact, such an assurance would probably render even

In *Fernandez v. Miller Richards Aircraft Sales, Inc.*,[21] on the other hand, the defective airplane was purchased for commercial rather than consumer purposes. The contract between seller and buyer provided, among other limitations of warranties and liability, that the plane was sold "as is." The Louisiana fifth circuit held that Fernandez had renounced implied warranties, since in the case of a commercial purchaser, the expression "as is" logically could be considered a "clear and unambiguous" renunciation.[22] Although presented with the opportunity, the court gave no clear message on the effectiveness of an "as is" warranty limitation in a contract involving an unsophisticated consumer.[23] Despite the court's discussion of the warranty limitation, *Fernandez* is not truly a renunciation case. Prior to the sale the purchaser knew of the redhibitory defect.[24] Thus, the court mischaracterized an apparent defect case, which would be prevented by article 2521, as a renunciation case.

Proof of the Existence of Redhibitory Vices at the Time of Sale

The buyer must not only prove the existence of a vice, but that the redhibitory vice existed at the time of the sale; how difficult his

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perfectly clear and otherwise unambiguous language ineffective, as it would create an external ambiguity. See 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); Lee v. Blanchard, 264 So. 2d 364 (La. App. 1st Cir. 1972). The Louisiana second circuit, in denying seller's motion for summary judgment, erroneously concluded in Barbour v. Pit Stop Imports, Inc., 507 So. 2d 14 (La. App. 2d Cir. 1987), that if the FTC-required "Buyer's Guide" window sticker was marked "AS IS—NO WARRANTY," a valid renunciation would result. See Hersbergen, Developments in the Law, 1980-1981—Consumer Law, 42 La. L. Rev. 513, 517-19 (1982).

21. 487 So. 2d 660 (La. App. 5th Cir. 1986).

22. Id. at 665. This result was not surprising in view of the Louisiana Supreme Court's decision in Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92 (La. 1979) (waiver of warranty on back of a lease indicating that "lessor makes no express or implied warranties" was written, clear, unambiguous, and therefore effective). See supra text accompanying note 10.

23. Although the language of renunciation in the *ADF* case was characterized as "clear and unambiguous," it was, in fact, of the "seller makes no implied warranty" variety, which has been held to be ineffective as against a consumer-purchaser. See supra note 11. Even so, the court focused on whether the language, presumptively effective against a nonconsumer, became ineffective because it had not been brought to the purchaser's attention, as required in consumer cases. The court then determined, in essence, that a commercial purchaser is expected to carefully read what he signs, including block letters on the face of the contract that direct his attention to renunciation language on the reverse side. 377 So. 2d at 96.

24. 487 So. 2d at 665. Implicit in the "apparency" of an oil leak is that the source of the leak is a possible defect such as a cracked crank case. Of interest, however, is the case of Port Fin. Co. v. Campbell, 94 So. 2d 891 (La. App. 1st Cir. 1957), in which the court held that to an "uneducated laborer" emission of smoke from a car did not make excessive oil consumption (presumably due to worn piston rings) an apparent defect.

burden will be largely depends on when the redhibitory defect becomes manifest. Civil Code article 2530 may ease this burden when the redhibitory vice makes its appearance within three days of the sale. The presumption is rebuttable, but unless the seller offers plausible evidence to establish the contrary, the vice will be considered present prior to sale.[25] When the vice appears more than three days after the sale, the purchaser may avail himself of two jurisprudentially created inferences. First, if the vice appears soon after the thing is put to its intended use, a reasonable inference[26] arises that the vice existed at the time of sale.[27] Second, if the failure occurs beyond the "soon after being put into use" time period an inference arises that the defect arose during the manufacture of the product if the defect appears at a significant period of time in advance of the reasonably anticipated useful life for which the product was designed or expressly warranted.[28]

These two inferences are more readily understood in cases involving the purchase of a new, rather than a used, thing. If, for example, the transmission of a new automobile fails thirty-five days and 1000 miles after the purchase, that clearly suggests that the thing was defective at the time of purchase;[29] likewise, the failure within two-and-one-half years of an air conditioning compressor that was designed and represented to work satisfactorily for ten years, clearly implicates a defect in manufacture.[30] In both instances the failure of the new thing so long a time before its useful life had run or the limited express warranty expired strongly suggests a defect in the manufacture. But the failure of a used thing soon after purchase does not so clearly suggest a manufacturing defect that was present at the time of sale, given the presence of competing, plausible explanations such as ordinary wear and tear, improper maintenance, and user abuse. The proof needed to establish that the condition existed at the time of sale, thus, may vary between new and used things.

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25. Juneau v. Bob McKinnon Chevrolet Co., 260 So. 2d 919 (La. App. 4th Cir. 1972).

26. Under the presumption of article 2530 the finder of fact is required to find a redhibitory vice in the absence of rebuttal evidence by the seller; the inference of a redhibitory defect merely permits the finder of fact to conclude that a redhibitory defect existed at the time of sale.

27. Rey v. Cuccia, 298 So. 2d 840 (La. 1974) (vice appeared on tenth day after sale, but on the second day of actual use); Moran v. Willard E. Robertson Corp., 372 So. 2d 758 (La. App. 4th Cir. 1979) (transmission failure in a new car thirty-five days and over 1000 miles after date of sale); Ball v. Ford Motor Co., 407 So. 2d 777 (La. App. 1st Cir. 1981) (leak in automobile "T-top" appeared approximately three months after the original sale by the dealer).

28. Moreno's, Inc. v. Lake Charles Catholic High Schools, Inc., 315 So. 2d 660 (La. 1975); Bendana v. Mossy Motors, Inc., 347 So. 2d 946 (La. App. 4th Cir. 1977).

29. *Moran*, 372 So. 2d 758.

30. *Moreno's*, 315 So. 2d 660.

The third circuit discussed this problem in *Wagnon v. Hebert*.[31] The consumer purchased a four-year-old automobile with an odometer reading of almost 40,000 miles; within three months of purchase the vehicle required a tune-up, new brake shoes and brake pads, and a new transmission.[32] In the court's words, "the warranty created against redhibitory defects applies to the sale of used [things] as well as new [things], although not as extensive as in the sale of new [things]. However, what is required is that the used equipment operate reasonably well for a reasonable period of time."[33] Relying on a prior third circuit case, which had held that the purchaser's evidence that a used truck underwent numerous repairs within a six-month and greater than 6000-mile period was sufficient to prove that the defect existed at the time of sale,[34] the court eventually held that the purchaser had proven that the defective transmission existed at the time of sale.

The third circuit had confronted the same issue in *Washington v. Morein Motor Co.*,[35] in which a five-year old car with 44,000 miles at the time of sale experienced a total engine failure within five months. The court adopted the reasoning of its 1981 decision of *Jofforion v. LeGlue Buick, Inc.*,[36] that since (major) repairs were necessary within a five- to seven-month period after purchase, the failed parts were obviously either severely worn or defective at the time of sale.[37]

Another third circuit decision, *Ambrose v. M & M Dodge, Inc.*,[38] addressed the question of when the defect arose in a new automobile, which required ten attempts within approximately fourteen months of sale to repair. The "abnormal and unreasonable number of repairs" required by the thing led the court to find that "[t]here is no other logical explanation for the problems which plaintiff experienced . . . other than a defect that existed at the time of sale."[39]

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31. 520 So. 2d 1136 (La. App. 3d Cir. 1987).

32. Id. at 1138. The brakes were repaired, and the court does not classify the tune-up problem one way or another. However, there apparently is no "test-drive" requirement under article 2521, so the need for a tune-up would be a nonapparent defect, if it is a redhibitory defect at all. See Prince v. Paretti Pontiac Co., 281 So. 2d 112 (La. 1973); Williamson v. Strange, 323 So. 2d 875 (La. App. 2d Cir. 1975); Wiltz v. Dixie Auto Sales, Inc., 315 So. 2d 811 (La. App. 3d Cir. 1975).

33. 520 So. 2d at 1138.

34. Tuttle v. Lowery Chevrolet, Inc., 424 So. 2d 1258 (La. App. 3d Cir. 1982). The court in *Wagnon* also relied on Riche v. Krestview Mobile Homes, Inc., 375 So. 2d 133 (La. App. 3d Cir. 1979), a case which involved a new mobile home that had defects which appeared three months of sale.

35. 488 So. 2d 325 (La. App. 3d Cir. 1986).

36. 399 So. 2d 762 (La. App. 3d Cir. 1981).

37. The purchaser in *Washington* was awarded a $1,330.54 reduction in price. 488 So. 2d at 327.

38. 509 So. 2d 444 (La. App. 3d Cir. 1987).

39. Id. at 447.

The Definition of Vice or Defect

Component Parts

Civil Code article 2520 defines redhibition in terms of "some vice or defect in the thing sold." Thus, if one part of a *whole* thing is redhibitorily defective, such as a transmission in an automobile, article 2531 mandates repair or restoration of the price;[40] if, on the other hand, the defective thing is a *separate* thing, that is, a separate component part that is designed and purchased to work with other separate things to form a whole, the Civil Code has no express provision.

The question of characterizing a defective thing as either part of a whole or as a separate thing arose in *Atkinson v. Total Computer Systems, Inc.*[41] The purchase in this case consisted of a computer, a printer, and an accounting software package. The trial court found that the computer was free of redhibitory vices, but that the printer and the software package were defective. The trial court then considered the computer-printer-software as an entire system, and, finding that this entire system had not been so useless that rescission was justified, granted relief in quanti minoris. The purchaser argued on appeal that since a part of the system was defective the entire system—computer, printer, and software—should be viewed as redhibitorily defective, and thus that rescission, not quanti minoris, was the proper remedy.

The first circuit agreed and reversed the trial court. The court held that the transaction should be treated as the sale of a *system* as a whole, designed to meet the purchaser's word processing, inventory, billing, payroll, and basic accounting needs. "[E]ach component," noted the court, "was carefully chosen . . . to form a system . . . ." The inconvenience caused by the defects in this "system" was such that rescission of the entire sale was warranted. The *Atkinson* decision left open the question of availability of rescission of the entire transaction had a lesser defect occurred, as if only the software or the printer had been defective.[42]

Noncompliance with Building or Manufacturing Codes

Just as a lessor breaches the implied warranty of suitability for use by failing to comply with building codes,[43] a seller might breach the

40. La. Civ. Code arts. 2541-43 provide for a reduction in the price in certain cases.

41. 492 So. 2d 121 (La. App. 1st Cir. 1986).

42. Cf. Photo Copy, Inc. v. Software, Inc., 510 So. 2d 1337 (La. App. 3d Cir. 1987) (a redhibitorily defective customized software package resulted in a reduction in price under article 2543).

43. La. Civ. Code art. 2692. The implied warranty of compliance with building codes has long been recognized in lease transactions. If leased premises do not conform to

redhibition warranty[44] through noncompliance with an applicable building or manufacturing "code." The Louisiana legislature apparently recognized such a notion in Louisiana Revised Statutes 51:911-23 (F),[45] which provides that in any redhibitory action against the seller of a manufactured home or mobile home, the standards set forth in the Uniform Standards Code for Mobile Homes and Manufactured Housing (USCMH) "shall be considered in establishing whether or not a defect exists." By the express terms of section 911-23 (F), a showing of noncompliance with the USCMH does not prove that there was in fact, a redhibitory defect; noncompliance is merely probative.

The converse issue was raised in *Bott v. Sterling Homes, Inc.*[46] In that case, the manufacturer argued that since it had constructed its mobile home in full compliance with the USCMH, section 911-23 (F) absolved it of liability. The third circuit ruled that compliance with such standards does not decide the issue of whether the mobile home had a defective condition. Neither compliance nor noncompliance with the uniform standards, therefore, are outcome-determinative in a redhibition action; the standards are simply "to be considered" in the action.

The Seller's Obligation/Opportunity to Repair

Redhibition

Article 2531 of the Civil Code grants the seller the right to attempt repair of the "vices" on the thing sold.[47] A key issue in most redhibition cases will be whether sufficient opportunity to repair was given. Only when the seller has had all the opportunity to repair which article 2531 entitles him may the buyer tender for rescission and restoration of the price, or seek repairs elsewhere.

Under the pre-1974 jurisprudence, the good faith seller could not tinker indefinitely with the thing in the hope of ultimately correcting

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housing or building "codes," the lessee is entitled to the repair or obviation of the nonconformity, or, alternatively, he may vacate the premises if his health or safety is threatened by the noncompliance. La. Civ. Code art. 2694. See Chagnard v. Schiro, 166 So. 496 (La. App. Orl. 1936); Evans v. Does, 283 So. 2d 804 (La. App. 2d Cir. 1973). See also La. Civ Code arts. 2692, 2693, and 2695.

44. See Tassin v. Slidell Mini-Storage, Inc., 396 So. 2d 1261 (La. 1981).

45. 1986 La. Acts No. 654.

46. 527 So. 2d 548 (La. App. 3d Cir. 1988).

47. Prince v. Paretti Pontiac Co., 281 So. 2d 112 (La. 1973). Prior to the 1973 Louisiana Supreme Court decision in *Prince*, the bench and bar assumed that a good faith seller had a right to a reasonable number of attempts to repair an alleged redhibitory defect and the purchaser had an obligation to allow such repairs to be made. However, in *Prince* the court held that no such seller-right or purchaser-obligation existed. Just one year later, the Louisiana Legislature amended article 2531 to provide for such a repair opportunity. Article 2531 did not, however, specify the number of repair attempts that would be reasonable for a good faith seller to demand.

its redhibitory vices.[48] Several decisions indicate that when a seller has had "ample" opportunity to repair,[49] made "repeated" or "several" attempts to repair,[50] or tried on "numerous occasions" to repair,[51] but has been unsuccessful in curing the defect, the purchaser need not afford him further opportunity to repair before demanding restoration or reduction of the price. This jurisprudence provides sufficient guidance for the conclusion that it is the nature of the opportunity to repair, rather than the number of repair attempts, that is decisive. Thus, if the seller had the opportunity and the equipment[52] to make a proper diagnostic inspection, and yet the defect was not cured, he must then demonstrate that the cause of the vice is one that could reasonably escape those diagnostic procedures which he, as a reasonable seller, used.[53] If he cannot demonstrate this, the jurisprudence indicates that one repair

48. See, e.g., Media Prod. Consult., Inc. v. Mercedes-Benz of N. Am., Inc., 247 So. 2d 266, rev'd on other grounds, 262 So. 2d 377, on remand, 264 So. 2d 686 (La. App. 4th Cir. 1972); A. Baldwin Sales Co. v. Mitchell, 174 La. 1098, 142 So. 700 (1932); Murret v. Mark II Elec. of La., Inc., 169 So. 2d 556 (La. App. 4th 1964); Stewart v. Mumme, 14 La. App. 221, 131 So. 683 (La. App. Orl. 1930).

49. In Kodel Radio Corp. v. Shuler, 171 La. 469, 131 So. 462 (1930), and Bishop & Babcock Co. v. Martino, 9 La. App. 359, 120 So. 517 (La. App. Orl. 1928), seller apparently made no serious effort to repair, though buyer afforded seller "ample" time and opportunity to do so. The only substantive reference made in *Kodel* was that buyer made constant complaints of the unsatisfactory performance of the thing. See also Hi Pure Indus., Ltd. v. Ecco High Frequency Corp., 356 So. 2d 1043 (La. App. 1st Cir. 1977).

In Forstall v. Stewart, 12 La. App. 628, 126 So. 705 (La. App. Orl. 1930), and Dolese v. Rousseau, 4 La. App. 49 (1st Cir. 1926), sellers attempted, without success, to cure the problem. The seller in *Forstall* tried on four occasions; in *Dolese* the seller tried on at least three occasions in an eight-month period. Cf. Co-Operative Cold Storage Builders, Inc. v. Arcadia Foods, Inc., 291 So. 2d 403 (La. App. 4th Cir. 1974) (repair attempts by a building contractor).

50. LaFleur v. Boyce Mach. Corp., 294 So. 2d 498 (La. 1974); Davis v. Bryan Chevrolet, Inc., 148 So. 2d 800 (La. App. 4th Cir. 1962); Fisher v. City Sales and Serv., 128 So. 2d 790 (La. App. 3d Cir. 1961).

51. Wade v. McInnis-Peterson Chevrolet, Inc., 307 So. 2d 798 (La. App. 1st Cir. 1975); Gonzales v. Southwest Mobile Homes, Inc., 309 So. 2d 780 (La. App. 3d Cir. 1975); Ticheli v. Silmon, 304 So. 2d 792 (La. App. 2d Cir. 1974); Pertuis v. Islander Motorhomes, Inc., 294 So. 2d 284 (La. App. 1st Cir. 1974); Breaux v. Winnebago Indus., Inc., 282 So. 2d 763 (La. App. 1st Cir. 1973); Head v. Tri-State Motors, Inc., 190 So. 186 (La. App. 2d Cir. 1939).

52. Lack of proper equipment or of skilled employees would not be a defense to seller's failure to repair. See Reech v. Coco, 223 La. 346, 65 So. 2d 790 (1953); Harris v. Automatic Enter. of La., Inc., 145 So. 2d 335 (La. App. 4th Cir. 1962); Head v. Tri-State Motors, Inc., 190 So. 186 (La. App. 2d Cir. 1939).

53. See Murret v. Mark II Elec. of La., Inc., 169 So. 2d 556 (La. App. 4th Cir. 1964); Fisher v. City Sales & Serv., 128 So. 2d 790 (La. App. 3d Cir. 1961); Cobb v. Truett, 11 So. 2d 120 (La. App. Orl. Cir. 1942); Head v. Tri-State Motors, Inc., 190 So. 186 (La. App. 2d 1939).

attempt could very well be the only opportunity the purchaser need afford him.[54]

After a second or third attempt to diagnose and correct the cause of the thing's malfunction, the seller should be prepared to come forward with a defensible reason for his lack of success,[55] or, in the alternative, with convincing proof that he believed in good faith that his efforts had cured the defect.[56] If the seller is unable to demonstrate why his efforts have not been successful, or if his purported belief that he has cured the defects strains credulity,[57] the buyer should then be entitled to rescission, reduction of the price or the aid of a third party's repair services.

Recent legislative enactments may have influenced the thinking of the judiciary on this point. The 1984 Motor Vehicle Warranties enactment, popularly referred to as the "lemon law,"[58] requires that manufacturers make such repairs as are necessary to make a new motor vehicle conform to an applicable express warranty.[59] The Act limits the manufacturer to a reasonable number of attempts to bring the automobile into conformity, which must be made within a reasonable period of time. Section 1943A of the Act creates a presumption that the manufacturer (or its agent or authorized dealer) has undertaken a reasonable number of attempts to conform a motor vehicle to the applicable express warranty if within the term of the warranty or one year following delivery, whichever is earlier, the vehicle is: (a) out of service by reason of repair for a cumulative total of thirty or more calendar days, or (b) the same nonconformity has been subject to repair four or more times by the manufacturer, its agent or authorized dealer.

One may reasonably infer that the presumption of section 1943A, that four or more repair attempts is a reasonable opportunity to repair

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54. See Hi Pure Indus., Ltd. v. Ecco High Frequency Corp., 356 So. 2d 1043 (La. App. 1st Cir. 1977); Levy v. Ebeyer & Winteler, 3 La. App. 500 (Orl. 1926); Cf. Moran v. Willard E. Robertson Corp., 372 So. 2d 758 (La. App. 4th Cir. 1979).

55. Woodward-Wright & Co. v. Engel Land & Lumber Co., 123 La. 1093, 49 So. 719 (1909); Britt v. Leaderbrand, 39 So. 2d 645 (La. App. 2d Cir. 1949); Brown v. Madison Paint Co., 170 So. 353 (La. App. 2d Cir. 1936); Murret v. Mark II Elec. of La., Inc., 169 So. 2d 556 (La. App. 4th Cir. 1964); Bergeron v. Mid-City Motors, Inc., 162 So. 2d 835 (La. App. 1st Cir. 1964); Baughman v. Quality Mobile Homes, Inc., 289 So. 2d 376 (La. App. 1st Cir. 1973); Forstall v. Stewart, 12 La. App. 628, 126 So. 2d 705 (La. App. Orl. 1930); Drummond v. American Ins. Co., 159 So. 2d 61 (La. App. 1st Cir. 1963); Stumpf v. Metairie Motor Sales, Inc., 212 So. 2d 705 (La. App. 4th Cir. 1968); Clark v. McBride Dodge, Inc., 289 So. 2d 841 (La. App. 4th Cir. 1973).

56. Jordan v. LeBlanc & Broussard Ford, Inc., 332 So. 2d 534 (La. App. 3d Cir. 1976).

57. See Drummond v. American Ins. Co., 159 So. 2d 61 (La. App. 1st Cir. 1963).

58. La. R.S. 51:1941-48 (1987).

59. The term "warranty" means the manufacturer's written warranty, on a new motor vehicle, of the vehicle's condition and fitness for use. La. R.S. 51:1941(5) (1984).

or "cure," was enacted with the article 2531 jurisprudence in mind. In any event, it was predictable that section 1943A's "four attempts" or "thirty days" presumption would have an impact on the meaning of reasonable opportunity for repair in redhibition cases, at least in those that involve new cars or cars that have recently been put into their intended use.

True to this prediction, several recent cases have shown the influence of article 1943A on redhibition cases. The first circuit has relied on article 1943A as an expression of legislative will that four attempts at repair or thirty days should be equivalent to a reasonable opportunity to repair and therefore applicable to a case under article 2531. Thus, in *Dreher v. Hood Motor Co.*,[60] the court held that the seller had all the opportunity to repair to which it was entitled under article 2531, in part because the vehicle was out of service for a cumulative total of more than thirty days.[61] Likewise, in *Webb v. Polk Chevrolet, Inc.*,[62] the fact that the seller unsuccessfully attempted five times to correct a problem of engine "surging and killing" was one of the factors that led the court to conclude that the seller had not made a conscientious effort to find and repair the problem.[63] Section 1943A had no effect on the outcome, however, since the court also held that rescission and restoration of the price would not be appropriate in this case,[64] and that tender for repair is not necessary in a reduction of price case.

Quanti Minoris

Since the amendment to article 2531 in 1974, a number of decisions, such as *Webb*, have held that tender for repair is not a prerequisite to the action for reduction in price.[65] That view was criticized in a prior

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60. 492 So. 2d 132 (La. App. 1st Cir. 1986).

61. One of the first decisions to address the question of what constitutes a reasonable opportunity to repair was Dickerson v. Begnaud Motors, Inc., 446 So. 2d 536 (La. App. 3d Cir. 1984), in which the court cited favorably to a law review article in which the following factors were suggested as relevant: whether the buyer has been furnished with a substitute for the defective thing while it is being repaired, the extent to which the buyer's lifestyle is disrupted by the unavailability of the thing, how difficult the thing is to remedy, and the number of unsuccessful repair attempts. See 49 Tul. L. Rev. 484 at 488. The *Dreher* decision adds to that list the "thirty days out of service" notion of section 1943A.

62. 509 So. 2d 139 (La. App. 1st Cir. 1987).

63. Id. at 143.

64. La. Civ. Code art. 2543.

65. Robertson v. Coleman Oldsmobile, Inc., 451 So. 2d 1323, 1327 (La. App. 1st Cir. 1984); Dunn v. Pauratore, 387 So. 2d 1227 (La. App. 1st Cir. 1980); Rausch v. Hanberry, 377 So. 2d 901 (La. App. 4th Cir. 1979); Coffin v. Laborde, 393 So. 2d 915 (La. App. 4th Cir. 1981); Boeneke v. Trotter, 426 So. 2d 230 (La. App. 1st Cir. 1983).

Symposium[66] on the basis that, among other things, such a construction of article 2531 has no obvious support in the Civil Code and is contrary to the plain meaning of article 2544.[67] Although offered without analysis or critique of the prior, contrary decisions, *Almanza v. Ford Motor Co.*[68] seems correct in holding that a failure of the purchaser to afford the seller[69] a reasonable repair opportunity precluded both the redhibition and the reduction of price remedy. Perhaps the Louisiana legislature should consider a clarifying amendment that would integrate articles 2531 and articles 2541 through 2544.

Damages Under Article 2545

Revised article 1998 of the Civil Code arguably makes the recovery of mental anguish damages possible in breach of consumer contract cases. Such recovery had been all but impossible under former article 1934(3), the predecessor to article 1998, because of the narrow construction given to article 1934(3) in the *Meador v. Toyota of Jefferson, Inc.*[70] case. The *Meador* court refused to allow nonpecuniary damages under former article 1934(3) unless the object of the contract had been "intellectual gratification." Thus, nonpecuniary damages were unavailable in most consumer contracts before the revision.[71] Since mental anguish, rather than loss of profit, is the typical damage suffered by consumers in breach of contract cases, the *Meador* case was lamentable.

Revised article 1998 focuses not on intellectual gratification, but rather on gratification of a nonpecuniary interest.[72] Consumer contracts

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66. Hersbergen, Developments in the Law, 1980-1981—Consumer Protection, 42 La. L. Rev. 513, 526-30 (1982).

67. La. Civ. Code art. 2544 provides: "The action for a reduction of price is subject to the same rules and to the same limitations as the redhibitory action."

68. 499 So. 2d 733 (La. App. 3d Cir. 1986).

69. The decision incorrectly refers to the failure of the purchaser to provide defendants with an ample repair opportunity. 499 So. 2d at 735. The manufacturer and the dealer-seller were the defendants; however, a manufacturer has no right under La. Civ. Code article 2531 to a repair in any case. See Burns v. Lamar-Lane Chevrolet, Inc., 354 So. 2d 620 (La. App. 1st Cir. 1977).

70. 332 So. 2d 433 (La. 1976).

71. Automobile repair was the subject of the *Meador* decision; Ostrowe v. Darensbourg, 377 So. 2d 1201 (La. 1979) removed from the possible reach of 1934(3) a distinctively planned home.

72. La. Civ. Code art. 1998 provides:

> Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.
>
> Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.

rarely have pecuniary gain as their objects; hence the new focus on nonpecuniary interests under article 1998 should permit mental anguish damages, where provable, in most consumer contracts.

The third circuit considered the question recently in *Robert v. Bayou Bernard Marine, Inc.*[73] The trial court had assessed $5000 against a boat manufacturer for mental anguish suffered by the consumer-purchaser of a redhibitorily defective boat, and the third circuit court affirmed the award. In that case, the defect in the consumer's boat and the manufacturer's repairs to it caused the consumer to miss two seasons of fishing. The third circuit found that fishing and boating were the consumer's primary recreational outlets, and that the boat was purchased exclusively for recreational purposes. Thus, under article 1934(3) and the *Meador* decision,[74] the principal object of the contract was intellectual enjoyment (some concurrent physical gratification notwithstanding), and mental anguish damages were proper. Under new article 1998 a case such as *Robert* seems, beyond argument, an appropriate one for the award of mental anguish damages.

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73. 514 So. 2d 540 (La. App. 3d Cir. 1987).

74. The *Robert* case arose prior to enactment of revised article 1998.