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Obligations

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During the last year, the reported opinions again spanned the law of obligations, including offer and acceptance,[1] implied terms of agreements,[2] error,[3] solidarity,[4] parol evidence,[5] interpretation of agreements,[6] alternative debts,[7] subrogation,[8] promesse de porte-fort,[9] compromises,[10]

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1. E.g., Tauzier v. Lewis, 562 So. 2d 924 (La. App. 5th Cir. 1990).

2. E.g., Wilson Oil Co. v. Central Oil & Supply, 557 So. 2d 753, 758 (La. App. 2d Cir.)("When a contract does not have a stipulated term, courts will infer a reasonable term from the nature of the contract and the circumstances of the case . . . .") (citing LeBlanc v. City of Plaquemine, 448 So. 2d 699, 703, 705 n.5 (La. App. 1st Cir. 1984); Caston v. Woman's Hospital Foundation, Inc., 262 So. 2d 62 (La. App. 1st Cir.), writ denied, 262 La. 1087, 266 So. 2d 220 (1972)), writ denied, 563 So. 2d 885, 886 (1990).

3. E.g., Shepherd v. Allstate Ins. Co., 562 So. 2d 1099 (La. App. 4th Cir. 1990); Tauzier v. Lewis, 562 So. 2d 924, 927 (La. App. 5th Cir. 1990) ("Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.") (citing La. Civ. Code art. 1949; Kethley v. Draughon Business College, 535 So. 2d 502 (La. App. 2d Cir. 1988)).

4. E.g., Lanier v. Capital Resources Group, Inc., 563 So. 2d 557 (La. App. 4th Cir. 1990).

5. E.g., Amoco Prod. Co. v. McMorris, 552 So. 2d 1255, 1257 (La. App. 1st Cir. 1989) ("A party to an act may prove by parol evidence that consideration, although completely different than that recited in the act of sale, was in fact given.") (citing Quinn v. Stafford, 357 So. 2d 628 (La. App. 1st Cir. 1978); Bell v. Bell, 339 So. 2d 1333 (La. App. 3d Cir. 1976)).

6. E.g., First Nat'l Bank of Commerce v. City of New Orleans, 555 So. 2d 1345, 1348 (La. 1990); Commercial Nat'l Bank v. Keene, 561 So. 2d 813, 815 (La. App. 2d Cir. 1990) ("One who signs a contract is presumed to know its contents. Courts are not created to relieve one of a bad bargain.") (citations omitted).

7. E.g., Pogo Producing Co. v. Shell Offshore, Inc., 898 F.2d 1064 (5th Cir. 1990).

8. E.g., Great S.W. Fire Ins. Co. v. CNA Ins. Cos., 557 So. 2d 966 (La. 1990).

9. E.g., Citizens Bank & Trust v. West Bank Agency, 540 So. 2d 440 (La. App. 1st Cir.), writ denied, 542 So. 2d 1381 (1989).

10. E.g., Impastato v. Impastato, 562 So. 2d 30, 32 (La. App. 5th Cir. 1990) ("Compromise agreements are contracts and should be construed according to the true intent of the parties.") (citing Maltby v. Gauthier, 526 So. 2d 455 (La. App. 5th Cir.), writ denied, 531 So. 2d 474 (1988)); Landmark Land Co. v. Jemison, 558 So. 2d 802 (La. App. 5th Cir. 1990).

noncompetition agreements,[11] restrictive covenants,[12] proof of agreements,[13] specific performance,[14] damages,[15] intentional interference with contract rights,[16] and unjust enrichment.[17] The following discussion covers a few of the highlights.

Error and Settlements: Rush to Excellence?

Eighty-six years ago the Supreme Court of Louisiana had little difficulty in setting aside a contract of compromise in light of the following: the person releasing his personal injury claims was young and had recently had both of his legs amputated; the attending physician assessed the accident victim's state as "nearly dead"; and the transaction consisted of an agent for an insurance company putting $50 under the pillow of the young man in full "satisfaction of any and all . . . demands."[18]

Under other shocking circumstances, the intermediate appellate courts have closely examined the genuineness of the consent of a person in pain giving up all his potential claims in return for a paltry sum.[19] Another related concern, often surfacing in conjunction with scenarios of persons signing settlement agreements and receiving minuscule compensation while experiencing physical or emotional pain, is the so-called

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11. E.g., Education for Living Seminars, Inc. v. Leone, 558 So. 2d 250 (La. App. 1st Cir.), writ denied, 559 So. 2d 1378 (1990).

12. E.g., Diefenthal v. Longue Vue Management Corp., 561 So. 2d 44 (La. 1990); Prian Oaks Homeowners Ass'n v. Mocklin, 560 So. 2d 115, 117 (La. App. 3d Cir. 1990) ("Restrictive covenants are to be construed strictly.") (citing Clark v. Manuel, 463 So. 2d 1276 (La. 1985)).

13. E.g., Drachenberg v. Parish of Jefferson, 563 So. 2d 523 (La. App. 5th Cir. 1990).

14. E.g., Major Commodity Corp. v. Cunningham, 555 So. 2d 525 (La. App. 4th Cir. 1989).

15. E.g., Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1491 (5th Cir. 1990) ("[W]hen items of damage are of a nature susceptible to proof of an amount, and the plaintiff can prove them but does not, only nominal damages may be awarded.") (quoting Standard Plumbing Supply Co. v. United States Steel Corp., 703 F.2d 802, 804 (5th Cir. 1983)).

16. E.g., Great S.W. Fire Ins. Co. v. CNA Ins. Cos., 557 So. 2d 966 (La. 1990); 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989); Compadres, Inc. v. Johnson Oil & Gas Corp., 547 So. 2d 382 (La. App. 3d Cir. 1989).

17. E.g., Taylor v. Woodpecker Corp., 562 So. 2d 888, 892 (La. 1990) ("A claim for unjust enrichment cannot be employed to modify the positive law. . . .").

18. Davenport v. F.B. Dubach Lumber Co., 112 La. 943, 948, 36 So. 812, 814 (1904).

19. E.g., Davis v. Whatley, 175 So. 422, 423 (La. App. 1st Cir. 1937) (The appellate panel reversed the district court's granting of the exceptions of no cause or right of action and remanded for a full trial the case of an illiterate adult who, on the day after suffering injuries in an automobile accident, executed a general release in consideration of $5 while in "great pain and before he had been examined or treated by a doctor.").

"rush release."[20] This is a transaction, in a personal injury context, executed within a short time of the accident. While not necessarily invalid,[21] the Supreme Court of Louisiana has declared that the courts are "justified in recognizing [the] high potential for error . . . connected with the execution of this type of release."[22]

Shepherd v. Allstate Insurance Co.[23] addressed these two difficulties. On November 4, 1988, an automobile driven by Marie Laurent ran into the rear of a motor vehicle in which Cindy Shepherd was a passenger. David Walston, the driver of the automobile in which Ms. Shepherd was riding, spoke to Ms. Laurent and secured from her certain information, including the name of her insurance company and the policy number. Later that day, within a few hours of the incident, Mr. Walston and Ms. Shepherd visited the insurer's office where Ms. Shepherd signed a release form and received a check for $250. Sometime after negotiating the check, Ms. Shepherd filed a lawsuit. In response, the insurer submitted an exception of res judicata[24] which the trial court granted. Ms. Shepherd appealed, alleging the following: that she was in severe pain when she signed the settlement agreement, that she thought the $250 was merely an advance for medical payments, and that she did not understand the meaning of the document she signed.

The fourth circuit rejected Ms. Shepherd's arguments, noting several important facts. The evidence in the record revealed that Ms. Shepherd, a high school graduate with over a year of college education, and the representative of the insurer reviewed the release "line to line."[25] Additionally, the insurance adjuster, according to the testimony of Mr. Walston, explained to Ms. Shepherd "what it [the release] meant."[26] As a consequence, the appellate panel concluded that Ms. Shepherd signed the compromise willingly and that she had not been incapacitated by pain: "[When] literate and intelligent persons execute a release that is clear and unambiguous, they may not later have that release nullified, absent fraud, duress, or error. Failure to read a release is neither an acceptable defense nor a reasonable excuse."[27]

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20. E.g., Wise v. Prescott, 244 La. 157, 172, 151 So. 2d 356, 362 (1963).

21. A number of states have enacted legislation rendering rush releases void or voidable as a matter of public policy. E.g., Mass. Gen. L. ch. 271 § 44 (1990); Idaho Code § 29-113 (1989).

22. 244 La. at 173, 151 So. 2d at 362.

23. 562 So. 2d 1099 (La. App. 4th Cir. 1990).

24. La. Civ. Code art. 3078: "Transactions have, between the interested parties, a force equal to the authority of things adjudged. They can not be attacked on account of an error in law or any lesion. But an error in calculation may always be corrected."

25. 562 So. 2d at 1102.

26. Id.

27. Id. (citing Murphy v. Hoffpauir, 540 So. 2d 573 (La. App. 3d Cir.), writ denied, 544 So. 2d 406 (1989)).

While contracts of compromise should be the product of careful deliberations, until the legislature makes a determination to negate the practice of rush releases, the courts are bound to enforce them as long as parties consent to their terms. With regard to contractual error caused by debilitating pain, the courts have the unenviable task in concluding, on a case-by-case basis, whether the circumstances surrounding the signing of an agreement show that the person releasing his claim did not understand the contents of the contract.[28] On both counts, the court in *Shepherd* acquitted itself well.

Dividing the Spoils—Phantom Indivisibility

One of the more mysterious legislative classifications of obligations, according to object of performance, is that of the indivisible debt. Under both the Louisiana Civil Code of 1870[29] and the Civil Code as revised in 1984[30] an obligation is indivisible when its object cannot be divided, materially or intellectually.[31] One significant effect of a court labeling an obligation with more than one obligee or obligor as indivisible is that the debt is then subject "to the rules governing solidary obligations."[32] During the past term, the fourth circuit, in identifying an indivisible debt in *Lanier v. Capital Resources Group, Inc.*,[33] may have missed the mark.

The lawsuit grew out of a failed real estate development venture involving, among others, Frank Lanier, Jack Wood, and Eddy Rutman. Sometime in 1985, Mr. Lanier and Capital Resources Group, Inc. (Capital Resources) discussed purchasing and renovating an apartment com-

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28. Presumably, this is an objective examination.

29. La. Civ. Code art. 2108 (1870): "An obligation is divisible or indivisible, according as it has for its object, either a thing which, in its delivery or a fact which, in its execution, is or is not susceptible of division, either material or intellectual."

30. La. Civ. Code art. 1815: "An obligation is divisible when the object of the performance is susceptible of division. An obligation is indivisible when the object of the performance, because of its nature or because of the intent of the parties, is not susceptible of division."

31. See A. Levasseur, Precis in Conventional Obligations: A Civil Code Analysis 18 (1980) [hereinafter Levasseur]. Thus, as Dr. Litvinoff has written: "An object may be divisible as a matter of fact, for example a sum of money, or as a matter of fiction, for example the right of ownership that may be abstractly divided among co-owners. On the other hand, indivisibility may be *natural*, as when a thing cannot be divided without being destroyed, or *conventional*, as when, because of the parties' intent, an obligation must be performed as a whole even though, by its nature, its object may be rendered in parts."
S. Litvinoff, The Law of Obligations in the Louisiana Jurisprudence: A Coursebook 609 (2d ed. 1985) (emphasis in original).

32. La. Civ. Code art. 1818.

33. 563 So. 2d 557 (La. App. 4th Cir. 1990).

plex in New Orleans, with Capital Resources buying the property and Mr. Lanier's company handling the construction. Capital Resources had already signed a contract to purchase with the owners of the apartment complex and Mr. Lanier that it was not prepared to close. The owners of the apartments agreed to extend the terms of the purchase agreement if the prospective purchaser would replace a promissory note previously given as a deposit with $40,000 in cash. Mr. Lanier, with a $40,000 check drawn on the account of Metropolital Erection Company, satisfied the owners' demand. Shortly thereafter, Capital Resources, Mr. Wood, and Mr. Rutman repaid $30,000 to Mr. Lanier. Over the weeks that followed, Messrs. Wood and Rutman replaced Capital Resources as the prospective buyers of the apartments, secured financing for the purchase, informed Mr. Lanier that he would not perform the renovation work, and offered to allow Mr. Lanier to continue participating in the venture at a cost of one-third of the loan commitment fee.[34] Mr. Lanier declined this invitation and ultimately sued Messrs. Wood and Rutman, among others, for expenses and lost profits in connection with the project plus $10,000, representing the remainder of his payment to the owners of the apartments in consideration for their extending the deadlines of the purchase agreement.

The trial court awarded Mr. Lanier $10,000, representing his advance on behalf of Capital Resources (and, subsequently, for the benefit of Messrs. Wood and Rutman), and adjudged all of the defendants solidary obligors in his favor. On appeal, the defendants raised several contentions of error, including the charge "that the trial court erred in holding them solidarily liable [,] . . . contend[ing] that they should be cast for no more than their virile share of the debt."[35] In ruling upon this question, the fourth circuit oddly stated that the defendants were joint obligors, not debtors in solido,[36] but that, because the obligation of the defendants to Mr. Lanier "was indivisible [,] the matter is subject to the rules governing solidary obligations."[37]

In its opinion, the appellate court does not offer an explanation for its perception of the debt owed by Messrs. Wood and Rutman, and others to Mr. Lanier. This is not to say that the result and the conclusion are necessarily unjustified.

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34. Mr. Lanier's share would have been $43,333.33.

35. 563 So. 2d at 559. The defendants urged that solidarity is not presumed, La. Civ. Code art. 1796, and is a permissible finding by a court when plainly expressed by the agreement of the parties or by law.

36. Writing for the panel, Chief Judge Schott noted the following: "When different obligors owe together just one performance to one obligee, but neither is bound for the whole, the obligation is joint for the obligors. CC art. 1788. That was the situation between the defendants." 563 So. 2d at 559.

37. Id. (citing La. Civ. Code art. 1789).

Obligations to do, as opposed to obligations to give,[38] are "frequently indivisible."[39] For instance, each co-vendor of property "is bound to warrant the ownership of the thing sold, and consequently each is obligated to pay the full amount of damages that result if its buyer is evicted."[40] But that rule may well be related more to the principles of warranty, and its indivisible nature, than any other element of the contract. Further, there may have existed, among the parties, an intention that any one of the defendants would fully reimburse Mr. Lanier for his $10,000 advance.

The problematic nature of the decision is that the court, unfortunately, does not illuminate its position. Moreover, any rationale, while furnishing support for the outcome of the case, would be at odds with the panel's remark that "the law makes defendants solidarily liable."[41] *Lanier v. Capital Resources Group, Inc.* is confusing and troubling, not from the perspective of its resolution but by reason of the court's haste to label the debt owed by the defendants as indivisible without more than a truncated discussion of the whys and wherefores.

Choices and Alternatives: One From Column A and One From Column B, But No Substitutions

In *Pogo Producing Co. v. Shell Offshore, Inc.*,[42] the United States Fifth Circuit Court of Appeals faced a not uncommon dispute in the oil and gas industry. Several companies, including Pogo Producing Co. ("Pogo") and Shell Offshore, Inc. ("Shell"), executed an Operating Agreement in connection with the exploitation of a certain mineral lease. One clause of the contract provided that if a party did not "take or sell its share," the other parties were free to produce their shares, with the party not taking selling to recoup its portion "*from future production and/or in cash by suitable agreement.*"[43] By reason of another arrange-

38. See La. Civ. Code arts. 1756, 1986. The Civil Code of 1870 drew distinctions, "according to each object, regarding obligations to do, obligations not to do, and obligations to give." Schewe, Developments in the Law, 1988-89, Obligations, 50 La. L. Rev. 321, 331 (1989). See Levasseur, supra note 31, at 4-6; Schewe, On Obligations to Pay Money with a View Toward Stipulated Remedies and Usury, 44 La. L. Rev. 151, 153 (1983).

39. Levasseur, supra note 31, at 18-19.

40. La. Civ. Code art. 1815, comment (b) (citing Soule v. West, 185 La. 655, 170 So. 26 (1936); Collins v. Slocum, 317 So. 2d 672 (La. App. 3d Cir.), writ denied, 321 So. 2d 362, 363 and 364 (1975)).

41. Lanier v. Capital Resources Group, 563 So. 2d 557, 559 (La. App. 4th Cir. 1990).

42. 898 F.2d 1064 (5th Cir. 1990).

43. Id. at 1065 (quoting Section 10.4 of the Operating Agreement) (emphasis in original).

ment, Pogo was committed to offer its share to United Gas Pipeline Company ("United"). The other parties to the Operating Agreement sold their gas to another pipeline company. Because United "did not have a pipeline connection to the lease and was therefore unable to take deliveries of Pogo's gas,"[44] for several years Pogo did not deliver its share of production to any buyer.[45] The other co-owners sold their gas during this time. After locating a buyer of its portion of the production from the lease, Pogo made an overture to Shell to resolve the "imbalances in production" by allowing it to "balance in kind,"[46] or take its prior non-produced share out of future production. When the parties did not agree to the manner of the taking in kind, Pogo "sought a one-time cash settlement."[47] Shell refused and Pogo filed suit, "seeking a cash recovery for approximately 2,000,000 Mcf of underproduced natural gas."[48] Shell moved the district court to issue an order granting it summary judgment, arguing (1) that the Operating Agreement did not support Pogo's demand for cash and (2) that the custom of the industry required balancing in kind. The trial court agreed with Shell, and Pogo noticed an appeal.

The most noteworthy issue addressed by the Fifth Circuit dealt with Pogo's reading of a clause in the Operating Agreement, specifying that a "*non-producing party . . . may recoup or recover [its] share from future production and/or in cash by suitable agreement*,"[49] as creating alternative obligations, the performance of either of which would satisfy the debt. In Pogo's view, Shell and the other parties to the Operating Agreement had the choice to select the method of balancing,[50] until they refused to do anything, after Pogo made demand upon them. Thereafter, Pogo contended, it was entitled to make the election[51] and the obligation was payment in cash.

The flaw in Pogo's argument flows from the language of the Operating Agreement it urged as the source of its relief. Only one method of performance is absolute: the non-producing party may recoup or recover its share in kind. If, however, that solution is not desired by

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44. Id.

45. Pogo began delivery to Texas Eastern Transmission Company in February of 1985.

46. 898 F.2d at 1065.

47. Id.

48. Id.

49. Id. (quoting Section 10.4 of the Operating Agreement).

50. La. Civ. Code art. 1809: "When an obligation is alternative, the choice of the item of performance belongs to the obligor unless it has been expressly or impliedly granted to the obligee."

51. La. Civ. Code art. 1810: "When the party who has the choice does not exercise it after a demand to do so, the other party may choose the item of performance."

the parties, the Operating Agreement admits of their ability to settle their differences "in cash by suitable agreement."[52] Thus, the parties left open the possibility of negotiating compromises outside of the terms of the Operating Agreement.[53] That certainly is not an obligation in existence, and that inchoate prospect cannot stand as an alternative debt. Accordingly, the Fifth Circuit properly affirmed the judgement of the district court dismissing Pogo's action.

On Fouling Deals: Intentional Interference With Contract Rights

Perhaps the crack in the resistance of the courts of Louisiana to authorize the action for intentional interference with contract rights[54] meaningfully appeared in 1984.[55] Regardless of the differences about chronology, few likely were stunned when the Supreme Court of Louisiana in *9 to 5 Fashions, Inc. v. Spurney*[56] set aside *Kline v. Eubanks*,[57] as well as a number of other decisions[58] including, at least in part, *a fortiori* (although it did not specifically reference it) *Forcum-James Co. v. Duke Transportation Co.*[59] insofar as it would disallow a claim against a corporate officer for "intentional and unjustified interference with the contractual relation between his employer and a third person."[60] Thus, it was confounding to a number of followers of the reporters when the third circuit court of appeal proclaimed, without qualification, six months after the decision in *9 to 5*, "that Louisiana law does not recognize the tort of intentional interference with contracts."[61] During the past

52. Pogo Producing Co. v. Shell Offshore, Inc., 898 F.2d 1064, 1065 (5th Cir. 1990).

53. Id. The district court labeled this proposition an "agreement to agree," a phraseology with which the appellate panel concurred. The salient language in the Operating Agreement more precisely should be viewed as an agreement to negotiate in good faith rather than a promise to reach any agreement.

54. See Schewe, Developments in the Law, 1983-84, Obligations, 45 La. L. Rev. 447, 465-66 (1984).

55. Sanborn v. Oceanic Contractors, Inc., 448 So. 2d 91, 95 n.5 (La. 1984); PPG Indus., Inc. v. Bean Dredging, 447 So. 2d 1058, 1059 n.1 (La. 1984).

56. 538 So. 2d 228 (La. 1989). See Morris, Developments in the Law, 1988-89, Business Associations, 50 La. L. Rev. 211 (1989) (an excellent review of *9 to 5*).

57. 109 La. 241, 33 So. 211 (1902).

58. Templeton v. Interstate Elec. Co., 214 La. 334, 37 So. 2d 809 (1948); Cust v. Item Co., 200 La. 515, 8 So. 2d 361 (1942); Hartman v. Greene, 193 La. 234, 190 So. 390 (1939); Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1927); B.J. Wolf & Sons v. New Orleans Tailor-Made Pants Co., 113 La. 388, 37 So. 2 (1904); Moss v. Guarisco, 409 So. 2d 323 (La. App. 1st Cir. 1981).

59. 231 La. 953, 93 So. 2d 228 (1957).

60. 538 So. 2d at 234.

61. Compadres, Inc. v. Johnson Oil & Gas Corp., 547 So. 2d 382, 390 (La. App. 3d Cir. 1989) (citing Cust v. Item Co., 200 La. 515, 8 So. 2d 361 (1942); Luck v. Fricks, 511 So. 2d 1315 (La. App. 2d Cir.), writ denied, 514 So. 2d 455 (1987); Charles v. Faust, 487 So. 2d 612 (La. App. 4th Cir. 1986)).

term, the supreme court may have somewhat clarified this subject and the issue of the existence or non-existence of this sort of claim.[62] Writing for the majority in *Great Southwest Fire Insurance Co. v. CNA Insurance Companies*,[63] Justice Dennis stated the following: "This court recently recognized for the first time in some 87 years the possibility of a narrowly drawn action for *intentional* interference with contractual rights and indicated that it would proceed with caution in expanding that cause of action."[64]

While the court's remark was not essential to the holding of the case and is not free from ambiguity, it does promote a measure of comfort. In the not-too-distant future, the supreme court may have the opportunity to make the recognition of a demand for intentional interference with contract rights and align the law of Louisiana "with the rule prevailing in every other jurisdiction in this country."[65]

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62. Great S.W. Fire Ins. Co. v. CNA Insurance Cos., 557 So. 2d 966, 969 (La. 1990).

63. 557 So. 2d 966 (La. 1990).

64. Id. at 969 (citing 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989)).

65. Schewe, supra note 54, at 466. See Malone, Torts, The Work of the Louisiana Appellate Courts for the 1963-64 Term, 25 La. L. Rev. 334, 341 (1965) ("Unfortunately, Louisiana is the only remaining American jurisdiction where the malicious inducement of a breach of contract is not regarded as an actionable wrong.").