The Role of "Unilateral" Error in Contract Rescission, Construction, and Damage Valuation: A Modest Proposal

David E. Redmann Jr.
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I. INTRODUCTION

The civil law in general, and Louisiana law in particular, have treated many contract law problems in an intellectually accurate and evenhanded manner. Although many cases would be decided the same way under either Louisiana law or common law, the two systems treat “unilateral” error differently, both theoretically and practically. While at common law unilateral error regarding a contract is often inconsequential, in Louisiana it can be the basis for rescission. Although a cursory inspection of the law might lead one to believe that error plays a limited role in Louisiana contract law, this is not so. Many of the provisions controlling the existence and construction of a contract, as well as the damages available, implicate questions of error to a considerable extent. It is impossible to apply properly these provisions without understanding the role of error and fault. Contract law can only serve contracting parties to the extent that its theoretical foundations reasonably reflect the typical conditions in which the parties operate. Frequently theoretical evaluations of contract law fail to consider that in many cases there is little or no mutual will because one or both parties have behaved in a substandard manner. This theoretical gap could be filled by the following rule: when the court cannot determine with any reasonable degree of certainty what the parties actually intended or what their contract objectively means, the court should attempt to resolve the dispute by considering the parties’ respective fault causing the misunderstanding.

When the court finds that there was no apparent agreement between the parties, justice is best served by allocating any costs of the misunderstanding to the party or parties who created it. Insofar as the parties share responsibility for the

1. Other contract law differences include: Louisiana requires “cause” whereas the common law requires “consideration”; and Louisiana law prefers specific performance, which the common law disfavors.
2. See Restatement (Second) of Contracts § 153 (1981). The Restatement explains that, among other requirements, a mistaken party may avoid the contract only when “(a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake.”
5. The traditional model of contracting might be characterized as: two parties, either themselves sophisticated or represented by counsel, negotiate the terms on a give-and-take basis and reduce the entire agreement to one written document. At least one author has averred (semi-humorously) that the last time this happened was 1879. See James D. Gordon III, How Not to Succeed in Law School, 100 Yale L.J. 1670, 1696 (1991). Although the point may be over-stated, it is probably true that there are now more “contracts” which the parties enter after less than a full bargaining and drafting process.
misunderstanding, it is just to allocate the costs of it to all of the responsible parties in fault-based proportions. Thus, justice is furthered by applying fault and comparative fault principles to contract cases in which the court cannot find that the parties had any particular agreement or that the agreement they executed has any particular meaning.

Besides promoting justice, the proposed rule will also increase the stability of transactions, which is arguably as important as achieving just results. However, when parties doubt the legal effects of their contract, three factors largely create this doubt: the parties' own substandard conduct during the contracting process, the courts' considerable discretion in contract disputes, and the Civil Code's contract interpretation articles which do not lead invariably to one result. The proposed rule is in part suggested specifically to reduce instability caused by the first factor. Moreover, it will also reduce instabilities arising from the law or the legal system. The party seeking contract rescission must prove: (1) the existence of his error; (2) the bearing of that error on a principal cause of the contract; and (3) the other party's knowledge that the subject of the alleged error concerned a principal cause. Once these are proven, the court nevertheless has considerable discretion on whether to grant rescission. Likewise, the court has considerable discretion on contract construction questions under the Civil Code's rules for "Interpretation of Contracts." By unwittingly choosing among these articles, one can often justify opposite results for the same contract. The court should consider the policies of the law in such cases for two reasons: only by doing so can it achieve stability; and to the extent that these articles can be ambiguous, the law requires the court to consider the relevant policies.

For the court to use legal or other public policies in guiding its considerable discretion, it must first determine exactly what those policies are. Under Louisiana contract law, three questions reflect the policies on resolving contract disputes: (1) what did the parties intend to bind themselves to; if the court cannot answer the first question completely satisfactorily, (2) what does the best objective interpretation of the contract require of the parties; and, unable to clearly answer one of the foregoing, (3) whose fault is it that the parties' intent and their objective manifestation thereof, usually a written contract, are unclear?

When the court cannot answer the first two questions satisfactorily, the court should consider the role of error and fault in the contractual misunderstanding.

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6. Although not truly contradictory, these articles could be misunderstood if applied out of context. See infra parts IV-B and IV-C.
10. La. Civ. Code arts. 2045-2057. See infra parts IV-B and IV-C.
11. "When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law." La. Civ. Code art. 10.
When a misunderstanding exists, at least one party is in error, whether the error is one legally sufficient to permit the court to grant rescission or not. Of course, not all errors are caused by one or both parties' faulty conduct, but there are several types of faulty conduct which regularly cause contractual misunderstandings, for example: failing to contract in sufficiently specific and clear terms; failing to explain one's goals in contracting and one's understanding of the proposed contract terms; or failing to provide contractually for a reasonably foreseeable contingency. If the court resolves the dispute based on error or fault and both parties' conduct is faulty, the only reasonable solution is to compare the fault of the parties and allocate the costs of the misunderstanding in proportion to their respective degrees of fault. Although not every misunderstanding or gap in contract terms is caused by faulty behavior, nevertheless, when faulty behavior makes resolving the dispute based on the parties' intent impossible, the court should allocate the costs of the misunderstanding to any and all parties responsible for it.

Many attorneys seem to believe that any interjection of questions of fault into contract law would invariably harm the stability of transactions. However, contract law better serves contracting parties when it encourages them to be clear during the contracting process. The more clear the contracting process and the contract document are, the fewer the resulting misunderstandings and the less time and money the parties lose because of these misunderstandings. The fuller use of fault-based principles in contract law as outlined above would promote both the stability of transactions and justice.

II. BACKGROUND

It is a common misperception that contract law is a field in which theory is of comparatively little importance. According to this inaccurate view, as long as the law is clear and well-known it may be relied on and applied with nothing more required. However, because the usefulness of contract law depends on the continuing relevance of its theoretical foundations, it is beneficial to consider briefly some of these underpinnings.

A contract is an agreement whereby the parties create, modify, or extinguish legal duties to each other. Because it is an agreement, its existence and effects depend on the will that the parties express. The parties can act on anything they

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15. For example, one lawyer told me that he once reviewed a contract for the sale of commodities between the United States and Canada. Although the contract specified the price in "dollars," it was unclear whether American or Canadian dollars were intended. His client told him to leave it ambiguous so that the client could urge whichever interpretation was more self-serving when the time came for payment. This misunderstanding, though careless in origin, was perpetuated deliberately. The law should discourage both negligent and intentional obscurity to increase stability and to decrease transaction costs.

16. The exact amount of explanation necessary will be a fact-sensitive determination. The contract's value, the transaction's regularity, and the parties' sophistication, among other things, are relevant to this determination.

agree to, but the utility of contract law lies in the parties' using it to order their rights and duties in an enforceable way. As long as the parties agree, there is no role for the coercive ability of the law. However, when the parties differ on whether they ever agreed to anything, what they agreed to, or whether they have met the agreement, they can use the legal system to resolve their dispute and enforce their agreement.  

When the parties use the legal system to resolve their dispute, it is generally because they no longer agree as they previously believed they did. Although in some cases one party may simply wish to ignore what he has agreed to do or may be unable to fulfill the agreement, such cases present issues outside the scope of this comment. In all other cases, the parties did not in fact fully agree. They may have failed to understand each other on some essential point of the transaction, or they may have agreed on the essential points of the matter but failed to consider some other points. When they have reduced their agreement to writing, the written contract may fail to show clearly either party's point of view, or it may show one's point of view and not the other's. Nevertheless, one or both of the parties were mistaken, or "in error," regarding the agreement. Although the parties in effect agreed to be bound by a reasonable interpretation of their contract, problems arise when no single interpretation of the contract is clearly more accurate than others. In such cases, one or both may file suit to enforce the agreement through the legal process.

The law must attempt to enforce the parties' agreement, regardless of how the law ascertains what the agreement actually is. Generally, the agreement will be a written set of provisions. If the law were to accept, without question, one party's assertion that he did not agree to the terms the other claimed, no agreement could ever be enforced, and contract law would be useless. Therefore, the law must attempt to determine the content of the parties' agreement. However, if one

18. "But when one party proposes, and the other assents, then the obligation [contract] is complete, and by virtue of the right each has impliedly given to the other, either of them may call for the aid of the law to enforce it [compel the other to perform his obligation]." La. Civ. Code art. 1803 (1870). This concept is recognized in other civil law jurisdictions. See, e.g., 2 Marcel Planiol & George Ripert, Traite Elementaire de Droit Civil § 1165, Part 1 at 661 n.2 (Louisiana State Law Institute trans. 1959):

It is certain that it is from the law that contracts derive their obligatory force, and that it [the law] could refuse it [the force] to them; but the contracting parties obligate because they want to, and if once concluded, the contract obligates each one of them in spite of himself, it is because the public authority sanctions the contract. This sanctioning role of the law does not destroy the anterior role of the will of the parties; one must not confuse the work of private wills, which determine the object and the extent of the promises made, with the exterior coercion applied to this pact by the public authority.

19. There is the problem of parol evidence, i.e., what may be used to demonstrate what a written document means. This is really a separate problem, and what is necessary to prove an obligation is dealt with in La. Civ. Code arts. 1831-1853.

20. There are so-called "objective" and "subjective" theories of contract law. These theories differ in their conclusions regarding whether a party's mental state or the outward manifestation thereof is more important. Few would suggest that subjective considerations should control the
party's interpretation of the agreement, though incorrect, occurred due to the other's lack of care when making the agreement, it would cause few problems for the law to refuse to enforce the agreement as understood by the party who misled the other. If one is careless when making the agreement, he can hardly claim the protection of the law in enforcing it. The law is useful when it enforces the will of the careful; it could be unjust to enforce the will of the careless.

The method the law uses to determine whether and how it will enforce any contract should be readily determinable beforehand, so that parties who wish to contract will know what standards of conduct they must meet before the law will enforce their agreements. Thus, explicit rules of law should set forth how the law will decide cases. However, no rule can provide for every situation, and many attempts to apply rules too literally will lead to unjust or absurd results. A rule of law utilizing error analysis can provide increased flexibility to help law accommodate reality and achieve justice. While the rules should not be subverted in the name of achieving the law's purpose, they frequently must be applied with an understanding of their purpose.

Error, and the related concept of fault, are often thought of as principles relevant solely to tort law. Conventional wisdom suggests that using tort law fault concepts to regulate contractual disputes does a disservice to all involved parties and promotes injustice by making the effect of contracts more uncertain and less reliable. Indeed, it is more important for substantive contract law to be stable than for it to be perfectly just. This is so because contracting parties are generally given a high degree of freedom and presumably can contract out of unwanted provisions of the law. In a sense, the contracting parties devise their own justice or law. On the other hand, tort law determines the rights and duties of parties who have made no previous provisions for their conduct vis-a-vis each other. Thus, tort law must be based on external rules, and not on ones created by the will of the parties. Nevertheless, the use of error for contractual analysis is not a radical proposal; indeed, it underlies many of the Civil Code's provisions.

Sometimes results, but to deny their relevance would be to do violence to the freedom of will which the civil law values. The concept of "unilateral" error, clearly mandated by the Civil Code, defines a limited area of Louisiana contract law in which partly subjective factors play a part. See, e.g., 1 Saul Litvinoff, Obligations § 135, at 223, in 6 Louisiana Civil Law Treatise (1969).

23. La. Civ. Code art. 10. See discussion infra parts IV-B and IV-C.
24. "Parties are free to contract for any object that is lawful, possible, and determined or determinable." La. Civ. Code art. 1971. Although this provision concerns what parties may contract about, the same spirit pervades rules on what interpretive provisions parties may stipulate. For example, parties are generally free to stipulate which state's or nation's law will govern their contract. See La. Civ. Code art. 3540 ("All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537.").
the court will be unable to determine the intent of the parties or will have to choose between two competing and equally tenable assertions regarding that intent. In such cases, judicious use of an error-, fault-, and comparative fault-based system of adjudication could increase certainty and encourage settlement. This would occur because the court could order remedies other than all-or-nothing ones in which one party's version of the contract would frequently end up controlling the contract's effects.

Another concern which defenders of traditional, somewhat doctrinaire positions express is that it would pervert contract law to consider the parties' subjective feelings instead of their objective manifestations. Certainly it would be a poor result not to protect a party who relied on the other party's objectively clear actions. However, several factors, including the overall obligation of good faith and the hostility to contracts of adhesion, give courts a mechanism to prevent one party from taking advantage of the other's inexperience or ignorance. There is ample basis and opportunity for judges to inquire whether a party's error is due more to passive unconcern or neglect, on the one hand, or reasonable misapprehension, on the other. A party may make every reasonable effort to express his intent when contracting, yet fail to communicate that intent to the other party or incorporate it into the terms and conditions of the contract. Thus, a party may be in error regarding the expressed meaning of a contract even after making objectively reasonable expressions of intent.

III. ERROR AND FAULT RELATING TO THE FORMATION OF AND THE EFFECTS ON THE EXISTENCE OF CONTRACTS

The area of Louisiana contract law in which the meaning of error is best defined encompasses the most basic question: is there a legally enforceable agreement between the parties? Louisiana law requires four elements before any agreement can be considered an enforceable contract: parties with capacity to contract, their consent to the contract, a lawful cause of the contract, and a determined or determinable object of the contract.

(exchange involving thing belonging to neither party).


28. See, e.g., La. Civ. Code art. 2056, cmt. (c): "Under the Article, a contract of adhesion must be interpreted against the party who prepared it."

as a "meeting of the minds" of the contracting parties. If the parties do not agree to the same essential terms at the same time, there is no contract.

A. The Standard for Legally Binding Consent

The Louisiana Civil Code provides that even if there is an apparent manifestation of consent, that consent is not necessarily legally valid. Consent may be defective because of error, fraud, or duress. Unlike at common law, the error need not be mutual, i.e., both parties need not have the same misapprehension of some material fact. In Louisiana, all contracts require a lawful cause, which is "the reason why a party obligates himself." The party not in error need not know of the error for the contract to be subject to rescission, but need only know that the subject matter of the error was a cause without which the other party would not have made the contract. At times this has been referred to, somewhat misleadingly, as the principal cause.

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30. The idea that a contract involves a meeting of the minds is frequently mentioned, though seldom fully explained, in American jurisprudence. See, e.g., Benglis Sash & Door Co. v. Leonards, 387 So. 2d 1171, 1172-73 (La. 1980), in which the court explained, "[T]he parties can consent to buy and to sell a certain thing for a reasonable price, and when they do, the contract of sale has been perfected. The essential thing is that there be a meeting of the minds (as opposed to a disagreement) as to price." In Bowsher v. Merck & Co., Inc., 460 U.S. 824, 864, 103 S. Ct. 1587, 1609 (1983), Justice Blackmun wrote:

A contract, after all, is a meeting of the minds. Many factors may affect one party's willingness to make an offer or the other party's willingness to accept it, but the vast majority of these factors are not mentioned in the bargaining process and play no part in the agreement ultimately reached.

(Blackmun, J., concurring in part and dissenting in part). For an older discussion of this idea, see Tayloe v. Merchants' Fire Ins. Co. of Baltimore, 50 U.S. (9 How.) 390, 401 (1850).

31. Consent may be legally invalid yet morally valid. For example, when a seventeen-year-old person contracts, the contract may be annulled because of the legal incapacity of one party. That party's consent was defective due to lack of capacity. However, such a party would be under a moral obligation to abide by the terms of the contract if he in fact understood and consented to the transaction. See, e.g., La. Civ. Code art. 1762(2).


33. La. Civ. Code art. 1949, cmt. (d) states that "it is not necessary that the other party have known of the mistake; it suffices that he knew or should have known that the matter affected by the error was the reason that prompted the party in error to enter the contract."


36. La. Civ. Code arts. 1949, 1950. An example illustrating this rule is Article 1837 (1870): "Thus, if intending to employ an architect of great eminence, the party addresses himself by mistake to one of the same name [and of the same profession], who has [neither skill nor reputation], the promise made to him for compensation is void . . . ." (The altered material reflects corrections of the mistranslations of the French text.) The rule of Article 1837 (1870) was generalized and incorporated into Article 1952 (1984), according to cmt. (a) to the latter article.

37. The requirement of "principal cause" comes from La. Civ. Code art. 1825 (1870) (and the identical Article 1819 (1825)), which stated, "The error in the cause of a contract to have the effect of invalidating it, must be on the principal cause, when there are several; this principal cause is called
The provisions of the law may seem odd, at least initially, in that they seem to depend on subjective factors. Louisiana Civil Code articles 1949 and 1950 state:

Art. 1949. Error vitiates consent

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.

Art. 1950. Error that concerns cause

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

The meaning of these articles, and the substantially similar ones which predated them, is well settled. The articles require (1) the error be one which, had the truth been known, the party in error would not have made the contract; and (2) the party not in error knew or should have known that the subject matter of the error was essential to the other party. When both of these requirements are met, the consent of the party in error is vitiated, and the court may grant rescission based on the lack of lawful consent. There is no requirement that the other party know of the error itself.

B. The Rationale for Error in Louisiana

The rationale for the lower standard (vis-a-vis the common-law) required to rescind the contract is not immediately clear. Why does it matter that the party not in error knew that the subject of the error was essential to the other party when the error itself was unknown? Is this simply a method of providing greater protection for parties in error while still placing some limits on that protection?
The best reason for this requirement is that, when one party is put on notice that a given detail is essential to the other party, that party is required to exercise reasonable care to see that the contract being contemplated does in fact embody that essential detail. Thus, not only must a party not take advantage of the other's inferior knowledge, but that party must also make an effort to discover the other's intent and attempt to satisfy it. When the party not in error was reasonably apprised of what the other wanted, but made no effort to see that the other's want was achieved by the contract, the party not in error has not truly fulfilled the requirement of good faith and thus may lose the benefit of the contract through rescission. Rescission is a just remedy because the party "not in error" was nevertheless partially at fault for its existence; only with this understanding can the rationale of rescission for unilateral error be applied in its proper context.

C. The Jurisprudence

1. Traditional Cases Granting Rescission

The revised articles are in line with the greater weight of jurisprudence. The cases indicate the judiciary has not hesitated to rescind contracts for unilateral error as defined above, although rescission may be accompanied by measures to protect the other party. In *Greater East Baton Rouge KOA, Inc. v. Lamar Corp.*, Lamar, an advertising company, contracted to remove and replace KOA's outdoor advertising sign. The new sign which Lamar contracted to erect needed to meet state requirements for sign spacing and Lamar needed to place another sign on Reverend Henry Roan's property, which Lamar leased. Before the work was done, the company discovered that the proposed location of the new sign (on Reverend Roan's property) was in a state highway right-of-way.

[T]he trial court held that Lamar's principal motive was to place a sign on the Reverend Roan's property that would be economically useful and feasible to them as an advertising company. The court found that because of the State's right of way they were not able to do it. We agree with the court.

The placement of the new sign was a principal cause of the contract, and the court held that rescission was the proper remedy for the error, i.e., that the proposed sign locations were legally available.

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42. This occurs when the party knows of the error itself.
43. See also Saul Litvinoff, "Error" in the Civil Law, in Essays on the Civil Law of Obligations 222, 266-69 (Joseph Dainow ed. 1969).
44. 481 So. 2d 654 (La. App. 1st Cir. 1985).
45. Id. at 655.
In *National Company v. Krider*, homeowners contracted to have siding installed on their house. Although they contracted to reduce the maintenance on their house, they mistakenly believed that the underlying wood was to remain in place. The court held that the error did, in fact, bear on a principal cause of the contract:

While defendants were interested in eliminating maintenance, the principal cause or motive here was the placing of aluminum siding on the house, conditioned upon the work being done in a manner which would retain all of the building’s wooden materials. And there was a misunderstanding regarding the manner in which the work was to be done, an error of fact as to what the factory directions stated, between defendants and plaintiff’s representative.

The court therefore granted rescission.

This might seem to cause great mischief by allowing rescission of contracts against parties who acted completely reasonably and fairly. However, the law protects the interests of parties not in error by allowing courts to award damages to the party not in error or refuse rescission when appropriate. Furthermore, courts have been ready to protect such parties when the party in error has brought about the error through his own lack of due care. Frequently the question of whether rescission for unilateral error will be granted turns on considerations of how careless or faulty the conduct of the parties was. For example, the party in error may have been careless in examining the contract and/or the party not in error may have failed to explain himself or the contract sufficiently. When the recission-seekings party’s carelessness or fault is very slight, the courts have granted rescission.

2. *Cases in which Negligence or Fault of the Party in Error was a Defense to an Action for Rescission*

Courts have long refused to grant rescission for error when the error arose due to the deficient conduct of the party in error. This rule dates back at least to *Wikoff v. Townsend*. The plaintiff sued for the price of a lot in New Orleans sold to the defendants. The plaintiff told the defendants the size of the lot, but the defendants believed that the lot consisted of all of the vacant ground in the area.
including a thirty-foot-wide strip that was not for sale. The defendants pled that they were in error concerning the extent of the lot. In rejecting their plea, the court explained,

We do not think that this is an error which vitiates the contract. The defendants understood they were purchasing a space of two hundred feet in front: they knew, or at least must be supposed to have known, what extent that was. If they wanted to satisfy themselves on that score, they might have had it measured: but, if relying on their own judgment they made any mistake, as to the real extent of the two hundred feet, they cannot plead such a mistake as an excuse. 51

The court thus refused rescission when the error was one which the party in error (the buyer) could have easily prevented, after having been correctly informed of the lot's dimensions by the seller. 52

Other venerable cases have reached substantially similar results. In Boullt v. Sarpy, 53 the court considered the effect of signing an instrument which one has not read and stated that if “informed, as he must have been . . . he—nevertheless—signed the note as such, and as signatures to an obligation are not mere ornaments, he cannot justly expect to be relieved from the effects of his own act . . . .” 54 Many cases have followed, which hold that contracting without making reasonable efforts to learn of the contractual terms is inexcusable error, depending upon the parties involved and the circumstances of the transactions. 55

More recently, the court in Allen v. Royale 16, Inc. 56 considered an alleged error concerning the articles of incorporation of a new company. A shareholder had the opportunity to read and modify the articles, but waited four months to do so. After a fight for control and an examination of the articles, the shareholder claimed

51. Id. at 452-53.
52. The facts raise the question: should the seller have known of the buyers’ error? The reported record shows that the court seems to have rejected the buyers'/defendants' contention that the seller misled them or knew what they expected. Id. at 452.
54. Id. at 495-96.
55. For a recent and especially strong example, see Bogalusa Community Medical Center v. Batiste, 603 So. 2d 183 (La. App. 1st Cir. 1992). There, a widow signed a financial responsibility form so that her (then living) husband could get medical treatment at the hospital where he was employed. She claimed that she signed the form to begin treatment but had no intent to obligate herself for the expenses. The court held that

- [t]he law provides that a party to a contract is presumed to know its contents and cannot avoid its obligations by contending that he did not read it, that it was not explained, or that he did not understand it . . . [T]he terms of the financial responsibility form clearly obligate the guarantor to pay for the medical services rendered to the patient identified on the form.

Id. at 186 (citations omitted). Thus, because the form itself was clear, the hospital did not owe Mrs. Batiste any explanation, and her failure to discover the nature of what she was signing was a product of her inexcusable fault.
56. 449 So. 2d 1365 (La. App. 4th Cir. 1984).
to be in error regarding the nature of the contract. The court held that "[o]ne who signs a contract... cannot avoid its provisions... simply because he fails to read or understand it. ... Apparently the articles were drafted hastily, but there was adequate time... for Allen to read [them] and make any necessary changes or correct errors." 57 The court refused to grant rescission because the error, if any, was inexcusable.

Likewise, rescission for error has been denied when the party in error did not properly communicate the cause to the other party. In Shreveport Great Empire Broadcasting, Inc. v. Chicoine, 58 a radio advertiser desired and expected a specific number of speaking engagements as a result of his advertisements. The court held that "[i]f the defendant required that such a provision be included in this agreement, he was bound to make his wishes known to the plaintiff and to be sure that the provision was included in the agreement." 59 Because the radio station neither knew nor should have known of this cause, the contract was upheld.

When rescission has been denied, the justification is usually that the party in error is to blame for the error. Although this may not quite be "fault" in the sense that tort law uses the word, nonetheless the conduct of the party in error falls below the standard of communication and investigation required by law, and thus the law grants no remedy. In such a case, even though the party not in error may have acted imperfectly, the party in error is primarily responsible for the error and therefore suffers the consequences of it. In a sense, the court compares the fault of the two parties and places the burden of the error on the party more responsible for it. The law should not protect a party whose fault has allowed the error to occur, at least when the other party is free of fault and would be harmed by rescission.

IV. ERROR AND FAULT REGARDING THE MEANING OF CONTRACTS

A. The Question of Construction in General

Just as the existence of a contract can be affected by error, the meaning of a contract can be affected by an error concerning the effect of the contract or one of its provisions. Two questions of contract law are essentially inseparable: first, is there a contract, and second, what are the contract's terms? Theoretically, if the parties do not agree on all essential terms, then there is no contract, in the sense that a contract requires a meeting of the minds. Problems typically arise when the parties fail to consider a given contingency or provide for a certain detail. Although there is no meeting of the minds in the fullest and most traditional sense, both parties behave (for a time, at least) as if there is a binding contract between them.

Any rule requiring that there must be a complete meeting of the minds is not practical for many modern contracts. Frequently it would be unfair to rescind a

57.  Id. at 1368.
58.  528 So. 2d 633 (La. App. 2d Cir. 1988).
59.  Id. at 637.
contract merely because the parties had a trivial misunderstanding. In Louisiana, a court may rescind a contract only for an error affecting a principal cause, i.e., a cause without which the contract would not have been made. When the misunderstanding (error) affects some other matter, rescission is not possible, and the court must attempt to interpret the contract and enforce it as interpreted. Thus, many disputes involving contract interpretation are cases of error, but either the error is legally insufficient to permit rescission or the parties want to retain the contract no matter which way the dispute is resolved.

When the misunderstanding or error is not so critical as to make rescission possible, the court should use Louisiana Civil Code articles 2045-2057 to aid in contract construction. These articles seem to present rules which are either counter-intuitive or contradictory because the law necessitates principles for contract construction which deviate considerably from the principles used in ordinary textual interpretation. However, this misconception usually occurs when the articles are considered outside of the framework in which they properly operate; the proper framework is one which considers error and fault of the parties when construing the contract. Ideally, the court, when interpreting a given contract, should ascertain the common intent of the parties. However, if the contract is ambiguous, the court’s task, to discover the common intent of the parties, proves impossible. When the contract language does not make one interpretation significantly more likely than another, Articles 2045-2057 place the burden of contractual misunderstandings on the party who could have better avoided them initially. Moreover, they seek to further equity and prevent one party from gaining a windfall at the other’s expense.

Although attorneys may be troubled by the idea that courts should decide contract disputes by comparing the fault of the parties, that notion is neither as radical nor as dangerous as it seems. The jurisprudence is replete with examples of cases in which the court examined the circumstances, considered the opportunity each party had to prevent the misunderstanding, and resolved the dispute in favor of the party who had less opportunity to prevent the misunderstanding. The
notion of fault, then, can be a good predictor of results. As a general proposition, if one party causes a misunderstanding because of his faulty conduct, he should pay the costs thereby incurred. However, it would be unwise to give courts complete discretion to determine which party is more responsible for a given misunderstanding. Guidelines are needed, and the present articles provide some very helpful principles. Both justice and the security of transactions will be better protected by having courts place the burden of a contractual misunderstanding on the party most responsible for it when the contract does not otherwise show a clear common intent of the parties. This principle can be derived from a proper and informed understanding of the present contract construction articles.

B. Disputes Concerning the Effect of a Contractual Provision

The rules of contract interpretation contained in Articles 2045-2057 are not exact formulae for reaching any result. Different rules may seem to suggest opposite constructions of any given contract, or constructions which are counter-intuitive. Applying the Civil Code articles is not very helpful unless the court understands that they contain factors to be weighed in a broader legal framework. They are simply factors which help the court answer two questions: what did the parties probably intend and who is more responsible for any lack of common intent?

As an example of when uninformed application of an article leads to seemingly counter-intuitive results, consider Article 2056: “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 of one party must be interpreted, in case of doubt, in favor of the other party.” This provision is neither new nor unique to Louisiana. The reason this article might seem counter-intuitive is that in most contexts, when one wishes to discover the meaning of a document, the best authority to consult is its author. One would not ask the author what he means and then conclude that the document means the opposite. The question is usually what the author means and then conclude that the document means the opposite. The question is usually what the author means and not what the document means,

discussed infra notes 82-89 and accompanying text.

65. There seems to be a strong correlation between being more at fault and being assessed the burden of that fault by the court. However, that correlation is not perfectly causal, or at least it should not be. Contract law demands as much certainty as possible while achieving reasonably just results, and therefore rules are necessary. Decisions should be based on application of the Civil Code’s rules and informed by the reason for the rules. Stated differently, a case is decided because of the rules, not because of the fault for the misunderstanding. The relation is not causal, but the correlation is strong. An understanding of the role of fault provides a context for interpreting the rules but it does not control such interpretation.


67. See, e.g., Restatement (Second) of Contracts § 206 (1981) (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”).
because in non-adversarial contexts the only purpose of the document is to show what the author thinks and means. In such cases the usual understanding is either that the document has no meaning of its own other than what the author intends, or that the meaning of the document itself is unimportant insofar as the document is a necessary evil in facilitating a mental connection or "meeting of the minds" between the author and the reader. In most cases the document is understood to be an imperfect method of communicating ideas and not an idea in itself, and thus its value is entirely in the reader's ability to determine from it the author's ideas.

However, contract law uses the convenient fiction that the document itself has intrinsic meaning. This fiction is necessary, of course, because without it there would be no objectivity and thus no stability in contracts. If a court asked the author (drafter) of a contract what the contract means, the author could always give a self-serving answer, thus destroying the stability of the contract. This stability is absolutely necessary for the contract to be a useful device. Necessity, however, has not generally been sufficient grounds for a legal rule. The rule that provisions are construed strictly against the drafter is justified because the drafter had the opportunity to prevent ambiguities from occurring. Thus, the failure to use precise language is in a sense faulty, and the drafter therefore properly bears the burden of the contractual misunderstanding he created.

C. Construction of Seemingly Conflicting Civil Code Articles

The contract construction articles themselves can seem to dictate contradictory results when one attempts to apply them without considering the underlying

68. It is technically true that words and documents have no meaning other than what people ascribe to them, in the sense that cultures ascribe ideas to sounds. However, the law necessitates that the apparent, or objective, meaning controls the effect of the documents. Thus, barring unusual circumstances, parties should not be allowed to assert that contractual meaning is other than what the terms of the contract are reasonably understood to mean according to common usage or, where appropriate, trade usage. Otherwise, courts would be free to do whatever they feel is just, without giving proper deference to what the parties clearly express. For a gross abuse of a court's power in this way, see Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968). Chief Justice Roger Traynor stated that "[s]ome courts have expressed the opinion that contractual obligations are created by the mere use of certain words . . . [and] flow, not from the intention of the parties but from the fact that they used certain magic words." Id. at 644. He construed a contract stating that the defendant would "'indemnify' plaintiff 'against all loss, damage, expense and liability resulting from * * * injury to property, arising out of or in any way connected with the performance of this contract.'" Id. at 643. The court held that this contract would be construed to mean that only third parties' property, and not the plaintiff's, would be covered by the indemnity provision. The court admitted parol evidence, overturned the trial court's determination that the plain meaning of the contract clearly supported the plaintiff, and remanded for a new trial. Id. at 646-47. The problem with this case is that the court was unwilling to give the reasonable construction to the contract.

69. Consider that some objectives of law may be unattainable. If the only way to stop the high rate of drug use in the United States requires suspending the Bill of Rights, most would agree that is too high a price to pay. A proper objective of law is frustrated because achieving it would entail sacrificing higher legal values.
principles. The articles must be viewed as simply the legally ordained factors to weigh in the totality of the circumstances, because in many cases multiple articles can be cited, each of which could suggest a different result if considered in a vacuum. Moreover, the articles are the written distillations of the more general principles of contract law, not the general principles themselves. This is done to provide more concrete help in construing contracts than any general statement could provide. However, the general principles are still important and should still be consulted when the specific rules do not clearly dictate one result. It is frequently forgotten that the Civil Code is an almost organic whole and that its provisions must be interpreted and applied in light of each other.\textsuperscript{70} For example, Articles 2049 and 2057 could be used by opposing sides to justify opposite results. They state:

\textbf{Article 2049.} Provision susceptible of different meanings

A provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not with one that renders it ineffective.

\textbf{Article 2057.} Contract interpreted in favor of obligor

In case of doubt that cannot be otherwise 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.

When the contractual provision in dispute would be effective mainly against the obligor, Article 2049\textsuperscript{71} and the general rule in the first paragraph of Article 2057 would seem to dictate opposite results. The provision could be construed to give it substantial effect (in accordance with Article 2049) and thus to place a greater burden on the obligor (contrary to Article 2057), or to have a minimal effect (contrary to Article 2049) and place a lesser burden on the obligor (in accordance with Article 2057). However, the second paragraph of Article 2057 gives the rule for resolving the conflict: the party responsible for the misunderstanding (if either can properly be charged with it) bears the burden which the misunderstanding

\textsuperscript{70} "Laws on the same subject matter must be interpreted in reference to each other." La. Civ. Code art. 13. "What is meant by the term 'code' as we use it here is to designate an analytical and logical statement of general principles of law to be applied by deduction to specific cases and extended by analogy to others." John H. Tucker, Jr., Forward to Louisiana Civil Code xxi (A.N. Yiannopoulos ed., West 1993).

\textsuperscript{71} The rule is much older than the present article. See M'Micken v. Stewart, 10 Mart. (o.s.) 571, 575 (La. 1822), for application of the same rule from La. Civ. Code art. 57 (1808), which came from Code Napoleon art. 1157 and was retained as La. Civ. Code arts. 1946 (1825) and 1951 (1870). For a more recent application of the rule, see American Bank & Trust v. Wetland Workover Inc., 523 So. 2d 942, 945 (La. App. 4th Cir.), writ denied, 531 So. 2d 282, 283 (1988).
creates. Thus, at least in this case, the role of error or fault is explicitly defined. Indeed, the use of the words "negligence" and "fault" immediately call to mind the tort principles expressed in Articles 2315-2324.2.

For example, suppose an eccentric gentleman were to bring his llama to a fine clothing store. At the store he contracted to have the store’s artisans provide the llama with a wool suit for $1,950, a custom made llama hat for $250, and shoes for $625. The suit and the hat specified in the contract were made according to sketches in the contract, and the gentleman was delighted. However, when the gentleman brought his llama in to have its shoes fitted, he was greatly disappointed. Unlike the suit and hat, no sketch had been made of the desired shoes. The gentleman had expected fine leather boots, but the shoes offered were merely modified horseshoes, though of obviously high quality. The gentleman promptly contacted his attorneys, demanding that they use all legal mischief at their disposal to procure for him proper shoes for his prized llama.

The gentleman’s attorneys might well argue that, according to Article 2050, the provisions of the contract “must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole.” Thus, because the gentleman obviously contracted for fine (and expensive) clothing for his llama, the contract must be construed to require equally fine (and expensive) shoes for the llama. On the other hand, the attorneys for the clothiers might well argue that according to Article 2047, “The words of a contract must be given their generally prevailing meaning.” Thus, they might plead, because the contract makes no specifications regarding the shoes, the clothier-obligors should be allowed to provide shoes such as are ordinarily made for large quadrupeds such as horses. Moreover, because they already incurred considerable expense having a master blacksmith in another state make special llama shoes and having these shoes brought in by courier, they have provided what would normally be expected for llama shoes and cannot be compelled to do more, at least not without a very specific contractual provision demanding so. There is merit in both positions, and specific articles, when considered by themselves, seem to dictate that each side should win! The proper result in such a case should turn on the care each party exercised, as a factual determination of the trial court, in specifying the object of the contract. The gentleman may have clearly indicated that he wanted something special or he may have been silent, leaving the clothiers to assume that he required special shoes. In any case, the court should protect the party not responsible for the misunderstanding.72

Although the second paragraph of Article 2057 is the only explicit mention of this error or fault concept in the interpretation articles, meaningful use of the articles requires that the court apply the articles only insofar as they help answer the two key questions; namely, what was the parties’ common intent and which party,

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72. The above example, while unlikely in its particulars, illustrates what may go wrong in a myriad of daily transactions. The odd circumstances are useful to avoid preconceived notions about the proper result which may exist for more common transactions.
if the contract is ambiguous, is responsible for the ambiguity? Indeed, if the words of a contract are given their generally prevailing meaning, the interpretation of the contract might conflict with the prior conduct of the parties. One could devise many other examples of situations creating an apparent conflict in the articles. Each article lists a factor which, in the absence of other factors, the court must follow when construing contracts. However, when a variety of factors makes use of the articles as hard-and-fast rules difficult, the court must decide the case in accord with the purpose of the law, which is to place the burden for a contractual misunderstanding on the party more responsible for it.

D. Jurisprudence Recognizing the Role of Error and Fault

In the above examples, the proper analysis of each case uses fault, but only as a guide for interpreting the Civil Code's rules, not as a controlling rule of law. The rules of contract law are in one sense more like those of intentional tort law, even though the relevant consideration is more like a negligence analysis. As in intentional tort law, the rights and duties of the parties are relatively well-defined, and arguments based merely on the fault of the parties should not control the result. However, the rules themselves cannot resolve all conflicts, and by properly considering the rationale behind the rules, courts can decide doubtful cases more fairly.

This methodology has been used many times in Louisiana. In *Vizinat v. Transcontinental Gas Pipeline Corp.*, the defendant wanted to traverse the plaintiff's land to work on a pipeline. Because the plaintiff demanded an initial payment for the use of his property, the parties executed a "damage release" which gave the plaintiff $4,185 for "full settlement and discharge of any and all claims or demands which the undersigned now have (has) for all . . . damage . . . incurred by reason of [the company's actions]." The defendants caused considerable damage to the plaintiff's property and refused to pay more than was indicated by the release. The defendant argued that the release was intended to cover whatever damage would occur, as there had been none when the plaintiff signed the release. However, the court was swayed by the fact that the defendant used a standard release form. The court explained the rule:

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77. For example, theoretically one can recover from another for a battery by proving an unconsented-to touching, even if the touching did not cause serious injury. "Reasonableness" is not the relevant standard. In contract law, one can recover for a breach of a contract without showing that the other party acted unreasonably; the parties' mutual duties, while not absolute, are relatively well defined, and thus the parties must do more than act reasonably.
79. Id. at 1238.
The agreement signed by the parties to this matter was a standard form contract provided by Transcontinental. The contract is ambiguous, in light of the circumstances, as to what it intends to compensate Mr. Vizinat for, since no damages had as yet occurred. However, any ambiguities in a standard form contract must be interpreted against the party who provided it and in favor of the other party.80

The court recognized that the dispute arose because the defendant had provided a form contract instead of one written for the circumstances. Use of it created the misunderstanding, and thus the defendant was in a sense at fault. The court held that the contract did not preclude recovery of damages the plaintiff sustained after it was signed; consequently, the court affirmed part of the trial court’s award.81

The rule from Article 2057, that failure to explain any relevant matter reasonably in need of explanation is a ground for the court to construe a contract against the failing party, is consistent with both the questions of which party is at fault for a misunderstanding and whether the party acted in good faith. In Williams Engineering, Inc. v. Goodyear,82 the court held that “[s]ince Robert Williams is the expert and also drew up both contracts, it is our opinion that he had a duty to clarify the effect of the oral change on the written contract terms.”83 The court reached a similar result in Larriviere v. Roy Young, Inc.84 and held, “Where a layman contracts with a knowledgeable and experienced businessman, the burden is on the latter to point out obscurity. To fulfill the burden on the experienced contractor in dealing with laymen, he should point to the inadequacy of the layman’s instructions.”85 The court realized that the experienced party had the greater ability to avoid the misunderstanding and, combined with the duty of good faith, the circumstances dictated that the result be affected accordingly. Present Articles 175986 and 2057 should work together to produce the same result.

80. Id. at 1239.
81. Id. at 1240. There was a reversal in part because the court found that part of the claimed damages had not been sufficiently proven. Id.
82. 480 So. 2d 772 (La. App. 5th Cir. 1985), aff’d, 496 So. 2d 1012 (1986).
83. Id. at 778. The court cited La. Civ. Code art. 1957 (1871). It seems that the imprecise language of Article 1957 (1870), which apparently changed the rule of Article 1952 (1825), caused the legislature to reverse the apparent meaning (from “in favor of” to “against him who has contracted the obligation”) of the article in 1871. By “him who has contracted the obligation,” did the legislature mean the obligor, who contracted to perform the obligation, or obligee, who contracted to secure the obligation’s performance? I believe (but cannot prove) that the legislature intended to create a rule consistent with both current Articles 2056 and 2057. The rule seems to have come from a careless rewrite of Article 62 (1808) (which came from Code Napoleon art. 1162), which has the same meaning as present Article 2057.
84. 333 So. 2d 254 (La. App. 3d Cir. 1976).
85. Id. at 255.
86. La. Civ. Code art. 1759 states: “Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation.”
In spite of all this, an unsophisticated party cannot prevail when that party's cause or causes are not communicated. In *Rozas v. Evangeline Parish Police Jury*, the court made it clear that the duty to explain in Article 1958 (1870) applies both ways. The plaintiff wanted very specific actions taken, but he did not make his requirements known. Mr. Rozas allowed the Police Jury to dredge Bayou Doza, which ran through his property, but he demanded that the spoils (the mud dredged up) be spread out so that the property would remain essentially level. The court held,

Arthur L. Rozas was the contracting party who desired the spoils spread in a certain way. The burden was therefore upon him to explain clearly what he wanted. The evidence indicates the obscurity in the contract arose because he failed to convey his wishes to the Police Jury; hence, the construction most favorable to the Police Jury must be adopted.

From this case it is clear that the burden of communicating one's desires is not only on the more sophisticated party. Each party must make reasonable attempts to communicate the desired terms of the contract. The burden on more sophisticated parties is simply to refrain from taking advantage of the other's inexperience. This case properly places the burden of the misunderstanding on the party most at fault for creating the misunderstanding.

All parties to a contract are required to express themselves clearly. This rule applies to sophisticated parties, who, when contracting with unsophisticated parties, should explain what the average layman would need explained and point out provisions which differ from what the average layman would expect them to mean. It also applies to unsophisticated parties, who should make their desires explicit, with more explicit instructions for more unconventional desires or requirements. Failure to express oneself is legally deficient conduct which may result in an error and the corresponding action for rescission or a contract construction dispute. The only important difference is that rescission is only available for misunderstandings regarding essential terms but any misunderstanding can result in a contract construction dispute. Courts sometimes do and usually should consider the failure to make oneself clear as a basis to burden the inarticulate party with the costs of the misunderstanding thereby created. In these cases, the courts' decisions were completely consistent with the articles in the Civil Code. The holdings are not based on some unprincipled (in the sense of not based on positive law) judicial discretion. They represent the achievement of that important goal of Louisiana law, namely, that cases should be decided not only in accordance with the text of the law, but also in harmony with the purpose of the law. This best serves both stability and justice.

87. 322 So. 2d 403 (La. App. 3d Cir. 1975).
88. The same result should apply under present La. Civ. Code art. 2057, which is substantially similar.
89. Rozas, 322 So. 2d at 404.
V. Error as a Basis for Damages and Specific Performance

A. The Problem of Selecting Remedies

When this existence or meaning of a contract is affected by error, the court must also determine what effect the error will have and what remedies the court will order. It is convenient for a court to find that an instrument is a valid contract, interpret it as well as possible, and then order full compliance with the court's interpretation of the terms. When this is done correctly, the court merely enforces the prior will of the parties. Thus, the court need not attempt to determine what is equitable, but only what was intended; the court's task is relatively simple.

When the common will of the parties is expressed in the contract, it is very important for the court to enforce it. If courts were to resolve contract disputes by making judgments on what would be "just" to both parties, the value of the contract as an institution would be almost destroyed. What may seem unfair to a court may have seemed completely fair to the parties when they contracted; furthermore, in most cases, the parties will have had superior knowledge, compared to the court, about the true value and burden of the contract. Moreover, an apparent injustice may result as a natural consequence of a contract's consensual allocation of risk. Generally, courts enforce all but the most egregiously unfair contracts. If they were to stop doing so, parties could not secure a future advantage, and there would be no stability of transactions. Modern life would become more burdensome.

In many cases, however, there is either a lack of consent to the contract or a lack of common will or understanding on the effect of the contract. These muddled circumstances present the more difficult cases because the court cannot simply enforce the common will of the parties; indeed, there is no common will to enforce. The court must fashion a remedy based on law and equity. If the behavior of one party was sufficiently faulty and justice requires that the other obtain the full advantage of the contract, the court may (and usually should) require specific performance in favor of the other party. However, specific performance, though favored by the civil law, is not always the lawfully decreed remedy. In many cases, courts may award damages instead of ordering a reluctant party to perform half-heartedly.

When one party is in error which vitiates consent, Article 1952 gives the court discretion: (1) to grant specific performance, and (2) to grant damages to whichever party was adversely affected by the first decision. Furthermore, some decisions have recognized a limited right of a party to whom rescission is granted to recover damages from the other party. Thus, the court has discretion to

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90. In some limited circumstances, enforcing the contract may do more harm than good. Thus, a contract to commit a crime is never enforceable. La. Civ. Code arts. 1966, 1968, 1971.
93. This is true unless the party not in error knew or should have known of the error itself. La. Civ. Code art. 1952. In that case, the party not in error has committed fraud. "At civil law, a
protect the party not in error by granting damages based on his reliance interest.  

If the party not in error can only be protected by specific performance, the party in error may be awarded damages so that the other may not profit unjustly from the error.  

When no true contract exists because of the error, the court has the power to fashion remedies which can, as nearly as possible, place the parties in their initial position. Article 1952 gives the court discretion to reach very equitable results.

B. Is there Comparative Fault for Contract Remedy Determination?

While in many cases of error only one party's conduct is legally deficient, there are many others in which both parties' fault contributed to the error. The results which Article 1952 achieves for cases of rescission (error in formation) only settle part of the problem. When a legally enforceable contract exists, but there is a dispute about its terms, other problems arise. Under Article 2057, if the misunderstanding is chargeable to the negligence of one party, the contract is interpreted in favor of the other. However, a contract may not contain an explicit provision for the case, almost certainly common in real-world transactions, when both parties have been at least somewhat negligent in making the contract. Do Louisiana Civil Code articles 1952, 2057, and 2323 work together to dictate that when both parties have negligently explained their positions on the same provision, comparative fault shall be used in computation of damages?

The idea that comparative fault should control certain contractual disputes predates the revision of the obligations articles in 1984. However, the adoption of tort comparative fault in 1979 and the revision give additional support to the view that, in limited circumstances, comparative fault should determine damages.

party's knowledge of the other's error at the time of making the contract constitutes fraud (dol) . . . ."  

La. Civ. Code art. 1949, cmt. (d). For cases granting rescission and damages, see infra note 113 and accompanying text.


95. La. Civ. Code art. 1952, cmt. (e). For a case following this rule but decided before the article was enacted, see Myles v. Louisiana Power and Light Co., 375 So. 2d 752 (La. App. 4th Cir. 1979).

96. Insofar as the error is a misunderstanding which costs the parties time and money, the party in error should bear this loss. Even if the error occurred without the party being at fault, it would be even more unjust to impose the cost of the error on the party who was not in error, i.e., who was "correct."

97. Article 1952 gives the court great discretion on granting rescission and damages; Article 2057 places the burden of an unclear contract provision on the party who, by lack of necessary explanation of negligence, caused a misunderstanding; and Article 2323 requires that, when negligence is compared, any recovery for it is reduced by the portion of fault attributable to the recovering party.

98. For a thorough analysis of the articles and cases prior to the revision, see generally Palmer, supra note 49. Professor Palmer suggests that reliance damages might be apportioned or reduced on the basis of comparative fault. Id. at 43-44.

Louisiana Civil Code article 2057 states that "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 . . . ." If both parties were negligent or failed to explain themselves, what should the court do? It could simply refuse to take any action, thereby leaving the parties as they were when the suit was filed. This practice, however, would probably produce many injustices. If one party's fault is greater than the other's, the court could interpret the contract as favorable to the party less at fault; similarly, this all-or-nothing rule would be somewhat unjust. The court could attempt to interpret the disputed provision to have a meaning between the extreme of what each party urges. Although more equitable, this would prove difficult in practice. These possible solutions are obviously unworkable in many cases. The value of many contracts is essentially all-or-nothing, with a partial or modified performance little better than no performance.

There is a generally workable solution: the court could, upon a finding that both parties' conduct was faulty under Article 2057, apply Article 1952 by analogy to award damages and apply Article 2323 directly to reduce the damages awarded to the party against whom the provision was interpreted, in proportion to that party's fault. Indeed, Article 2323 states: "When contributory negligence is applicable to a claim for damages . . . the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering . . . the loss." Thus, to give full effect to Article 2057, if both parties are negligent, their negligence must be compared. The only feasible remedy in such a case is to award damages, applying Article 1952 by analogy. Assuming that Article 2057 compares negligence, and Article 1952 awards damages, Article 2323 demands that damages be apportioned by the degree of fault or negligence. The resolution of the dispute or misunderstanding could then mirror the reality of the situation, i.e., both parties bearing part of the burden their mutual misunderstanding created.

The advisability of using this analysis largely turns on its effect on the stability of transactions. The present rules are not manifestly unfair. Courts, when they apply the articles informed by the rationale behind the law, place the burden of disputes on the party most chargeable with the cause of the dispute. However, it is hard to see how the proposed analysis will harm stability. When there is a discoverable common will of the parties, it would be enforced. When one party acted reasonably and the other negligently, the negligent party would bear the loss.

100. If this injustice at least promoted stability and predictability, it might be tolerable. However, determining which party was more at fault is often speculative, and not readily susceptible to extra-judicial resolution. The parties could compromise the question, but this says nothing useful—they could compromise the whole dispute. If the parties subject the matter to judicial resolution, an all-or-nothing rule is effectively a roll of the dice for the parties.

101. The article directly governs cases of rescission and damages related thereto. However, the principle that the court should have wide discretion to protect the parties could also apply to cases of contract construction.
Neither party would be subjected to burdens except those which a reasonable interpretation of the contract could have specified. The only difference is that, when the court finds that both parties are at fault, the burden would be split between them according to their fault. Neither party would have any liability greater than what the law now imposes, but more equitable results would be achieved. With identical maximum risks and less chance of an all-or-nothing result, the stability of transactions should be improved.

VI. OTHER LAW TO BE CONSIDERED AND THE LESSONS LEARNED THEREFROM

A. Historical Bases for Error Analysis and the Revision of Obligations in 1984

Most of the contract provisions of the current Civil Code articles are rooted, both in substance and in language, in older articles. The revision in 1984\textsuperscript{102} made some changes, but the older principles remain largely in tact. Thus, not only is the meaning of the articles stable, but the jurisprudence is generally constant.

The provisions on error and rescission in Articles 1948-1952 are all new as text, but most are old as law.\textsuperscript{103} The most important change is that Article 1952 gives the court greater discretion on remedies when rescission is considered. Previously the question was treated as one of rescission or not; if rescission was granted no damages were awarded, but if the contract was upheld it was enforced by its full terms.\textsuperscript{104} The court is now free to grant rescission, or not, and to award damages, or not, to the party against whom the contract is upheld or against whom rescission is granted, based on which remedy or combination of remedies will best protect each party and serve justice.

Articles 2045-2057, regulating the interpretation of contracts, are based on prior law.\textsuperscript{105} Most of the articles do not change the law,\textsuperscript{106} but those that do—Articles 2053, 2054, and 2057—do so to limit judicial efforts to determine meaning when the text is clear\textsuperscript{107} and, at the same time, clarify the rules of

\begin{footnotesize}
\textsuperscript{102} The revision culminated in the enactment of the current Book III, Title III (Obligations in General) and Title IV (Conventional Obligations or Contracts) of the Louisiana Civil Code by 1984 La. Acts No. 331, effective January 1, 1985.

\textsuperscript{103} The vices of consent listed in Article 1948—error, fraud, and duress—were found in Articles 1819 (1870), 1813 (1825), and 9 (1808). Article 1949's requirement that, to vitiate consent, an error must concern a cause without which the party would not have contracted and which the other party is aware of is based on Articles 1823, 1825, and 1826 (1870), Articles 1817, 1819, and 1820 (1825), and Article 10 (1808). The recognized types of error in the cause in Article 1950 come from Articles 1824-1846 (1870) and various earlier provisions. The most significant changes occur in Article 1952, but even it is based on prior law: Articles 1837 and 1839 (1870) and Articles 1831 and 1833 (1825). \textit{See} La. Civ. Code Ann. Vol. 16, arts. 1819, 1823-1846 (1870) (West 1973).

\textsuperscript{104} La. Civ. Code art. 1952, cmt. (b).

\textsuperscript{105} \textit{See} comments to La. Civ. Code arts. 2045-2052.

\textsuperscript{106} \textit{Id}.

\textsuperscript{107} La. Civ. Code art. 2053, cmts. (a) and (b).
\end{footnotesize}
interpretation. Thus, the actual methods used to interpret contracts have not changed very much.

The effect of the revision on the discussion above is generally slight, and the rationale of the prior law is left intact. The major change affecting this discussion comes in Article 1952, which greatly liberalizes the remedies available to the court. Thus, it indicates a basic legislative intent consistent with the rationale of comparative fault and damages discussed above.

B. Implications and Limits of Error Analysis

1. Stability of Contracts

The suggestion that error and fault concepts should be applied more frequently in contract law can be disturbing because it might appear that their use would inject uncertainty to a presently stable area of law. Some fear that the present set of arguably simple rules of contract law would be replaced with a more nebulous decision-making analysis. With respect to questions of rescission and construction, this is clearly not so. If the Civil Code articles are applied as written when doing so leads to no absurd results, the outcomes should be the same as are reached under the prevailing methods because the rules of the Civil Code are typical contract construction rules. When the articles cannot reasonably be applied as written, but their purpose is agreed on, if the articles are applied with a reference to this purpose, the results in these cases should be more stable. The purpose is a predictable fall-back reference to be considered after the text is consulted. To the extent this purpose is ascertainable and agreed on, all can use it to evaluate contractual disputes.

Comparing the fault of the parties should be reserved for those exceptional cases in which both parties carried on their business in a clearly careless manner. In almost any case it would be possible to construct a theory under which either party, by acting more cautiously, could have prevented the contractual misunderstanding. Although the law should not require this extreme degree of care, when both parties' conduct was clearly deficient, the best way to achieve a just result may be to compare the fault of the parties and order remedies accordingly. In cases in which both parties' conduct led to a misunderstanding, an all-or-nothing scheme like the presently prevailing one makes predicting outcomes and valuing settlements largely a matter of luck. It cannot be said that such a scheme promotes stability. Furthermore, in time litigants will be able to evaluate the worth of their claims by comparing them to similar, previously decided cases. Tort cases are frequently handled this way today.

108. See supra note 62 and accompanying text.
109. See, e.g., the example supra at part IV-C.
110. When the Supreme Court adopted comparative fault for maritime collision cases, rejecting the old rule of "divided damages" (an equal share of damages was assessed to each party at fault), it stated,
2. Restrictions in the Civil Code's Scheme?

It might be suggested that the Louisiana Civil Code creates two\textsuperscript{111} distinct vices of consent—error and fraud—and that these are purposefully separated. According to this view, any attempt to examine the fault of the parties which consists of more than error but less than fraud is unauthorized. However, Article 3506(13) states: "The gross fault is that which proceeds from inexcusable negligence or ignorance; it is considered as nearly equal to fraud." Given that many courts have refused to grant rescission for unilateral errors which they deemed "inexcusable,"\textsuperscript{112} it seems there is at least a tacit recognition that error and fraud are not two completely separate concepts, but rather overlap in some cases.

An example of overlap of error and fraud occurred in \textit{Fuller v. Barattini},\textsuperscript{113} where Mr. Barattini leased a shop to Mr. Fuller after having assured him, first, that he (Barattini) would get Fuller permits to operate a lounge on the premises, and second, that ample parking would be available on adjacent lots which Barattini purportedly controlled. After Fuller signed the lease, Barattini attempted, unsuccessfully, to use his political connections to secure the necessary permits and to gain control of the parking areas, which he did not then own or lease. Because Barattini had misrepresented several facts, there was a two-year delay before the lounge could open. After further troubles, Fuller sued for rescission of the lease. The court held that, although the defendant's conduct was highly blameworthy, it did not meet the legal requirement of fraud.\textsuperscript{114} The court stated:

This article [Louisiana Civil Code article 1953] requires not only that there be a misrepresentation, but also that the misrepresentation be made with the "intention" of gaining an unjust advantage... The record indicates that Barattini honestly believed that through his political contacts he could readily acquire the needed permits... In none of this did he intend to take advantage of Fuller.\textsuperscript{115}

Experience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements... [C]omparative negligence does not appear to discourage the negotiation of settlements... Of the marine personal injury cases involving a federal question that were terminated in the fiscal year 1974, only 9.6% ever reached trial.

United States v. Reliable Transfer Co., 421 U.S. 397, 408 & n.13, 95 S. Ct. 1708, 1714 & n.13 (1975). Adopting comparative fault in contract cases may similarly lead to an increase in the pre-trial settlement of such cases.

\textsuperscript{111} Duress is also a vice of consent, La. Civ. Code art. 1948, but consideration of it is not very helpful to this discussion.

\textsuperscript{112} The first case stating this rule is Wikoff v. Townsend, 7 Mart. (o.s.) 451 (La. 1820). See also, e.g., Shreveport Great Empire Broadcasters, Inc. v. Chicoine, 528 So. 2d 633, 637 (La. App. 2d Cir. 1988).

\textsuperscript{113} 574 So. 2d 412 (La. App. 5th Cir. 1991).

\textsuperscript{114} Id. at 416.

\textsuperscript{115} Id.
The court held that rescission was proper for error and awarded Fuller the expenses he incurred remodeling the premises, but attorney's fees were not awarded because there had been no fraud.\textsuperscript{116}

\section*{C. Other Laws with Comparative Fault}

Interestingly, the Louisiana Legislature has recently passed measures which provide for comparative fault determinations in a limited contractual setting. Additionally, federal law already does so in some circumstances. This indicates that the legislatures have determined that the use of comparative fault to decide contractual disputes will not destroy contract law.

The Louisiana Legislature recently adopted revised provisions of the Uniform Commercial Code article on Bank Deposits and Collections.\textsuperscript{117} One provision of the new law regulates the "[c]ustomer's duty to discover and report unauthorized signature[s] or alteration[s]."\textsuperscript{118} According to this provision:

If the bank proves that the customer failed . . . to comply with the duties imposed on the customer . . . [A]nd the customer proves that the bank failed to exercise ordinary care . . . and that the failure substantially contributed to the loss, the loss is allocated between the customer . . . and the bank . . . according to the extent to which the failure[s] . . . contributed to the loss.\textsuperscript{119}

The Uniform Commercial Code section's official comment explicitly states that the court should apply comparative negligence principles.\textsuperscript{120} Moreover, other sections of the newly adopted law, which govern commercial paper, require similar results.\textsuperscript{121} Although these provisions are limited in scope and are not part of the

\textsuperscript{116.} There are other cases in which a vendor or lessor of immovable property made misrepresentations short of fraud to the vendee or lessee. In these cases, the courts frequently granted both rescission and damages to the misled party. See, e.g., Marcello v. Bussiere, 284 So. 2d 892 (La. 1973) and Guaranty Sav. Assurance Co. v. Uddo, 386 So. 2d 670 (La. App. 1st Cir. 1980). Moreover, misrepresentations short of fraud occur in other contexts. See, e.g., First Acadiana Bank v. Bollich, 532 So. 2d 248 (La. App. 3d Cir. 1988) (considering effect of contract written as continuing guarantee for loans but intended and requested as guaranty of only two notes).

\textsuperscript{117.} 1992 La. Acts No. 1133 adopted, with certain modifications not at issue here, many revised sections of U.C.C. article 4 as portions of La. R.S. 10:4. The effective date of these revisions is July 1, 1993.


\textsuperscript{120.} U.C.C. § 4-406, cmt. 4 (1990) states that "[s]ubsection (e) replaces former subsection (3) and poses a modified comparative negligence test for determining liability."

\textsuperscript{121.} La. R.S. 10:3-404 to 3-406, as amended by 1992 La. Acts No. 1133 (effective July 1, 1993). See also William D. Hawkland, 1992 Revisions to Chapters 3 and 4 and the New Chapter 4A of the Uniform Commercial Code (1992) (unpublished materials for the author's continuing legal education class), explaining that, for U.C.C. § 3-406 (1990), "the result of negligence is put on a comparative, rather than absolute, basis where both the issuer of the instrument and a subsequent holder or other person have been negligent." Id. at 13.
general contract law of the Civil Code, they do provide for comparative fault
damage valuation in contractual settings, namely, banking and other lending.

Federal law also provides for comparative fault damage valuation in maritime
contractual settings. For example, Coastal Iron Works, Inc. v. Petty Ray
Geophysical\textsuperscript{122} concerned liability for a fire on a ship which Coastal had been
repairing for Petty Ray. The Fifth Circuit Court of Appeals agreed with the trial
court that the fire was due to the concurrent causes of the shipyard’s negligence in
performing the repairs (assessed at 75\%) and the shipowner’s negligence in failing
to discover or report the highly flammable materials on the ship (assessed at
25\%).\textsuperscript{123} Although the court characterized the shipowner as a “tort plaintiff,”
such a characterization is incorrect, at least in that the court’s theory of recovery
was the warranty of workmanlike performance implicitly given by the shipyard to
the shipowner.\textsuperscript{124} This is clearly a contract-law basis for the decision, whether
or not the court characterized it as such.\textsuperscript{125} A warranty is a promise, actual or
implied,\textsuperscript{126} and thus any action or decision based on a warranty is contractu-
al.\textsuperscript{127}

In these examples, a comparative fault rule determines the damages for a
breach of a contract.\textsuperscript{128} The court examines the conduct of the parties and decides
the case based on how much of the difficulty it finds each party is responsible for;
the result depends on the respective fault of the parties. Implicit in this is the
determination that there exists a contract of fixed or agreed-upon meaning to be
breached. If comparative fault is a beneficial rule when a contract definitely exists,
it should be even more applicable when no such contract of agreed-upon meaning
exists, in which case the matter is more analogous to a tort or a quasi-contract.\textsuperscript{129}

\begin{itemize}
\item[122.] 783 F.2d 577 (5th Cir. 1986).
\item[123.] \textit{Id.} at 582.
\item[124.] \textit{Id.} at 583.
\item[125.] The fault allocation did not affect the final award because the damages attributable to the
shipyard’s fault were greater than a contractual limitation of liability which the court upheld. \textit{Id.}
\item[127.] Before the modern expansion of tort law into areas like products liability, suits for injuries
caused by defective products could only be brought by the purchaser against the manufacturer
because only he enjoyed the “privity of contract” and the related warranties. See, e.g., W. Page
Keeton et al., Prosser and Keeton on the Law of Torts § 96, at 681 (5th ed. 1984). Warranties were
the result of a contract, not a general duty to the public. Although now there is a recognized duty
to protect the public, such duty does not give rise to any warranty. The duty is independent from
any warranty; the warranty, being contractual or quasi-contractual, requires an affirmative act, but the
duty does not, and thus the duty does not arise from a warranty.
\item[128.] The breach is based on general requirement of conscientious performance theories or
explicit contractual provisions.
\item[129.] However, according to the “objective” theory of contracts, the acts and not the will of the
parties are important. The parties’ belief about the contract is irrelevant. Thus, both the existence
and the effects of a contract depend solely on objective factors, i.e., what have the parties done? This
answered, it is a relatively simple matter to determine what the contract required (if anything) by
judging the parties’ actions. See, e.g., supra note 20. Of course, the objective theory does not
account for possible multiple causes of damages under the contract.
\end{itemize}
Nevertheless, in some limited contractual settings comparative fault principles are already in effect, and the law has not suffered.

D. Some Scenarios for Consideration

Suppose a high school desired to procure entertainment for a school dance. The students, acting through their student council, are given the basic authority to choose the musical entertainment, but a faculty advisor has the ultimate authority to approve or deny any proposal. The students decide to hire a disc jockey instead of a live band, select one, and get a contract for the faculty advisor's approval and signing (the advisor being the only representative of the school with legal capacity to contract). Even though the faculty advisor is given a brochure describing the disc jockey's services, he signs the contract without even realizing that he has engaged a disc jockey—not a live band. When the principal and the advisor discover this, they attempt to rescind the contract for error.

Several questions arise. What are the causes which may vitiate the advisor's consent? Are the students' principal causes controlling, or are the advisor's? Did the disc jockey know of the principal causes? Was the advisor's error inexcusable? Perhaps the principal cause was to procure musical entertainment for the dance. Perhaps, at least as far as the advisor was concerned, the principal cause was to procure a band for the dance. The disc jockey may have thought that the advisor's approval would be essentially a formality and that the students' wishes were controlling, or he may have thought that the advisor would have his own say based on his own criteria. The advisor may have neglected to review information readily available to him or have been misled by information which would be unclear to someone who does not frequently hire musical entertainment.

Because the school or school board is the true contracting party, the consent of its agent, the advisor, is the consent at issue. If the advisor can prove that he would not have contracted, under any circumstances, with a disc jockey instead of a band, then having a band should be a cause which, if affected by error, could vitiate the consent. However, if the advisor would have considered having a disc jockey under some circumstances, then this cause would not subject the contract to rescission. The question raised is: Would the matter affected by the error automatically have dissuaded the party in error from contracting, if he had known the truth?

If the advisor discussed "musical entertainment" with the disc jockey, then the disc jockey would have had no reason to know that the advisor expected a band; however, if the advisor discussed "live entertainment" for the dance, then the disc jockey should have been put on notice that the advisor may well have expected a band. The questions are: Was the party not in error reasonably apprised of the other party's main expectations from the contract? Did he attempt to accommodate the party in error when contracting? The advisor's error may well be inexcusable. If he had the opportunity to inquire about the exact nature of the entertainment or was given a brochure describing the disc jockey service but failed to read it, then his own negligence should prevent the rescission he seeks. The next question is:
Did the party in error act with the care of a reasonable person, given all the circumstances? Although these questions all turn on factual issues, they serve to illustrate the considerations which arise in an action for rescission of a contract for unilateral error.  

Error can also affect the parties' understanding of the meaning of their contract. Suppose a husband and wife, desiring to have a new house built, solicit bids for building a house according to their general specifications. Ultimately the couple accepts a proposal that includes an exact cost figure. While the house is being built, the couple requests certain changes to the house, which the contractor agrees to make for an agreed-to, specified price. When the house is complete, a dispute arises concerning the exact price the couple must pay the contractor. The contractor alleges that the contract was on a “cost plus” basis, so the price is determined by adding a fixed fee to the cost of construction, while the couple argues that the contract was for a fixed, all-inclusive price. The contractor sues for an unpaid balance allegedly due.

Relevant inquiries may include: Did the contractor make it known that the contract was on a cost plus basis? Did the contractor explain what pricing alternatives were used in the construction industry? Did the couple adequately convey how much extra they were willing to pay for the changes they requested? Did they inquire what the full price would be, given the alterations? One could argue that if a given method of pricing was predominant in the construction industry, such a method should be presumed absent a clear contrary intention. On the other hand, it could be argued that because most contracts are for a fixed price, such a price should be presumed unless another price is specified.

Both parties to the contract have a duty to make clear what they understand the contract to require. If the couple explained to the contractor that they wanted to be told a specific price for which the contractor would build the house, then absent the contractor's refusal to work for such a price, the contract should be construed as a fixed-cost contract. If, on the other hand, the contractor explained that the price estimate was composed of two elements, cost and profit, and correctly gave a revised cost, not including profit, when the couple requested changes in the house, then the contract should be construed as a cost-plus contract. If neither party adequately explained what was expected or desired, and no usage or understanding can be truly understood as the common or prevailing one, then comparative fault should be applied. Both parties failed to use the degree of care the law requires, so each should be liable for part of the difference in the alleged contract prices. If the court found that the contractor was 65% at fault and the couple 35% at fault, and the difference in the prices was $5,000, then the couple should have to pay an additional 35% of the difference, or $1,750 above what they understood to be the price.  

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130. These facts are adapted from and an extension of Hebert v. Livingston Parish School Board, 438 So. 2d 1141 (La. App. 1st Cir. 1983).
131. Maxwell v. Bernard, 343 So. 2d 431 (La. App. 3d Cir. 1977), provided the basis for this
VII. CONCLUSION

Some contractual situations would benefit from an updated theoretical approach. The proposed rule is that when the court cannot determine with any reasonable degree of certainty what the parties actually intended or what their contract objectively means, the court should attempt to resolve the dispute by considering the parties' respective fault causing the misunderstanding. Although this rule is more of a synthesis and distillation of existing principles of Louisiana law than a radical precept, some seem reluctant to accept what is already woven in the fabric of the law.

For example, the entire question of whether a contract exists depends on issues of possible errors in any principal cause of the contract. If one party is in error on such a cause and the other is aware of the importance of this cause, the court may grant rescission. In deciding whether to grant rescission, the court should consider the origin(s) of the error. Indeed, Louisiana courts have based rescission decisions on whether the error was excusable, negligent, or induced by the other party for over 150 years.

Moreover, in many cases the only way to use the Civil Code's contract interpretation articles properly is to apply them while considering that they seek to allocate the costs of a contractual misunderstanding to the party who created it. Any narrow attempt to apply these rules literally can only cause inconsistent results and thus instability in the law.

Of course, if the court actually reaches the stage of resolving a contract dispute based on the comparative fault of the parties, it may be difficult for it to provide proper remedies. One may debate whether the present Civil Code articles provide for comparative fault damages, but several cases have already fashioned remedies similar to those which would be necessary under a comparative fault cost allocation. Moreover, increasing the court's flexibility to provide other than all-or-nothing remedies should further enhance the stability of transactions in the long run by allowing parties to value potential disputes and claims by other than a simple win-or-lose standard.

The validity and value of this approach are already subject to scrutiny because Louisiana law currently recognizes the role of comparative fault in a few limited contractual settings. If our contract law is not destroyed by these inroads,
presumably it can survive these modest proposals for making more definite and explicit the role of error and fault in the contractual arena. This would not be an unheard of step and it is arguably permissible under the present Civil Code articles. Perhaps the more important question concerns how the proposed rules would affect those who depend on contract law. If the present proposal is followed by Louisiana courts, contracting parties would be well served by a more stable and just contract law.

David E. Redmann, Jr.